IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., KEREFU, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 201 OF 2019

MTANDI NASORO ISSA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Bongole, J.)

dated the 03rd day of May, 2019

in

Criminal Appeal No. 85 of 2019

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JUDGMENT OF THE COURT

15th & 20th March, 2021

MWAMPASHI, J.A.:

Mtandi Nassoro Issa, the appellant herein, was charged with and convicted by the District Court of Igunga at Igunga (the trial court) of the offence of grave sexual abuse contrary to section 138C (1)(a)(2)(b) of the Penal Code [Cap 16 R.E. 2002; now R.E. 2022]. It was alleged by the prosecution that on 18.05.2017 at 10:00hrs at Store Street within the District of Igunga in Tabora Region, for sexual gratification, the appellant, by using his hands touched the private parts of "K. D", a five (5) years old girl (hereinafter to be referred to as PW2 or the victim) and further that he also undressed her underwear.

Upon conviction, the appellant was sentenced to serve the statutory minimum sentence of twenty (20) years imprisonment. Being

aggrieved by the conviction and sentence, the appellant unsuccessfully appealed to the High Court hence the instant second appeal to this Court.

The facts of the case which led to the appellant's arraignment and conviction, as they can be gleaned from the record of appeal, are simple and straightforward. On the material day at 10:00hrs, Joseph Patrick (PW1), Charles Joseph (PW5) and one Khamis, were on their way to the river to fetch some water when they heard a child screaming from the nearby bushes. Upon getting there, they allegedly found the appellant undressing PW2 by taking off her underwear. They then apprehended him.

According to PW2, on the fateful day while at home watching television with her twin sister PW3 and one Joshua, the appellant appeared and asked her to go with him to buy sweets. Instead of taking PW2 to the shop, the appellant took her to the river where he took off PW2's underpants and touched her private parts. It was at that moment when PW1 and PW5 appeared and apprehended the appellant. PW2's evidence on the fact that the appellant took her from where she had been watching television, was supported by her twin sister PW3. The evidence from PW2's mother, one Christina Daudi who testified as PW4

was to the effect that, after being brought home by PW1 and PW5, PW2 told her that the appellant had touched her sexual organ at the river.

In his brief defence, the appellant denied to have committed the offence in question. He claimed that on the material day PW2's sister asked him to take PW2 home from Kilabu cha Chini.

The trial court, believed and found the prosecution evidence sufficient to found the appellant's conviction. As we have alluded to earlier, the appellant's first appeal was dismissed by the High Court which upheld the trial court's decision that the case against the appellant was proved to the hilt. Still undaunted, the appellant has preferred the instant appeal raising four grounds of complaint as follows:

1. That, the ingredients of the offence of grave sexual abuse were not proved.
2. That, the appellant was not accorded a fair trial as the substance of the charge was not explained to him immediately before the case for the prosecution was opened.
3. That, the evidence of PW2 and PW3 was recorded in contravention of section 127 (2) of the Evidence Act, Cap. 6 R.E.2002 (the Evidence Act).

4. That, the provision of the law under which the appellant was convicted was not cited.

At the hearing of the appeal the appellant appeared in person whereas Ms. Lucy Enock Kyusa, learned State Attorney, appeared for the respondent Republic.

Upon being given the floor to argue his appeal, the appellant adopted the grounds of appeal as listed in his memorandum of appeal and prayed for his appeal to be allowed.

Ms. Kyusa, who had initially intimated that she was not supporting the appeal and who had submitted on the first two grounds and urged the Court to find the said two grounds baseless, changed her stance after getting to the third ground of appeal. She readily conceded that the evidence of PW2 and PW3 who were children of tender age, was recorded in contravention of section 127 (2) of the Evidence Act as the said two witnesses did not promise to tell the truth to the court and not to tell any lies before their respective evidence could be recorded. For that reason, Ms. Kyusa urged us to expunge the said evidence from the record. She then intimated that in the absence of the evidence of the victim, that is, PW2, there remains no sufficient evidence to prove the offence of grave sexual abuse against the appellant. Ms. Kyusa did therefore implore us to allow the appeal.

Having heard the arguments from the appellant and the learned State Attorney, who are at one on the fact that the evidence of PW2 and PW3 was recorded and received in contravention of section 127 (2) of the Evidence Act, as we have recast above. We share similar views as it is on record that PW2 and PW3 who were five years old when their respective evidence was recorded by the trial court on 05.10.2017, were children of tender age within the meaning of section 127 (4) of the Evidence Act. It is also clear from the record that before the evidence from PW2 and PW3 could be recorded, the trial court conducted a voire dire test and found that though the two witnesses did not understand the nature of an oath, they were however, possessed of sufficient intelligence to justify the reception of evidence.

It is also evident from the record that, after finding that PW2 and PW3 could not take an oath, the trial court proceeded to record their evidence without first having required them to promise to tell the truth to the court and not to tell any lies as it is mandatorily required by section 127 (2) of the Evidence Act. This was a clear contravention of the mandatory provision of the law. Following the 2016 amendments of section 127 (2) through the Written Laws Miscellaneous Amendments Act No. 4 of 2016 which came into force on 08.07.2016, the provisions under section 127 (2) made it mandatory that when evidence of a child

of tender age whose evidence cannot be given on oath or affirmation, has to be recorded, such a child must be required to promise to tell the truth to the court and not to tell any lies. This position has been restated by the Court in a countless of its decisions including in **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018, **Ally Ngozi v Republic,** Criminal Appeal No.216 of 2018 and **Msiba Leonard Mchere Kumwaga v. Republic,** Criminal Appeal No. 550 of 2015 (all unreported). In the latter decision, the Court observed that:

> *"...we have deemed it crucial to point out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No. 4 of 2016 (Amendment Act). Currently, a child of tender age may give evidence without taking oath or affirmation provided he/she promises to tell the truth and not tell lies".*

As to the effects and value of the evidence of a child of tender age whose evidence is recorded without a prior promise to tell the truth to the court and not tell any lies, the Court in **Godfrey Wilson** (supra) held thus:

> *"...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 a 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".

As we have earlier observed, PW2 and PW3 who were children of tender age, gave their respective evidence without making prior promise to tell the truth to the court and not tell any lies in contravention of section 127 (2) of the Evidence Act. As such, their respective evidence has no evidential value and the trial court ought not to have relied upon it to found the appellant's conviction. As correctly argued by Ms. Kyusa, the evidence from PW2 and PW3 has to be expunged from the record, which we hereby do.

Having discounted the evidence of the victim PW2, the immediate issue is whether the remaining evidence is sufficient to found the appellant's conviction. The only remaining relevant evidence is that of PW1 and PW5 whose evidence is to the effect that they found the appellant undressing PW2. We have examined the evidence given by PW1 and PW3 and observed that while PW1 claimed that upon getting there they found the appellant undressing PW2, the evidence by PW5 is to the effect that they just found PW2 naked. We wonder how, if it is

true that the appellant was found undressing PW2, it was only PW1 who saw the appellant undressing PW1 and not PW5. The evidence by PW1 and PW5 is therefore contradictory and unreliable. We also observe that since neither PW1 nor PW5 saw the appellant touching PW2's private parts as the particulars of the offence allege, in the absence of PW2's evidence, the allegation that the appellant touched PW2's private parts remain unproved.

In the end and for the above given reasons, we find merit in this appeal and allow it. We consequently, quash the conviction and set aside the sentence imposed upon the appellant and order for his immediate release from prison unless he is otherwise lawfully held.

DATED at **TABORA** this 20th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2023 in the presence of the Appellant in person and Ms. Tunosia John Luketa, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL