IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 551 OF 2020

MATHIAS JOROMINI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Dodoma)
(Mansoor, J)
dated the 24th day of July, 2020
in
Criminal Appeal No. 40 of 2019

JUDGMENT OF THE COURT

20th & 25th August, 2021

MAIGE, J.A.:

In Criminal Case No. 167 of 2018, the appellant was charged, at the District Court of Manyoni ("the trial court"), with the offence of rape c/s 130 (1) and (2) (e) and 131(1) of the Penal Code, Cap. 16, R.E., 2019 ("the Penal Code"). The allegation was that, on 8th day of July, 2018 at or about 02:00 hours at Chinyika- Chibumwanga area within Manyoni District in Singida Region, the appellant had carnal knowledge of PW1, a young girl of 12 years (name withheld). He was convicted and sentenced to 30 years imprisonment. Aggrieved, the appellant faulted the conviction and sentence

to the High Court of Tanzania at Dodoma ("the first appellate court") vide Criminal Appeal No. 40 of 2019. The first appellate court found the appeal devoid of any merit and dismissed it. Still aggrieved, the appellant has attempted a second appeal to the Court.

Before we consider the merit or otherwise of the appeal, a brief factual account underpinning the background of the case may be necessary. On the material date and time, the appellant was at home sleeping. Her father Yohana Mario (PW1) was in another village attending funeral ceremony. Suddenly, the appellant entered her bed room. He undressed her clothes and inserted his penis into her vagina. She felt pain but could not raise an alarm because the appellant had threatened to kill her. She was able to recognize the appellant because she had a torch with her and the appellant spent more than an hour in her room. When the appellant left, she reported the incident to her neighbors who conveyed the information to PW1. Subsequently, PW1 came and found PW2 crying in pain. He also found a gathering of villagers. They were busy tracing the footprints of the suspect which were visible on the ground.

PW1 reported the matter to police and rushed PW2 to hospital. Dr. Titus Ugi (PW4) medically examined the victim and established as per exhibit P1 that, she had been raped. On the next day in the morning, the appellant was arrested by some villagers and taken to police by Akley Simon, a militia at Sasajila village (PW3). The matter was investigated into by DC Amina (PW5) and eventually the appellant was arraigned at the trial court.

In his defense, the appellant denied committing the offence. He said, on the material day during morning, he was informed of the rape of PW2. He went at the scene of the crime with his fellow villagers. He found PW2 who told him that she had been raped during night but she did not identify the offender. On the next day, he was arrested in connection with the crime.

In its judgment, the trial court found the appellant culpable of the offence. It believed the evidence of PW2 as corroborated by PW1 and PW4 as credible and sufficient to establish the offence. The first appellate court endorsed the conviction. In its opinion, there was no reason for the victim to fabricate a case against the appellant considering the fact that

she was his neighbour and treated him as her brother. Like the trial court, the first appellate court dismissed the defense by the appellant for failure to establish that he was absent at the scene of the crime at the material time.

In the memorandum of appeal, the appellant enumerated six grounds. The first ground faults the propriety of admission of the evidence of PW2. The remaining grounds in effect fault the concurrent finding of the lower courts that, the case against the appellant was proved beyond reasonable doubts.

When the appeal came for hearing, the appellant appeared in person and M/s Miyango Kezilahabi, learned State Attorney, appeared for the Respondent.

In his submission, the appellant adopted the grounds of appeal to form part of his submissions. He invited the Court to expunge the evidence of PW2 because she did not promise to tell the truth as the law requires. He submitted further that, as the contents of exhibit P1 was not read out upon being received into evidence, the same was improperly admitted and

should be expunged from the record. He prayed therefore that, the appeal be allowed and he be set free.

In her submissions, M/s. Kezilahabi, supported the appeal in the strength of the first ground. She submitted that, the evidence of PW2 was admitted in total violation of the mandatory requirement of section 127(2) of the Evidence Act Cap. 6 [R.E., 2019], as the record does not show that, PW2 promised, before adducing evidence, to tell the truth and not lies. She placed reliance on the case of **Godfrey Wilson vs. the Republic**, Criminal Appeal No. 168 of 2016. She therefore urged the Court to expunge the testimony of PW2 from the record. She submitted further that, if the evidence of PW2 is expunged, the remaining evidence cannot establish the offence beyond reasonable doubts. She submitted therefore that, since PW2 was a material witness and the impropriety was caused by the Court itself, the Court should, instead of setting the appellant free, order for retrial.

We have considered the parties' submissions. We are in agreement with the learned State Attorney that, the evidence of PW2 was admitted improperly. PW2 is a child of tender age. The procedure for dealing with a

testimony of a child of tender age is set out in section 127(2) of the Evidence Act which provides as follows: -

> *"(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".*

From the provision above, it is apparent that, giving a promise to tell the truth and not lies, is a precondition for admissibility and reliability of the evidence of a child of tender age. As rightly submitted by the learned State Attorney, there is nothing on the record to the effect that PW2 promised to tell the truth. The remarks of the trial magistrate before taking the evidence of PW2 was as follows: -

> *"**Court:** The court complied with Section 26(a) of The Written Laws (Miscellaneous Amendments) (No.2) Act No. 4 of 2016".*

We are of the opinion that, mere saying that the relevant provision of law has been complied with, is not by itself a proof of the compliance of the said precondition. The trial magistrate was obliged upon the child giving the promise, to record the same in the proceedings. There are a

number of decisions supporting this position. One of such decisions is the case of **Godfrey Wilson vs. the Republic** (*supra*), cited by the learned State Attorney. In particular, it was stated as follows: -

> *"Therefore, upon making the promise, such promise must be recorded before the evidence is taken".*

In the circumstance, we uphold the first ground of appeal and expunge the evidence of PW2 from the record.

After expunging the evidence of PW2 from the record, there is no doubt that, the remaining evidence cannot establish beyond reasonable doubts that, it was the appellant who committed the offence. PW1 was absent when the offence was being committed. His testimony on the identification of the appellant is based on what he heard from PW2. Assuming that, the evidence of PW2 remained, yet the same would be doubtful because the evidence of PW1 suggests that, the appellant's arrest by the villagers was not a result of being named by PW2 but by tracing footprints.

The testimony of PW3, the militia, cannot assist anything too. He was not there when the offence was being committed. More so, he is not the one who arrested the appellant. The appellant was arrested by the villagers. His evidence was a mere hearsay. The evidence of PW4 would only be relevant to establish that the offence was committed. It has nothing to link the appellant with the offence.

In our opinion, therefore, the case against the appellant was not proved beyond reasonable doubt. The second ground of appeal is also upheld.

Before we conclude, it is desirable that we remark on whether a retrial is an appropriate order in the circumstance. The submission by the learned State Attorney was that, as the irregularity emanated from inaction of the trial court itself, an order for retrial is inevitable. With all respects to the learned counsel, we are unable to agree with her. The position of law as stated in Fatehali **Manji v. Republic,** [1966] E.A. 343 is such that, a retrial can only be ordered if the irregularity is so serious as to render the whole proceeding of the trial court illegal or defective. It cannot be ordered

if in effect it will enable the prosecution to fill up the gaps in its trial evidence.

In this case, it is only the evidence of PW2 which had been improperly received. The defect in the said piece of evidence in our view does not render the whole proceeding of the trial court defective or illegal. As held in **Godfrey Wilson v. the Republic**, ((s*upra*), the effect of the evidence being improperly admitted is to make the same with no evidential value. The proper way forward, as observed in the decision just referred, is to have the irregularly admitted evidence removed from the record, as we did. After such a removal, the Court is obliged to consider the appeal in line with the remaining evidence. It does not matter, in our view, whether the respondent had a role in the improperly admission of the evidence. This has been the practice of the Court and we find no reason to decide otherwise. See also instance, **Jafason Samwel v. the Republic,** Criminal Appeal No. 105 of 2006 (unreported), **Faraji Said v. Republic**, Criminal Appeal No. 172 of 2018 (unreported) and **Osward Charles v. Republic**, Criminal Appeal No. 223 of 2017.

Having said so, the appeal is hereby allowed. We consequently quash the conviction and set aside the sentence imposed against the appellant. We order that the appellant be released forthwith from prison custody unless he is held for some other lawful cause.

Order accordingly.

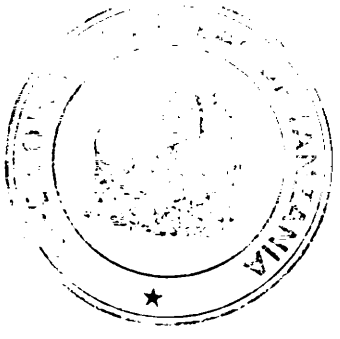
DATED at **DODOMA** this 24th day of August, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered on 25th day of August, 2021 in the presence of the appellant in person and Mr. Matibu Salum, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL