THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL No. 135 OF 2019

(Original Criminal Case No. 67 of 2018, in the Court of Resident Magistrate of Mbeya, at Mbeya).

ISEGE FUATANYUMA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

17/03 & 08/06/2020.

UTAMWA, J.

In this appeal, the appellant ISEGE FUATANYUMA challenges the judgement (impugned judgement) of the Resident Magistrates Court of Mbeya, at Mbeya (the trial court) in Criminal Case No. 67 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 (3) 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 15th day of March, 2018, at DDC area of Usongwe Ward within the District of and Region of Mbeya, the appellant did have carnal knowledge of one Gladness d/o Danganya

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

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 found the appellant guilty, convicted and sentenced him to life imprisonment. He was also ordered to pay compensation of Tanzania shillings 1, 000, 000/= to the complainant.

Aggrieved by the entire impugned judgment, the appellant preferred this appeal through Mrs. Joyce Kasebwa, learned counsel. The petition of appeal is based on six (6) grounds. However, they can be smoothly condensed to only four 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. The trial court erred in law and facts in contravening section 210 (3) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (now R. E. 2019) that requires a trial court to read the evidence to a witness testifying before it.
3. The trial court erred in law and fact in failing to properly analyse the appellant's defence evidence.
4. The trial court erred in law and facts in not reading the charge to the appellant.

For these grounds of appeal, the appellant's counsel urged this court to allow the appeal, quash the conviction, sentence and the whole decision of the trial court and let the appellant free.

The respondent, 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 that, this has been a trend in a number of cases where learned State Attorneys make representations in courts. My guidance is that, it is a better practice for a State Attorney signing court documents like submissions to disclose his/her name for purposes of firm authenticity of documents. I look forward to witnessing changes from the prosecution office in future practice.

I have considered the record, the submissions by the parties and the law. In deciding this appeal, I will test the improvised first ground and make a finding. If need will arise, I will also test the rest of the grounds. This plan follows the fact that, I rank the first ground as the strongest ground capable of disposing of the entire appeal if it will be upheld. The issue regarding the first ground of appeal is therefore, *whether or not the prosecution proved the case against the appellant before the trial court beyond reasonable doubts.*

In her submissions to support this issue, the learned counsel for the appellant basically contended as follows: that, in criminal cases, the prosecution has to prove the case against an accused person beyond

reasonable doubts. However, in the case at hand the prosecution did not discharge that duty. She specifically challenged the evidence of the victim arguing that, it was not received according to the law related to evidence of a child of tender age. She argued that, the victim did not make a promise to tell the truth and not lies to the trial court as per section 127 (2) of the Evidence Act, Cap. 6 R. E. 2002 (now R. E. 2019) as amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016. The learned counsel thus, argued that, the evidence is liable to be expunged. She based the contention on the decision by the Court of Appeal of Tanzania (CAT) in the cases of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT, at Bukoba** (unreported) and **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported).

The learned counsel for the appellant further contended that, there was no proof of penetration by the victim thought this is an important ingredient of rape. The Prosecution Witness (PW) No. 6W. 6 (the doctor who examined the victim) did not also provide any proof for the penetration.

The learned State Attorney for the respondent submitted in reply that, the record of the trial court indicates that the victim made the promise to tell the truth according to the current law on the evidence of a child of tender age. The six prosecution witnesses paraded by the prosecution, especially the victim and the PW. 6 (the doctor), proved the case beyond reasonable doubts. They also proved penetration of the appellant's penis into the victim's private parts. The trial court found the

witnesses credible and it was entitled to do so. Besides, it is the trial court which is, in law, placed in a better position to assess the credibility of witnesses. This position was underscored in the case of **Ali Abdallah Rajab v. Saada Abdallah Rajab and others [1994] TLR. 132.**

In my settled opinion, the circumstances of this case do not attract answering the issue posed above affirmatively on the following reasons: in the first place, according to the impugned judgement it is clear that, the trial court based the conviction mainly on the evidence of the victim and PW. 6 (Gerald Kilinga), i. e the doctor who had examined the victim. The evidence of the victim was to the effect that, on the material date, the appellant took her to his house, lied her on his coaches and inserted his penis in her private parts. When she cried, he shouted at her in stopping her from crying. On his part, the PW. 6 testified that, he examined the victim who was aged six years, found her private parts penetrated by a blunt objected and felt the PF. 3 accordingly.

The defence by the appellant was that, he was arrested for nothing. The case was fabricated against him. The victim was only tutored to victimise him, hence her hesitation to testify in court.

According to the submissions by the parties, it is not disputed that, the victim was 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 and the **Issa Salum case** (supra). Indeed, I agree with the learned counsel for the appellant that, the victim's evidence was not taken according to the current law on evidence of a child of tender age. This is because, the law, according to the totality of section

127 (2) of the Evidence Act as amended by Act No. 4 of 2016, the decisions by the CAT in the **Godfrey Wilson case** (supra) and the **Issa Salum case** (supra), 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.

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

"PROSECUTION CASE OPENS IN CAMERA
PW. 1 Gladness Danganya, Res. Of DDC, has promised to tell the truth
XD by State Attorney..."

Upon the trial court making the entry into the record as quoted above, it went on to record the evidence of the victim (see page 6 of the typed version of the proceeding). The same course is shown in the original handwritten proceedings of the trial court. The record however, does not show that, prior probing relevant questions were asked by the trial court to the victim to determine whether or not she understood the nature of oath or affirmation. This was against the legal guidance marked **b)** herein above. It is not thus, shown in the record as to how the trial court reached to a conclusion that the victim did not understand the nature of oath or affirmation and that she had to make the promise instead of taking oath or affirmation. Again, the trial court did not record the actual promise made by the victim as required by the law, i. e the guidance marked **d)** herein above. The trial magistrate just endorsed into the record, in a reported speech, that the victim had made the promise without recording the very promise in the victim's words or in words to that effect.

In my concerted opinion, the rationale for the guidance by the CAT marked **d)** herein above, to the effect that the promise of the child witness should be recorded by a trial court is not far to fetch. In fact, I am of the view that, even the probing questions to the child witness need be recorded by a trial court. I underscored the need to record the promise of a child witness (according the new law cited above) and other important matters in the case of **Enock s/o Mabondo v. Republic, DC. Criminal Appeal No. 77 of 2018, High Court of Tanzania (HCT), at Tabora**

(unreported). I will quote the relevant paragraphs of the decision as a means of underscoring that requirement in this case and for a readymade reference:

> "...As indicated earlier, in the case at hand, the promises by PW. 1 and the victim are not seen in the record of the trial court though they were children of tender age. In my settled view, and as I underscored in the case of **Joshua s/o Christopher @ Magesa v. Republi, DC. Criminal Appeal No. 40 of 2018, the High Court of Tanzania, at Tabora** (unreported), for purposes of a proper administration of justice in promoting fair trials at both trial and appellate levels, a trial court is enjoined to ensure that a witness of this kind makes the promise. The promise must also be recorded by using own words of the witness as nearly as possible. This legal proposition is based on the understanding that, it is legitimate always, for an appellate court to be acquainted with what had actually transpired before a trial court through the records. This gives a wider room to an appellate court to decide whether or not, the law was actually followed and justice was actually done.
>
> It was thus, important for this court in the appeal at hand, to see the promises of the two witnesses recorded in the proceedings of the trial court. The importance of the requirement to record important matters in criminal trials was underscored by the CAT in a criminal appeal of **Misango Shantiel v. Republic, Criminal Appeal No. 250 of 2007, CAT at Tabora** (unreported). In this case, the CAT observed that, in criminal trials everything that takes place in the proceedings, must be on record so as to enable an appellate court to decide fairly any question brought before it challenging the conduct of the trial."

Furthermore, in the case at hand, the trial court's act of concealing the promise of the victim and the probing questions put to her was not compatible with an effective administration of justice that needs transparency as one of the important gears of dispensation of justice. This court underscored in the case of **Gilbert Nzunda v. Watson Salale, (PC) Civ. App. No. 29 of 1997, at Mbeya** (unreported) that, transparency and justice are inseparable.

Due to the weaknesses pointed out above, it could not be said that the victim's evidence in the matter at hand was properly received before the eyes of the law.

Even if it is presumed (without deciding) that the victim's evidence was properly received in law, it could still be difficult to rank the victim as a credible witness on the following reasons: in the first place, according to PW. 2 (Selina Mwaigombe), her own mother, the victim did not promptly disclose the event to her. It was alleged into the charge sheet that, the event occurred on the 15th March, 2018. However, on 16th March when PW. 2 returned home at night, the victim concealed the event. She only complained of headache and stomach-ache. She gave her mere pain-killer tablets. The next day, the PW. 2 went to her work. It was at the night of that date (apparently on 17th March), when the victim disclosed the event to her (PW. 2). No reasons were shown as to why she delayed to inform her mother of the event. Besides, in her own evidence, the victim did not testify that the appellant had threatened to harm her in case she disclosed the event to any person. If anything, she only testified that during the event, the appellant warned her not to make noise by mere Swahili words of "kelele."

Again, the conduct of the victim in court was inconsistent with a credible witness. According to the record (page 4-5 of the trial court's typed proceedings), the victim firstly appeared for testimony on 2/5/2018 before one Mr. Mteite, Senior Resident Magistrate. Nevertheless, she failed to testify and the case was adjourned to another date. No reason was given by the prosecution as to why the witness could not testify. On

10/05/2018, the prosecutor informed the court to the effect that, he had interviewed the victim intensively, but, she could not state the evidence clearly. The prosecutor thus, merely guessed that, the victim had fear. He then requested to the presiding magistrate for the case to be re-assigned to any female magistrate. The case was accordingly re-assigned to a female magistrate who tried it to its finality. The prosecutor nevertheless, did not disclosed what were the reasons for the victim's fear which had caused her failure to testify before the male magistrate. The prosecutor did not also adduce any reason showing why a female magistrate was preferred to a male magistrate.

In his defence, as hinted earlier, the appellant complained against the conduct of the victim in her hesitation to testify. He stated further that, the same implied that the case was fabricated and the victim was tutored to implicate him in her testimony.

In my further view, the course taken by the predecessor magistrate and the prosecutor in causing the case to be re-assigned to another magistrate merely because she was a female judicial officer, was also not supported by any law. The law has set the procedure for hearing cases in camera to create friendly atmosphere for witnesses who may not be comfortable to testify in public. It did not make any discriminatory rules requiring specific witnesses to testify before female judicial officers and others to testify before male judicial officers. It follows thus that, a witness who fails to testify before a judicial officer for undisclosed reasons, and testifies before another judicial officer because she or he is of a distinct gender from the former, is a witness whose credibility is questionable.

Such a conduct of a witness does not bode any transparency which is among the important gears in the admiration justice as underscored in the **Gilbert Nzunda case** (supra). The victim's evidence in the matter under consideration was thus, shaken by her suspicious conduct shown above.

It follows thus that, the above unexplained hesitation of the victim in informing her mother on the event and in testifying before the court, was totally inconsistent with a demeanour of a witness who was determined to tell the truth.

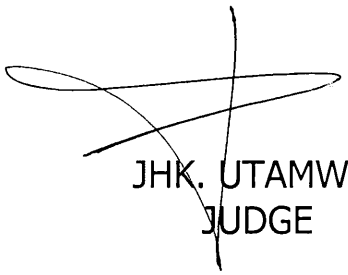
Furthermore, there are some serious contradictions that affects the victim's evidence negatively. At the time of her testimony for example, she told the trial court that, when she cried in the due course of the event, the appellant only told her "*kelele*" in Kiswahili, meaning that she should not make noise. However, PW. 2 (her mother) testified that, the victim had informed her (PW. 2) that, when she cried the appellant held her mouth. This contradiction shakes the prosecution case.

It follows therefore that, though it is true as argued by the learned State Attorney that the trial court is the best judge of credibility of witnesses, that is not always the case. Where the trial court misdirects itself or fails to consider important factors affecting the credibility of a witness, an appellate court may interfere and re-asses the credibility of the witness.

Owing to the above reasons, I expunge the evidence of the victim from the record. The remaining evidence adduced by PW. 2, 3, 4, 5 and 6 cannot support the charge because they were meant to merely corroborate the victim's evidence. This is because, PW. 2, 3 and 5 were only informed

of the event by the victim. The PW. 4 was only a police investigator whose story depended much on the information from the victim and other witnesses. PW. 6 (the doctor) and the PF. 3 he had made, could only prove penetration and did not implicate the appellant in any way. Now, once the victim's evidence is expunged, the prosecution case cannot not remain with legs to stand.

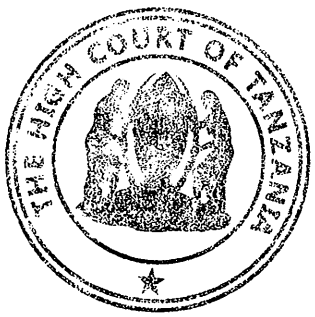
Due to the above weaknesses in the prosecution evidence, I find that, the prosecution evidence left reasonable doubts. I consequently determine the issue posed above negatively to the effect that, the prosecution did not prove the case against the appellant beyond reasonable doubts. I accordingly sustain the first ground of appeal. This finding is forceful enough to dispose of the entire appeal without considering the rest of the grounds. I will not thus, test them, otherwise that will amount to a superfluous academic exercise of kicking a dead horse, which is not the primary objective of the process of adjudication. I consequently, make the following orders: I allow the appeal, quash the conviction, set aside the entire impugned judgment, the sentence and the compensation order. The appellant shall be set free from the prison forthwith unless held for any other lawful cause. It is so ordered.



JHK. UTAMWA.
JUDGE
08/06/2020.

08/06/2020.
CORAM; Hon. JHK. Utamwa, J.
Appellant: present (by virtual court, while in Ruanda prison-Mbeya) and Mr. Luko Deda, learned advocate.
Respondent; Mr. Shindai Michael, learned State Attorney.
BC; Mr. Kibona, RMA.

Court: Judgment delivered to the appellant, Mr. Luko Deda learned counsel for the appellant and Mr. Shindai Michael, learned State Attorney for the respondent (through Virtual Court), this 8th June, 2020.



JHK. UTAMWA.
JUDGE

08/06/2020.