IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 34 OF 2019

SHAIBU NALINGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High of Tanzania at Mtwara)

(Dyansobera, J.)

dated the 10th day of October, 2018

in

(DC) Criminal Appeal No. 16 of 2018

JUDGMENT OF THE COURT

25th & 28th February, 2020

KWARIKO, J.A.:

Formerly, the appellant, Shaibu Nalinga was charged at the District Court of Mtwara with the offence of rape contrary to sections 130 (1)(2)(e) and 131 (3) of the Penal Code [CAP 16 R.E. 2002]. The appellant was accused of having carnal knowledge of his grand daughter 'XY' a girl aged six years, between 11th and 25th October, 2016 at Magomeni area within the Municipality and region of Mtwara. At the end of the trial, the appellant was convicted and sentenced to life imprisonment. His appeal before the High Court was dismissed for lack

of merit. Still aggrieved, the appellant is before this Court on a second appeal.

It is on the Court's record that before the trial commenced, the appellant jumped bail and that court decided to proceed with hearing in his absentia in terms of section 226 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA).

We find it appropriate at this juncture to give a brief background of the case which led to the appellant's conviction. The appellant and one Fatuma Dismas Shima (PW2) are husband and wife respectively while the complainant 'XY' (PW1) is their grand daughter who used to stay with them. At the material time, PW2 was working as a security guard and sometimes she was having night shifts. Whenever she was out on night duty, the appellant used to sleep on the same bed with the complainant. However, on 24/10/2016, PW2 noticed some changes on PW1 as she was even losing weight. She tried to inquire the cause behind the changes but in vain. On 5/11/2016 PW2 returned home and in the course of bathing her, PW1 complained of chest and neck pains. Not only that, but when she poured water in her private parts, she raised alarms and refused to go on with the bathing. Upon further inspection PW2 found wounds between PW1's vagina and anus. That is

when PW1 spilled the beans as she revealed that the appellant had been having sexual intercourse with her whenever her grandmother was on night shifts and used to threaten and cover her mouth to prevent her from raising any alarm.

Upon that revelation, the appellant threatened to divorce PW2 if she persisted with the accusations. He even refused to give his wife money for taking PW1 to hospital insisting that he was the only one to take the child to hospital. However, in the end, PW2 took the girl to hospital without the appellant's knowledge.

At the hospital, Emmanuel Gwerino Mtove (PW4) a Clinical Officer examined PW1 and found bruises in the inner walls of the vagina though the hymen was intact. He concluded that PW1 was penetrated by a blunt object and he filled a PF3 which he tendered in evidence and was admitted as exhibit P2.

At the end of the trial, the appellant was convicted in absentia and sentenced to life imprisonment on 8/12/2016. However, the appellant was arrested and taken to the trial court on 22/01/2018. He was given opportunity to explain his non-appearance during the hearing, but in the end, the trial court found that he had not shown good cause why he had

absconded and that he had no probable defence on merit as per section 226 (2) of the CPA. He was thus committed to prison to serve his sentence effective from 25/1/2018.

In his memorandum of appeal, through his own lay hand, the appellant raised two grounds which we have conveniently paraphrased as follows: -

1. *That, a **voire dire** test in respect of PW1 was not properly conducted.*
2. *That, there was no ruling on whether the prosecution side had established a prima facie case against the appellant.*

When the appeal was called on for hearing, the appellant appeared in person, unrepresented while Mr. Abdulrahman Msham, learned Senior State Attorney represented the respondent Republic.

The appellant elected for the State Attorney to respond to his grounds of appeal first and reserved his right to respond later if need arose.

Mr. Msham did not oppose the appeal. In relation to the first ground of appeal, the learned counsel argued that although the appellant complains that the *voire dire* was not properly conducted in

respect of PW1, this procedure was no longer a legal requirement following amendment of section 127 of the Evidence Act [CAP 6 R.E. 2002] (the Evidence Act), vide the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 which became operative on 8/7/2016 whereas PW1 testified in December, 2016.

It was Mr. Msham's further argument that all the same, at the end of the *voire dire* test, the trial court formed an opinion that PW1 did not know the meaning of an oath and the duty of speaking the truth. It was his submission that being the case, the trial court ought to have required PW1 to promise to tell the truth before she testified which is a mandatory requirement under the new section 127 (2) of the Evidence Act. He argued that had PW1 said she knew the meaning of an oath she would have been sworn and nothing would have prejudiced the case. The learned counsel contended that the omission rendered the evidence of PW1 lack evidential value deserving to be discarded from the record. To fortify his position, Mr. Msham referred us to the case of **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (unreported).

As to whether the remaining evidence is sufficient to sustain the conviction after the discardment of PW1's evidence, the learned counsel argued that PW2's evidence is hearsay while that of PW4 only

established that PW1 was sexually assaulted but did not prove who committed the offence. He wound up by submitting that as the first ground has merit, there was no need to dwell on the second ground. The learned counsel's stance made the appellant's position easy because he had nothing to say in his rejoinder.

Having considered the first ground of appeal and the submission by the learned Senior State Attorney, the issue for our determination is whether the evidence of PW1 was properly taken. Before its amendment vide Act No. 4 of 2016, section 127 (2) of the Evidence Act provided that: -

> *"(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."*

In compliance with the above provision, the courts used to conduct *voire dire* test to establish whether the witness of a tender age understood

the meaning of an oath, had sufficient intelligence for reception of his evidence and understood the duty of speaking the truth. Then came the amendment of that provision through Act No 4 of 2016 which repealed sub-section (2) of section 127 of the Evidence Act and replaced with it the following:

> *"(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 lies."*** (Emphasis ours).

According to this provision, where the court is satisfied that a child of tender age is incapable of giving evidence on oath or affirmation, it should make him promise to tell the truth to court and not to tell lies. Some of the Court's decisions which have interpreted this provision are: **Godfrey Wilson v. R** (supra), **Msiba Leonard Mchere Kumwaga v. R,** Criminal Appeal No. 550 of 2015, **Hamisi Issa v. R,** Criminal Appeal No. 274 of 2018 and **Issa Salum Nambaluka v. R,** Criminal Appeal No. 272 of 2018 (all unreported). For instance, in the case of **Issa Salum Nambaluka** (supra) the Court said thus: -

> *"....under the current provision of the law, if the child witness does not understand the nature of an oath, she or he can still give evidence without taking oath*

or making an affirmation but must promise to tell the truth and not to tell lies."

Now, in the instant appeal, although the trial court conducted *voire dire* test which is no longer a requirement of the law, after it was satisfied that PW1 did not understand the nature of an oath, it ought to have required her promise to tell the truth and not to tell lies. That promise should have been reflected in the proceedings. This was not the case since the trial court just received PW1's evidence without oath with nothing more. This was a fatal irregularity which vitiated PW1's evidence. The Court said in **Godfrey Wilson** (supra) thus: -

"In the absence of 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."

Likewise, in the present appeal, the evidence of PW1 which was taken contrary to the law lacks evidential value and it is hereby discarded from the record. Having expunged PW1's evidence, the remaining evidence is not sufficient to sustain the appellant's conviction. As rightly argued by Mr. Msham, PW2's evidence is hearsay and that of PW4 only proved that PW1 was sexually assaulted but did not prove

who the perpetrator was. With the foregoing analysis, we find the first ground meritorious which is sufficient to dispose of the appeal.

In the event, we allow the appeal, quash the conviction and set aside the sentence meted out against the appellant. We order his immediate release from prison unless his continued incarceration is related to other lawful cause.

DATED at **MTWARA** this 27th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 28th day of February, 2020 in the presence of the appellant in person and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL