THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 34 OF 2020

(Originating from Criminal Case No. 78/2017 Appeal from decision of the District Court of Rungwe at Tukuyu)

ENOCK S/O NDAKASIME MWALUBANDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: *23/03/2020*
Date of Judgment: *13/05/2020*

NDUNGURU, J.

The appellant, Enock Ndakasime Mwalubanda was charged and convicted by the District Court of Rungwe at Tukuyu of the offence of rape contrary to Sections 130 (1) (2) (e) and 131 (3) (a) of the Penal Code, Cap 16 Revised Edition 2002. It has been alleged before the trial court that the appellant on unknown dates and time between March to

April, 2017 at Alanzi - Ndato village within Rungwe District Mbeya Region did have carnal knowledge to one JJM a girl of 7 years old.

To prove their case, a prosecution side paraded three witnesses including JJM, the victim who gave her unsworn testimony. I shall refer to her interchangeably as JJM or PW3.

Before embarking on the merits of appeal, I deem appropriate to give albeit a brief background of the case which led to the appellants conviction.

The incident took place at Alanzi Ndato within Rungwe District. PW1 Bahati George and PW3 the victim resides in that area. On the fateful unknown dates, between March and April, 2017, the appellant who is the victims step father, usually stays at home, took advantage of having carnal knowledge with the victim continuously when she arrives from school. PW1 used to sell bans hence she is frequently absent from home. It would appear that the appellant took that advantage and started undressing PW3's underwear, thereafter took his male organ and inserted it to her vagina. The appellant threatened JJM not to disclose it to any one or lest she will be beaten.

On 16th day of April, 2017, PW1 and the appellant while whirling under their ongoing matrimonial dispute, separated each other, forcing

PW1 and her children to live with their grandmother. On that date JJM refused to have bath, complained to her mother that the appellant has raped her. PW1 was prompted to examine her own daughter by the aid of torch light and discovering that something wrong has happened to her. Some blood was coming out. The matter was reported to the village chairperson and Police at Igogwe. Later, PW3 was taken to hospital at Igogwe for medical examination.

The appellants defence was a general denial of a liability. He insisted that he divorced with PW1 after some misunderstandings. He added that the victim complained being raped when she was living with her grandmother. He was wondering on why he was arrested on April, 2017 for allegations of rape while he did not commit such act.

The trial court acting on the evidence of PW1 and PW3 as well as medical opinion as documented in PF3, held that the case has been proved beyond reasonable doubt that JJM was carnally known by the appellant. As to who is the perpetrator of the crime was, the learned trial magistrate acknowledged JJM's evidence as credible and that it was sufficient proof that the appellant is the perpetrator. The learned trial Magistrate was unconvinced by the appellants defense of denial and the contention that JJM complained being raped after his divorce with PW1.

The appellant was, subsequently, charged and convicted with the offence of rape and was bestowed with life imprisonment in jail.

The appellant was therefore aggrieved with the decision, conviction and sentence metered at the trial court. He rushed to this court armed with five grounds of appeal to the effect that, **One** the exact date of the alleged offence was not stated; **Two,** the victim of rape did not report the alleged offence of rape at first opportunity; **Three,** the doctor (PW2) did not say when the alleged rape had occurred; **Four**, there had been bad relationship between the two witnesses and the appellant; **Five,** the conviction of the appellant was against the weight of evidence which was in favor of the appellant.

With the leave of the court, both parties consented to file their written submissions in support and against the appeal. In brief, the appellant in referring to his first ground of appeal insisted that the charge does not specify the exact date when the offence was committed. To substantiate his argument, the appellant requested the court to refer the case of **Sanke Donald @ Shapanga vs. Republic,** Criminal Appeal No. 408 of 2013 and the case of **Ryoba Mariba @ Mungare vs. Republic**, Criminal Appeal No. 74 and **Christopher Rafael Maingu vs. Maingu**, Criminal Appeal No. 222 of 2004 (both

Unreported). The appellant was of the view that he was left in total darkness as to which date the offence was committed, praying to be acquitted.

In submitting to his second ground of appeal, the appellant stated that the victim did not report the alleged offence at the earliest opportunity contrary to what has been held in the case of **Marwa Mwita and another vs. Republic (2002) T.L.R 39** at page 43. For the appellant, the victim would not have reported the matter, if there was no separation between them.

The appellant abandoned his third ground and went straight to his fourth ground stressing that the evidence of witnesses with bad moral characters should only be believed with circumspection. He backed up his arguments by relying on Section 164 (1) (d) of the Evidence Act, Cap 6 Revised Edition 2019. He ended up his submissions by stating that the weight of evidence used to convict the appellant was insufficient praying for the court to allow his appeal, quashing the sentence entered by the trial court and be set free.

Replying, Ms. Zena James strongly insisted that the trial court was correct in convicting the appellant on the offence of rape. The learned State Attorney went on to state that failure to name exactly the date is

not fatal since the accused did not raise any doubt that during such period, he was no longer at the area of the incident.

In replying to the second ground of appeal, the learned State Attorney submitted that the records show that PW1 was informed about the incident by PW3 after having separated with the appellant fearing that she will be beaten. The learned State Attorney in dealing with the third ground insisted that failure by the medical doctor (PW2) to state when the alleged rape had occurred is not fatal. For her, the best evidence is from the victim whereas the doctor's evidence is just an expert opinion that does not bind the court. To fortify her position, Ms. Zena James referred to this court the case of **Seleman Makumba vs. Republic (2006) T.L.R (2006) at page 384**. The learned State Attorney concluded by stating that the appellant was properly convicted because the victim's evidence was credible.

After having considered the rival submissions, I wish to start with the first ground of appeal raised by the appellant. In his submission, the appellant took a significant time to convince the court that failure to show the exact time and date when the offence was committed has occasioned injustice as he was left in total darkness. The respondent through the reign of Ms. Zena strongly resisted the appellant's version

with the reasoning that failure to name the exact date when the offence was committed is not fatal. Without being detained much on this, I think the **Ryoba Mariba @ Mungare vs. Republic (supra)** cited by the appellant is distinguishable from the facts of this case. In **Ryoba Mariba @ Mungare vs. Republic (supra)**, the court held that there was no evidence to prove that Ryoba committed the offence of rape against the complainant on 20/10/2000.

In our instant case, the facts are dissimilar. There is iota of cases to signify that failure to mention specific date or time is not fatal at all as to render the charge impotent. To get more emphasis, I will at this occasion, replicate the Provisions of Section 234 (3) of the **Criminal Procedure Act, Cap 20 R.E 2002** which provides as follows:

> **234 (3)** *variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by the law for the institutions thereof.*

From the wordings of the cited provisions of the law, it is intensely clear that it is no longer fatal if the specific date and time is not indicated in the charge. What matters **is** the credibility and the weight of

evidence adduced by the witnesses. I do not see any failure of justice due to the omission by the respondent to state the exact date and time when the charge was rested against the appellant at the trial court. This ground of appeal therefore lacks merit to be entertained by this court.

Before venturing to the other grounds of appeal, I must admit that there is an error prompted by the trial court when recording the evidence of PW3. Upon having perused the trial court records, I noted that Section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016 was not been complied with by the trial court. Unfortunately, neither the appellant nor the learned State Attorney addressed the court basing on this irregularity.

Previously, In terms of Section 127 (2) of the Evidence Act, a child of tender age could testify on oath or not on subject to conducting a competency test known in legal parlance as *voire dire*. I am alive that Section 127 (2) of the Evidence Act, Cap 6, R.E 2002, prior to the amendment, required the trial magistrate who conducts *voire dire* test to indicate whether or not the child of tender age understands the nature of oath and the duty of telling the truth, and if he is possessed of sufficient intelligence to justify the consideration of her evidence. However, in the wake of the 2016 amendment through Act No. 4 of

2016, subsections (2) and (3) of Section 127 of the Evidence Act were deleted and substituted with subsection (2) in the following manner:

> ***(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 added]*

It appears that at page 18 of the typed proceedings that, when the victim was giving her testimony, there are no questions raised to show that they were imposed by the court in order to determine on whether she has the ability to tell the truth and not lies. The trial Magistrate simply recorded as follows:

> ***Court: PW3 has been addressed by the Court in terms of Section 26 (a) of the Written laws (Miscellaneous Amendments) (No. 2) Act 2016 ad stated the following;***
> ***PW3: I know the meaning of taking an oath is to speak the truth. I promise to this court that I will speak what really happened on the date of incident.***

In the instance case, the charge and the victim's mother (PW1) clearly shows that the victim was seven at the time when she was raped. As it was stated in **Godfrey Wilson vs. Republic**, Criminal Appeal No. 168 of 2018, Court of Appeal of Tanzania at Bukoba, Section

127 (2) as amended, provides two conditions. **First**, it allows a child of tender age to give her evidence without oath or affirmation and **Secondly**, before giving evidence, such child is mandatorily required to promise to tell the truth and not to tell lies.

There is no gainsaying that the trial magistrate did not indicate in his proceedings the type of questions imposed to the child. The trial magistrate merely recorded what appears to be the reply made by the Victim. There is no proof or clue that questions were raised and or are featured in the court records. I am not certain on whether such questions were raised because they are not featured in the court proceedings. I think the trial magistrate merely recorded his own version which is contrary to the requirements of Section 127 (2) and from the plethora of diverse decisions.

In **Godfrey Wilson vs. Republic (supra)** at page 13 of the typed judgment it was stated that the trial Magistrate or a judge can ask witnesses of tender age such simplified questions which may not be exhaustive depending on the circumstances of the case as follows:

(1) The age of a child.

(2) The religion which the child professes and whether she understands the nature of oath.

(3) Whether or not the child promises to tell the truth and not to tell lies.

The court went on to state that upon making the promise, such promise must be recorded before the evidence is taken. Since on record such questions are not chronicled, I contemplate 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. It will be highly dangerous if I assume that the omission to indicate the questions raised by the court to PW3 is not fatal. Henceforth the same has no evidential value to be considered, it is therefore expunged. It was held in **Selemani Makumba vs. Republic (supra**) that that the best evidence of rape is that of the victim.

In our instant case since the victim's evidence is of no evidentiary value due to errors committed by the trial magistrate. Subsequently, the crucial evidence of PW3 is invalid, there is no evidence remaining to be corroborated by the evidence of PW1 and PW2 in view of sustaining the conviction. On my part, this appeal is yet another disturbing example of the trial court failing to comply with the mandatory statutory requirement when confronted with Section 127 (2) of the Evidence Act.

Having said so, I find no need to deal with the rest of other grounds since this anomaly prompted by the trial court has rendered the recording of the evidence of PW3 who is the victim in the instance case to have no evidentiary substance to be relied on. There is no any other sufficient evidence remaining to withstand the verdict of the appellant. The conviction of the appellant is accordingly quashed and set aside as well as the sentence imposed on him. I order his immediate release from prison unless held for other indorsed cause.

Order accordingly.

D. B. NDUNGURU
JUDGE
13/05/2020

Date: 13/05/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Appellant: Mr. Mkumbe – Advocate

For the Republic: Mr. Kihaka – State Attorney

B/C: Zena Paul

Mr. Kihaka – State Attorney:

The case is for judgment, we are ready.

Mr. Mkumbe – Advocate:

We are ready for judgment.

Court: Judgment delivered in the presence of Mr. Kihaka State Attorney and Mr. Mkumbe Advocate for the appellant.

D. B. NDUNGURU
JUDGE
13/05/2020