IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 138 OF 2023

RAMADHANI SHEBE----------APPELLANT

VERSUS

THE REPUBLIC----------RESPONDENT

JUDGMENT

MKWIZU,J:-

In the District Court of Kinondoni at Kinondoni , the appellant was arraigned for two offences, grave sexual abuse c/s 138 (1) and (2) and Unnatural offence C/S 154 (1) (a) and (2) all of the Penal code (Cap 16 R E 2016).In the period between January 2021 and 26th October 2021 at Kigogo area within Kinondoni District Dar es salaam, the appellant is accused to have inserted his fingers into the victims vagina and condomized the victim a girl of 9 years old.

The appellant denied the charge, whereupon the prosecution featured four witnesses and a PF3 (exhibit P1).PW1's testimony was that from January to October she was living with her family, mother, brother, and a stepfather (the accused). And that the incident was committed at their home in the absence of her mother who was at work and her brother who was at the tuition. Explaining how the offence was committed, she said, the accused closed her eyes, tied her hands and legs, laid her on the bed and inserted

his fingers into her vigina before he inserted his penis into her anus while preventing her to raise an alarm by blocking her mouth threatening to cut her fingers and kill her if she discloses it to her mother. She only revealed the ordeal to her mother after the mother had noticed her discomfort in walking and inspected her and that she named the accused as a perpetrator. PW1 told the court that when asked by her mother, the accused denied having committed the offenses, but he confessed later before a ten-cell leader asking for forgiveness. They were lastly advised by the ten-cell leader to report the matter to the Police.

PW2 is one Zabibu Simon Ntango, the victim's mother. Her evidence was short and brief that the victim is her daughter and that she was in 2021 living with the accused as her lover. PW3 is a medical Doctor who examined the victim on 8th November 2021 and found her penetrated by a blunt object on both the vagina and anus.

In his sworn testimony, the appellant completely disassociated himself from the foregoing condemnation. He associated the accusations with his follow-ups of the victim's academics at school and a misunderstanding between him and the victim's mother that led to the filling a case at the primary court accused him of stealing her money through internet the evidence, which was supported by DW2, the victim's teacher and the prosecution witnesses.

At the end of the trial, the trial court accepted as truthful the prosecution version of the occurrence. The appellant's defence was considered but found to fall short of casting any doubt on the prosecution case. In the upshot, the appellant was found guilty in the second count, convicted, and sentenced to life imprisonment.

Aggrieved by the decision of the trial court, the appellant is currently seeking to impugn the decision upon a memorandum of appeal which is comprised of seven (7) grounds challenging the trial court on two main points receiving the evidence of PW1 without first requiring her to promise to speak the truth, and failure by the prosecution to prove the offence beyond reasonable doubt.

At the hearing of the appeal, the appellant was unrepresented and had to fend for himself. The respondent /Republic had the services of Mr. Curthbert Mbilingi learned State Attorney. The appeal was disposed of through written submissions.

In the 1st ground the trial court is faulted for recording the PW1's evidence contrary to section 127(2) of the Evidence Act. And on the second point comprising of the 2nd to 7th ground of appeal, the trial court is faulted for relying on weak evidence by the prosecution. Several ailments were listed on this point including failure by the prosecution to parade the ten-cell leader on whom the incident was first reported as a witness in court, delay in reporting the incident to the police. That while PW2 admits having learnt of the ordeal on 24/10/2021, she firstly explained it to Pw4 on 5/11/2021; Pw2's evidence was inconsistent with her statement made at the police (exhibit D1) and that the evidence of the rest of the prosecution witnesses is weak incapable of proving the offence to the required standards.

The learned State Attorney was on the other hand in support of the conviction and the meted sentence. He said, the procedure set under s. 127(2) of the Evidence Act was followed and the victim's evidence was taken after she had promised to tell the truth and not on oaths or affirmation which

requires examination to test if the victim understands the nature of oaths or affirmation.

He asserted that the paraded witnesses were satisfactory to prove the case. This being a sexual offence case, the best evidence comes from the victim. He maintained that the appellant failed to cross examine Pw2 on the issue of the delay in reporting the incident to the police and did not oppose the admissibility of the complainant statement Exhibit D1 insisting that prosecution evidence was strong enough to prove the charged offence.

I have considered the grounds of appeal and the parties' submissions. The procedure for recording the evidence of a child of tender age is provided for under section 127 (2) of the Evidence Act. For easy reference, we reproduce the section hereunder:

> *"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."*

Plainly interpreted, a child of tender age may, in terms of the above provisions, give evidence on oath or affirmation or without oath or affirmation. Where such a witness is to give evidence without oath or affirmation, he must make a promise, to tell the truth and undertake not to tell lies. This position was underscored by the Court of Appeal in **Godfrey Wilson Vs Republic,** Criminal Appeal No 168 of 2018(unreported) where it was held :

"The trial magistrate ought to have required Pw1 to promise whether or not she would tell the truth and not lies, we say so because section 127(2) as amended imperatively requires a child of tender age to give a promise of telling the truth and not telling lies before she /he testifies in court. This is a condition precedent before reception of the evidence of a child of tender age.

The child witness (PW1) in this case did not give evidence on oath or affirmation. Contrary to the appellant's complaints in ground one, on page 13 of the typed trial court records PW1's promise was solicited and vividly recorded by the trial magistrate before recording of his evidence in court. Though I agree with the appellant that there was no inquiry done to ascertain the child's understanding of the oath/ affirmation or otherwise and no record was made of the child's promise not to tell lies, I am of the firm view that such an omission is not fatal. Faced with a similar situation, the Court of Appeal in **Mathayo Laurence William Mollel V The Republic**, Criminal appeal No. 53 of 2020(Unreported) held:

*"We **are unable to agree with the appellant that the trial court ought to have conducted a test to verify whether the child witnesses knew and understood the meaning of oath or affirmation**. In our considered view, **that requirement would only be necessary if the child witnesses testified on oath or affirmation**. We respectfully think that if a child of tender age is not to testify on oath or*

affirmation, a preliminary test on whether he knew and understood the meaning of oath may be dispensed with.

*The appellant also argued that the child witnesses' **promise was incomplete for promising only to tell the truth** and omitted **to undertake not to tell lies.** We find difficulties in agreeing with him. We understand the legislature used the words "promise to tell the truth to the court and not to tell lies". **We think tautology is evident in the phrase, for, in our view, 'to tell the truth" Simply means "not to tell lies". So, a person who promises to tell the truth is in effect promising not to tell lies**. The tautology in the subsection is, in our opinion, a drafting inadvertency. We thus find no substance in the first ground of appeal and dismiss it." (emphasis added)*

I am bound by the above authority. That being the position, the trial court did what it was required of and PW1's evidence was thus recorded in accordance with the laid-down procedures. The first ground of appeal is without merit.

The 2nd to 7th ground of appeal is a complaint over the failure by the prosecution to prove the case. I should admit from the outset that, indeed, there was a failure by the prosecution to prove the accusations levelled against the appellant. As rightly submitted by the appellant, the accused's oral confession is a very important piece of evidence in this case that if proved would have supported the prosecutions version of evidence. According to the records, PW2 was informed of the ordeal and the

perpetrator on 24/10/2021 and the matter was reported to the ten-cell leader where the appellant confessed asking for forgiveness before they were advised to report the matter to the police. A close look at the prosecution evidence one would agree with the appellant that the mentioned ten-cell leader was a key witness in this case. He could have been the best witness to confirm to the court the appellant's confession. Sadly, the ten-cell leader before whom the appellant confessed was not called as a witness and no explanation was given for that omission.

Again, it is on the records that Pw2 knew of the incident on 24/10/2021, she enquired from the appellant and was on the same day advised to report the matter to the police after the confession by the appellant before the ten-cell leader. However, the prosecution's evidence is silent on why the matter was not taken to the police until 5/11/2021 after almost eleven days . This is also serious because the appellant is a family member and there is no report of his absence during this period.

There is also a clear contradiction by the prosecution witnesses. While Pw1 speaks of unnatural offence in support of the 2nd count, PW3, the doctor speaks of the victim's penetration on both vagina and anus. PW2, the victim's mother child, is alleged to have been informed of the incident on 24/10/2021 but she failed to tell, the court in even a single sentence on what had happened either to her child , the victim or her husband the accused. And during cross examination, she was able to expose a glaring variance between her evidence adduced in court and her statement (exhibit D1) record at the police when she first reported the matter. All these raises doubt on the credibility of the prosecution witnesses.

Unexpectedly, PW1 and PW2's evidence was in total support of the defence evidence that linked the accusations with his follow-ups of the victims' academics at school and the misunderstanding between him and the victim's mother (PW2). For instance, PW1 at page 6 of the trial courts proceedings admitted that she was not attending school, hiding in bushes the reason that prompted the appellant to go to school to see her teacher. This evidence was also supported by Dw2, the victim's teacher. PW2 was also keen enough to admit that she instituted a case against the appellant at the primary court accusing him of stealing her money through internet.

In the upshot, I find the prosecution case weak to hold the appellant's conviction. The appeal is thus allowed, appellant's conviction is quashed, and the sentence set aside. The appellant is to be released from prison forthwith unless otherwise held. Order accirdingly.

Dated at **Dar es salaam**, this **22nd** Day of **December 2023**

E. Y Mkwizu
Judge
22/12/2023

COURT: Right of Appeal explained

E.Y Mkwizu

Judge