THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL No. 118 OF 2019

(Original Criminal Case No. 40 of 2018, in the District Court of Rungwe District, at Tukuyu).

ALBERTO KIBAMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

30/03 & 30/06/2020.

UTAMWA, J.

In this appeal, the appellant ALBERTO KIBAMBA challenges the judgement (impugned judgement) of the District Court of Rungwe District, at Tukuyu (the trial court) in Criminal Case No. 40 of 2018. Before the trial court, the appellant stood charged with a single count of rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R. E. 2002, now R. E. 2019 (the Penal Code).

It was alleged before the trial court that, on the 1st day of April, 2018, at about 20: 00, at Ikama village within the District of Rungwe in Mbeya Region, the appellant did have carnal knowledge of one Angel d/o

Saimon, a girl of 11 years (hereinafter called the victim for purposes of protecting her dignity).

The appellant pleaded not guilty to the charge, hence a full trial. At the end of the day, through the impugned judgment, the trial court convicted and sentenced him to serve thirty years in imprisonment.

Aggrieved by the entire impugned judgment, the appellant preferred this appeal through Mr. Omary Issa Ndamungu, learned counsel. The petition of appeal is based on four grounds of appeal. However, they can be smoothly condensed to only two as follows:

1. That, the trial court erred in law and fact in making the impugned judgment against the appellant though the prosecution had not proved the charge beyond reasonable doubts against him.
2. That, the trial court erred in law and facts in disregarding the appellant's defence evidence that was strong and corroborated.

Owing to these grounds of appeal, the appellant's counsel urged this court to allow the appeal, quash the conviction and sentence and then acquit the appellant.

The respondent Republic, was represented by different learned State Attorneys at different times. They resisted the appeal. The appeal was argued by written submissions. On the date of setting the scheduling order for filing the submissions, Ms. Prosista Paul, learned State Attorney represented the respondent in court. Parties accordingly filed their written submissions. Unfortunately, one cannot guess which State Attorney had signed the submissions for the respondent. The same was signed and dated by a State Attorney who did not disclose his/her own name. I would

like to remark here, as I did elsewhere that, this has been a trend in a number of cases where learned State Attorneys make representations in courts, at least in this registry of the High Court. My guidance is that, it is a better practice for a State Attorney signing court documents like these written submissions to disclose his/her name for purposes of authenticity of documents. I look forward to witnessing changes from the National Prosecution Service Office in future practice.

In deciding this appeal, I will test the improvised first ground and make a finding. If need will arise, I will also test the second improvised ground. This plan follows the fact that, I rank the first ground as the stronger ground capable of disposing of the entire appeal without even considering the second ground of appeal.

In his submissions to support the first ground of appeal, the learned counsel for the appellant basically contended as follows: that, the trial court based the conviction mainly on the evidence of the victim who testified as PW. 3. However, her evidence was contradictory in that, she testified that she was playing in the road and at the same time that she was in a hut where she was raped by the appellant. Again, there is contradiction in the prosecution evidence on the person who found the appellant in the hut. He thus, argued that, though section 127 (7) of the Evidence Act, Cap. 6 R. E. 2019 guides, as a general rule, that, the evidence of a victim in sexual offences can base conviction, this general rule has exceptions. One of the exceptions is that, where there are contradictions, the evidence cannot be relied upon. He supported the contention by the cases of **Pascal Sele v. Republic, Criminal Appeal**

No. 23 of 2017, Court of Appeal of Tanzania (CAT), at Tanga (unreported) and **Raphael Mhando v. Republic, Criminal Appeal No. 54 of 2017, CAT, at Tanga** (unreported). The learned counsel for the appellant further testified that, the person who allegedly found the victim after rape did not testify as key witness.

The learned counsel for the appellant thus, contended that the prosecution evidence raised doubts that must be resolved in favour of the appellant.

On the part of the respondent's reply, it was contended that the victim's evidence was not contradictory. And if there were any contradictions, they might have not gone to the root of the case. It was also contended by the respondent that the evidence of the victim was credible and proved that she had been raped by the appellant.

I have considered the record, the submissions by the parties and the law. In my settled view, it is true as rightly contended by the appellant's counsel, that the trial court convicted the appellant mainly on the evidence of the victim. In fact, no any other eye witness testified in court apart from her. All other witnesses testified according to the story given to them by the victim. The PW. 4 (the doctor who had examined the victim) testified only on the fact that the victim had been raped. He did not testify that it was the appellant who raped her.

In fact the victim testified that, at that material night she was playing in the road, the appellant who was well known to her took him to a trading-hut of one Neema who was not there. The hut is usually left unclosed. The appellant inserted his penis into her private parts and had

carnal knowledge of her. She went home the next day, reported the matter to his father and then to local leaders, hence this case.

The crucial issue that arises at this stage is *whether or not the trial court was entitled to rely solely upon the victim's evidence in convicting the appellant*. Indeed, I doubt if the evidence of the victim was capable enough to base the conviction. My worry is not based on the grounds adduced by the appellant, but on the style the said evidence was received by the trial court. The worries are based on the following reasons: In this matter, it is not disputed by the parties that the victim was only eleven years at the time of her testimony. She was thus, a child of tender age. The phrase "child of tender age" is defined to mean a child whose apparent age is not more than 14 years; see section 127 (4) of the Evidence Act, Cap. 6 R. E. 2002 (now R. E. 2019 and the decision by the CAT in the case of **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported).

It is also common ground that that, the law on the evidence of child of tender age in this land has changed substantially. The contemporary stance of this branch of the law is underlined under 127 (2) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016. The same has been interpreted by the CAT in some precedents including **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT, at Bukoba** (unreported) and the **Issa Salum case** (supra) and is to the following effect:

a) That, a child of tender age can give evidence with or without oath or affirmation.

b) The trial judge or magistrate has to ask the child witness such simplified and pertinent questions which need not be exhaustive depending on the circumstances of the case. This is for purposes of determining whether or not the child witness understands the nature of oath or affirmation. The questions may relate to his age, the religion he professes and whether he understands the nature of oath and whether or not he promises to tell truth and not lies to the court. If he replies in the affirmative, then he can proceed to give evidence on oath or affirmation depending on the religion he professes. However, if he does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the truth and not lies to the court.

c) Before giving evidence without oath, such child is mandatorily required to promise to tell the truth, and not lies to the court, as a condition precedent before the evidence is received.

d) Upon the child making the promise, the same must be recorded before the evidence is taken.

My construction of the law is thus, that: It is a crucial requirement of the contemporary law that, a child of tender age like the victim in the case at hand, has to give evidence on oath only when the trial court is satisfied, upon conducting a brief inquiry through putting some relevant questions to child witness, that he knows the meaning of oath. Otherwise, where the trial court finds, upon making the brief inquiry, that he does not know the meaning of oath, the child witness shall give evidence without oath. Nevertheless, the witness shall make the promise to speak the truth and

not lies to the court. The promise is made before he testifies. The two steps are thus, in alternative and not cumulatively. In other words, a single child witness cannot make the promise and take oath at the same time.

I consider the legal requirement just mentioned above as crucial because section 127 of the Evidence Act essentially guides on who is a competent witness for testifying before a court of law. Section 127 (2) thus, guides on how to determine the competence of a child witness. The determination of an issue of competence of witness is thus, vital before the court receives his testimony if fair trial has to be promoted as required by the law.

In the case at hand however, the proceedings of the trial court shows that, when the victim appeared before the trial court for her testimony, the trial Resident Magistrate recorded as follows before receiving her evidence:

> "PW3: ...(name of the victim); Aged 11 years, resident of Isebe, a student of standard II and Christian had been asked whether she knows the nature of oath and will speak the truth and states.
> PW3: I am Christian I use to attend to church. I know God loves the children who speak the truth. I promise that I will speak what really happened (truth).
> PW3 had sworn and states the following..."

From the above quotation of what transpired before the trial court in the matter at hand, it is clear that, the trial court caused the victim to perform both steps, i. e. she made the promise to speak the truth and took the oath at the same time. The legal implication of this trend is that, the learned trial Resident Magistrate worked in a serious misconception of the law. It is not thus, clear if the victim in fact knew the meaning of oath or not. It was thus, not certain as to which group did the trial magistrate place the victim; was it in the group of children/witnesses who had to

testify without oath, but with a prior promise to speak the truth or to the group of those who had to testify upon taking oath and without any need for making the promise.

Owing to the omission committed by the trial court, it cannot be said that the evidence of the victim was properly received. I thus, find that, the blunder was fatal to the trial. I consequently expunge the evidence of the victim from the record. Now since the victim was the only eye witness, and since the trial court based the conviction mainly on her evidence, the conviction cannot stand upon expunging her evidence from the record. Due to these reasons, I answer the issue negatively to the effect that, the trial court was not entitled to rely solely upon the victim's evidence in convicting the appellant. Consequently, I uphold the first improvised ground of appeal though on different reasons from those advanced by the appellant's counsel in his submissions in chief. This finding makes it not necessary to consider the second ground of appeal since it suffices to dispose of the entire appeal.

The pertinent sub-issue at this juncture is thus, *which orders should this court make under the circumstances of the case*? In my view, since it was the trial court which committed the blunder discussed above, the following orders shall meet the justice of the case; in the first place, I nullify the proceedings of the trial court, quash them together with the conviction. I also set aside the entire impugned judgment and the resulting sentence.

Furthermore, I order for a retrial of the appellant since he has served only two years and a month in prison. There is also apparently tangible

prosecution evidence save for the improper manner the evidence of the victim was received. These circumstances meet the conditions for ordering retrial as set by the CAT in the case of **Kaunguza s/o Machemba v. Republic, Criminal Appeal No. 157B of 2013, at Tabora** (unreported) following the case of **Fatehali Manji v. R [1966] EA 343**. The retrial shall thus, take place within a period of only two months from today and before another magistrate of competent jurisdiction. The appellant shall remain in prison custody while awaiting the retrial. His right to bail is however, un-affected by this judgment when the retrial commences. In case he will be convicted at the end of the retrial, the period he has stayed in prison by virtue of the improper conviction discarded above shall be deducted from his term of imprisonment. It is so ordered.

JHK. UTAMWA.
JUDGE

30/06/2020.

30/06/2020.
CORAM; Hon. JHK. Utamwa, J.
Appellant: present (by virtual court, while in Ruanda prison-Mbeya) and Mr. Omary Issa Ndamungu, learned advocate (present in court personally).
Respondent; Mr. Hebel Kihaka, learned State Attorney (by virtual court).
BC; Mr. Kibona, RMA.

Court: Judgment delivered in the presence of the appellant (through virtual court), Mr. Omary Issa Ndamungu, learned counsel for the appellant (present physically in court) and Mr. Hebel Kihaka, learned State Attorney for the respondent (through Virtual Court), this 30th June, 2020.

THE HIGH COURT OF TANZANIA

JHK. UTAMWA.
JUDGE

30/06/2020.