IN THE UNITED REPUBLIC OF TANZANIA

THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL No. 24 OF 2019

(Originating from Kigamboni District Court in Criminal Case No. 236 of 2018)

JOSEPH JUMA MAENDE.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

16th March, 27th April, - 4th May, 2020

J. A. DE - MELLO J;

A charge of **Rape** contrary to **section 130 (1) (2) (e)** and, **131(1)** of the **Penal Code, [Cap. 16 R.E 2002]**, was levied against the Appellant **Joseph Juma Maende,** following his arraignment before the **District Court of Kigamboni** on **2/11/2018**. Upon satisfactory completion of Trial, the Magistrate convicted and, sentenced the accused now the Appellant, for life imprisonment. Aggrieved, the Appellant knocked the door of this Court at a first Appeal on the following grounds;

1. **That, the learned Trial Magistrates erred in holding PW1 evidence procured un-procedural where no 'Voire Dire' test was conducted.**
2. **That, the learned Trial Magistrate grossly erred by convicting the Appellant without establishing penetration which is mandatory provision of the penal Code, Cap. 16 R.E 2002.**
3. **That, the learned Trial Magistrate erred in failing to realize huge disparity between PW1 and PW2 as to how PW2 learnt of the alleged offence and where she found the victim and he referred to the examination in chief of both by State Attorney.**
4. **That, the learned Trial Magistrate erred in convicting the Appellant where none of the local authority ever testified to be acquainted of the alleged offence as expounded by PW2.**
5. **That, the learned Trial Magistrate erred in finding the appellant guilty where the prosecution failed to establish his re-apprehension in connection with the offence.**

6. **That, the learned Trial Magistrate grossly erred by failing to draw an adverse inference against the prosecution for not having tendered the alleged stained bed sheets as amplified by PW2 to cement their case.**

7. **That, the learned Trial Magistrate grossly erred in holding that, the prosecution proved its case against the Appellant beyond reasonable doubt as charged.**

Coming from custody where he is serving his sentence and, with no legal assistance, he preferred oral submissions, requesting **State Counsel Florida Wenceslaus,** fended for the Respondent, the Republic to commence. Being lay, he could only emphasize the 'err' by the prosecution for not summoning the Local Government Leader **(Mjumbe wa nyumba Kumi or Mtendaji)** to testify over this. With regard to the **5th ground,** it was his submissions that, in the absence of Police or Investigators, the charge remained vague as these would add value to the allegations which he in turn termed them as malicious, following a claim he had against his employer the victims mother. Regarding the **6th ground,** he found it appropriate for the **Trial Magistrate** to draw an adverse inference against the prosecution for failing to tender stained bed sheets as alleged. He

concluded by bringing the Court to notice that no **Voire Dire** was conducted as the law required rendering the victim a liar.

Florida Wenceslaus, learned State Counsel, for the respondent, Republic strongly resisting all the grounds of Appeal as she commenced by combining second and seventh, while the first, third and fourth ground individually. Submitting she admitted fault for missing **Voire Dire** as required by law under **section 127 (2)** of **Cap. 6,** but the omission if at all, not fatal to the root of the mater. She prayed for justice to prevail based on the evidence adduced by the victim herself, the best witness being the one affected. Counsel in support of her contention made reference to the case of **Mtayomba** vs. **Republic, Criminal Appeal No. 217 of 2012, CA (at Mwanza)** on page **14**. She however refreshed the Court mind to the current position following amendments which omitted **Voire Dire** and, bring to practice the Court discretion judiciously exercised in bringing the child witness to her understanding of telling the truth. On the **2nd** and, **7th ground** she argued that, the victim had no reason at all to implicate the Appellant whom he knew all along and, one who painted their house. She even and, without fear explained how he lured her into the victim mother's bedroom, lying her into the bed and forced penetration

which she described to be painful. Under **section 130 (4) (a) Cap. 16,** this was adequate Counsel observed. Even **PW5** corroborated this as seen in page 20 of the proceedings, in which **PF3** revealed discharge and, scratches within the vagina. However and, again in yet another similar admission, prayed for expunging of the same, for having not been in line with **section 240 of Cap. 20,** not read over to the Appellant and which went against the law, but take into account the evidence that the doctor adduced in Trial. Submitting on the **3rd ground,** Counsel found no contradiction between **PWI** and **PW2** as to where exactly did **PW2** found **PW1.** It was her contention that, **PW1** the victim immediately rushed to their neighbor taking into account her mother was not in the vicinity who in turn phoned the victim's mother to explaining the episode. In fact **PW2** corroborated all what **PW1** said to have received the information from the neighbor on **24th February, 2018.** It was then she hurried back home and only to find her daughter in that state. With regard to the **4th ground,** she found it baseless, reminding the Appellant that choice of witnesses depends solely on litigant choice. The summoning or not of the local leaders was not important, so long as the best witness seemed sufficient. Arguing jointly on the **5th** and **6th ground,** it was on **27th**

February, 2020 when the Appellant went to **PW2's** house after disappearing which lead **PW2** to shout for help with a view of apprehending him. They managed and dragged him to **Kigamboni Police station.** It even was not necessary for tendering the bed sheets she lamented.

In his short rejoinder, the Appellant reiterated the claim unpaid and outstanding for the painting he did was all that which brought such fabrications. We all are versed with the demands of '**Voire Dire'** prior to 2016 following the **Written Laws (Miscellaneous Amendments) No. 2 Act, 2016 Act No. 4 of 2016** which came into force on **8/7/2016,** making it not only mandatory but, procedurally correct. The test was to establish whether the child of tender age knows the nature of oath or he/she possesses sufficient intelligence for reception of his/her evidence. A small mistake then, rendered the charge incompetent and accused acquitted. The reference to **page 7** as suggested by Counsel for the Republic is of no value when it comes to the mandatory requirement that the law had provided.

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**

Cap. 6 were deleted and, substituted with **sub-section (2)** in the following manner;

(a) deleting subsections (2) and (3) and substituting for them the following:

(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. "

I will not lose track of what is at stake, by accommodation the current position, considering the matter and, a 2012 had **Voire Dire** as mandatory of which the new law does not act retrospect. It is obvious and, evident that, nowhere from the proceedings this was conducted. The fate for such failure is well stated in a series of cases but I will go by this one of **Godfrey Wilson** vs. **The Public, Criminal Appeal No. 168 of 2018, Court of Appeal at Bukoba,** where it was held;

"The Trial Magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127 (2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not

telling lies before he/ she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age".

It was and, shall remain so until the amendment and with no excuse as what the case of **Godwin Ndewesi Karoli Ishengoma** vs. **Tanzania Audit Corporation (1995) TLR 200,** that,

"Rules are made to be followed and rules of Court must 'prima facie' be obeyed".

The law had its rules and, procedure as to how to conduct **Voire Dire,** nothing less nothing more. See also the recent case of **Issa Salum Nambaluka** vs. **The Republic, Criminal Appeal No. 272 of 2018, Court of Appeal, at Mtwara** stated;

"In the case at hand, PW1 gave her evidence on affirmation. The record does not reflect that she understood the nature of oath. As stated above, under the current position of the law, if the child witness does not understand the nature of oath, she or he can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies. In the circumstances therefore, we agree with both the appellant and

the learned Senior State Attorney that in this case, the procedure used to take PW1's evidence contravened the provisions of s. 127 (2) of the Evidence Act. For these reasons, we allow the 2nd ground of appeal."

In the absence of promise by **PW1,** her evidence, however best, it may look like but, not properly admitted in terms of **section 127 (2)** of the **Evidence Act** as amended by **Act No. 4 of 2016,** renders the whole Trial incompetent, for lack of evidential value. Since this is of essence and, basis of the entire trial, the rest of the grounds have no legs to stand upon as I allow the Appeal, quash the conviction and, set aside the sentence imposed against the Appellant. Sad, it seems but, law and rules binds us in rendering justice.

I therefore further order for an immediate release of the Appellant from prison unless held for other lawful reasons.

It is so ordered.

THE HIGH COURT OF TANZANIA

J. A. DE- MELLO
JUDGE
4th May, 2020