IN IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 275 OF 2020

(Originating from the decision of the District Court of Temeke Criminal Case No 574 of 2020 before Hon A.R Ndossy, RM)

GEORGE BATHOLOMEO ..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 15. 12.2021
Date of judgment: 23.2.2022

MASABO, J.:-

This appeal is against the decision of the District Court of Temeke in Criminal Case No. 574 of 2019 (Ndossy- RM), where the appellant was arraigned before the district court of Temeke charged with the offence of unnatural offence contrary to section 154(1) (a) & (2) of the Penal Code [Cap 16 RE 2019]. The prosecution alleged that on 3rd August, 2019 at Yombo Vituka area within Temeke District in Dar es salaam George Batholomeo, the appellant had canal knowledge of a 4-year-old boy against the order of nature against.

During trial the prosecution arraigned a total of three witnesses to prove the charges against the appellant. The prosecutrix was the first to testify as PW1. He told the court that on the fateful day he was going to Happy's place when the appellant called him, lied him on a chair and inserted his 'mdudu' (penis) in his mouth and buttocks. He also told the court that he

felt pain and that after the incident he put on his clothes and went back home and narrated the incident to one Mama George. Pw1's father one Leonard Salimin, testified as PW2. He narrated that on the said day he returned home after 5pm and on arrival, PW1 approached him and narrated the incident. After this narration which shocked him, he undressed PW1 inspected his private parts but did not find any thing as he is not an expert. On the next day he went to police, collected a PF3 and had PW1 examined at hospital. PW3, the last witness, investigated the case and visited the scene in the course of investigation. On his part, the appellant did not have any witnesses but defended himself on oath. Testifying as DW1 he offered a total denial. At the end of trial, the prosecution was found to have successfully proved its case beyond reasonable doubt against the appellant who was subsequently convicted and sentenced to life imprisonment.

Disgruntled, the appellant is now before this court armed with four grounds of appeal namely; **One**, that the conviction was solely based on PW1 (victim) evidence which was taken contrary to section 127(2) of the Evidence Act [Cap 6 RE 2019]. **Two**, the court wrongly disregarded the evidence of PW2 (the victim's father) and PW3 (the investigator). **Three**, the conviction was based on the hearsay evidence of PW2 and PW3 and **Four**, the conviction was based on prosecution evidence which was incredible and reliable and totally ignored his defence.

During the hearing which proceeded in writing, the appellant who was unrepresented, consolidated the 2nd and 4th ground of appeal and submitted on the 1 and 3rd ground separately. On the 1st ground, he

challenged the manner in which the evidence of the victim who is the child of the tender age (4 years) was procured by the trial magistrate. He argued that, it was procured in total contravention of section 127(2) of the Evidence Act [Cap 6 RE 2019] as PW1 did not promise to tell the truth. He proceeded that, the Court of Appeal has in a plethora of authorities directed the manner in which evidence of the child of tender years be obtained and specifically cited **Geofrey Wilson Versus Republic**, Criminal Appeal No. 168 of 2018 (unreported); and **Hemedi Omary Ally @Dallah Versus Republic**, Criminal Appeal No. 181 of 2018 (unreported) where it was pointed out that the judge/ magistrate may ask a witness simplified questions which may not be exhaustive so as to drive the child to promise to tell the truth and not to tell lies. He urged further that the law requires the child witness to promise to tell the truth and not lies but, in this case, PW1 just promised to tell the truth hence, his evidence be disregarded and expunged.

In regard to 2nd and 4th ground, the appellant argued that, the court is duty bound to analyse the evidence on the record as a whole but in the instant case the conviction was solely based on oral evidence of the victim. The court disregarded PW2's and PW3's evidence without assigning any reasons contrary to the position stated in **Goodluck Kyando v Republic** (2006) TLR 363 where it was stated that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. He then contended that it was wrong to disregard the evidenced of PW2 without assigning reasons as the evidence of this witness was very material. He testified that he inspected his son's anus but did not see anything a

revelation which poses a serious doubt on the credibility of the allegations made by the prosecution. He added that, it is unimaginable how the anus of a child of 4 years can be penetrated and show no sign of injury, bruises or other physical change. He argued further that, the testimony by PW2 that he reported the matter to police on the next and had the child medically examined was an empty assertion as it was not supported by any evidence. The PF3 was not produced in court and the doctor who examined the victim was not called to testify.

On the third ground of appeal the appellant submitted that the court erred in holding that the prosecution proved its case beyond reasonable doubt as there were material inconsistencies in evidence rendered by PW2 and PW3. For instance, PW3 stated that the Appellant was in lockup when he was assigned the case to investigate a statement which materially contradicted with PW1 who stated that they found the appellant at his home. The appellant argued further that PW1's testimony was not credible because he did not tell the court whether or not the appellant used lubricant which suggests that he did not. Yet, neither blood nor bruises were spotted on PW1's anus which casts a doubt on whether he was carnally known as alleged.

In response, Ms. Wenceslaus, the learned State Attorney who appeared for the Republic sternly opposed the appeal and supported conviction. Responding on the 1st ground of appeal, she submitted that, much as it is a trite law that the evidence of a child of tender years should be procured in compliance with section 127(2) of the Evidence Act, in the present case, the complaint is unmerited as this requirement was strictly complied with.

She cited the case of **Eliah Bariki v Republic**, Criminal Appeal No. 321 of 2016, CAT and **Kimbute Otiniel v Republic**, Criminal Appeal No. 300 of 2011, CAT (all unreported) and proceeded that at page 8 of proceedings the trial magistrate recorded that PW1 promised to tell the truth and that was sufficient in the eyes of the law.

In regard to the 2nd and 4th ground, she submitted that two elements were to be proved namely *penetration* and *whether the appellant committed the offence*. The prosecution proved its case beyond reasonable doubt. It was proved that it is the appellant who committed the offence against PW1. PW1 clearly explained how the appellant called him, lied him on a chair and inserted his 'mdudu' in her mouth and buttocks a narration which sufficiently establish that he was carnally known against the order of nature. The learned counsel added that, PW1 further stated that he felt pain when the appellant penetrated his anus which credibly proved that he was penetrated as per **Minani Evarist v R**, Criminal Appeal No. 124 of 2007 (unreported). Had he not been penetrated; he would not have felt pain. Ms. Wenceslaus stresses that, since the evidence of the victim is the best evidence (**Tumaini Mtayomba v R**, Criminal Appeal No. 217 of 2012) and is sufficient to sustain the conviction, the evidence of PW1 in the instant case suffices to sustain both the conviction and sentence.

Regarding the complaint that the court ignored the testimony of the victims' farther who deponed that he physically inspected the victim but did not find anything unusual, it was argued that, the court was justified to disregard this evidence as PW2 is not a medical expert. As for the

legation that the appellant's defence was ignored, it was argued that, the trial court found his defence a total denial which could not raise any doubt.

I have considered the submission for and against the appeal and the lower court records placed before me. Starting with the first ground of appeal, the issue is whether the evidence of PW1 was irregularly procured in disregard of the mandatory provision of section 127(2) of the Evidence Act. As submitted by both parties, the provision of section 127(2) provides for reception of the testimony of a child of tender years who are defined under section 127(4) to mean, children whose apparent age is not above 14 years. It also provides a mandatory condition of reception of evidence of children in this category. It provides thus:

> "(2) A child of tender age may give evidence without taking an oath or making an affirmation but 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."

This import of this provision has been extensively litigated. The case of **Geofrey Wilson v Republic** (supra); **Hemedi Omary Ally @Dallah v Republic** (supra); **Eliah Bariki v Republic** (supra) and **Kimbute Otiniel v Republic** (supra) are among the relevant authorities. In ***Godfrey Wilson vs Republic*** (supra) which has been affirmed in many decisions of the apex court, it was held that:

> Section 127(2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/ she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. The question, however, would be on how to reach at that stage. We think, the trial

> magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the y circumstances of the case, as follow:
> 1. The age of the child.
> 2. The religion which the child professes and whether he/she understands the nature of oath.
> 3. Whether or not the child promises to tell the truth and not to tell lies. Thereafter, upon making the promise, such promise must be recorded before the evidence is taken.

The requirement to ask simple question was emphasized by the Court of Appeal in **Mbaraka Ramadhani @ Katundu Versus Republic**, Criminal Appeal No. 185/2018 CAT at page 14. As per these authorities, the question-and-answer session is deemed crucial not only in deriving the undertaking to tell the truth and not lies but in determining whether in the first place the child of tender years is a competent witness. Cementing the importance of the question-and-answer session in **Jafari Majani vs Republic**, Criminal Appeal 402 of 201, the Court of Appeal having cited its previous decision in **Godfrey Wilson** (supra) and **Issa Salum Nambaluka v. Republic,** Criminal Appeal No. 272 of 2018 (unreported) underscored that:

> It is settled that in situations where a child witness is to give evidence without taking oath or making an affirmation, the child must first and foremost make a promise and undertake not to tell any lies. The promise to tell the truth and the undertaking not to tell any lies must be recorded. It should be emphasized that it is from the above circumstances that our decisions in Godfrey Wilson (supra) and Nambaluka (supra) in essence demand the competence of a child of tender age witness to be tested first, albeit in brief, before his evidence is received under S.127(2) of the Evidence Act.

> The provision enjoins trial courts when dealing with children of tender age as witnesses, to still conduct a test on such children to test their competence. It is unthinkable that S.127(2) of the Evidence Act can be blindly applied without first testing a child witness if he does not understand the nature of an oath and if he is capable of comprehending questions put to him and also if he gives rational answers to the questions put to him.

Undeniably, in the present case, PW1 was 4 years hence of a tender age. The reception of his evidence ought to strictly comply with the law stated above. In my scrutiny of the lower court record, I have observed that, page 8 of the trial court proceedings reveals that when the prosecutions opened, the trial magistrate having recorded the name of the witness, his age and school wrote that *'he has promised to tell the truth"*. She then proceeded to record PW1's testimony.

Two shortcomings are conspicuous in the procedure applied. First, the undertaking to tell the truth is in the citation by the presiding magistrate and not the witness which is in law is fault. Needless to stress, the mere declaration by the court that the child promised to tell the truth is insufficient. It should be clearly demonstrated on the proceedings that indeed the child promised to tell the truth. Second, contrary to the authorities above there is nothing on record from which this court can infer or deduce that, the victim who was 4/5 years on 15/1/20202 when he appeared on court as witness, was a competent witness.

Cumulatively, the anomaly is fatal and has rendered the evidence of PW1 devoid of any evidential value and liable for expungement from the record (**Masoud Mgosi vs Republic**, Criminal Appeal No. 195 of 2018, CAT and **Abdallah and Nguchika vs Republic**, Criminal Appeal No. 182 of 2018, CAT (all unreported). Upon disregarding the evidence of PW1, I have asked myself whether the remaining evidence is sufficient to sustain the conviction. Under the circumstances of this case this question attracts a negative answer because the testimony of the remaining two witnesses is purely hearsay. All what PW2 and PW3 narrated in court is what they were told by PW1.

Under the premise, I will stop here and allow the appeal. The conviction and sentence of trial court are quashed and set aside. It is further ordered that the appellant be discharged from custody unless he is held for another lawful cause.

DATED at **DAR ES SALAAM** this 23th day of February 2022.

X _____

Signed by: J.L.MASABO

J.L. MASABO

JUDGE