IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: JUMA, C.J., KWARIKO, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO 61 OF 2022

ATHUMANI ALLY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the Judgment of the Court of Resident Magistrate at Tanga)

(Hon. E. F. Mchauru with Ext. Jur)

dated the 14th day of September, 2020

in

Criminal Appeal No. 25 of 2020

JUDGMENT OF THE COURT

09th & 12th May, 2022

JUMA, C.J.:

The District Court of Pangani at Pangani tried and convicted the appellant, ATHUMANI ALLY, of one count of unnatural offence, contrary to section 154 (1) of the Penal Code Cap 16 R.E. 2002 (now Penal Code, Cap 16 R.E. 2019). The prosecution alleged that the appellant committed this offence on 10/02/2017 at Mtango village in Pangani District of Tanga Region against an eight-year-old girl. We shall refer to this girl as "ADM."

ADM testified before the trial Magistrate, J. Mnguto-RM, as PW3. As she walked back home from Mtango Primary School, she met the appellant. She knew him as a local herdsman. He grabbed and carried her to the nearby bush. He then covered her mouth with a cloth and tried to insert his penis into her vagina. When penetration failed, he asked her to bend as he penetrated his penis into her anus. After completing the anal act, he ordered her to go home and not to her grandmother.

Around 14:00 hours, ADM's mother, Halima Hassan (PW2), saw her daughter returning from school crying. Her daughter carried wounds on her back and cheeks, appearing like a stranglehold. ADM explained what the appellant did to her. PW2 asked her brother Mkombozi Macholo to accompany her and ADM to the village where ADM's father and the appellant's uncle (one Saleh) lived. After brief consultations, they decided to take ADM to the hospital for medical examination.

On 11/02/2017, Josephat Simon Shirima (PW4), a nurse and midwife, was at Kipumbwi Dispensary when PW2 and a police officer brought ADM for treatment. PW4 saw bruises on the patient's open anus with scattered

faeces. After the medical examination, PW4 prepared a medical examination report (PF3) tendered as exhibit P1.

Earlier on 13/02/2017, the Officer in Charge of Pangani Police Station assigned a police officer, H. 6192 Majidi Ismail Ali (PW1), the responsibility to investigate the crime. The following day, PW1 recorded the appellant's cautioned statement wherein the appellant apparently confessed the offence.

The appellant testified in his defence. He was at home around midnight on 17/06/2017 when members of the militia informed him the village chairman wanted to see him. On arrival, the Chairman accused him of rape, which he denied. All the same, the Chairman directed the militia to send him to the Kipumbwi Police Post.

After hearing the evidence of four prosecution witnesses and the appellant, the trial magistrate determined that the prosecution evidence proves that the appellant sodomized the eight-year-old ADM. The trial magistrate convicted the appellant of committing the unnatural offence and sentenced him to life imprisonment.

In the appeal petition that he filed in the High Court at Tanga, the appellant faulted the trial court for admitting the cautioned statement that the police recorded outside the prescribed time. He also complained that the trial magistrate failed to consider his age when convicting him. The appellant raised the issue of the sentence of life imprisonment, which he contended, infringed section 131(2)(a) of the Penal Code. In other words, as a boy under eighteen years and a first offender, the proper sentence should have been corporal punishment only.

E.F. Mchauru (Principal Resident Magistrate) heard the appellant's first appeal on extended jurisdiction under section 45(2) of the Magistrates' Courts Act. He agreed with the appellant that the trial court wrongly relied on his cautioned statement, which the first appellate Principal Resident Magistrate (extended Jurisdiction) expunged from the record. In dismissing the appeal, the first appellate court did not accept the appellant's complaint that being a child of under the age of eighteen, the trial court should have sentenced him under section 131 (2)(a) of the Penal Code.

Aggrieved by the dismissal of his appeal, the appellant has come to this Court with six grounds of appeal. We paraphrase these grounds as follows. Firstly, he complains that the prosecution did not prove the unnatural offence beyond a reasonable doubt. Secondly, he faults the first appellate Court for failing to find that the trial magistrate did not ask ADM, a child witness, questions to determine whether this witness promised to tell the truth to the Court as per section 127(2) of the Evidence Act, Cap 6 R.E. 2019 demands. In his third complaint, the appellant questions the credentials and qualifications of PW4, the Nurse Midwife, to testify as a professional and qualified medical practitioner. Fourthly, the appellant blames the first appellate court for an excessive sentence that did not consider his age, thereby violating the law. On his fifth ground, the appellant complains that the prosecution failed to read out the medical examination report before the trial court admitted it as exhibit P1. On the sixth ground, the appellant faults the two courts below for failing to consider his defence.

At the hearing of this appeal on 09/05/2022, the appellant appeared in person, unrepresented. The learned State Attorney, Mr. Paul Kusekwa, appeared for the respondent Republic. The appellant adopted his six

grounds of appeal and expressed his wish that the learned State Attorney should first respond to his grounds of appeal.

Mr. Kusekwa supported the appeal mainly on the first ground of appeal where the appellant maintains that the prosecution failed to prove beyond a reasonable doubt the charge of unnatural offence. He submitted that the unnatural offence that the prosecution directed against the appellant, stands or fell on the evidence of ADM. In so far as the learned Stated Attorney is concerned, the evidence of ADM suffers from the defect arising from how the trial court admitted it without following the preconditions laid down under section 127 (2) of the Evidence Act, Cap 6 R.E. 2019. He explained that this provision relates to competence and admissibility of evidence of a witness of tender age, described under subsection (4) of section 127 as a child whose apparent age is not more than fourteen years. Section 127 (2) provides:

> *"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 any lies."*

Relating the evidence of the then eight-year-old ADM, Mr. Kusekwa submitted that the trial Magistrate who recorded ADM's testimony did not demonstrate how she concluded that: *"The child understands questions put to her, she has sufficient intelligence and promised to speak the truth."* He contends that the trial Magistrate should have recorded what ADM actually said when promising to tell the truth.

The learned State Attorney urged us to disregard the evidence of ADM. He asked us to abide by our decision in **JOHN MKORONGO JAMES VS REPUBLIC** (Criminal Appeal 498 of 2020) [2022] TZCA 111 (TANZLII), which faulted the trial court for recording that a child witness promised to tell the truth, and understood the duty of telling the truth. This decision, cited with approval of the case of **GODFREY WILSON VS REPUBLIC** (Criminal Appeal 168 of 2018) [2019] TZCA 109 (TANZLII). In the case of **GODFREY WILSON VS REPUBLIC** (supra), the Court gave guidance that to determine the promise, to tell the truth to the Court, and not to lie to the Court, the trial magistrate or judge can ask a child witness of under the age of fourteen, simplified questions, which, depending on the circumstances, need not be exhaustive.

We must point out that the phrase "*a child of tender age may give evidence without taking an oath or making an affirmation*" in subsection (2) of section 127 is not free from ambiguity in so far as it leaves open the question of whether a child of tender age may also give evidence on oath or affirmation. We also leave for future decisions whether, before a child of tender age gives evidence on oath or affirmation, he or she must similarly promise to tell the truth to the court and not to tell any lies.

For now, however, as submitted to us by the learned State Attorney, the Court has on numerous occasions pronounced itself on the requirement that the trial court must record the words of a child of tender age promising to tell the truth. In **RAPHAEL IDEJE @ MWANAHAPA V. R.** [2022] TZCA 71 (TANZLII) the Court referred to a position it took earlier in **YUSUPH S/O MOLO V. R.** [2019] TZCA 344 (TANZLII). The position is to the effect that the record of the trial court must show the words of a child of tender age promising to tell the truth before the trial court allows him to testify.

From authorities of the Court, Mr. Paul Kusekwa, the learned State Attorney, is correct to fault the way the trial magistrate in this appeal failed to record her engagement with ADM before writing down her conclusion that this child of tender age promised to speak the truth. We think before a trial magistrate or judge allows a child under the age of fourteen to testify under section 127(2) of the Evidence Act, the trial court must record how it engaged that child to conclude that the child promised to tell the truth to the court and not to tell any lies. While there is no formula for what actual words the trial courts should record, what is essential is for the trial court's record to leave no doubt that what the court recorded was what the child said. For reasons we have outlined here, we shall delete the testimony of ADM from the evidence on record.

After discarding the evidence of ADM, the fate of the prosecution's case inevitably rests on the question whether there is other evidence remaining on record to sustain the unnatural offence against the appellant. The learned State Attorney is correct to submit that the remaining evidence of the police officer (PW1) who conducted the initial investigation, the victim's mother (PW2) who saw her daughter returning home injured, and the Nurse/Midwife (PW4) at Kipumbwi Dispensary is

not sufficient to prove that it was the appellant who committed the unnatural offence contrary to section 154 (1) of the Penal Code, Cap. 16 (now R.E. 2019).

In the final result, we allow this appeal. We quash the conviction and set aside the appellant's sentence of life imprisonment. We order the appellant to be freed unless otherwise lawfully held.

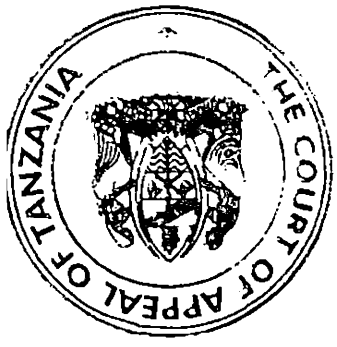
DATED at **TANGA** this 11th day of May, 2022.

I. H. JUMA
CHIEF JUSTICE

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered this 12th day of May, 2022 in the presence of Mr. Athumani Ally, the Appellant in person and Ms. Donata Kazungu, State Attorney for the Respondent, is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRARD
COURT OF APPEAL