IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 163 OF 2020

RASHID SALEHE SHABAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Moshi)

(Massati, RM Ext-Juris)

dated the 20th day of March, 2020
in
Criminal Appeal No. 2 of 2020

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JUDGMENT OF THE COURT

22nd & 26th September, 2023

MAIGE, J.A.:

The appellant was convicted by the District Court of Hai of the offences of rape contrary to section 130(1) (2) (c) of the Penal Code [Cap. 16 R.E] and unnatural offence contrary to section 154 (1) (a) of the same Code. He was sentenced to 30 years imprisonment for each of the offences. On appeal, the Resident Magistrate of Moshi presided over by a Resident Magistrate's Court with extended jurisdiction aside from confirming the conviction, enhanced the sentence to life imprisonment.

The appellant still believes that he was not rightly convicted and sentenced and thus the present appeal.

In accordance with the charge sheet, the two offences were committed on 23rd July, 2018 (the material date) at Kimashuku village within Hai District in Kilimanjaro Region. It was against a girl of 5 years (PW1). On the material date, PW1 testified, while on her way from school, the appellant appeared and took her to a maize field where he removed her clothes and inserted his penis into both her private parts. On arriving home, it was in her evidence, she informed her mother one Pendo Wilfred Shalua (PW3) as to what had happened.

In connection to that, PW3 attested that, on the material date at noon hours while at home, she heard the victim narrating to her younger sister Angela (PW2) about the incident while portraying the identity of the culprits as a young man who used to cut grasses for feeding cows. From that information, she eventually established that the named person was the appellant. Soon thereafter, she reported the incident to the police and rushed the victim to hospital for examination. Upon the victim being examined by Dr. Victor Jeremiah (PW5), it was established as per exhibit P1 that she had been raped and sodomised.

PW2 who was a child of 2½ years claimed to have been informed by the victim, on the material date, while playing that, the latter had shared love in a corn field with someone as she was coming from school. On cross examination, she told the trial court that, "Those wazungu are the ones who did so."

On his part, the appellant denied the charges. In his testimony in defence, he informed the trial court that he was arrested on 4th July, 2018 at home while planting grasses. He was taken to the police where he was incarcerated for four days before being produced to the trial court. He said, he did not know the victim before. At the police, he said, the victim identified him after being shown by her mother.

The trial court believed the evidence of PW1 to be nothing but true. In its view, it was next to impossible for a young girl of five years to manufacture a story about what happened to her. In addition, the trial court took it that, the victim's evidence was duly corroborated by the testimony of PW2, PW3 and PW5. Having observed that, the trial court convicted the appellant and sentenced him as afore stated, the first appellate court entirely concurred with the conviction and, as we said, enhanced the sentence to life imprisonment. In the memorandum of

appeal, the appellant has raised seven grounds to fault the concurrent decision of the two courts below.

In the third and fourth grounds of appeal, the appellant criticized the two courts below for convicting the appellant based on the incredible evidence of the victim which was incapable of proving the case beyond reasonable doubt.

The appellant who personally prosecuted the appeal, did not, when he was called upon to address the grounds of appeal at the hearing date, make any submission. Instead, he fully adopted the grounds of appeal and urged the Court to allow the appeal.

On the other hand, the respondent Republic had the services of Ms. Revina Tibilengwa, learned Principal State Attorney who was assisted by Ms. Eliainenyi Njiro, learned Senior State Attorney. Right from the outset, Ms. Njiro who presented the oral arguments for the respondent informed us that, the respondent was supporting the appeal to the extent of the 3rd and 4th grounds of appeal with the effect that; the evidence of PW1 upon which the appellant was convicted was so incredible that it could not prove the case beyond reasonable doubt. Before she went further submitting in substantiation of those grounds

however, we requested her to address us on the evidential status of the statement of PW1 in relation to compliance or otherwise of the requirements under section 127(2) of the Evidence Act.

In response, she submitted that the conditions in the respective provisions were not complied with. She clarified that, while it is the law under section 127(2) of the Evidence Act [Cap.6 R.E] that, evidence of a child of tender age which is taken without oaths or affirmation cannot be received and relied upon without the child expressly promising to tell the truth, it was her observation that, such requirement was not observed as there is nothing on the record suggesting that PW1 did promise to tell the truth. Equally so for PW2 who like the victim was a child of tender age. She submitted therefore that, since such evidence was received in violation of the law, it is bound to be discarded. Once discarded, she submitted, there remains nothing but mere hearsay. In any event, she submitted, the evidence of PW1 and PW2 was tainted with material contradictions which would inevitably affect its credibility and probity. She thus urged us to allow the appeal and set the appellant free. As we expected, the appellant had nothing to submit in rejoinder.

On our part, having fittingly pondered the submission of the learned counsel and, upon careful examination of the record, we find ourselves unable to do without agreeing with her that, the evidence of PW1 upon which the appellant was convicted does not qualify as evidence for non-compliance with the pre-conditions under the provisions in question. As the record speaks, PW1 was a child of five years when she was testifying. She was, therefore, a child of tender age. As correctly submitted for the respondent, admission of evidence of such kind of a person is regulated by section 127(2) of the Evidence Act which provides that:

> *"(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".*

It is plain from the above provision that, giving a promise to tell the truth and not lies, is a condition *sine qua non* for admissibility and reliability of the evidence of a child of tender age which is given without oaths or affirmation. Like the learned counsel, we have examined the record and satisfied ourselves that indeed, PW1 did not, before giving

her testimony, promise to tell the truth. Equally so for PW2 who was 2 ½ years old as she was testifying.

We noted however that, the trial magistrate, before receiving the evidence of PW1, sweepingly stated that the witness promised to tell the truth. With respect, that by itself cannot amount to compliance with the requirement. In our judgment, the trial magistrate should have, before taking such evidence without oaths or affirmation, caused the child to promise to tell the truth and the words constituting the promise recorded. We have consistently said that in a number of pronouncements. Suffice it to mention the case of **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (unreported) where we remarked:

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

In the circumstances, we expunge the evidence of PW1 and PW2 from the record of appeal. We agree with the learned counsel that after expunging such evidence, what remains in the record is nothing else other than a mere hearsay unworthy of being relied upon to sustain conviction.

In the final result, we allow the appeal to the extent of the third and fourth grounds of appeal. We thus quash the conviction of the appellant and set aside the sentence. The appellant is to be released from prison forthwith unless he is otherwise lawfully detained.

DATED at **MOSHI** this 23th day of September, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 26th day of September, 2023 in the presence of the appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Ms. Eliainenyi Njiro, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL