THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 40 OF 2022

(An appeal from the Judgment of the District Court of Arusha at Arusha, before Hon. C.A Chitanda – SRM dated 28th day of February, 2022 in Criminal Case No. 51 of 2021)

YUSUPH JUSTINE SANARE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

05th July & 15h August, 2022

TIGANGA, J.

Yusuph Justine Sanare, hereinafter, the appellant, stood charged in the District Court of Arusha at Arusha (C.A. Chitanda- SRM) with an unnatural offence contrary to section 154(1) and (2) of the Penal Code [Cap. 16 R.E 2019]. In the charge sheet which was preferred before the trial court by the respondent, the Republic, the particulars of the offence were that, on 12th day of April 2021 at Kanisani area, Sakina in the City and District of Arusha, in Arusha Region, the accused, (now the appellant) did have carnal knowledge with one "SS" a boy of 10 years old against the order of nature.

On arraignment, he pleaded not guilty to the charge but after full trial which involved three prosecution witnesses who tendered one exhibit, that is the PF3 of the victim and one defence witness who happened to be the appellant himself, the appellant was found guilty and convicted of the offence he was charged with, before he was sentenced to life imprisonment.

Aggrieved by the decision of the trial court, the appellant under the service of Erick Charles, learned Advocate fronted before this court four grounds of appeal couched in the following words:

1. That, the learned trial Magistrate erroneously acted upon the evidence of PW2, the victim, the child of tender age which was recorded conversely to section 127(2) of the Evidence Act [Cap. 6 R.E 2019]

2. That, the learned trial Magistrate erred in law and in fact by failing to implicate on record whether PW2 promise (sic) to tell the truth to (sic) and not to tell any (sic) lies.

3. That, the learned trial Magistrate erred in law and in fact by not drawing inference adverse (sic) to the prosecution side by its failure to call a witness the (sic) investigator of the case.

4. That, the learned trial Magistrate grossly erred in law and in fact by failing to be rigorous after basing the conviction on the weak, contradictory and inconsistent evidence of the prosecution witnesses which did not prove the charge to the touch- stone as required by the law.

However, to easily understand what brought out this appeal, I find it important to point out the historical background as gleaned from the record which stands briefly as follows; that, on 12th April, 2021 at Kanisani area Saluni within the District and Region of Arusha, the appellant met the victim on his way back home from school. The appellant called the victim and told him that, he is a friend of his brother. Soon thereafter, the accused pulled him into the bush and took off his clothes, before he also undressed himself and started sodomizing the victim, the action which took twenty minutes. After satisfying his sexual greed, the appellant gave the victim Tsh. 2,000/= and ordered him to leave the place with immediate effect. Over and above, the appellant told the victim to come again on the threat that, if he would not come again he would be killed.

In compliance with the order given by the appellant, the victim went back home, and upon reaching at home, the victim did hide his

pants avoiding to be noticed. According to the evidence of Pw3 who introduced herself as the mother of the victim as reflected at page 10 of the proceedings, on 16th April, 2021 the victim's mother discovered the hidden pants having shade with faeces. Upon such discovery, she interrogated the victim who informed her that he was sodomized by the accused person. Basing on such information, the victim's mother reported the incidence to police station where she was given the PF3, which she used to take the victim to hospital for examination. At hospital, the victim was examined by PW1 who examined the victim on 18th April 2021 and found the anus sphincter muscles loosened which findings in his opinion leads to the conclusion that, the victim had been sodomised frequently. That finding is also reported in the PF3 which was admitted as exhibit P1. Later on, the accused person was arrested and taken to police station for interrogation. Thereafter, he was aligned before the trial court to answer for the charges against him.

Called upon to defend himself, the accused now the appellant, denied to know the victim and his mother before he was arrested. He also said to have been arrested on 26th April 2021, but before that, he was called by the ten cell leader of his area following the complaint by the mother of the victim that he sodomised the victim, but he denied to

do so. He said he did not commit the offence that is why he did not run away. His defence was never believed by the trial court, the court believed what was said by the prosecution, it found the case to have been proved at the required standard, found him guilty and convicted him as charged on the strength of the prosecution evidence.

Hearing of the appeal was conducted orally. At the hearing of the appeal, the appellant enjoyed the service of Mr. Erick Charles learned counsel, while the respondent, Republic had the service of Ms. Akisa Mhando, Senior State Attorney in defending this appeal.

From the grounds of appeal, and the submissions made in support and against the appeal, the issues for determination by this court are three, namely: **One,** whether the evidence of PW2, a child of tender age was properly recorded and in compliance with the provision of section 127(2) of the Evidence Act [Cap. 6 R.E 2019]. **Two,** whether the trial court was bound to call as a witness the investigator of the case. **Three,** whether, the evidence of prosecution case proved the charge beyond reasonable doubt.

The first and second grounds of appeal will be considered jointly due to the fact that they are similar in nature and suggest the same response in resolving the first issue. whereas the third and fourth

grounds of appeal will be dealt with separately and will be resolving the second and third issues.

As earlier on pointed out, the appeal was argued orally. As usual, Mr. Charles, the appellant's advocated submitted in his submission in chief on the first issue that, the trial court failed to comply with the requirement of section 127(2) of the Evidence Act (supra) in recording the evidence of PW2. He submitted that, the section requires that, before the court has proceeded to record the evidence of a child of tender age, it must secure his promise to tell the truth and not to tell lies before the court. According to him, that the proceedings of the trial court do not seem to have complied with the requirement of the law.

He also submitted that, the offence for which the appellant was charged with, is a serious offence attracting a life imprisonment, therefore it was necessary for the trial court to comply with the law.

Further to that, he submitted that, the provision of section 127(6) of the Evidence Act, referred to by the trial magistrate was not intended to rectify irregularities before the court because, before the magistrates resort to the provision of section 127(6) of the Law of Evidence he was supposed to first comply with section 127(2) of the same Act. As the former is not an alternative to the latter. He submitted further that, the

trial magistrate did step into shoes of the victim, and in fact he tampered with the quality of evidence of PW2. He in the end submitted that, this is contrary to the principle of evidence that, justice should not be done but must be seen to have been done. He asked the to grounds to be allowed.

In her counter argument, Ms. Mhando, SSA submitted that, the answer to the first and second grounds of appeal are reflected at page 8 of the impugned proceedings. While she is in agreement with the fact that, there is no promise by the PW2 to tell the truth as opposed to the promise to tell lies, she said, given the nature of his evidence as reflected at page 8 of the proceedings where he kept affirming as a Muslim is on itself a proof that he knew the essence of an oath.

She said voire dire examination intends to show if the witness knows the importance of speaking the truth as in the case of **Shabani Lulabisa vs The Republic,** Criminal Appeal No. 88 of 2018 CAT at Shinyanga. Now, since the victim has already proved to the court to know the importance of oath there was no need of conducting voire dire, she submitted. Therefore, that the magistrate had the capacity of accessing and recognizing the understanding of the witness before her as in the cited case above.

Thus, owing to that, there was no need of complying with Section 127(2) of the Evidence Act. In further fortifying her arguments the learned SSA, submitted that, according to section 127(7) of the Evidence Act, the court has power to convict an accused person relying solely on the evidence of the victim who is a child of tender age only if, it is satisfied that the witness is speaking the truth. She, in the end asked the court to dismiss the two grounds of appeal for lack of merits.

Now, from the arguments by both parties, in resolving the first and second ground of appeal, I will be guided by the said section 127(2) of the Evidence Act, [Cap. 6 R.E 2019]. For purposes of clarity, and for easy reference I find it important to reproduce the provision referred to above:

> *S.127(2) 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.*** *(Emphasis added).*

This provision makes exception to the general rule under section 4 (a)(b) of the Oath Statutory Declaration Act CAP 34 RE 2019 which require any person who testifies in court to take oath or make an affirmation. From the above cited section, two conditions have been

provided for. **One**, it does away with the requirement of oath or affirmation for every witness. Meaning that a child of tender age can give evidence without being sworn or affirmed. **Two,** however before giving the evidence, the there is a condition that a child of tender age must make a promise to the court that he/she will tell the truth and not lies. On this I have been persuaded by the decision of this court in the case of **Joseph Nyigana @ Baba Bhoke vs The Republic,** Criminal Appeal No. 218 of 2019 – HC- Mwanza page 6 of the judgment.

The assumption of the law, is that the child of tender years, does not know the nature of oath or affirmation, therefore it is un procedural for the court to proceed receiving and recording the evidence of the child of tender years without an assurance the nature of oath or affirmation. This means therefore that, once the court finds the witness before it, to be a child of tender age, then the court becomes burdened with two duties, first, to ascertain as to whether the witness knows the nature of oath or affirmation, if it find him knowing the nature of oath, then the court shall proceed swearing or affirming the witness, but if it find that he does not understand the nature of oath or affirmation, then it should nevertheless, receive his evidence but before receiving his

evidence, it must require him to promise to speak the truth and not to tell lies.

On how to do that, the Court of Appeal in the case of **Godfrey Wilson vs The Republic,** Criminal Appeal No. 168 of 2018, CAT at Bukoba observed as follows; *voire dire* is no longer the requirement of the law. On its place the promise to tell the truth and not to tell lies has been introduced. In so doing the Court held *inter alia* that:

> *This, however, as we have alluded to earlier on, is currently no longer a requirement of the law. 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 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 court of appeal proceeded providing for a mode on how to reach there as follows:

> *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 follows:

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. In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016. Hence, the same has no evidential value."

In this case, the appellant insists that the trial court was required to secure the promise of the victim, while the learned Senior State Attorney is of the view that since the victim made affirmation, then there was no need for him to conduct *voire dire* examination. In line of the reasoning and findings herein above, it was important for the court to first ascertain as to whether the victim who was 11 years old,

therefore a child of tender years, knew the nature of oath or affirmation before allowing him to make affirmation.

Section 127(2) has been interpreted by the Court of Appeal of Tanzania in a number of cases, one of them being **Shaibu Nalinga vs. Republic**, Criminal Appeal No. 34 of 2019 CAT - Mtwara (unreported). In that case, at page 8 of the judgment, it was held *inter alia* that;

> *"..after the court was satisfied that PW1 did not understand the nature of oath, it ought to have required her to promise to tell the truth and not to tell lies. That promises should have been reflected in the proceedings, if not, this is a fatal irregularity which vitiate PW I's evidence.*

Interpreting the provision and applying the case authority purposively, it means even the fact that the child of tender age must be reflected in the proceedings for the appellant court to understand that real, the witness knew the nature of oath or affirmation, and took one while aware of what it means and entails. Failure to so reflect in the proceedings makes the proceedings to be not self explanatory and correctly argued by the counsel for the appellant, that omission cannot be mitigated by the submission of the learned SSA, as what she actually

said was based on her personal assumption which has no backup of the record and evidential value.

That being the case, it goes without saying that, as there was no evidence in the proceedings to prove that the victim PW2 knew the nature of affirmation, it can be concluded that, he made affirmation without knowing what the affirmation meant and what it entailed, which makes the same to be not an affirmation worthy a name. That being the state of affairs, it goes without saying that the evidence of the victim PW2 was recorded without oath and without making promise to tell the truth and not lies.

The authority in the case of **Godfrey Wilson vs. The Republic,** Criminal Appeal No. 168 of 2018 (unreported) which is quoted **in Shaibu Nalinga Vs. Republic** (supra) it was held inter alia that:

> *"In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No. 4/2016. Hence the same has no evidential value, it should be discarded from the record."*

Guided by the above authorities, I find the evidence of PW2 to have been improperly taken for having admitted and recorded in contravention of the mandatory procedure provided under section

127(2) of the Evidence Act (supra), the same is therefore discarded from the record. Now, having discarded the evidence of the victim from the record, there remains the evidence of PW1 and PW3 who are not eye witnesses.

Further to that, of the law since the crucial evidence of PW2 is invalid, there is no evidence remaining to be corroborated by the evidence of PW1 (the Doctor) and PW3 (the mother of the victim) in view of sustaining the conviction. Also taking into account the principle in the case of **Bashiri John vs The Republic**, Criminal Appeal No. 486 of 2016, CAT- Iringa, that the best evidence in sexual offences comes from the victim. That said, in the circumstances, I find the 1st and 2nd grounds of appeal to be meritorious and hence, I sustain them.

Now, the evidence of PW2 being the corner stone and a foundation upon which the whole case has been predicated, in my settled view, discussing the remaining two grounds of appeal in order to resolve the second and third issues serves nothing but an academic exercise. It cannot at any rate revive the dying horse. That said and done, the whole appeal crumbles, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant.

In the normal circumstances, I would have ended here, however, I have asked myself whether this is not the fit case in which retrial can be ordered. In examination as to whether this case is fit for retrial or not, the authority in the case of **Rashid Kazimoto and Masudi Hamis Vs Republic**, Criminal Appeal No. 458 of 2016, will be of much help. In that case the principles governing the situation in which a retrial can be ordered was discussed. That authority quoted with approval the authority in the case of **Sultan Mohamed Vs Republic**, Criminal Appeal No. 176 of 2003 (unreported) which also quoted with approval the decision in **Fatehali Manji vs Republic** (1966) E.A 343 which held inter alia that: -

> *"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 gaps in its evidence at the first trial, however, 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 it"*

Also see **Paschal Clement Branganza versus Republic** (1957) EA 152

Now, looking at the principle in the above cited authorities it is instructive to find that, retrial should be ordered if the following conditions exist:

i) when the original trial was illegal or defective

ii) where the conviction was set aside not because of in sufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial

iii) Where the circumstances so demand,

iv) Where the interest of Justice requires it.

This means, if the court finds the existence of the circumstances set out in the above authorities and where the interest of justice so requires, may order retrial. In this case, the reason for allowing the appeal is non compliance of the procedure in recording the evidence of the victim who happened to be a child of tender age. It is not the fault of the victim or the prosecutor, but it was the fault of the court which recorded the evidence without demanding the witness to state as to whether he knew the nature of affirmation he made, or to give promise that he would tell the truth and not lies.

This is one of the serious case which is premised on the grave violation of child's right, to be specific, the child sexual abuse. It needs to be determined on merit so that the right of the victim and that of the accused can be determined on merits, as opposed to the technicalities basing on the omission done by the court. In the end, and having considered all the above criteria, I find this to be a fit case for retrial. I thus order this case to be remitted back before the trial Court for retrial before another magistrate of competent jurisdiction.

It is accordingly ordered.

DATED at **ARUSHA** this 15th day of August, 2022.

HIGH COURT OF TANZANIA

J. C. TIGANGA

JUDGE