IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KOROSSO, J.A., KEREFU, J.A. And MLACHA, J.A.)

CRIMINAL APPEAL NO. 65 OF 2023

ALI ABDALLA OMAR..... ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION..... RESPONDENT

(Appeal from the decision of the High Court of Zanzibar at Tunguu)

(Issa, J.)

dated the 13th day of June, 2022

in

Criminal Appeal No. 22 of 2021

JUDGMENT OF THE COURT

23rd April & 6th May, 2024

MLACHA, J.A.:

The appellant, Ali Abdallah Omari, was found guilty and convicted of indecent assault on a boy aged 9 years contrary to section 135 of the Penal Act, No. 6 of 2018 of the Laws of Zanzibar, by the Regional Court of Zanzibar at Vuga. He was sentenced to serve 20 years at the Offender's Education Center of Zanzibar. His appeal to the High Court of Zanzibar at Tunguu in Criminal Appeal No. 22 of 2021 (Issa J., as he then was) was not successful. He is now before the Court on a second appeal.

Briefly stated, the evidence leading to the conviction of the appellant, as perceived by the lower courts, can be put as follows: Jamila Maleja Yango (PW1) left home on 22/8/2020 at 4:00 pm to visit a patient at Magomeni Hospital Zanzibar, leaving her 9 years old boy, (PW2) (the victim) and his brother, Ismail Fadhili Ali (PW3) (14 years old), at home. While away, the appellant who is familiar at the house, came in. He was known as an electrician with skills to repair/service television and computers. He told the children that he had come to repair a computer. He entered the sitting room where he met the victim. The appellant put saliva on his hand and fingers and applied it on the victim's anus. He later brushed his penis on it. It was the testimony of the victim that a piece of cloth was put on his mouth by the appellant to prevent him from raising an alarm during the assault. Thereafter, the appellant gave him TZS 500.00 with a warning that he should not tell anybody. PW3 who was outside the house, looked inside through a hole at the door and saw the victim laid down by the appellant who was half naked and committing the crime. He saw the appellant giving the victim TZS. 500.00 followed by a warning, for the victim not to disclose the incident to anybody. PW3 rushed to report to Issa Gumbo (PW4) (aged 16) on what he had witnessed who come and saw the appellant getting

out of PW1's house. PW1 went back home at around 21:00 hours and was informed by PW2 and PW3 of what had happened. She examined the victim's anus and saw some bruises. She reported the matter at the police station where she was given a PF3 (Exhibit P1) and directed to send the victim to hospital. Dr. Rashid Salim Abdulla (PW6), who examined the victim later that day, remarked on the PF3 that there was a small laceration (bruises) at the anus of the victim but that there was no bleeding or evidence of penetration.

The appellant denied to commit the crime or visit PW1's house that day. He said that on the day and material hour alleged, he was at Zanzibar harbour waiting for his father in law, Ramadhani Nguali Makame (DW5), who was arriving from Pemba. He received his guest and together they went home. He remained at home till the next day. He was arrested early the next day on accusations of assaulting the boy something which he did not do. He paraded 4 witnesses; Fatma Amour Juma (DW2), Halima Hamadi Ali (DW3), Rahma Ramadhani Ngwali (DW4, his wife) and DW5 to support the story that he was at the harbour on the material day and hour and later proceeded home where he remained till the next day.

The trial court believed the prosecution witnesses and convicted the appellant who was sentenced to serve 20 years as alluded above. The defence of the appellant was found to be baseless and rejected. The first appellate court upheld the conviction and sentence.

The grounds upon which this appeal is based can be put as under:

1. That, the High Court erred in law and fact in basing its decision on extraneous matters other than the evidence of the victim and PW3.
2. That, the High Court erred in Law and facts in basin its decision on witnesses who did not take an oath or promise to say the truth.
3. That, the High Court erred in law and fact for upholding the conviction of the appellant in the absence of the piece of cloth which was put on the mouth of the victim at the time of the assault.
4. That, the High Court erred in law and fact for upholding the conviction of the appellant based on hearsay evidence of PW1 and PW4.
5. That, the High court erred in law and fact for failing to properly analyze the evidence of DW1, DW2, DW3, DW4 and DW5.

The respondent Republic was represented by Messrs. Mohamed Salehe Iddi, Principal State Attorney and Ilham Sultan Malik, Senior

State Attorney, whereas the appellant appeared in person fending for himself.

When the appellant was called to address the Court at the hearing, he opted for the respondent Republic to respond to his grounds of appeal while reserving his night of rejoinder.

Mr. Iddi came with an approach of objecting the appeal. He started with ground two and in the midst, upon dialogue with the Court, he changed his position and conceded to the appeal. He explored the legal provisions dealing with the evidence of children of tender age under the laws of Zanzibar and concluded that the procedure was not complied by the trial court. He submitted that the evidence of PW2 and PW3, who were aged 9 and 14 years respectively, was received contrary to the provisions of the law. Amplifying, he made reference to the evidence of PW2 appearing at pages 4 and 5 as well as that of PW3 appearing at page 8 of the record of appeal and submitted that, the witnesses gave unsworn testimony but did not promise to tell the truth. This, he contended, contradicted the mandatory requirements of section 113 (3) and (4) of the Evidence Act, No. 9 of 2016 (the Evidence Act) and section 49 of the Children's Act, No. 6 of 2011 (the Children's Act).

The Principal State Attorney submitted further that, failure to comply with these provisions render the evidence of PW2 and PW3 illegal calling for an order to expunge them from the record. He added that, if the evidence of these witnesses is expunged, the remaining evidence will not sustain the appellant's conviction. He urged the Court to expunge the evidence of PW2 and PW3 from the record of appeal but hastened to say that what happened is a procedural irregularly which should not be used as a peg to defeat justice because the respondent Republic had strong evidence against the appellant. He urged the Court to order a retrial instead of setting the appellant free. He submitted that they are not going to fill gaps because they have strong evidence from PW2 and PW3 which can sustain a conviction. He made reference to **Elias Mwaitambila and 3 others v. R.,** Criminal Appeal No. 316 of 2019 [2023] TZCA 89; (8 March, 2023; TANZLII) to support his stance. He saw no need of addressing other grounds of appeal as, in his view, ground two could dispose of the appeal.

The appellant being a layman did not have much to say. He contended that there was no evidence to prove the case. He resisted the prayer for retrial and urged the Court to set him free.

We have painstakingly revisited the record and considered the submissions of the parties carefully. We plan to start by revisiting the evidence of PW2 and PW3 to show the way the *voire dire test* was conducted. The record of appeal from pages 4 to 5 depicts the following:

> ***"Court:*** *the second witness who appear before me on this trial is a minor under the age 10 years, my court consider the voire dire test and witness PW2 reply questions as follows:*
>
> ***Court:*** *what is your name?*
>
> ***PW2:*** *My name is Kassim Fadhili Ali.*
>
> ***Court:*** *How old are you?*
>
> ***PW2:*** *My age is 9 years.*
>
> ***Court:*** *where do you live?*
>
> ***PW2:*** *I am living at Munduli.*
>
> ***Court:*** *do you stay with parents*
>
> ***PW2:*** *I am living with mom, father and sisters.*
>
> ***Court****: mention your father's name?*
>
> ***PW2:*** *Janja.*
>
> ***Court:*** *Mention your mother's names.*
>
> ***PW2****: Jamila.*
>
> ***Court Observation.***
>
> *After questioning PW2 (witness) I observed that, PW2, he is capable of understanding the rational answer he is clean in mind and PW2 well*

know question and understanding the answer. This Court proceeds to order the prosecution to take Chief examination without formality as Children Act. No. 6/2011 declared."

PW2 (the victim) then started to give his evidence without oath or affirmation. He was subjected to examination in chief, cross examination and re - examination and his evidence was closed.

The evidence of PW3 started as follows:

"What is your name?
Ismail Fadhili Ali.
How old are you?
I am 14 years old.
Where do you live?
I llve at Mtopepo.
Are you studying school?
Yes.
Which school?
Mtopepo. I am completed my examination standard six.

Court- voire dire test

The witness is a boy of 14 years age his capability of understanding is good and he know the question and answer hence, this Court proceed to second the evidence of the witness without taking oath."

The issue now is whether what was done by the trial magistrate was in line with the Law. As correctly pointed out by the learned Principal State Attorney, the relevant law is section 133 of the Evidence Act and section 49 of the Children's Act, Laws of Zanzibar. We find it apposite to reproduce them verbatim for ease of reference:

Section 133 of the Evidence Act reads in part as under:

> *"133 (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them, or from* ***giving rational answers to those questions, by tender years,*** *extreme old age, disease, whether of body or mind, or any other cause of the same kind.*
>
> *(2) A person of unsound mind is not competent to testify, unless he is prevented by reason of such unsoundness of mind from understanding the question put to him and giving rational answers to them.*
>
> *(3) Where in any criminal proceedings or matter,* ***a child of tender age*** *called as a witness does not, in the opinion of the court,* ***understand the nature of the oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court*** *which shall be recorded in the proceeding,* ***he is***

possessed of sufficient intelligence to justify the reception of his evidence, and to understand the duty of speaking the truth.

(4) Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (7) of this section, where evidence received by virtue of subsection (3) of this section is given on behalf of the prosecution and is ***not corroborated*** *by any other material evidence in support of it implicating the accused,* ***the court may, after warning itself of the danger of doing so, act on that evidence to convict the accused if it is fully satisfied that the child is telling the truth.***

(5) ... the evidence of a child of tender age received under subsection (3) of this section may be acted upon by the court as material evidence corroborating the evidence of another child of tender age previously given or the evidence given by an adult which is required by law or practice to be corroborated.

(6) ... the expression ***"child of tender age" means a child whose apparent age is not more than fourteen years.*** *(Emphasis added)*

(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offences, the only independent

evidence is that of a child of tender age or a victim of sexual offence, the court shall receive the evidence and may after assessing the credibility of the evidence of the child of tender age or the victim of sexual offence, as the case may be, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, ***if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of sexual offence is telling nothing but the truth.***

(8) For the purpose of this section the term "sexual offence" means any of the sexual offences created either under the Penal Act or any written law.

Section 49 of the Children's Act reads as under:

"49 (1) Any child may be admitted to give evidence in criminal proceedings without taking the oath or making an affirmation; provided that such child is ***able to understand questions put to him or to respond to such questions*** *in a manner which is intelligible and provided further that such child shall, in lieu of oath or affirmation,* ***be admonished by the presiding officer to speak the truth, the whole truth and nothing but the truth.***

(2) ***Every child shall be presumed to be competent to testify*** *in criminal proceedings and such shall be precluded from giving evidence* ***unless he or she is found,*** *at any stage of the proceedings,* ***not have the ability or mental capacity,*** *verbal or otherwise,* ***to respond to questions*** *in a way that is understandable to the court.*

(3) ***The evidence given by a child*** *referred to in subsection (2) of this section* ***shall be admissible*** *in criminal proceedings, and the court* ***shall attach such weight to such evidence as it deems fit.***

(4) Notwithstanding any rule of law or practice to the contrary, where evidence received by virtue of subsection (2) of this section is ***given on behalf of the prosecution and is not corroborated*** *by any other material evidence in support of it implicating the accused, the court may, after warning itself, act on that evidence to convict the accused, if it is fully satisfied that the child is telling the truth.*

(5) Notwithstanding the provisions of this section, where in any criminal ***proceedings involving a sexual offence, the only independent evidence is that of the child or victim of sexual offence, the court shall***

receive the evidence and may, *after assessing the credibility of the child or victim of sexual offence, on its own its merits,* ***notwithstanding that such evidence is not corroborated, proceed to convict for*** *reasons to be recorded in the proceedings,* ***if the court is satisfied that the child is teliing nothing but the truth."***

(6) For the purpose of subsection (5) of this section and any other written laws, "sexual offence" means any of the sexual offences as under the Penal Act, No. 6 of 2004. (Emphasis added)

The two provisions provide the legal framework of dealing with the evidence of children in Zanzibar. The import of these provisions is that, children are competent witnesses and can give evidence in trials unless they are prevented from understanding the question put to them, or from giving rational answers to those questions. To ascertain this, the court will have to start with a *voire dire test.* This will enable the court to form an opinion on whether the child witness has sufficient intelligence to respond to questions and give rational answers and whether he understands the meaning and nature of an oath or affirmation and its

consequences. See **Edward Nyegela v. The Republic,** Criminal Appeal No. 321 of 2019 [2022] TZCA 136; (24 March 2022; TANZLII).

If the witness will be found to have sufficient intelligence and if he understands the meaning and nature of an oath or affirmation, he will be allowed to take an oath and give a sworn or affirmed evidence. But, if has sufficient intelligence but does not know the meaning, nature and consequences of an oath or affirmation, he will give evidence without oath or affirmation provided he promises to tell the truth and not lies. See **Edward Nyegera v. The Republic** (supra) which followed our earlier decision made in **Msiba Leonard Machere Kumwaga v. The Republic,** Criminal Appeal No. 550 of 2018 [2018] TZCA 571; (6 July 2018; TANZLII) where we stated:

> *"A child of tender age may give evidence without taking oath or affirmation provided he or she promises to tell the truth and not lies."*

A point to stress here is that, if the witness gives unsworn evidence, he must make a promise to speak nothing but the truth. Further, the law has put a duty on the part of the trial court to require the witness to make the promise and warn him of the dangers of speaking lies in court. This must appear on the record of the trial court.

The questions put to the witness during the *voire dire* test may vary depending on the scenario but must aim at testing the knowledge of the witness, his intelligence and ability to give rational answers. They must also be designed to checking if he knows the meaning of an oath or affirmation and its consequences. See **Mohamed Sainyeye v. R,** Criminal Appeal No. 57 of 2010 [2012] TZCA 15; (17 May, 2012; TANZLII) which followed principles laid in **Gadiel Emmanuel Urio v. The Republic,** Criminal Appeal No. 538 of 2016 [2019] TZCA 586; (13 December, 2019; TANZLII). See also **Godfrey Wilson v. The Republic,** Criminal Appeal No. 168 of 2018 [2019] TZCA 109; (6 May, 2019; TANZLII) and **Hassan Bundala @ Swaga v. The Republic,** Criminal Appeal No. 386 of 2015 [2015] TZCA 261; (23 February, 2015; TANZLII).

All done, the witness will be put to examination in chief, cross examination and re-examination just like any witness but taking into account that he is a child. His credibility will then be examined, and if the court will be satisfied that his evidence contain nothing but the truth, it can act on it and convict the accused as alluded to above.

Next we will look at what happened during the trial subject to this appeal. Our close look at the record of appeal has revealed that, the

voire dire test miss three key elements: **One**, the oath or affirmation; the witnesses were not asked about the oath or affirmation and its consequences. **Two**, the promise to speak the truth; the witnesses were not asked questions leading them to make a promise to speak the truth. And **three**, the warning of the court; the witnesses were not admonished on the dangers of speaking lies while on oath or affirmation. We thus agree with the learned Principal State Attorney that the evidence of PW2 and PW3 was recorded contrary to the law and thus illegal. We proceed to expunge the evidence from the record.

Ordinarily, after expunging evidence, in a situation like this one, the court making the order will have two options; **one**, where the evidence on record is found to be generally poor, the proceedings will be quashed and the conviction and sentence set aside with the result of setting the accused/convict free; **two**, where there is good evidence, the court can order a retrial. A retrial must be ordered carefully, where need be, to avoid manufacture of new evidence to fill in gaps. See **Fatehal Manji v. R.** [1966] E.A. 341 where it was stated:

> *"In general* ***a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of***

insufficiency of evidence or for the purpose of enabling the prosecution to fill in gaps *in its evidence at the first trial. Even where a conviction is visited by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an* ***order for retrial should only be made where the interest of justice require.*** *"* (Emphasis added).

The principles in **Fatehal Manji** (supra) were followed in a number of decisions of this Court including the case of **Charles Lyatii @ Sadala v. The Republic**, Criminal Appeal No. 290 of 2011 [2012] TZCA 155; (21 May, 2012; TANZLII) and **Mtangi Masele v. The Republic,** Criminal Appeal No. 115 of 2016 [2018] TZCA 520; (13 December, 2018; TANZLII).

Similar observations were made by the Supreme Court of Ghana in **Sam Qarshie v. Edie Kusi Ankomah**, Civil Appeal No. J4/59/2022 [2023] GHASC 34 (10 May, 2023) where it was stated:

"But a retrial is not to be ordered lightly and will not be ordered to enable a party to fill in gaps in the case she presented during the original trial. See; ***Jass Co. Ltd & Anor v. Appau & Anor***

(2009) SLGR 265. A retrial entails repeat expenses and may encounter other challenges."

The learned Principal State Attorney has urged the Court to order a retrial saying there is sufficient evidence making reference to the evidence of PW2 and PW3. The appellant is resisting. We have given due consideration on these opposing positions.

With respect to the learned Principal State Attorney, we don't think that the evidence of the victim and that of PW3 can sustain a conviction. The charge sheet shows that the crime was committed on 22/11/2018 at 4:00 pm at Munduli, West District, in the West Region of Zanzibar. The particulars of the offence were that the appellant assaulted the victim by brushing his penis in the victim's anus. There evidence on record does not establish what is in the charge sheet. We observe some serious short comings, inconsistencies and contradictions as follows: **One,** the victim and PW3 did not mention the date and time of commission of the crime. Their testimony is hanging. **Two,** the victim and PW3, who was an eye witness, did not say that a penis of the appellant was applied to the victim's anus. What was said by the victim is that *"he put saliva to his hands and fingers and put to my anus."* He did not say that a penis was applied to his anus which was a key

element of the charge sheet. PW3 who looked inside through a hole at the door did not say that he saw the penis of the appellant being applied to the victim's anus. The evidence of the victim and PW3 on this aspect is vague and is not directed to the offence charged. **Three,** the evidence of PW1 and PW5 who alleged to have seen bruises in the victim's anus, suggesting that there was the brushing of the appellant's penis on the victim's anus, contradicts with what was said by the victim and PW3 who did not mention of any touching of the anus by a penis or any hard object. Neither did the victim complain of any pains. **Four,** PW5 who received the complaints from PW3 and who allege to have seen the appellant coming out of the house, did not report the matter to any neighbour or relative at the material moment. **Five,** the evidence of all prosecution witnesses is generally vague and poor. It cannot lead to a proof beyond reasonable doubts on the offence charged.

Taking all this into consideration, we are of the view that, a retrial order, if issued, will give the prosecution an advantage to fill in the gaps. This will be contrary to the principles laid in **Fatehal Mulji** (supra) which have now been enshrined to be part of our laws. We thus see no need for making a retrial order.

The above said, we proceed to nullify the proceedings and decision of the trial court, quash the conviction and set aside the sentence. The proceedings and decision of the High Court are also nullified, quashed and set aside. We direct the immediate release of the appellant from the Education Center unless held for some other lawful cause.

Order accordingly.

DATED at **ZANZIBAR** this 4th day of May, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of May, 2024 in the presence of the appellant in person and Mr. Ali Yussuf Ali, Principal State Attorney for the respondent Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL