IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL No. 17 OF 2023

(C/f Criminal Case No. 198 of 2019 Resident Magistrate's Court of Arusha at Arusha)

VERENATUS S/O GABRIEL ..... APPELLANT

VERSUS

THE DPP ..... RESPONDENT

JUDGMENT

19th June & 27th July, 2023

TIGANGA, J.

Before the Resident Magistrate's Court of Arusha at Arusha (the trial court), the appellant was arraigned with two offences, the first being rape contrary to sections 130 (1), (2) (e), and 131 (3) of the **Penal Code,** [Cap 16 R.E 2002], now R.E. 2022] and the second being, unnatural offence contrary to section 154 (1) (a) and (2) of the same law.

According to the prosecution case, as particularized in the particular o offence in the charges sheet and the evidence to prove the case, it was alleged that on 05th April, 2019 at Mianzini area, Kiranyi Ward within Arusha District in Arusha Region, the appellant herein had sexual intercourse with

JPN (true identity hidden), a girl of seven years old through her vagina and against the order of nature.

On arraignment, the appellant pleaded not guilty to both counts, and during the preliminary hearing, he admitted to his name and other personal particulars, and the fact that he was charged with two counts. The rest of the facts which constituted the offence were disputed. According to the prosecution evidence, the appellant and the victim were neighbours at the time when the offence was allegedly committed. On the faultful date the victim who testified as PW2 was called by the appellant into his house while in the company of her sister, PW3, and her friend named Dorii. While there, the appellant offered them tea and mandazi and started to show them pornographic content from his phone. He then asked them if they wanted to try in exchange for money. PW3 and the friend denied while the victim agreed to try for Tshs. 100/=. Following that readiness of the victim, the appellant undressed his cloth and put on a green towel, took the victim to the bed, and started to have both vaginal and anal sex with her while PW3 and the friend watched. After a while, a woman passed outside the appellant's room and saw the victim and her companions' shoes outside the

appellant's door. She knocked on the door, called them out, and told them to go home. The victim dressed and together with his fellows left.

On the following day, her sister and the fried told PW1's mother that, she did "tabia mbaya" with Baba Aidan, the appellant. The mother PW1 examined PW2 and saw bruises on her vagina and anus. The matter was reported to the authorities, then to the police. That which led to the appellant's arrest. At the police station, the victim was given the PF3, and taken to the hospital, and after the medical doctor, PW5, had examined the victim, he found her hymen intact but found some bruises in her anus. He completed the PF3 which was admitted in court as exhibit P1.

In his defence, the appellant claimed that the case had been fabricated against him by the appellant's mother after he denied having sexual relations with her because she was married. He denied either having sexual intercourse with the victim or showing them pornography from his phone.

In the end, the trial court was satisfied beyond reasonable doubt that the prosecution had managed to prove the case against the appellant on the

2nd offence of unnatural offence only but not the first. It convicted and sentenced him to serve thirty (30) years imprisonment.

Disgruntled with the decision, the appellant initially filed six grounds and later he filed additional three grounds making them nine (9) as follows;

1. That, the trial court erred in law and fact in convicting the appellant by relying on the evidence of PW3 which was received contrary to section 127 (2) of the Evidence Act, [Cap 6 R.E. 2019].
2. That, the trial court erred in law and fact in failing to take into consideration that the evidence adduced by PW1, PW2 and PW5 was contradictory, unreliable, inconsistent, incoherent hence not credible and unworthy of belief.
3. That, the trial court erred in law and fact in holding that, the prosecution side proved the case against the appellant beyond reasonable doubt.
4. That, the trial court erred in law and fact in failing to take into consideration the appellant's defence.
5. That, the trial court erred in law and fact in failing to evaluate, assess and subject the entire evidence on record to scrutiny.
6. at, the trial magistrate failed to take into consideration that, the bruises found in the anus of the victim (PW2) might have resulted from other object than penis because the doctor did not state in his testimony.
7. That, the trial magistrate erred in law and fact in failing to properly analyze the victim's testimony which was untrustworthy.

8. That, the trial magistrate erred in law and fact in failing to comply with section 127 (6) of the **Evidence Act**, [Cap 6, R.E. 2019].
9. That, the trial magistrate erred in law and fact in convicting and sentencing the appellant while failed to draw adverse inference to the prosecution for failing to call material witnesses to testify.

Hearing of this appeal was by way of written submissions, the appellant appeared in person and was unrepresented while the respondent was represented by Ms. Akisa Mhando, State Attorney.

Supporting the appeal, the appellant submitted on the 1st ground that, the trial magistrate erred in law and fact in convicting him based on the evidence of the victim, PW2 and her sister PW3, which was received contrary to section 127 (2) of **the Evidence Act**, [Cap 6, R.E. 2019] (the Evidence Act). He argued that, since the witnesses were children of tender years, they were supposed to explain if they knew the meaning of oath or promised to tell the truth, however, they did not. He referred the court to the case of **John Mkorongo James vs. The Republic**, Criminal Appeal No. 498 of 2020 which underscored the importance of a trial court asking questions which test the victim's intelligence before ruling out that a child of tender years can give his testimony under oath or not. In consequence thereof, he prayed for the court to expunge their evidence for lacking evidential value.

On the 2nd ground of appeal, the appellant averred that there were contradictions between the testimony of PW1, PW2 and PW5 on how the victim was taken to the hospital for medical examination. He said, PW1 told the trial court that, she took her daughter to the hospital twice for different examinations while PW2 and PW5 told the court that, there was only one visitation to the hospital and only one examination was done on the victim. He asserted that such a contradiction should be resolved in the appellant's favour.

Further to that, he challenged the victim's testimony for not being trustworthy as she told the trial court that, she did not make any noise during the commission of the offence, and that even after the acts she walked home painlessly. He argued that, for a child of seven years, it would have been difficult to walk after the awful deeds done to her.

As to the 3rd ground of appeal, the appellant contended that, the case against him was never proved beyond reasonable doubt because the victim told the trial court that, she was penetrated both through her vagina and anus but when examined it was ruled out that she was only penetrated through her anus. He also challenged PW3's testimony as to why she did not call for help when the woman who passed outside the appellant's room called

them out and told them to go home. He argued that their silence makes their testimony wanting.

On the 4th and 5th grounds, the appellant challenged the trial court for not considering his defence testimony that, the case against him was fabricated because the victim's mother had been persuading him from time to time into having sexual relations with him but he refused. He also contended that, although the victims claimed they were shown pornographic content from his phone, no trace of such videos was found in his phone when he was arrested.

As to the 6th ground, it was the appellant's submission that, the doctor told the trial court that, the bruises found in the victim's anus were due to a penetration by a blunt object. He however did not mention if it was a penis hence leaves a lot to be desired on what exactly penetrated the victim. The appellant did not submit on the remaining grounds. He prayed that this Court allow the appeal, quash the conviction, set aside the sentence and acquit him.

In reply, Ms. Mhando opposed the appeal and submitted on the 1st, 7th and 8th grounds jointly that, both the victim, PW2 and her sister PW3,

promised to tell the truth as witnessed on pages 12 and 20 of the typed proceedings. In that regard, section 127 (2) of the Evidence Act was complied with. Also, section 127 (6) of the Evidence Act was complied with after the trial magistrate evaluated the testimony of PW2 and PW3 and used it to convict the appellant.

On the 2nd ground of appeal, the learned State Attorney submitted that, there was no contradiction in the witnesses' testimonies. Also, whether or not the victim managed to walk after the incident is irrelevant, what matters is the fact that, the offence was committed and it was the appellant who committed it. Apart from that, there was evidence of PW3 who witnessed the ordeal when the victim was sodomized. On top of that, after a medical examination, PW5, the medical doctor ruled out that the victim was penetrated through her anus as there were remarkable bruises.

On the 3rd ground of appeal, Ms. Akisa Mhando, SSA submitted that the case against the appellant was proved beyond reasonable doubt because the prosecution managed to prove anal penetration through the evidence of PW2, and PW3 which was corroborated by PW5, the medical doctor. On top of that, the appellant was properly identified by the victim and other

witnesses as Baba Aidan or Babuu hence all ingredients of the sexual offences were proved to the required standard.

On the 4th ground, she submitted that, the trial court took into account the appellant's defence evidence and found that, the same did not raise any doubt to the prosecution case. Still challenging the appeal, Ms. Akisa submitted on the 5th ground that, the trial magistrate thoroughly analysed the evidence on the record as seen on pages 8 through 14 of the judgment and reached her findings.

On the 9th ground, the learned State Attorney submitted that, section 143 of the Evidence Act, does not specify a specific number of witnesses required by the court to prove a certain fact. That, the witnesses called were sufficient to prove the case against the appellant and no other witnesses were needed. She referred the court to the case of **John Paschal vs. DPP**, Criminal Appeal No. 306 of 2007.

Lastly, on the 6th ground of appeal, she argued that, PW4, the medical doctor's observation after examining the victim was that, she was penetrated against the order of nature by a blunt object. Even without specifying the kind of blunt object, the appellant did not cross-examine him on such an

issue hence raising it now remains an afterthought. She prayed for the appeal to be dismissed and the trial court's decision to be upheld. In his rejoinder, the appellant reiterated briefly his submission in chief while maintaining his innocence and prayed for the appeal to be allowed.

After going through both parties' submission and the trial court's records, I will for reasons to be communicated in due course, start with the 1st and 7th grounds of appeal, which raised the complaints that the (PW2) victim's testimony and that of her sister, PW3 were received in contravention of section 127 (2) of the Evidence Act. The section reads;

> *"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 lies."*** [Emphasis added]

In the appeal at hand, before the PW2 testified at the trial court, this is what transpired;

> ***"PW2****: JPN.*
> *-08 years*
> *-Std. II Student at Arusha School Primary.*
> *-Christian Catholic*
> *-Living at Mianzini.*
> *I know to tell the truth telling lies is sin.*

The witness knows the meaning of telling the truth and she is promising to tell the truth;"

From thereon, the victim started to give her unsworn testimony. Similar circumstances occurred before her sister, PW3 testified. Below is what transpired;

*"**PW3**: Lizy Olais Laizer.*
-12 years
-Std VII Student at Makumbusho Primary School Arusha
-Christian of Mianzini.
Who knows the meaning of telling the truth and is promising to tell the truth before the court and starting (sic);"

From thereon, PW3 also started giving her unsworn testimony. Unfortunately, the trial magistrate did not show how she concluded that, the witnesses understood the meaning of oath or the difference between telling the truth and lies. Neither the witnesses promised before giving evidence, to tell the truth and not lie as required by section 127(2) of the Evidence Act.

The law is now settled and there is a plethora of Court of Appeal decisions which underscores the importance of asking simple questions to a child of tender years to ascertain his or her competence before giving evidence. One of them is the case of **Edmund John @ Shayo vs. The Republic**, Criminal Appeal No. 336 of 2019, CAT at Moshi (unreported)

where the Court of Appeal while revisiting its previous decisions on the subject had this to say regarding what to do before taking the testimony of a child of tender years;

> *"... We have observed that there is an absence of any record of there being any test conducted by way of simple questions from the trial court to PW4 in line with what was expounded in the cases cited above,* ***Geofrey Wilson*** *(supra) or* ***Issa Salum Nambaluka*** *(supra). In* ***John Mkorongo James v. Republic,*** *Criminal Appeal No. 498 of 2020 (unreported), the Court held:*
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> > *"The omission to conduct a brief examination on a child witness of tender ages to test his competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the court, to tell the truth, and not tell lies, is fatal and renders the evidence valueless."*
>
> *That being the position, having found that there was a contravention of section 127 (2) of the Evidence Act in the instant appeal with regard to recording PW4's evidence, undoubtedly, renders the said evidence inconsequential. The consequence is to expunge the said evidence from the record (See,* ***John Mkorongo James*** *(supra)). Therefore, the evidence of PW4 is hereby expunged from the record."*

I do not only fully subscribe to the position above but am also bound by it under the doctrine of stare decisis, that testimony of a child of tender years taken without compliance to section 127 (2) of the Evidence Act is

rendered valueless should as a matter of law be expunged from the record. In the appeal at hand, the testimony of the victim, PW2 and the key witness PW3, were taken without compliance with the above section.

As earlier pointed out, their evidence was not preceded by the question to test the competence of the child witnesses which would create the base of the trial magistrates' findings that the witnesses possessed sufficient intelligence and were competent to testify. This finding in my view is based on the well-known principle of evidence that it is only the evidence of the competent witnesses which can be received and recorded. And in my view, the competent witness has the sufficient mental capacity to perceive, remember and narrate the incident they have observed. Section 127(1) of the Evidence Act, provides that;

> *"Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."*[Emphasis added]

This provision was interpreted in the case of **Republic vs Halfani Bwire Hassan & 3 Others, Economic case No. 16 of 2021 HC- CECD,**

in which this Court having encountered the issue of the competence of witnesses held inter alia that:-

> *"As earlier pointed out, under this law, a person can be held to be incompetent to testify if the court considers that, either* ***he is incapable of understanding the questions put to him*** *or he is* ***incapable of giving rational answer to the question put to him.*** *That incapacity may be caused either, by* ***tender age,*** *extreme old age, diseases or any other similar cause".*

From the provision herein above, it is instructive that one of the factors which affect the competence of the witnesses is the tender age of the witness. Now since the general rule requires only the competent witness to testify, and one of the factors which affect competence is the tender age, then that brings in the importance and the rationale as to why the witness of tender age must have their competence tested before testifying. As held by the court of appeal, in the cases of **Edmund John @ Shayo vs. The Republic**, (supra) and **John Mkorongo James v. Republic,** (supra) the testing of the competence is by conducting a brief examination on a child witness of a tender ages before his/her evidence is taken and recorded to test his competence and whether he/she understands the meaning and nature of an oath. This should be done before his/her evidence is taken on the promise to the court, to tell the truth and not tell lies. The noncompliance

with this important procedure vitiated the evidence so recorded. That being the case I thus expunge the evidence of PW2 and PW3 from the record for non-compliance of section 127(2) of the Evidence Act.

Now having expunged the evidence of the victim and PW3, the issue is whether the remaining evidence can sustain the conviction, the answer to that question is no, the same cannot sustain the conviction. I hold so because sections 3(2)(a) and 110 of the Evidence Act as interpreted in the case of **Magendo Paul vs The Republic** [1993] TLR 219 requires the prosecution to prove the case to the standard of beyond reasonable doubt. In the case of **Maliki George Ngendakumana vs The Republic,** Criminal Appeal No. 353 of 2014 CAT Bukoba, the Court of Appeal held *inter alia* that,

> *"In criminal cases, the prosecution duty is two folds,* ***one*** *to prove that the criminal offence has been committed and* ***two****, that it is the accused person who committed it".*

Although there may be evidence by the prosecution particularly of the medical doctors to prove that the victim was carnally known against the order of nature, in the absence of the evidence of PW2 and PW3 there cannot be evidence to prove that it is the accused person who committed it. That said, it is instructive to find that the case against the accused person has not been proved at the required standard.

As these two grounds dispose of the whole appeal, I find no reason to venture into other grounds of appeal as doing so is engaging in an academic exercise which is not the business of this court. Since the appellant has already spent almost three years from when he was convicted and sentenced. Based on the authority in the case of **Fatehali Manji vs. Republic**, [1966] E. A 343 discussing when to order a retrial, the Court of Appeal held that;

> *"Generally 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 up gaps in its evidence at the first trial****; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;* ***each case must depend on its own facts and circumstances*** *and an order for retrial should only be made where the interests of justice require it." (emphasis mine)*

Also see the case of **Adam Selemani Njalamoto vs. The Republic,** Criminal Appeal No. 196 of 2016, CAT at Dar es Salaam (unreported) where the Court of Appeal held that;

> *"We are mindful that where the trial court fails to direct itself on an essential step in the course of the proceedings, it does not in our view, automatically follow that a re-trial should be ordered, even if*

the prosecution is not to blame for the fault. ***Clearly of course each case must depend on its particulars."*** *(emphasis mine)*

Looking at the medical evidence, and the evidence of PW2 and PW3, which have been expunged from the record due to the non-compliance with the law in receiving their evidence, it can be safely concluded that this is a fit case for retrial. In the upshot, the appeal is allowed to the extent explained above. The trial court's record should be remitted back to the trial court and start afresh before another magistrate. Since the case is of 2019, the same should be determined expeditiously.

It is accordingly ordered

Dated and delivered at **Arusha** this 27th day of July, 2023.

J.C. TIGANGA

JUDGE