IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 66 OF 2019

(Appeal from the decision of the District Court of Chunya at Chunya in Criminal Case No. 95 of 2018)

AHAZI MWAKISISYE @ SUGU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order : 05/05/2020
Date of Judgement: 09/06/2020

MONGELLA, J.

In the District court of Chunya, the appellant was charged and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R. E. 2002. In the trial court it was alleged that, on 08th May 2018 at Chunya town within the District of Chunya and Mbeya Region, the appellant did have carnal knowledge of one A daughter of A (being initials of the victim's names), a girl aged 11 years. He was ultimately sentenced to serve thirty years imprisonment and to undergo twelve strokes of the cane. Aggrieved by this decision,

he has appealed to this Court on seven grounds, however, I shall deal first with the first ground which shall determine whether it shall be necessary to deliberate on the remaining grounds.

The appellant fended for himself and he prayed for the court to adopt his grounds of appeal as his submission. The respondent however, prayed to reply to the grounds of appeal through written submission, a prayer which was not objected by the appellant. The written submission in reply was thus filed in time by Mr. Daviceh Msanga, learned State Attorney.

On this first ground, the appellant claims that the learned trial Magistrate erred in law and fact when he admitted the evidence of PW1 who was a child of tender age without conducting *voire dire* test as directed under the law. He argued that by not conducting *voire dire*, PW1 was not examined by the trial Magistrate in order to ensure that PW1 knows the meaning of oath and telling the truth.

Mr. Msanga replied in his submission that the requirement to conduct *voire dire* no longer exists under the law. He argued that under the current legal position, for a child's evidence to be admitted in court, he/she is only required to promise to tell the truth and nothing but the truth. He argued that this new legal position is provided under section 127 (2) of the Evidence Act, Cap 6 R.E. 2002, as amended by section 26 (a) of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016. He therefore prayed for the Court to dismiss this ground of appeal.

The requirement to cause the child of tender age to tell the truth was brought into the law vide section 26 of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016. This provision amended section 127 of the Evidence Act by deleting section 127(2) and (3) thereof and replacing them with other provisions in sub section (2). Specifically the amended provision reads:

> *"26. Section 127 of the Principle Act is amended by*
> *(a) Deleting sub sections (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 any lies."*

The provision thus requires the child of tender age to promise to tell the truth and not to tell lies to the court. Nevertheless, the promise given by the child must be recorded in the proceedings. This position was underscored by the CAT in the case of ***Godfrey Wilson v. Republic*** Criminal Appeal No. 168 of 2018 (CAT-Bukoba, unreported) in which the Court demonstrated on how to reach to the said promise by the child of tender age. The Court stated:

> *"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 27 (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. The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a*

tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:

1. *The age of the child.*
2. *The religion which the child professes and whether he/she understands the nature of oath.*
3. *Whether or not the child promises to tell the truth and not to tell lies.*

Thereafter, upon making the promise, ***such promise must be recorded before the evidence is taken*** *(emphasis added)."*

At page 7 of the typed proceedings of the trial court, the Hon. Magistrate wrote:

> *"I have examined the victim who is of tender age and be of the settled opinion that, though she is of tender age but she know the nature of oath and she will testify under oath and will only testify truth and truth only."*

The proceedings of the trial court do not show the questions asked to PW1 to obtain her promise before recording her testimony. Her promise was also not recorded because what the trial magistrate noted down was his conclusion and not what PW1 stated upon promising to tell the truth. In my considered opinion, I find it unsafe to rely on what is stated by the trial Magistrate as quoted above and assume that the process of making PW1, a child of tender age, promise to tell the truth, was adhered to as required under the law. The promise of PW1 ought to have been recorded in her own words. This position has also been taken by this Court in a number of cases whereby it has been insisted that the procedure towards reaching the promise by the child to tell the truth must be vividly seen in the proceedings to erase doubts on whether the trial court just inserted the promise on its own. Failure to include the

procedure vitiates the whole proceedings of the court. See for instance: ***Hassan Samson v. The Republic***, Criminal Appeal No. 145 of 2019 (HC at Mbeya, unreported).

Considering the observations I have made above I find that the conviction and sentence of the trial court were founded on defective proceedings. The defect renders the trial court decision a nullity. At this point I find myself having to deliberate on whether I should order a retrial or not. The Court of Appeal (CAT) in the case of ***Merali and Others v. Republic*** (1971) HCD no. 145 ruled that:

> *"It is clear that the original trial was neither illegal nor defective. It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal.*

Quoting the case of ***Ahamed Ali Dharamsi Sumar v. Republic*** (1964) E.A. 481the CAT held:

> *"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made when the interests of justice require it and where it is likely not to cause injustice to an accused."*

In ***Fatehali Manji v. The Republic*** (1966) E.A. 343 the Court of Appeal for East Africa held that:

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the first trial...each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*

Considering the above settled legal position, the Court therefore has to take into account the interest of justice of both the accused and the victim, the chances of the prosecution filling gaps on insufficiency of evidence at the trial and whether the original trial was defective or not. I have gone through the proceedings of the trial court and do not see chances of the prosecution feeling gaps in the evidence already adduced. By not adhering to the amendments in the law requiring the trial court to make the child of tender age promise to tell the truth and the same be reflected in the proceedings, the trial became fundamentally defective. I therefore order the case to be tried afresh as soon as it is practicable. Meanwhile the appellant shall continue to remain in custody.

It is so ordered.

Dated at Mbeya on this 09th day of June 2020

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya through video conference Chambers on this 09th day of June 2020 in the presence of the appellant, and Ms. Mwajabu Tengeneza, learned State Attorney for the Respondent.

L. M. MONGELLA
JUDGE