IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., GALEBA, J.A And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 137 OF 2018

BUNDALA MAKOYE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania

At Mwanza)

(Gwae, J.)

in

Criminal Appeal No. 85 of 2017

RULING OF THE COURT

27th April, & 12th May, 2022

RUMANYIKA, J.A.:

On 8/4/2016, Bundala Makoye, the appellant was arraigned in the District of Court of Misungwi, the trial court and charged with rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap.16 R.E. 2002; now R.E 2019] (the Code). The prosecution case had it that on 26/04/2016 at about 06.00 hrs at Mwamazengo Village in Misungwi District, Mwanza Region, the appellant had canal knowledge of a 14 years old girl, who, for the purpose of concealing her identity we shall refer to her as the victim. On 15/11/2016, he was convicted as

charged and was ordered to suffer a custodial sentence of thirty years. Aggrieved by the conviction and sentence, he appealed to the High Court (Gwae, J) but lost. He was aggrieved by that decision, and, before us he is appealing against it.

In a bid to establish their case, the prosecution had three witnesses. PW1 was the victim who stated that as she was, early in the material morning still in bed, her step father, the appellant stormed in her bed room, he grabbed and raped her while threatening to kill her should she cry for help. Meanwhile, her mother, PW2 entered the room and caught the appellant infragrante delicto. PW2 supported PW1's evidence that when the appellant went to the victim's bed room to awaken her up to go to school, however, it took him unreasonably long to come back to the master bedroom. That, raised suspicion whereupon she rushed into the victim's bed room only to find the appellant in the agony of the moment because the latter had just satisfied his sexual desires on the victim. PW2 further stated that her brother, mother, the local Chairman and Ward Executive Officer arrived in answer to the alarm raised. Then they reported the case to the police who issued the PF3 to the victim. At Lubili hospital the PF3, Exhibit P1 was filled in, establishing that indeed the victim had carnally been known. PW3,

F.183 Detective Corporal Benson is the one who investigated the matter and interrogated the appellant but the latter denied committing the crime. DW1, the appellant was the sole defence witness and had a few words. He denied the charges or involvement in committing the offence. The trial court believed the victim and PW2 as credible and witnesses of truth. On first appeal, the High Court found that exhibit P1 was improperly admitted and expunged it from the record for contravention of the provisions of section 240(3) of the Criminal Procedure Act [Cap. 20 RE 2002; now 2019] (the CPA). However, the learned High Court Judge held that the remaining prosecution evidence was enough and the conviction was sufficiently premised. He did not fault the trial court generally. As said earlier, the appellant is aggrieved by the decision, subject of this appeal.

The appellant has four grounds of appeal, which in the interest of convenience we will not reproduce them. They revolve around, and boil down to the following points:

(1) (a) That, the impugned conviction is against weight of the evidence on record.

(b) That none of the neighbours who arrived at the crime scene in answer to the alarm raised was called as a

witness, in which case the trial court ought to have drawn an inference adverse to the prosecution.

(c) *That the victim, if at all had been raped by the appellant three times and acquiesced, the trial court should have declared her unreliable and incredible witness.*

(2) *That the two courts below erred in law and in fact for not discounting the testimony of PW2, the victim's mother for being biased.*

At the hearing, Ms. Sophia F. Mgassa, learned State Attorney appeared for the Respondent Republic, whereas the appellant appeared in person.

Just before the appeal took off, Ms. Mgassa had a point of law upon which to address us first. She contended that, contrary to the provisions of section 198 (1) of the CPA, PW1, PW2 and DW1 did not swear before giving their evidence and the trial court recording it. She submitted that, in effect the omission rendered the evidence adduced as good as no evidence at all. For that reason, Ms. Mgasa beseeched the Court to nullify the proceedings of the two courts below, quash the subsequent conviction, set aside the sentence and accordingly remit the record to the lower Court with the direction that the evidence of PW1, PW2 and DW1 be recorded according to law. To bolster her

argument, she cited our decision in the case of **Nestory Simchimba v. Republic**, Criminal Appeal No. 454 of 2017 (unreported).

On his part, being a lay person, the appellant had no useful submission to make. He just urged us to allow his appeal and order restoration of his liberty.

For our determination, the issue is whether, for the reason of PW1, PW2 and DW1 having not sworn vitiated their evidence and the resultant decision. In this case as vividly noted from pages 8-11 and page 18 of the record of appeal, it is clear that the said three witnesses gave unsworn evidence. Section 198 (1) of the CPA is relevant in the circumstances. It provides thus:

> "***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.* (Emphasis added).

In the instant case, the record glaringly indicates that except for DW1 whose professed religion is on record not disclosed, PW1 and PW2 professed Christianity. Unless they chose not to, which is not the case,

the latter should have sworn first instead of giving plain evidences as they did.

This Court tested the mandatory provisions of section 198 (1) of the CPA and the effects of its noncompliance in **Mwami Ngura vs. Republic**, Criminal Appeal No. 63 of 2014 and **Jafari Ramadhani v. Republic**, Criminal Appeal No. 311 of 2017 (both unreported). For instance in **Mwami Ngura** (supra) we stated as follows: -

> "*... **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 such exception is section 127 (2) of the Evidence Act.*
>
> *... in several cases, this court has held **if in a criminal case, evidence is given without oath or affirmation, in violation of S.198(1) of the CPA, such testimony amounts to no evidence in law.** (see: **Mwita Sigore @ Ogorea vs. Republic**, Criminal Appeal No. 54 of 2004 (unreported).* (Emphasis added)."

Since, as said earlier on, in the instant case, PW1 and PW2 gave their evidence without being sworn, as it happened in the case of

Nestory Simchimba (supra) also in a number of cases that followed. In the circumstances, as we held in the case of **Nestory Simchimba** (supra), we hold that the evidence of PW1, PW2 and DW1 amounts to no evidence in law. Next for our consideration is the way forward. Ms Msasa urged us to nullify the proceedings related to the evidence of the said three witnesses, quash the decision, set aside the sentence and order a retrial. Before we consider her submission, we are mindful of the fact that where a trial *de novo* is ordered, there are possibilities for the parties to fill up the gaps, if any. We nevertheless, are guided by the legal principles enunciated in the popular decision of the defunct East African Court of Appeal in **Fatehali Manji vs. Republic** (1966) E.A. 341, where it was stated as follows: -

> *"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".*** [Emphasis added].

Having been encountered by the above stated problem, to answer the issue whether or not to order a retrial, in **Selina Yambi and Others vs. Republic**, Criminal Appeal No. 94 of 2013 (unreported) we borrowed a leaf from **Fatehali Manji** (supra) and held as follows: -

> *"We are alive to the principle governing retrial. Generally a retriai 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 be made where the interest of justice so required..."*

We entertain no doubts, in the instant case to hold and declare that the trial court's failure to have PW1, PW2 and DW1 sworn before their evidence was recorded, rendered such evidence unauthentic and unreliable hence no evidence in law.

We have gone through the evidence, based on the above stated reasons albeit illegally recorded and we are satisfied that the interests of justice require that we order a retrial.

However, we need to say a word or two in passing that the mandatory requirement of oaths or affirmation as the case may be is for a purpose. We think chances are minimal for God fearing people to tell lies in extra judicial forums or in witness boxes in the courts of law for that matter. It is presumed that a person who takes oath or affirmation lies, he is taken to have risked to be punished by the Almighty God or, if a pagan offended his own god, and they are ready to receive the deserving punishments. Not notwithstanding the popular joke that a person holding a Holly Quran in mosque or Bible in church might tell lies, not a person who is holding a glass of liquor in the bar!

When all is said and done, we are constrained under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] as we hereby do, with respect to the evidence of PW1, PW2 and DW1 adduced at pages 8-10 and 18 of the record of appeal nullify the respective proceedings of the two courts bellow and order a retrial. For avoidance of doubts therefore, the other part of the proceedings remains undisturbed.

Should the appellant's conviction survive the retrial, the period of custodial sentence so far served by the appellant be taken into account. In the meantime, the appellant shall remain in remand custody. We further direct that the trial court shall conveniently expedite the retrial ordered.

Order accordingly.

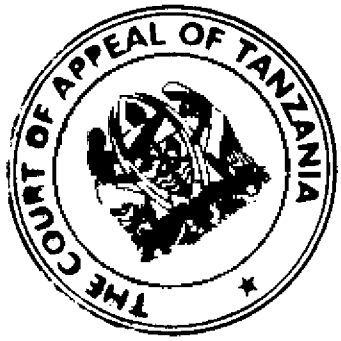
DATED at **MWANZA** this 12th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 12th day of May, 2022 in the presence of the Appellant in person and Mr. Emmanuel Luvinga, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL