IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 21 OF 2023

(C/f Criminal Case No. 187 of 2018 District Court of Monduli at Monduli)

THOBIAS PENDAEL ..... APPELLANT

VERSUS

THE D.P.P ..... RESPONDENT

JUDGMENT

18th September & 18th December, 2023

TIGANGA, J.

The appellant herein was charged with and convicted of unnatural offence contrary to section 154 (1) (a) and (2) of **the Penal Code,** Cap 16 R.E. 2019, by the District Court of Monduli, at Monduli (the trial court), in Criminal Case No. 187 of 2019.

The particulars of the offence show that, on 23rd July 2018 at Majengo, Mto wa Mbu area within Monduli District in the Region of Arusha, the appellant had carnal knowledge of one **RA** (true identity hidden) a boy of ten (10) years against the order of nature.

The appellant pleaded not guilty to the above allegations hence, a full trial involving five prosecution witnesses and one defence witness was

conducted. Before the trial Court, the evidence shows that, on 23rd July 2018, the appellant lured the victim into his room. While there, the appellant who is a neighbor to the victim penetrated him against the order of nature and immediately thereafter the victim reported the matter which led to the appellant's arrest.

In his defence, the appellant denied having committed the offence and claimed that, the victim was insane to mention him as the one who sexually assaulted him. At the end of the trial, the appellant was found guilty and convicted to 30 years of imprisonment. Aggrieved, he brought this appeal raising a total of four (4) grounds as follows;

1. That, the magistrate erred in convicting the appellant while the case against him was not proved beyond reasonable doubt.
2. That, the trial magistrate erred in convicting the appellant based on the evidence of PW5 (the victim) which was received in contravention of section 127 (2) of **The Evidence Act**, Cap 6 R.E. 2019.
3. That, the trial magistrate erred in convicting the appellant while the age of the victim was not proved beyond reasonable doubt.
4. That, the learned trial Magistrate erred in law and fact in convicting the appellant despite contradictions and inconsistencies in the prosecution case.

During the hearing of this appeal, the appellant appeared in person and was unrepresented while the respondent was represented by Ms. Caroline Assenga, learned State Attorney.

Supporting the appeal, the appellant summarised his grounds of appeal on two limbs; the first being the fact that the victim's evidence was taken in contravention of section 127 (2) of the Evidence Act. He argued that the victim is a child of tender years, his evidence ought to have been taken after his intelligence has been tested by simple questions to ascertain whether or not he understands the meaning of oath and knows the importance of speaking the truth and promise to speak it. However, looking at the proceedings, those questions were never asked by the court, the omission which makes his evidence suffer from noncompliance as held by the Court of Appeal in the cases of **Issa Salum Nambaluka vs. Republic**, Criminal Appeal No. 272 of 2018 and **James Mkorongo vs. The Republic**, Criminal Appeal No. 498 of 2020.

The second limb of the appellant's submission was the fact that the trial court erred in convicting him while there were a number of contradictions in the prosecution evidence. He mentioned one of the contradictions which in his view, would benefit him. He said PW9 mentioned his name as Pendael Kingo who was never arraigned before

the trial court for this offence. More so, according to PW3, the appellant molested the victim in his room while they were witnessing the act, whereas the victim told the trial court that, he was undressed and sexually abused outside the appellant's home. The appellant prayed the said doubts to be resolved in his favour as held in the case of **Paschal Yoya Maganga vs Republic**, Criminal Appeal No. 248 of 2017

The appellant also challenged the fact that at the trial court, he relied on the defence of alibi, but the same was not considered. He prayed that this appeal be allowed, the conviction be quashed and the sentence be set aside so that he can be set free.

Opposing the appeal, Ms. Assenga submitted on the 1st limb that, the victim's evidence was not taken in contravention to section 127 (2) of the Evidence Act because he promised to speak the truth. She argued that even though the victim did not promise not to tell lies, the same can be cured under section 388 of the **Criminal Procedure Act**, [Cap 20, R.E. 2019] and as held in the Court of Appeal cases of **Halfan Rajabu Mohmed vs. The Republic**, Criminal Appeal No. 281 of 2020 and **Elibariki Naftal Mchomvu vs. The Republic**, Criminal Appeal No. 332 of 2019.

On the 2nd limb regarding the evidence being contradicting, it was Ms. Assenga's submission that according to the case of **Goodluck Kyando vs. Republic** [2006] TLR 363 every witness is entitled to credence unless there is good reason not to believe him/her. She went on to submit that, the victim's evidence was clear that the appellant penetrated him while inside his room. Also, PW3 testified that the appellant molested the victim inside his house. She contended that, even though PW3 said the appellant's name is Pendael Kingo she referred to the same person, thus, such a contradiction of names is so minor and does not go to the root of the case. To cement her point, the learned State Attorney referred the Court to the case of **Emmanuel Lybonga vs. Republic**, Criminal Appeal No. 257 of 2019 where the Court of Appeal observed that, a minor contradiction occurring to witness due to normal error in memories or lapse of time cannot affect the prosecution case.

She submitted further that, whether the victim was molested inside or outside of the appellant's house does not matter as long as the same was not an ingredient of the offence. In her view, there is enough evidence by the victim to prove that he was penetrated against the order of nature, his testimony was corroborated by the evidence of PW2, PW3, and PF3 which sufficiently prove the offence. Moreover, the victim

managed to report the incident as soon as it occurred, and before the trial court, he managed to prove how it occurred. It should also be noted that him being the victim, his evidence weighs heavier as held in the case of **Godi Kasenegala vs. The Republic**, Criminal Appeal No. 10 of 2008. She prayed that the appeal be dismissed for wants of merits and the trial court decision be upheld.

In his rejoinder, the appellant maintained that the case against him was not proved at the required standard as the irregularities and contradictions are not minor as they go to the root of the case. He prayed that this Court set him free.

After going through the appellant's submissions, trial courts' proceedings, and judgment, the issue for consideration is whether the case against the appellant was proved at the required standard.

Starting with the 1st ground, the appellant alleges that, the trial magistrate relied on the evidence of a child of tender age without fully complying with Section 127 (2) of the **Evidence Act** as amended which reads;

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence promise to tell the truth to the court and not to tell lies."*

Looking at page 15 of the trial court's proceedings before testifying, the trial magistrate recorded that;

> *"PW 5: RA, 11 years, Mto wa Mmbu, Moslem, promises to speak the truth."*

From thereon, the victim went on testifying without oath. Unfortunately, the trial magistrate did not show how she concluded that the witnesses understood the meaning of oath or the difference between telling truth and lies. The law is now settled and there is a plethora of Court of Appeal decisions which underscores the importance of asking simple questions to a child of tender years to ascertain his or her competence before giving evidence. One of them is the case of **Edmund John @ Shayo vs. The Republic**, Criminal Appeal No. 336 of 2019, CAT at Moshi (unreported) where the Court of Appeal had this to say regarding what to do before taking testimony of a child of a tender year;

> *"... We have observed that there is an absence of any record of there being any test conducted by way of simple questions from the trial court to PW4 in line with what was expounded in the cases cited above,* ***Geofrey Wilson*** *(supra) or* ***Issa Salum Nambaluka*** *(supra). In* ***John Mkorongo James v. Republic,*** *Criminal Appeal No. 498 of 2020 (unreported), the Court held:*
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> > *"The omission to conduct a brief examination on a child witness of a tender age to test his competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the*

court, to tell the truth, and not tell lies is fatal and renders the evidence valueless"

That being the position, having found that there was contravention of section 127 (2) of the Evidence Act in the instant appeal with regard to recording PW4's evidence, undoubtedly, renders the said evidence inconsequential. The consequence is to expunge the said evidence from the record (See, ***John Mkorongo James*** *(supra)). Therefore, the evidence of PW4 is hereby expunged from the record."*

I fully subscribe to the position above, that a testimony of a child of tender years being taken without compliance to section 127 (2) of the Evidence Act renders it valueless. In the appeal at hand, the testimony of the victim, PW5 was taken without compliance and the same is hereby expunged from the records.

In the circumstances, the trial magistrate erred in convicting the appellant based on the evidence of PW5 (the victim) which was received in contravention of section 127 (2) of The Evidence Act. Having discounted the evidence of PW5, now the question remains if the remaining prosecution evidence was enough to warrant a conviction. Looking at the evidence I find that the remaining evidence of PW1, PW2, PW3, and PW4 is not insufficient to prove that the appellant had committed the offence he was charged with. For instance, the evidence of PW3 who claimed to have witnessed the sexual assault after she

received the information from her son, I find it wanting because the evidence is silent on if she found the appellant at the act of penetrating the victim or if she witnessed when the appellant was arrested in his house after being alleged to have committed the offence. The evidence of PW1 with that gap the same becomes reduced to hearsay as he was only told that the appellant committed the alleged offence. The evidence PW2, the doctor, was only to establish that PW5 was penetrated but not prove that it was the appellant who penetrated him.

It is therefore my considered view that, had the trial court thoroughly considered this inefficiency, it would have come to the inevitable finding that it was not safe to convict the appellant based on the kind of evidence. Since the above finding disposes of the appeal, I find no need to discuss other grounds of appeal. In the premises therefore, I find the case against the appellant was not proved at the required standard hence, I hereby allow the appeal, quash the conviction, and set aside the sentence. The appellant is to be released immediately unless he is lawfully held for another offense.

Dated and Delivered at **Arusha** this 18th day of December, 2023.

J.C. TIGANGA

JUDGE