IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 10 OF 2022

(Originating from Criminal Case No. 234 of 2020 of district court of Rombo at Mkuu)

PHILIMON ELIABU MOSHI.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

5/9/2022 & 10/10/2022

SIMFUKWE, J.

The appellant herein was charged before the District Court of Rombo at Mkuu (trial court) with the offence of unnatural offence contrary to **section 154(1)(a) (2) of the Penal Code, Cap 16 R.E 2002**. He was convicted and sentenced to thirty (30) years imprisonment.

After being aggrieved with the said conviction and sentence, he appealed to this court. The appellant presented six detailed grounds of appeal which I will not reproduce but I will refer to them in the cause of my decision.

Due to the fact that the appellant was unrepresented, the appeal was ordered to be argued by way of written submissions.

On the first ground of appeal, the appellant faulted the trial magistrate for convicting him basing on the evidence of the victim which was taken contrary to **section 127(2) of the Evidence Act Cap 6 R.E 2022** which requires the child of tender age before giving evidence to promise to tell the truth and not lies.

The appellant argued that in the instant case when the victim of the alleged offence (PW2) was in the dock, he did not promise the trial Court to tell the truth and not to tell lies. The appellant made reference to the proceedings at page 10 which reads:

> *"**Court;** The witness is a five years old boy he had intelligence of speaking but he does not understand the nature of oath however is hereby promise to speak the truth before this Court and not lie, and start to explain as follows; -"*

It was submitted that when the trial Magistrate was composing judgment, he was of the view that the child promised to speak the truth and not lies. However, careful observation of the above quotation does not reflect whether the said child (PW2) promised to tell the truth to the Court or not, as the alleged recorded promise in the Court's proceedings is not direct from the child himself rather it is a reported speech by the trial Magistrate that the child had promised to tell the truth and not lies.

The appellant continued to argue that the gist of **section 127(2) of the Evidence Act** (supra) is that, the child must promise the trial court to tell the truth and not lies. He was of the opinion that it was importance for the Court's proceedings to display that, the promise

came direct from the child in conformity to **section 127(2) of the Evidence Act** and not a mere recording by the trial Magistrate. Thus, it cannot be said with certainty that, **section 127 (2) of the Evidence Act** (supra) was complied with.

As far as compliance of **section 127(2)** is concerned, the appellant made reference to the decision of the Court of Appeal in the case of **PHILIPO EMMANUEL vs R, Criminal Appeal No. 499 of 2015** and the case of **JUMANNE NCHIMBI. V.R, Criminal Appeal No. 06 of 2018** (Unreported) which held that:

> *"Without gain saying, the recording of PW1 and PW2 testimony was done in contravention of section 127(2) of the Evidence Act, Cap. 6 as the Written Laws (Miscellaneous Amendments) (No.2) Act of 2016 which came into effect on 08th day of July, 2016. PW1 and PW2 testimonies were recorded without them promise to tell the truth to the Court. Their testimonies were wrongly and improperly received. Their evidence is discarded from the record."*

The appellant also cemented the 1st ground of appeal with the case of **RAJABU NGOMA MSANGI V.R, Criminal Appeal No. 22 of 2019** which held that:

> *" As for the consequences for such irregularity, the Court of Appeal in Godfrey Wilson vs R, (supra) held further as follows; -*
>
> *In this case since PW1 gave her evidence without making prior promise of telling the truth and not lies*

there is no gain saying that the required procedure was not complied with before taking the evidence of the victim. In the absence of a promise by PW1 we think that, the 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."

Basing on the above cited authorities, it was the argument of the appellant that the omission done by the trial Magistrate by failing to adhere to legal requirement in treating PW2, cannot leave the evidence of such a witness with legs to stand. He implored the court to expunge the same from the record.

On the second ground of appeal, the appellant lamented that the trial magistrate failed to note that, the case against him was fabricated since the victim (PW2) withheld the details of the alleged offence for quite a while and he (PW2) did not disclose to anybody especially his guardian (PW1) at the first earliest possible opportunity.

The appellant said that it has been held in many occasions that, a credible and reliable witness would be expected to name a suspect at the earliest possible opportunity. In the instant matter, the appellant submitted that the said offence was alleged to had occurred for two consecutive days as stated by PW1 (victim's grandmother) at page 8 of the proceedings.

The appellant contended that it is not convincible for a male person of 55 years as the appellant to sodomize a boy of 4 years and still the act not to be recognized by either the parents nor the guardians

as what has been alleged in the instant matter. The said ordeal is alleged to had happened to PW2 one day prior to the one shown/ indicated in the charge sheet.

The appellant questioned how did the 4 years old boy manage to tolerate the ordeal against him for all those hours to the extent that nobody came to realize that he had been sodomize? The appellant continued to argue that if it could not be the smell of the stool, could the said ordeal continue to be the secret of the victim?

The appellant was of the opinion that it cannot be said with certainty that, the alleged ordeal occurred to PW2 since his evidence is unreliable as he did not disclose the information of the alleged crime to anybody at the first earliest possible opportunity.

Further to that, the appellant referred to the evidence of PW1 at page 7, 1st paragraph of the proceedings, where PW1 was quoted to have said that:

> *".... I take it and put in the bathroom, by that time my grandson was there and later I took my grandson to take a bath and I was try (sic) to touch his anus to see if there something wrong happened to him however I did not discover anything although I was suspicion." (sic)*

From the above quoted paragraph, the appellant asserted that evidence of PW2 was unreliable. That, a child of four (04) years old is very small and minor who, if he faced such cruel act of being sodomize by an adult person like the Appellant herein, the child could never tolerate and manage to hide such an act. That, even the

guardian failed to notice the same. The appellant commented that the situation automatically connotes that, the case at hand was pure lies and fabrications against him.

In support of his argument, the appellant cited the case of **AHMED SAID V.R, Criminal Appeal No. 291 of 2015** (Unreported) at page 14, where the Court of Appeal held that:

> *"...Much as we are aware of the timidness, taboo or stigma that may be an associated cause for the late or non -reporting to a person of confidence of an act of sexual violence by a victim, nothing in the record points to that direction; on a failure to name a suspect at the earliest possible opportunity, this Court in the unreported* ***Criminal Appeal No. 06 of 1995 Wangiti Mansa Mwita and Others V. The Republic,*** *the Court made the following observation:*
>
> > *'The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as an unexplained delay or complete failure to do so should put a prudent Court into inquiry.'*
>
> In our view the statement of principles equally be falls on a witness *in the shoes of Yusra who withheld the details of the sexual occurrence for quite a while. To further complicate her non-disclosure and as was correctly formulated by the learned senior state attorneys, Yusra was a self-confused liar."*

The appellant prayed the court to amplify the above cited findings by

the Court of Appeal in resolving the instant matter.

On the 3rd ground of appeal, the appellant faulted the trial magistrate for failure to note that the case at hand fell short of proof as the prosecution failed to lead the victim (PW2) to demonstrate the location or part of the said ''limit.' When PW2 was testifying, he was referring to what he categorically described as *"limt* and *limit",* and the boy went further and stated that, the appellant took that *"limt* and *limit"* and inserted it in his buttocks and that the said *"limit"* was taken from the trouser.

The appellant argued further that neither the Public Prosecutor nor the trial Magistrate required the victim to describe the said *"limit"* and what part of the body was the said *"limit"* located. Also, the victim never said what part of the trouser the alleged *"limit "* was taken from by the Appellant, was it in trousers' pockets or in flies' area. That, the child never said whether the appellant removed/undressed his clothes before penetrating him.

In conclusion, the appellant urged the Court to find that, the prosecution case was not proved to the required standard by the law and beyond reasonable doubts against him. Thus, it should not rely on the same to sustain the Appellant 's conviction rather, the appeal should be allowed, quash the conviction, set aside the sentence and set him at liberty.

Replying the first ground of appeal, Mr. Rweyemamu submitted that PW2 the victim was a boy of five years old who did not know the nature of taking oath or making an affirmation. Thus, under **section 127(2) of the Evidence Act**, PW2 should have promised to tell the

court the truth and not lies as noted at page 10 of the proceedings.

Responding to the allegation that the said words were just mere recording by the trial Magistrate, it was stated that though it was just a mere recording but the trial Magistrate could not have recorded something which was not stated. Meaning that such recording is a result of what the said child stated and thus reduced into words. The learned State Attorney gave an example from the proceedings where it is recorded that: "*PW1 take oath and state as follows.*"

The learned State Attorney referred to the case of **Mohamed Said Rais v Republic, Criminal Appeal No. 167 of 2020** (Unreported) which held that evidence from the victim of a sexual offence can ground conviction if it is beyond reproach by itself which boils down to credibility. He also cited the case of **Selemani Makumba v Republic [2006] TLR 379** which held that the best evidence in sexual offences comes from the victim.

Basing on those arguments, the learned State Attorney commented that the trial Magistrate correctly convicted the appellant basing on PW2's evidence since the best evidence came from him.

On the second ground, that the victim failed to report the incidence at the earliest time, the learned State Attorney argued that the victim (PW2) testified that the appellant told him not to tell anyone about the act. To substantiate this argument, he quoted the words of the victim at page 10 of the proceedings where he was quoted to have said; "*also accused told me not to tell anyone about the act.*"
Mr. Rweyemamu continued to state that on the second day after PW2

was forced by his grandmother (PW1) to tell her what was wrong, he disclosed the ordeal to his grandmother who took him to hospital for examinations, after the accused had been taken to the authorities. Mr. Rweyemamu referred to the case of **John Leon Kimario v Republic, Criminal Appeal No. 54 of 2019, HC at Moshi** which held that:

> *"It is also worth mentioning the fact that in African tradition it is shameful to let other people know what happened to her. The effect and proof of ongoing rape was cemented by PW3's testimony as recorded at page 18 & 19 of the proceedings that;*
>
> > *"...She said she has been raped before, sodomized and raped when she came for examination said it was in November when she was last sodomized and raped. Following her statement, she said she was sodomized before, there was smell, she was discharging feaces and she was smelling. Since days had passed according to her, she said she was sodomized back in June and July...."*

The learned State Attorney was of the opinion that in this case the incident was reported within a reasonable time, and thus this ground is baseless. He added that it can be seen from the testimony of the victim that he was told by the appellant not to tell anyone and in connection with the case cited above, the shameful feeling the victim felt of letting other people know what had happened to him.

Responding to the 3rd and 4th grounds of appeal, the learned State Attorney referred to page 7 of the proceedings, where PW1 was quoted testifying that:

> *"I asked him what kind of stick did he put to you and he replied the said stick look like the hand and he took it from his trouser and insert it to me."*

The learned State Attorney also quoted the words of PW2 at page 10 of the proceedings where he said *'he took the said stick from his trouser and insert it to my buttocks and I felt bad."*

From the above quotation, it was the opinion of Mr. Rweyemamu that the mere confession of the victim to his grandmother that what that stick looked like and where it came from though, he did not know the exact name of the stick, it was enough to explain what that stick was. He also opined that given the case of the victim, he could not have known the exact name of the stick having in mind what he had experienced. The learned State Attorney referred to the case of **Yusuph Mgendi vs Republic, Criminal Appeal No. 148 of 2017** which held that *given the age of the victim and what she experienced after the appellant male organ was inserted in his anus thus, the use of the term "**msumari.**"*

Mr. Rweyemamu also cited the case of **Joseph Leko v Republic, Criminal Appeal No. 124 of 2013** (unreported) in which factors for one not to describe and explain explicitly that the appellant inserted his penis in her anus were stated. That:

> *"Recent decision of the Court shows that what the Court has to look at is the circumstances of each case*

including cultural background, upbringing, religious feelings, the audience listening and the age of the person giving the evidence. The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and related matters."

Responding to the allegations that the case was not proved beyond reasonable doubts, the learned State Attorney mentioned **section 3(2)(a) of the Evidence Act** (supra) which is to the effect that a fact is said to be proved when in criminal matters, except where any statute or other laws provides otherwise, the court is satisfied by the prosecution beyond reasonable doubts that the fact exists. He continued to state that in criminal cases it is the duty of the prosecution to prove the case beyond reasonable doubts by leading its witness to show that such offence was actually committed by the accused. He cited the case of **Ryoba Mariba @ Mungane v Republic, Criminal Appeal No. 74 of 2003** (unreported), and argued that in this case, PW5, a medical doctor who examined the victim discovered his anus to have been wider than normal for the kid of his age due to penetration of a blunt object and thus caused damage resulting to loss of external sphincter and the submission of PF3 as an exhibit proved the same.

Also, PW2 the victim was able to give out his evidence whereas he pointed out that it was the appellant who did such an act to him as it was held in the case of **Selemani Makumba v Republic** (supra)

that the best evidence in sexual offences comes from the victim. He added that penetration was also proved as the main ingredient in proving any sexual offence as it was testified by PW5 and the PF3 and as it was in the case of **Kiune Ernest @ Mzava v Republic, Criminal Appeal No. 60 of 2021, HC at Moshi.**

Mr. Rweyemamu concluded that the prosecution case was proved. He prayed for dismissal of this appeal for lack of merit.

After going through parties' rival submissions and trial court's records, the main issue which cut across all the grounds of appeal is ***whether the case against the appellant was proved on the required standard.***

It is an established principle of law that the prosecution has the duty to prove the case against the accused beyond reasonable doubts. In case of any doubt, such doubt should benefit the accused. That position has been underscored in numerous decisions of this court and the Court of Appeal. In the case of **Jonas Nkize V R. [1992] TLR 213** the late Hon. Justice Katiti, J had this to say:

> *"While the trial magistrate has to look at the whole evidence in answering the issue o f guilt, such evidence must be there first - including evidence against the accused, adduced by the prosecution which is supposed to prove the case beyond reasonable doubt."*

Having established the position of the law, I now turn to the grounds of appeal. The appellant raised six grounds of appeal and opted to submit on five grounds only.

On the first ground of appeal, the appellant's grievance is that the trial magistrate did not comply with **section 127(2) of the Evidence Act** (supra) which requires a child of tender age before testifying to promise to tell the truth and not lies. The appellant stated that the words which were recorded by the trial magistrate do not suggest if the same came from the victim.

Responding to this grievance, the learned State Attorney submitted that though the words recorded by the trial magistrate suggests that the same were merely recorded, the trial magistrate could not record something which had not been stated by the victim.

As rightly submitted by the parties, the law requires that a child of tender age before giving evidence to promise to tell the truth and not lies. For the purpose of reference, **section 127(2) of the Evidence Act** (supra), provides that:

> *"(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."*

In scrutinizing this ground, I keenly examined the trial court's proceedings. At page 10 of the typed proceedings the trial magistrates record the following words:

> ***"Court;*** *The witness is a five years old boy he had intelligence of speaking but he does not understand the nature of oath however is hereby promise to speak the truth before this court and not lie, and start to explain as follows;" (sic)*

The issue here is whether recording that the child of tender age has promised to tell the truth and not lies suffice to conclude that the above noted section was complied with.

It is obvious that the quoted words were recorded by the trial magistrate. Thus, it cannot be said with certainty that the victim promised to tell the truth and not lies. The Court of Appeal in the case of **John Mkorongo James vs Republic, Criminal Appeal No. 498 of 2020 [2022] TZCA 111 [Tanzlii]** held that:

> *"It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete."*

From the above recommendations of the Court of Appeal which binds this court, I concur with the appellant that the recorded words by the trial magistrate did not suggest if the same came from the victim's mouth since it was recorded in indirect speech.

Before concluding that PW2 had promised to tell the truth and not lies, the trial magistrate did not conduct inquiry to know whether the said child knew the meaning of telling the truth and not lies. The Court of Appeal in the case of **John Mkorongo James** (supra) at page 12 to 13 of the judgment the Court while facing the same issue had this to say:

> *"...The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court to tell the truth and not to tell lies. It is so because it cannot*

be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court to tell the truth and not tell lies. It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court to tell the truth and not tell lies before they testify. ***This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief, to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court to tell the truth and not tell lies as per section 127 (2) of the Evidence Act.***" Emphasis added.

I fully subscribe to the above authority. In the instant matter, the trial magistrate did not conduct the examination/inquiry to PW2 who was of tender age, to test his competence and to ascertain whether he knew the meaning of telling the truth and not lies, rather the trial magistrate jumped into conclusion that PW2 had promised to tell the truth and not lies.

Equating the above authority with what happened in the instant case, I am of the considered opinion that the learned trial magistrate contravened **section 127(2) of the Evidence Act** (supra) as rightly submitted by the appellant. The consequences of the omission to record the promise in direct speech and failure to inquire the child was stated in the case of

Faraji Said v. Republic, Criminal Appeal No. 172 of 2018 (unreported) where the Court of Appeal held that:

> *"To us, like the appellant and the learned State Attorney, the questions asked by the trial magistrate did not satisfy the requirement of section 127 (2) of the Evidence Act. This was violation of the settled principle under section 127 (2) of the Evidence Act which justify for our interference of the concurrent findings of the two courts below. We therefore fully concur with the submission made by Mr. Kalinga that evidence of PW1 does not have evidential value, it ought, and we hereby do, expunge that evidence from the record."*

In the same manner, in this case since there was such omission as demonstrated above, it goes without saying that evidence of PW2 has no evidential value and I hereby expunged it from the record.

Having expunged the evidence of PW2, the last question is; does the remaining evidence suffice to sustain the appellant's conviction? The answer is definitely *'NO'.* Apart from the evidence of PW2 (the victim), there is no any other evidence to prove the offence beyond reasonable doubts. Even the PF3 which was tendered by PW5 and marked as Exhibit P.2, does not prove whether it was the appellant who carnally knew the victim.

From the above findings, it is a considered opinion of this court that, the 1st ground of appeal suffices to dispose of this appeal. Thus, I will not discuss the rest of the grounds of appeal. In the event, I hereby quash

the appellant's conviction and set aside the sentence. The appellant is henceforth set free unless lawfully held.

It is so ordered.

Dated and delivered at Moshi this 10th day of October, 2022.

S. H. SIMFUKWE

JUDGE

10/10/2022