IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 274 of 2018

HAMISI ISSA .... APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

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

(Twaib, J)

dated the 15th day of August 2018
in
Criminal Appeal No. 78 of 2017

JUDGMENT OF THE COURT

4th & 7th November, 2019

MWANDAMBO, J.A.:

This is a second appeal by Hamisi Issa (the appellant), in his bid to protest his innocence following conviction and sentence on an offence of rape by the District Court of Nanyumbu. The appellant's first attempt in Criminal Appeal No. 78 of 2018 before the High Court at Mtwara was dismissed. The appeal before this Court predicated on only one ground which shall become apparent later.

Before the trial court the appellant stood charged with rape involving a girl aged 11 years contrary to section 130 (2) and 131 (1) of the Penal Code, Cap. 16 [R.E. 2002]. For the purpose hiding the victim's identity, we shall be referring to her as ZSM in this judgment. The prosecution alleged that on 23rd September, 2016 Hamisi s/o Issa at /about 19:00 hours at Nangalano village within Nanyumbu District in Mtwara Region had carnal knowledge of ZSM aged 11 years.

The arraignment of the appellant has its genesis on an event which occurred on 23rd September 2016 at a place called Nangalamo village. On 23rd September, 2016, there was a football match at Nangalamo village. Various people attended the said match. It is common ground that the appellant, who was a resident of Naimba village attended the match. ZSM too, a girl of 11 years the daughter of Said Said Mdoka (PW1) and Bienna Rashid (PW3) attended that match. ZSM was, at the material time residing with her father at Nangalamo village. As he was on his way back to his village after the match, the appellant met ZSM who was also on her way back home. It was at this point the appellant asked ZSM assist him collecting raw cashew from his farm nearby in return for payment of TZS 2,000.00. ZSM obliged and the duo proceeded to the destination. However,

before arriving at the cashew farm for the intended purpose, the appellant turned to ZSM at a bush and forcefully undressed her and inserted his penis into her vagina. Having gratified his passion, the appellant released the victim and fled. ZSM returned to her father's home very late that night and narrated the story about what the appellant had done to her. Subsequently, the incident was reported to Mangaka police station leading to the appellant's arrest on 29th September, 2016. Ultimately, he was arraigned before the District Court to answer the charge of rape which he denied.

Most of the facts read during the preliminary hearing stood undisputed except those incriminating the appellant. The trial of the case before the trial court involved four prosecution witnesses which included the victim of the offence (PW3), her father and mother (PW1 and PW2 respectively) and No. G. 5089 DC Mark (PW4) the investigator of the case. In his defence, the appellant who had no other witness than himself through affirmed testimony, denied any involvement in raping the victim. He stated that he was surprised to be arrested and charged in the trial court to answer a charge on an offence which he had not committed.

After hearing the case, the trial court found the evidence of PW3 as credible and watertight to prove the charge beyond reasonable doubt. That aside, the trial court found the evidence of PW1 and PW2 as corroborative of PW3's testimony supported by a PF3 tendered by PW4 and admitted as exhibit P1. Accordingly, it found the appellant guilty and convicted him as charged followed by a mandatory sentence of thirty years' imprisonment with an order for compensation of TZS 100, 000.00. He unsuccessfully appealed before the High Court which dismissed his appeal upon being satisfied that the case against the appellant was proved beyond reasonable doubt.

Still aggrieved, the appellant is before this Court on a second appeal. The appellant complains that he was wrongly convicted because the trial court did not comply with the mandatory provisions under section 127 (1) (2) (3) (5) and (7) of the Evidence Act, Cap 6 [R.E 2002] (henceforth the Evidence Act). Essentially, the appellant faults the courts below for making concurrent findings in connection with his conviction relying on the evidence of PW3 received by the trial court without conducting a *voir dire* test as required by section 127 (2) of the Evidence Act.

On the day the appeal was called on for hearing, the appellant appeared in person, unrepresented. He stood by his ground of appeal and deferred his arguments until after hearing submissions from the learned Senior State Attorney but urged us to consider his sole ground. On behalf of the respondent/ Republic, Mr. Paul Kimweri learned Senior State Attorney appeared resisting the appeal.

Before the commencement of hearing, the Court wanted to know whether the ground of appeal the appellant urged us to consider in this appeal was raised and determined by the High Court. We did so having regard to the dictates of Rule 72 (2) of the Court of Appeal Rules, 2009 (the Rules). That rule provides that second appeals to this Court as it were, must be predicated on points of law or mixed law and facts restricted to matters wrongly decided by the High Court. The appellant admitted as such that he did not raise that ground in the High Court. Like the appellant, Mr. Kimweri had similar answer but urged us to consider the ground nonetheless because it was premised on a point of law in line with our previous decision in **Godfrey Wilson vs. Republic**, Criminal Appeal No. 168 of 2018. Without ado, we readily agreed to consider that ground of appeal as prayed by Mr. Kimweri.

The essence of Mr. Kimweri's submissions which we did not find any difficulty in agreeing with him was that the appellant's complaint is misconceived. This is so, the learned Senior State Attorney argued, because there is no longer any requirement to conduct a *voir dire* test to witnesses of tender age before their evidence is received by a trial court following amendments to section 127 of the Evidence Act by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016 which came into force on 8th July 2016. The learned Senior State Attorney submitted that what was required and which was in fact done, was a promise from the witness of tender age to tell the truth and not lies before her evidence was received consistent with the court's decision in **Godfrey Wilson vs. Republic** (supra). Mr. Kimweri pointed out that the trial court complied with the requirement under section 127(2) of the Evidence Act (as amended) having been satisfied that PW3 did not understand the meaning of an oath or affirmation as indicated at page 11 of the record. With the foregoing, he invited the Court to dismiss the appeal for lacking in merit.

The appellant had noting in rejoinder having invited us to consider his ground of appeal at the beginning.

Having heard the submissions by the learned Senior State Attorney we have no hesitation in holding that the appeal is plainly misconceived. We say so advisedly. As rightly submitted by Mr. Kimweri, the requirement to conduct *voir dire* test in respect of witnesses of tender age ceased immediately after the amendment of section 127 of the Evidence Act vide Act No. 4 of 2016. An examination of the record of the trial court shows clearly that the learned trial Resident Magistrate directed himself to the dictates of the section 127 (2) of the Evidence Act (as amended). By virtue of the amendments to that section, *voir dire* test is no longer a requirement before receiving evidence of witnesses of tender age such as PW3. The law as it stands from 8th July, 2016 covers the instant appeal provides that witnesses of tender age may give evidence without oath or affirmation provided they promise to the trial court to tell the truth and not to tell lies. The learned trial Resident Magistrate had regard to the dictates of the law as evidenced at page 14 of the record showing a clear declaration by PW3 to tell the truth and not lies before that court. That followed a clear answer from PW3 that she did not understand the meaning of an oath or affirmation. After the said declaration, PW3 stood a witness box and the trial court received her

unsworn evidence in strict compliance with 127 (2) of the Evidence Act.

Had it been otherwise, we would not have hesitated chucking out PW3's evidence as we have done in previous cases where there was a clear non-compliance with section 127 (2) of the Evidence Act. For instance, in **Yusuph Molo vs. Republic,** Criminal Appeal No. 343 of 2017 (unreported) we said:

> *"It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution's case... if there was no such undertaking, obviously the provisions of section 127 (2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value..."*

See also: **Godfrey Wilson vs. Republic** (supra) and **Msiba Leonard Mchere Kumwaga vs Republic,** Criminal Appeal No. 550 of 2015 (also unreported).

Considering that the record of the trial court is plain that PW3 made her promise to tell the truth and not lies before her evidence was received in compliance with section 127(2) of the Evidence Act, the appellant's appeal is patently misconceived and we hereby dismiss it.

Order accordingly.

DATED at **MTWARA** this 6th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 7th day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Paul Kimweri, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL