IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL N0.104 OF 2023

(Appeal from the decision of the District Court of Temeke at Temeke, in Criminal Case No 453 of 2022 dated on the 10th day of March 2023)

HASSAN SAIDI BILAL ..... APPELLANT

VERSUS

THE REPUBLIC..... .....RESPONDENT

JUDGMENT

MKWIZU J:

The appellant was arraigned before the District Court of Temeke for Insets by male contrary to Section 158 (1) (a) of the Penal Code, Cap 16 R.E 2022 where the appellant was accused of having carnal knowledge of his own daughter aged 6 years on an unknown date in July 2022 at Mabagala Kipati area within Temeke District in Dar es Salaam Region. He maintained his innocence and upon trial was convicted and sentenced to thirty years imprisonment.

The appellant is aggrieved. He now appeals to this Court against both conviction and sentence on eight (8) grounds of appeal which can safely be condensed into four main grievances i)That the conviction was based on a defective charge that Does not mention the date of the commission of the offence(ii)The decision was grounded on evidence of PW1 taken in contravention of section 127(2) of the Evidence Act [Cap 6 R: E 2022]

(iii)Failure by the prosecution to prove the case and (iv) failure by the trial magistrate to consider defence.

At the hearing of the appeal, the appellant was in person without legal representation, while the respondent/ Republic was represented by Ms Gladness Senya learned State Attorney.

With the leave of the court, the appeal was disposed of by written submissions. The appellant's contention in his written submissions was that the victim's evidence ought to have been taken after a proper examination to test his competence and a promise that he would speak the truth and not lies. He censured the trial court for not indicating the questions put to the witness and the answers given thereto in establishing that she really gave the required promise as required under section 127 (2) of the Evidence Act.

The appellant also doubted the charge sheet for not disclosing the date of the commission of the offence. He contended that PW1 and Pw2's evidence was specific that the offence was committed on 1/7/2022 but the charge sheet could not come clearly on the point. He, citing to the court the decision in **Abel Masikiti V R**, Criminal Appeal No 21 of 2015 invited the court to find the charge sheet incurably defective.

The appellant went further to complain over failure by the prosecution to prove the case beyond a reasonable doubt. He called upon the court to find that there existed grudges between him, and his wife affirmed by Pw1 that resulted in the filing of this case. He also invited the court to look into the delay in arresting him, that from 1/7/2022, the date of the incident he was only arrested on 30/7/2022, which raised doubt on the prosecution's case and resolve the doubts in his favour.

The learned State Attorney on the other hand was in support of the conviction and the sentence. She was of the view that the victim (PW1) was let to procure the requisite promise envisaged under section 127 (2) of the Evidence Act. Citing to the court the case of **Mathayo Laurence William Mollel V The Republic**, Criminal Appeal No. 53 of 2020, she said, where the child of tender age is not to testify on oath or affirmation, a preliminary test on whether he knew and understands the meaning of oath may be dispensed with.

On the variance between the charge sheet and the evidence, the learned State Attorney said, the charge sheet says that the offense was committed on an unknown date of July 22 while the prosecution witnesses, Pw1 and Pw2 are more specific pointing out to 1/7/2022 as the date of the commission of the offence and therefore the ground is baseless.

While admitting that the defence of the appellant was not considered in the judgment, the learned State Attorney was of the view that that omission is not fatal. She through the decision of **Siaba Mswaki V R**, Criminal Appeal No 40 of 2019 (Unreported) invited this court as the first appellate court to step into the shoes of the trial court and evaluate the same. She however invited the court to find the defence evidence as an afterthought for failure by the appellant to cross-examine Pw2 on the misunderstandings he stated in his defence.

The learned state attorney went further to explain that the best evidence in sexual offence comes from the victim, PW1 in this case. It is the state attorney's view that PW1 managed to tell the court what had befallen her on the material date, that her father, the appellant put his mdudu into her vigina and she relayed that information to her mother immediately after

she was back from the hospital the evidence that was confirmed by the Doctor, PW3 and the PF3(exhibit P1). The court was thus invited to confirm both the conviction and sentence.

I have evaluated the grounds of appeal, court records, and the party's submissions. Indeed PW1's evidence was recorded contrary to section section 127(2) [Cap 6 R: E 2022]. Though it is clear in this section that where a witness is a child of tender age, his or her evidence can be considered even if it is not made on oath or affirmation provided that the witness promises to tell the truth, that conclusion is to be arrived at after ascertainment of the child's understanding of the nature of oath or otherwise. This is so because, under section 198 of the Criminal Procedure Act, all evidence in criminal proceedings is to be given under oath or affirmation unless otherwise provided for. This means that unless it is established that the tender-aged child witness is unaware of the meaning of the oath, the promise is not required. Faced with an akin situation, the Court of Appeal in **John Mkorongo James vs Republic** (Criminal Appeal 498 of 2020) [2022] TZCA 111 (11 March 2022) said:

> "... The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature o f an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court, to tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court to tell the truth and not tell lies. It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus requires to be sworn and not just promise to the court to tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is

> brought before the court as a witness is required to be examined first, albeit in brief, to know whether he/she understand the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court to tell the truth and not tell lies as per section 127 (2) of the Evidence Act"

The proceeding does not reflect, the questions that were put to the tender-aged witness in ascertaining whether she knows the meaning and nature of an oath or otherwise for her to be subjected to giving a promise that she would tell the court the truth and not lies. The proceedings show the court on page 7 to have recorded thus:

> *"COURT: upon investigation a child witness she is promised this court to say/testify truth."*

Plainly, the trial court did not observe the provisions of section 127 of the Evidence Act. This omission is in my view a fatal omission that renders PW1's evidence inconsequential and proceeds to expunge the same from the records.

This isn't the only issue in this case. According to PW2, she learned of the incident immediately after its commission on the same date, that is 1/7/2022 and reported the incident to the police and sent the child victim to the Hospital on the next date. Assuming this fact is true, then we would have expected the Doctor to have attended the victim on 2/7/2022. In reverse, Doctor Juma (PW3) who attended to the victim, said he received the victim at Kizuiani dispensary on 4/7/2022. The prosecution evidence is silent on what was befalling Pw1 and Pw2 on 2nd July 2022 and 3rd July 2022.Again, in terms of PW4, the investigator, the appellant, the Husband to PW2, and the victim's father was arrested on 30/7/2022, 30 days after the incident without explanation. All these raise doubt about the prosecution case.

I have also considered the defense evidence where the appellant relates the prosecution accusations with the religious dispute that existed between

him and her wife, PW2 the evidence that was approved by PW1 who categorically said the two had grudges. All taken care of, I find it unsafe to uphold the appellant's conviction based on this woolly prosecution evidence.

That said and done, I find the appellant appeal meritorious. Allow the same, quash the conviction, and set aside the sentence meted against him, the appellant is to be released from prison forthwith unless otherwise lawfully held.

Order accordingly.

DATED at **DAR ES SALAAM**, this **22nd DAY of September** 2023

E.Y. Mkwizu

Judge

22/9/2023