IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KWARIKO, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 78 OF 2020

DENIS JORAM @ DENIS MASENGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Dar es Salaam]

(Kulita, J.)

dated the 31st day of December, 2019
in

(DC) Criminal Appeal No. 267 of 2018

.....

JUDGMENT OF THE COURT

22nd & 29th October, 2021

KWARIKO, J.A.:

In the District Court of Ilala, the appellant, Denis Joram @ Denis Masenga was charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2019]. It was alleged by the prosecution that on diverse dates of March, 2017 at Buguruni Mivinjeni within Ilala District he had carnal knowledge against the order of nature of one 'AB', name withheld to preserve his dignity, a boy aged ten years.

Having denied the charge, the appellant was fully tried and at the end he was found guilty, convicted and sentenced to an imprisonment

term of thirty years. Aggrieved, he unsuccessfully appealed to the High Court of Tanzania sitting at Dar es Salaam. Undaunted, the appellant preferred this second appeal.

The background of the case which led to the present appeal is as follows. The victim (PW3) was one of the children of Rehema Rudanga (PW1). Between 20th of February and March, 2017, PW1 discovered that the victim was unable to sit properly and would spend a long time in the toilet whenever he went for a call of nature. He also used to return late from school thus PW1 became suspicious. It transpired that when PW3 came late from school on 28th March, 2017 and PW1 interrogated him, he said that he was caught by some boys.

On his part, the victim (PW3) who testified after *voire dire* examination, said that while on his way to school he used to meet with the accused at 'mama Sabra's place'. That, on the first day, the appellant showed him a different way to follow and, in the process, he grabbed and took him into a small hut. Thereafter, the appellant threatened to chop him with a knife if he raised alarm, following which he put some lubricants in his anus and sodomized him. PW3 adduced further that the appellant used to sodomize him twice a week and he did it to him more than ten times and whenever he finished his desire, his

colleagues took turns to do the same. He said that, since the assailants threatened him, he did not reveal the ordeal to his parents.

The facts of the case show further that on 29th March, 2017, PW3 led his cousin one Rahimu Abubakari Lusanga (PW4) to the scene of crime whereby they waited for some time and upon spotting the appellant, PW3 named him as an assailant. With the help of community police, the appellant was arrested. Meanwhile, the victim was taken to the hospital for examination, where he was attended by Dr. Jamila Hussein Makame (PW2). According to PW2, the victim had bruises, red blood cells and bacteria in the anal area and had contracted HIV and other sexually transmitted diseases. She posted her findings in the PF3 which was admitted in evidence as exhibit P1.

In his defence, the appellant denied the allegations explaining only how he was arrested. He had two other witnesses in his support, Salehe Bakari (DW2) who witnessed his arrest and Frank Sylvester (DW3) whose evidence was that he had known the appellant for six years within which he had never heard him being involved in any criminal activities.

As we indicated earlier, after a full trial, the court found that the prosecution case was proved beyond reasonable doubt against the appellant and was accordingly convicted and sentenced. The first appellate court upheld that decision and dismissed his appeal.

In the instant appeal, the appellant raised twelve grounds which we have paraphrased into the following eight grounds of complaint. The appellant is faulting the first appellate court for upholding the trial court's decision while, **one,** section 127 (2) of the Evidence Act [R.E. 2002] as amended by Act No. 4 of 2016 was not complied with by the trial court in respect of PW3 a child of tender age; **two,** the evidence of identification was not watertight against the appellant; **three,** no police officer testified on how the appellant was arrested; **four,** section 210 (3) of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA) was not complied with by the trial court; **five,** the judgment of the trial court was not composed as required by the law; **six,** the defence evidence was not considered; **seven,** the PF3 was improperly admitted in evidence, the doctor did not prove her qualifications and her evidence was not reliable; and **eight,** the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented whilst, Ms. Faraja George, learned Senior State Attorney assisted by Ms. Gladness George, learned State Attorney, represented the respondent Republic.

When the appellant was called upon to argue his appeal, he adopted the grounds of appeal and supporting written submission without further oral explanation and paved the way for the State Attorney to respond to the appeal.

For her part, Ms. George announced her stance of supporting the appeal on the basis of the first ground of appeal. The appellant's submission in respect of the first ground as it will shortly be seen did not materially differ from that of the learned Senior State Attorney. He fortified his contention by relying on the case of **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (unreported).

Arguing that ground, the learned Senior State Attorney submitted that the evidence of PW3 a child of tender age was taken contrary to section 127 (2) of the Evidence Act [CAP 6 R.E. 2002; now R.E. 2019] as amended by Act No. 4 of 2016 (henceforth the Evidence Act]. She expounded that in this case the trial Magistrate conducted a *voire dire*

test and concluded that the child was capable of giving true evidence following which he was allowed to testify. Ms. George argued in that respect that in this case the child did not give evidence on oath or promise to tell the truth and not to tell lies in accordance with the cited provision of the law. By this omission, PW3's evidence lacked evidential value deserving to be expunged from the record, argued the learned counsel. In support of this argument, she cited to us the Court's decision in the case of **Masanja Makunga v. R,** Criminal Appeal No. 318 of 2018 (unreported).

The learned Senior State Attorney argued further that, subsequent to expunging PW3's evidence, there would not be any other evidence to ground conviction against the appellant. She explained that, while PW1 did not show that the victim informed her that he was sodomised, the doctor, PW2 only indicated that the victim was sexually assaulted but did not prove who the perpetrator was. Whereas, PW4 was a mere arresting person and after all he was not sworn before giving evidence thus his evidence is invalid.

With the foregoing, Ms. George concluded that, there cannot be sufficient evidence within which the respondent can rely to still hold the

appellant liable for the alleged offence. She thus urged us to allow the appellant's appeal and release him from prison.

The concession to the appeal by the respondent made the appellant's life easy as he did not have anything substantial to say in his rejoinder. He only reiterated the learned Senior State Attorney's prayer for his release from prison.

We have considered the submissions by the parties in respect of the first ground of appeal. The issue which beckons for our determination is whether the trial court complied with section 127 (2) of the Evidence Act in respect to the evidence of PW3 who was aged ten years when he testified on 14th August, 2017 hence a child of tender age. The record of appeal at page 16 shows that, the trial magistrate made some inquiry by asking few questions to test the child's competence to give evidence. At the end, he concluded at page 17 of the record of appeal as follows:

> *"Upon those questions [,] I am satisfied that the witness is competent to tell this court the truth of what he says."*

Subsequent to that conclusion, the child proceeded to give evidence. He was not sworn or made to promise to tell the truth to the

court and not to tell lies. Section 127 (2) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 Act No 4 of 2016 which became operative on 8th July, 2016 provides thus:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but before giving evidence, promise to tell the truth to the court and not to tell lies."*

It is our considered opinion that the trial court did not comply with the cited provision of the law. This is so because, if after the inquiry the court found that the child knew the meaning of an oath, before giving evidence he ought to have been sworn. Conversely, if it was found that the child did not understand the meaning of an oath, before giving evidence, the magistrate ought to have made him to promise to tell the truth to the court and not to tell lies. Interpreting the cited provision of law, in the case of **Godfrey Wilson** (supra), the Court observed thus:

> *"To our understanding, the above cited provision as amended, provides for two conditions.* ***One,*** *it allows the child of a tender age to give evidence without oath or affirmation.* ***Two,*** *before giving evidence, such child is mandatorily required to*

promise to tell the truth to court and not to tell lies."

See also **Ally Ngozi v. R,** Criminal Appeal No. 216 of 2018; **Marko Bernard v. R,** Criminal Appeal No. 329 of 2018 (both unreported); and **Masanja Masunga** (supra).

From the discussion above, it is clear that the evidence of PW3 was taken in total contravention of the mandatory provisions of the law. As correctly argued by both parties, this evidence lacked evidential value and we hereby expunge it from the record. The first ground is thus merited.

The next question to be considered is whether in the absence of PW3's evidence there is left any other evidence upon which to sustain the appellant's conviction. Ms. George was categorical that there is no such evidence. Upon consideration of the remaining prosecution evidence, we agree with the learned counsel that there is no cogent evidence to ground conviction against the appellant. This is so because PW1 did not even say she was informed by her son that he was sexually assaulted and who the perpetrator was. She only testified on what she detected from the child's private parts.

Furthermore, in his evidence, PW2 stated that upon examination, she found bruises, red blood cells and bacteria in his anal area signifying that he was sexually assaulted. However, even though it was proved that the victim was sexually assaulted, there is no evidence to prove that the appellant was the perpetrator of the crime. For his part, PW4 who was not sworn before giving evidence as per section 198 (1) of the CPA, his evidence is invalid and we hereby expunge it from the record.

It is clear from the foregoing that the prosecution has remained with no evidence to hold the appellant accountable for the alleged offence. It is trite law that in criminal trials, it is the prosecution that is required to prove the case against the accused person beyond reasonable doubt. Re-affirming this position of law, in the case of **George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016 (unreported), the Court stated thus:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise."*

The foregoing was also re-stated in our decision in the case of **Issa Reji Mafita v. R,** Criminal Appeal No. 337 'B' of 2020 (unreported).

With what we have shown above, we find no need to determine the remaining grounds of appeal. In the event, we have no flicker of doubt in our minds that the prosecution case against the appellant was not proved beyond reasonable doubt to ground conviction. We thus allow the appellant's appeal, quash the conviction and set aside the sentence. We consequently order the appellant's release from prison unless his continued incarceration is related to other lawful cause.

DATED at **DAR ES SALAAM** this 27th day of October, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 29th day of October, 2021 in the presence of the appellant in person, and Ms. Subira Mwalumuli, learned Senior State Attorney for the Respondent/republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL