IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A, KOROSSO, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 454 OF 2017

NESTORY SIMCHIMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania

at Mbeya)

(Levira, J.)

Dated the 22nd August, 2017

in

Criminal Appeal No. 120/2016

.....

JUDGMENT OF THE COURT

25th March & 1st April, 2020.

LILA, J.A:

In the District Court of Chunya, the appellant was arraigned and convicted for raping a girl of the age of four (4) years who we shall be referring to as "the victim" for the purpose of hiding her identity. The charge was predicated under sections 130(1)(2)(e) and 131(1) of the Penal Code, Chapter 16 of the Revised Laws, 2002 (the Penal Code). He was sentenced to thirty (30) years imprisonment. It was also ordered that

he should suffer sixteen (16) strokes of the cane. He was aggrieved. His appeal to the High Court was devoid of merit. It was dismissed. Still protesting his innocence, he preferred the instant appeal to the Court.

The accusation by the prosecution against the appellant as reflected in the particulars of the offence was that; on 10th June, 2016 at Mamba village within Chunya District and Mbeya Region, the appellant had carnal knowledge of the victim, a child aged four (4) years.

The prosecution lined up a total of six (6) witnesses in their verge to prove the charge against the appellant. It is noteworthy that Mihayo Katunge (PW1) and the appellant (DW1), prior to giving their respective testimonies, informed the trial court that they had no religion in which they profess. Upon that information, the learned trial magistrate proceeded to record their respective evidences without being affirmed. Nonetheless, the material facts of the case as unveiled in the trial court record during the trial may briefly be recapitulated thus:-

On the material day, at 15:00hrs, Mihayo Katunge (PW1), the victim's father, was with the appellant at his home and the victim and his brother one Mandulu (PW6), who are his daughter and son, were grazing calves nearby their house. Sometimes later, he sent the victim and PW6 to

take the calves to the well which was a bit far from their house to drink water. No sooner had the duo left with the calves to the well, the appellant asked for a plastic container and a water cane for watering his garden in which he had planted tomatoes. The garden seemed to be near the well. According to PW6 while there at the well, the appellant called the victim so that he could give her tomatoes. A short time later, PW6 returned back home with the calves leaving the victim with the appellant who was also a family member. The appellant, as per the victim (PW5), seized that opportunity to order her to undress her under pants while he lowered his short half way and sexed her. According to PW1, his wife one Kija Masonga (PW4) told him that the victim returned back home at 18:00hrs holding the underpants. PW4 became suspicious of the health condition of the victim when she wanted to wash her at about 19:00hrs as the victim cried when she bent down and when urinating. Upon inquiring from her as to what happened to her, the victim told her that she was sexed by the appellant. Further, PW4 found blood and bruises on the victim's private parts. The matter was reported to the hamlet chairman who directed them to go the ten cell leader. Thereafter the victim was taken to Mamba Dispensary and after examining her private parts, Obed

Prosper (PW2), a Nurse Assistant, found bruises in the victim's female organ and the virginity was removed.

The appellant (DW1), on the other hand, flatly denied committing the offence in his unsworn defence and raised a defence of alibi. He alleged that, on 7/6/2016 he irrigated his tomato farm and on 8/6/2016, after being informed by one Willy Kapingu that his father was indisposed, he left to Mwaoga village whereat he stayed until 10/6/2016 when he went back to Mamba village where he arrived at 19:00hrs. He further stated that after taking dinner he spent some time exchanging ideas with his friends and then retired to bed at 20:00hrs only to find, at around 00:00hrs, being awakened by his boss and was later arrested on accusation of raping the victim which he strongly denied. He insisted that on 10/6/2016 during the afternoon he was not at Mamba village.

His denial notwithstanding, the trial magistrate was satisfied that the prosecution had proved the charge against him to the hilt and proceeded to convict and sentence him as stated earlier. Believing that he was innocent, he appealed to the High court but was unsuccessful. As it were, the appellant lodged a memorandum of appeal comprising seven (7) grounds before the Court faulting the decisions of both courts below.

Given the course we have taken in the determination of this appeal, as will hereunder be apparent, we desist from reciting the said grounds of appeal.

At the hearing of the appeal before us, the appellant appeared in person and was fending for himself, whereas Mr. Ofmedy Mtenga, learned State Attorney stood for the respondent Republic.

As hinted upon, PW1 and DW1 gave their evidence without oath or affirmation. We, therefore, *suo motu* put it to the parties to address us on the consequences that may befall the evidence of such witnesses and the effects on the prosecution case as a whole.

Mr. Mtenga was first to address us. Apart from conceding that the two witnesses gave their testimonies before they were either sworn or affirmed, he was of the view that what was recorded when they testified was no evidence at all in the eyes of the law and could not be acted on to determine the appellant's guilt or otherwise. He submitted that such evidence was recorded in total contravention of the mandatory provisions of section 198(1) of the Criminal Procedure Act, Chapter 20 of the Revised Edition, 2002 (the CPA) and section 4(a)(b) of the Oaths and Judicial Proceedings Act, Chapter 34 of the Revised Edition 2002 (the OJPA).

Regarding the impact of the testimonies by PW1 and DW1 being discarded on the prosecution case, the learned State Attorney, argued that in so far as PW1 was a key prosecution witness and the only witness who gave evidence proving the age of the victim which is an essential ingredient of the offence of statutory rape with which the appellant was charged, then without such evidence the prosecution case collapses. Unfortunately, he could not avail us with any authority to that effect contending that he did not expect that such an issue would arise.

Mr. Mtenga was also of the view that even the defence evidence would not survive the infraction hence there will be no defence evidence to be considered. It will, he added, have the effect that the appellant did not render his defence which is one of natural rights he is entitled to exercise. He finally concluded that the trial was unfair and the consequences are that the trial is vitiated.

The learned State Attorney could not let the appellant benefit from the infraction. Both sides, he emphatically argued, were negatively impacted by the shortcoming in the conduct of the case. He ultimately urged us to nullify the proceedings of the two courts below and order a retrial.

Nothing was forthcoming from the appellant on the legal issue we raised when we called him to reply. He is blameless for the matter was purely a legal one and he was ignorant of the subject matter. The most he did was to leave it to the Court to decide but he urged us to set him free.

On our part, without having to linger on the matter, we entirely agree with Mr. Mtenga's views on the legal point we raised. It is clear to us that PW1 and DW1 informed the trial court that they had no religion on which they professed. Thereafter, the trial magistrate recorded their testimonies without subjecting them to either oath or affirmation. It needs no overemphasis that evidence to be acted on by any court must come from a competent witness. Unless a witness is exempted under section 127(1) of the Evidence Act, Chapter 6 of the Revised Edition 2002 (EA) for being a child of tender age and does not understand the nature of an oath hence his evidence is taken without being sworn or affirmed, any other witness in any judicial proceedings must be sworn or affirmed. This is the tenor and import of the mandatory provisions of section 198(1) of the CPA, section 4(a)(b) of the OJPA and the Oaths and Affirmations Rules, GN No. 125 of 1967 made under section 8 of OJPA (the OJPA Rules). The OJPA Rules prescribe distinct types of oaths for witnesses who are

Christians who should swear, Muslims who should affirm and Hindus or Pagans who should affirm.

We shall start our discussion with the provisions of section 198(1) of the CPA which imperatively require a witness be sworn or affirmed before his evidence is taken. That section states:-

> *"198(1)- Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act."*

In line with the above, the provisions of section 4(a)(b) of OJPA states that:-

> *"4. Subject to any provision to the contrary contained in any written law, an oath shall be made by:*
>
> *(a)* ***any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court;***

(b) any person acting as interpreter of questions put to and evidence given by a person being examined by or giving evidence before a court;

Provided that where any person who is required to make an oath professes any faith other than the Christian faith or objects to being sworn, stating, as the ground of such objection, either that ***he has no religious belief*** *or that the making of an oath is contrary to his religious belief,* ***such person shall be permitted to make his solemn affirmation*** *instead of making an oath and such affirmation shall be of the same effect as if he had made an oath."*(Emphasis added).

Further to the above and relevant to the instant case, Paragraph 4 of the First Schedule to the OJPA Rules prescribes a specific form of affirmation by a Pagan. It states:-

"4. Affirmation by pagans, person objecting to making an oath, or persons professing any faith other than the Christian, Moslem or Hindu faith:

"I solemnly affirm that what I shall state shall be the truth, the whole truth and nothing but the truth".

In the instant case PW1 and DW1 professed no any religion hence they were pagans. So, they ought to had been affirmed in the above accord before their evidence was taken.

The need to meet the threshold of section 198(1) of the CPA was discussed in the case of **Mwami Ngura vs Republic**, Criminal Appeal No. 63 of 2014 and **Jafari Ramadhani vs Republic**, Criminal Appeal No. 311 of 2017 (both unreported) when the Court faced an identical situation. In the former case it was stated that:-

> *"...this means that, as a general rule, every witness who is competent to testify, must do so under oath or affirmation, unless, she falls under the exceptions provided in a written law. As demonstrated above one such exception is section 127(2) of the Evidence Act. But once a trial court, upon an inquiry under section 127(2), of the Evidence Act, finds that the witness understands the nature of an oath, the witness must take an oath or affirmation. If this is not done, such evidence must be visited by the consequences of non-compliance with section 198(1) of the CPA.* ***And, in several cases, this Court has held that if in a criminal case, evidence is given without oath or affirmation, in violation of section 198(1) of the CPA, such testimony***

amounts to no evidence in law *(see eg.* ***MWITA SIGORE @OGOREA vs. R.*** *Criminal Appeal No. 54 of 2004 (unreported). The question of such evidence being relegated to "unsworn" evidence does not therefore arise."*

(Emphasis provided).

Since, in the present case, PW1 and DW1 gave their evidence without being affirmed, on the authorities above, their words recorded when they gave testimonies was no evidence at all and, in that accord, we entirely agree with Mr. Mtenga that such evidence deserved not be considered by the court to determine the guilt or otherwise of the appellant. The evidence by PW1 and DW1 is hereby accordingly discarded.

Moving on to the second limb of the issue we raised, we agree with Mr. Mtenga that age is of essence in establishing the offence of statutory rape under section 130(1)(2)(e) of the Penal Code, the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen,(See **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015).

We further agree with Mr. Mtenga that, in the circumstances of the case under our consideration, exclusion of the testimony of PW1, the sole

witness who lead evidence proving age of the victim, seriously affects the prosecution case. There remains no proof of age of the victim. The offence of statutory rape charged against the appellant cannot stand. The prosecution case, as rightly argued by Mr. Mtenga, collapses.

Should we order a retrial or not, is the issue that pops for our determination.

In considering the above issue, we are guided by the principles laid down in the often cited decision by the defunct East African Court of Appeal in the case of **Fatehali Manji vs Republic** [1966] E. A. 341). In that case it was stated that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that, a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made when the interest of justice require."*

The principles stated in the above decision were followed by the Court in the case of **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 (unreported) in which the Court stated:-

> *"We are alive to the principle governing retrials. Generally a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that, an order should only be made where the interest of justice require."*

Failure by the trial court to affirm the appellant (DW1) before recording his defence evidence, similarly affected the appellant. His defence evidence equally suffers from a syndrome of being disregarded. The appellant remains with no defence evidence completely. The situation turns out to be like that of a person who did not defend himself. The right of an accused person to defend himself before his rights are determined is taken or an adverse action is taken by a court of law is a constitutional right as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. To uphold that right in the conduct of criminal trials, section 231(1)(a)(b) of the CPA was enacted. No one else can wish away that right except the appellant himself by expressly opting out not to

render his defence. We, consequently, have no doubts in our minds that failure to affirm the two witnesses rendered the trial defective.

In the instant case, save for the trial court's failure to affirm PW1 and DW1 which anomaly went unnoticed by the first appellate court, the evidence on record do not suggest that anything material was left out or was not presented to the trial court such that the prosecution may fill up during the second trial if an order of retrial is made. And, in a nutshell, the evidence availed to the trial court incriminated the appellant. It is our view, therefore, that justice of the case demands an order of retrial be made.

All said, we invoke our powers of revision under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Edition, 2019 to quash the proceedings and judgments of both courts below, set aside the sentence of thirty (30) years imprisonment meted out by the trial court and sustained by the High Court. The order to suffer sixteen (16) strokes of the cane is also set aside. We direct the trial court record be remitted back so that the trial shall be recommenced before another magistrate from when the infraction first occurred, that is immediately before PW1 gave his testimony. For avoidance of doubt, the proceedings of

27/06/2016 and prior to are not affected. We further direct that, for the interest of justice, both the Republic and the trial court to ensure that a retrial is expedited. Meanwhile the appellant shall remain in remand custody.

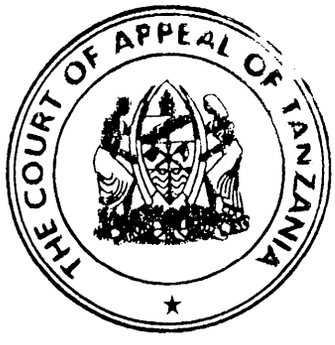
DATED at **MBEYA** this 31st day of March, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 1st day of April, 2020 in the presence of the Appellant in person and Ms. Rhoda Ngole, Senior State Attorney and Ms. Xaveria Makombe State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL