IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 262 OF 2020

(CORAM: MUGASHA, J.A., KENTE, J.A. And MASHAKA, J.A.:)

PASCHAL NDALAHWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Mdemu, J.)

dated the 15th day of July, 2019

in

Criminal Appeal No. 181 of 2016

JUDGMENT OF THE COURT

5th & 12th July, 2023

KENTE, J.A.:

This appeal arises from the judgment of the High Court (Mdemu J. as he then was), sitting at Mwanza, in Criminal Appeal No.235 of 2018. Initially, the appellant namely Paschal Ndalahwa appeared before the District Court of Magu where he was convicted of the offence of rape contrary to section 130(1),(2)(e) and 131(1) of the Penal Code, Chapter 16 of the Revised Laws and subsequently sentenced to thirty years imprisonment. Dissatisfied, he appealed in vain to the High Court which affirmed both the conviction and sentence.

Continuing to protest his innocence, he has appealed to this Court citing ten grounds of complaint.

For the reasons which will come to bare in the course of this judgment, and for the sake of clarity and benefit of the appellant who is a layman with no legal representation, we shall consider only the first ground of appeal which mistakenly challenges the first appellate court for allegedly relying on the evidence of the victim (PW1) which was received in violation of section 127(2) of the Evidence Act, Cap.6 of the Revised Laws (hereinafter the Evidence Act) together with the tenth ground of appeal which faults the first appellate court for upholding the appellant's conviction and sentence notwithstanding the fact that his guilt was not proved to the required standard.

The facts of this case as accepted by the trial and the first appellate court were briefly to the following effect: The appellant and the complainant whose identity we shall hereinafter conceal and simply refer to as either the victim, the child victim, or PW1, were up to the time which is material to the occurrence of this dispute, living together at Kayenze Village in Magu District Mwanza Region. On 25th August, 2016 the appellant who was related to the victim and was living with her in the same compound, is said to have called and taken her to his house where he stripped her naked and went on to have sexual intercourse with her.

Upon fulfilment of his seemingly irresistible sexual urge, he gave her a piece of candy telling her that she was his daughter. Thereafter the appellant escaped to Nyashimba Village and, on being traced and arrested, upon interrogation, he allegedly confessed to have committed the offence of which he was ultimately convicted.

Before the trial court, the appellant denied the offence in the strongest possible terms whereupon, a full trial was held. At the conclusion of the trial, he was found guilty as charged and sentenced to the mandatory thirty years imprisonment as stated earlier.

At the hearing of this appeal, the appellant who appeared in person fending for himself had nothing substantial to expound on his grounds of complaint. He only invited us to consider the said grounds as presented and allow the appeal.

On her part, Ms. Lilian Meli learned State Attorney who appeared along with Messrs. Deogratias Rumanyika and Benedicto Ruguge learned State Attorneys to represent the respondent/Republic appeared to be wavering in her position. Making her submissions on the first ground of appeal, Ms. Meli conceded that, indeed the evidence of the victim who was a child of tender age as provided for under section 127(5) of the Evidence Act, was received in total violation of the law as she was neither sworn nor made to promise to tell the truth and not to tell lies in terms of section

127(2) of the Evidence Act. In the circumstances, the learned State Attorney prayed that the evidence of the child victim which was received in violation of the law should be expunged from the record for lack of evidential value.

However, as if Ms. Meli did not sincerely believe in the position which she had taken, immediately thereafter and in an unexpected turn of events, she contended that, the same evidence of the child victim could be saved and subsequently acted upon in terms of what we held in our decision in the unreported case of **Wambura Kiginga v. Republic**, Criminal Appeal No.301 of 2018.

Regarding the appellant's hotly contested cautioned statement, which he made to Detective Corporal Dafroza (PW7) which was relied on by the two lower courts to support his conviction, after we drew Ms. Meli's attention to the procedure adopted by the trial magistrate who allowed the witness (PW7) to give oral testimony on the statement's material contents before its admission in evidence contrary to the established practice, the learned State Attorney conceded that indeed the contents of the said statement were unprocedurally introduced in evidence when PW7 was allowed to narrate what the appellant had allegedly told her during interrogation before his statement was formally admitted in evidence. The learned State Attorney was of the unhesitating opinion that, the appellant's

confessional statement was received in evidence not in accordance with the established procedure and thus, it ought to be disregarded.

Even though, not-withstanding the above-mentioned short falls in the prosecution case, Ms. Meli still maintained that there was enough evidence to support the appellant's conviction. Keeping in mind the fact that, a medical examination report (Exhibit P1) tendered by Doctor Wilbroad Kahumuza (PW3) who examined the victim and established that she was raped, was equally problematic as it was not read out in court after being admitted in evidence, Ms. Meli sought to rely on PW3's oral testimony which is materially similar and to the same effect as what PW3 had told the trial court orally. Asked if the oral testimony of the medical expart could shed some light on the identity of the culprit, the nail-biting learned State Attorney returned a negative answer but still believed that she could triumph in this tough going legal tussle.

In determining the appellant's mistaken complaint together with the correctness or otherwise of the learned State Attorney's arguments, like the first appellate court, we start with section 127(2) of the Evidence Act which provides thus:

> *"(2) A child of tender age may give evidence without taking oath or making affirmation* ***but shall, before giving evidence, promise to tell***

the truth to the court and not to tell lies"

[Emphasis added]

Following the amendments of S.127(2) of the Evidence Act through Act No.4 of 2016 which brought about the above-quoted changes in the law and simultaneously did away with the requirement to conduct **voire-dire** test before receiving the evidence of a child witness, there are cases galore dealing with non-compliance with the new requirements of the law some of which were referred to by the learned first appellate judge. For instance, in the case of **Yusufu Molo v. Republic**, Criminal Appeal No. 343 of 2017 (unreported), we issued a categorical statement that:

> *"What is paramount in the new amendment, is for the child witness before giving evidence to promise to tell the truth to the court and not to tell lies. That is what is required. It is mandatory that such a promise must be reflected on the record of the trial court. If such a promise is not reflected on the record, then it is a big blow in the prosecution case."*

With regard to the pertinent question as to how the trial court can lead a child witness to that stage, our guidance in the case of **Godfrey Wilson v. Republic**, Criminal Appeal No.168 of 2018 (unreported) was that:

"We think, the trial magistrate or Judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:

1. *The age of the child*
2. *The religion which the child professes and whether he/she understands the nature of oath*
3. *Whether or not the child promises to tell the truth and not to tell lies."*

Like in the case of **Yusufu Molo** (supra), our emphasis in the case of **Godfrey Wilson** (supra) was that, the child's promise to tell the truth must be recorded before the evidence is taken. We also emphasized that, in the absence of such a promise, the evidence of the child witness will not be properly admitted in terms of section 127(2) of the Evidence Act, and, as a consequence, it will have no evidential value.

Coming to the specifics of the instant case, the following is what transpired immediately before the child witness who was then aged ten years gave evidence:

"PW1 .....10 years old, Sukuma of Kayenze village, Christian

voire dire conducted

What is your name? My name is.....

Court

How old are you?

Witness

I am 10 years old

Court

What is your father's name?

Witness

My father' name is .....

Court

Where are you coming from?

Witness

I am coming from Kayenze village

Court

After conducting a voire dire examination I am of the view that the witness understands the questions put on her but she knows the meaning of taking oath and the court has taken her oath and she states".

It must be noted from the above-quoted excerpt that, apart from the fact that a voire dire test is no longer a requirement of the law, the questions put to PW1 by the trial magistrate were solely, intended to test her knowledge on self-introduction. There is nothing suggesting, albeit in the least that, the child witness was led by the trial magistrate to make a promise to tell the truth and not to tell lies before she went on testifying as required by law.

Upon the above omission by the trial court, it follows in our judgment that, as correctly maintained by the appellant and readily conceded by Ms.

Meli, the testimony of the child victim has no evidential value as it was improperly admitted in evidence contrary to section 127(2) of the Evidence Act.

Now, what appears to have confused the draftsman of the appellant's memorandum of appeal as to believe that the evidence of the victim was relied on by the 1st appellate court, is the omission by the first appellate judge to clearly state in his judgment that he had expunged the evidence of the victim from the record after he correctly reached to the conclusion that the said evidence was wrongly admitted. For, what appears at page 80 of the record of appeal shows that, having made a finding that the mandatory provisions of section 127(2) of the Evidence Act were not complied with by the trial court, the learned judge then posed a pertinent question thus; What value does the evidence of PW1 have under the circumstances? The learned judge then proceeded to answer that question by quoting what this Court said in **Godfrey Wilson** (supra) thus:

> *"In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. 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. Since the crucial evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of sustaining the conviction. In the circumstances, we find the 4th ground of appeal to be meritorious and hence we sustain it."

With due respect, we think what the learned judge of the first appellate court did, was not enough. For the avoidance of doubt and for the sake of completeness, he ought to have gone further and expressly expunged the evidence of PW1 from the record as a final word on the matter. Stepping into his shoes, we proceed to expunge the said evidence from the record for having been received in violation of the law.

Next on our list to consider, is the appellant's confessional statement (Exhibit P2) which was admitted in evidence after its contents were narrated in court by PW7 the recording Police Officer, contrary to the established norm. Upon a careful reading of the applicable law, we are left with no doubt that it was quite wrong for PW7 to narrate the contents of the appellant's cautioned statement to the trial court before it had been cleared for admission. (See **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R. 218, **Ntobangi Kelya and Another v. Republic**, Criminal Appeal No. 256 of 2017 and **Omari Said @ Mami**

and Another V. Republic, Criminal Appeal No.99/01 of 2014 (both unreported)

Another disquieting feature in the appellant's cautioned statement which appears to have escaped the attention of the two lower courts is the undisputed fact that it was recorded after expiry of the prescribed period. We say so because section 50(1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA) which prescribe the period available for interviewing a criminal suspect who is under the custody of the Police provides in no ambiguous terms that:

> *"(1) For the purposes of this Act, the period available for interviewing a person who is in restraint in respect of an offence*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence"*

However, section 51(a) and (b) of the same Act permits extension of the beginning of interviewing period to be beyond the prescribed four hours upon reasonable cause for delay being furnished. Such extension may be made either by a police officer incharge of investigation of the offence or by a magistrate upon application. (See **Janta Joseph Kamba**

and Three others V. Republic, Criminal Appeal No. 95 of 2006 (unreported).

In the instant case, the fact that the appellant's cautioned statement was recorded far beyond the four hours period after he was formally taken into restraint by the police and that there was no extension of such period as required by law, cannot be gainsaid. According to PW7, whereas the appellant was arrested and taken into restraint by police on 9th September, 2016, she recorded his statement on 10th September 2016. This evidence is partly supported by Isack Mashomari (PW5) who told the trial court that the appellant was arrested and taken to the Police Station at Magu on 9th September, 2016. The same version was repeated by the appellant that he was arrested on 9th September, 2016 but his statement was recorded on 10th September, 2016.

Quite clearly, that was in total violation of the mandatory requirements of section 50(1)(a) of the CPA as to render the appellant's cautioned statement as having been illegally obtained. In the circumstances and for the above two reasons, we should find that the appellant's cautioned statement was wrongly admitted in evidence. We accordingly expunge it from the record.

In the final analysis and for the reasons we have given, we find the appeal to have merit and it is hereby allowed. For want of sufficient

evidence, the conviction is quashed and the sentence of thirty years imprisonment meted out on the appellant is set aside. Unless he is retained on account of some other lawful cause, the appellant is set at liberty.

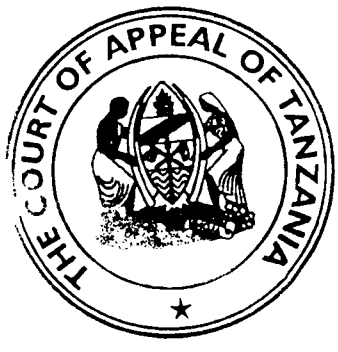
DATED at **MWANZA** this 11th day of July, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of July, 2023 in the presence of the Appellant in person, and Mr. George Ngemela State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL