IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC. CRIMINAL APPEAL NO. 84 OF 2019

(Originating from Criminal Case No. 81 of 2018 from Manyoni District Court dated 30th May 2019)

BETWEEN

JOSEPH ANTONY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

MANSOOR, J.

Date of Judgment: 5th August, 2020

JUDGEMENT

The appellant herein was charged before the District Court of Manyoni for the offence of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code Chapter 16 R.E 2002. It was alleged by the prosecution side that on 28th day of March 2018 about 19:30hrs at Majiweni –Mwembeni village within Manyoni District in Singida Region, the appellant had unlawfully sexual intercourse with a 12 years old girl. For purposes of

concealing the victim's identity, I shall henceforth be referring to her as **DD** or **PW2** as the case may be.

After a full trial, the Court was satisfied that the prosecution case was proved against the appellant, found him guilty and subsequently convicted him. He was then sentenced to a thirty (30) years term of imprisonment.

Aggrieved with the conviction and sentence, the appellant preferred this appeal with a total of four grounds of appeal which had the complaints that;

1. That, the 1st, 2nd, and 5th PW witnesses did not mention me through their evidence's (sic)produced before the court.
2. That, no any medical evidence produced before the court to prove the allegations.
3. That, no any parade inspection made to identify the accused person.
4. That, my statement at the police station was not taken within 4 hours rather was taken after 3 days.

The appeal was ordered to be argued by way of written submissions, the appellant was unrepresented whereas the respondent was represented by Judith J. Mwakyusa the State Attorney. What is seen here is that,

the appellant instead of filling his written submission(s) as he was ordered by this Court, he filed additional grounds of appeal and he did not rejoin after respondent's submissions. In short, this is to say that the appellants grounds of appeal went unsubstantiated by the appellant.

I have read and carefully considered the respondent's submissions and I have read and re-evaluated the evidences of both parties presented before the trial court.

Before embarking into submissions made by the counsel for the respondent, this court finds that, it is vital to consider some flaws seen in the proceedings of the trial court, which is, failure of the trial court to receive evidence of PW2 a child of tender age without oath or affirmation and without recording the promise to tell truths and not to tell lies. The underlying question is whether those flaws/failures are fatal and if yes what are the consequence?

Currently the position of the law is that a child of tender age can testify before a court of law without taking an oath or making an affirmation, but in so doing he or she must promise the court that he or she will tell the

truth not lies. This is in the light of section 127(2) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016 which stipulates;

> **''(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''**

In the instant case, it is apparent from the trial court records that the trial court magistrate did not adhere to the requirement of the provision above. At page 10 and 11 of the records of the trial court contains the evidence of PW2 and appears in the following;

> **''PW2: DD, 13yrs, Nyaturu, Sayuni, Standard seven, Christian:-**
>
> **Court: This court comply with S. 26(a) of the Written Laws (Miscellaneous Amendments)(No.2) Act No 4/2016.**
>
> **Sgd: S.T. KIAMA,**
>
> **RM**
>
> **10/9/2018**

XD in Chief by P.P

I am resident at Kaloleni, I am a student at....."

What this Court gather from the above passage is that, PW2 was answering questions regarding her profile/particulars such as her name, age, tribe and that she is a school girl, then the trial court recorded to have been in compliance with S. 26(a) of the Written Laws (Miscellaneous Amendments (No.2) Act No 4/2016 and thereafter allowed PW2 to give her evidence. There is nothing more to suggest that the trial magistrate endeavoured to procure a promise from PW2 to tell the court the truth not to tell lies as required by S. 127(2) above. But S. 127(2) is silent on the procedure on how to reach that stage. However the Court of Appeal of Tanzania in **Godfrey Wilson Vs. R, Criminal Appeal No. 168 of 2018** at **Bukoba (unreported)** at page 13 and 14 suggested the trial court to 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 the Court of Appeal held, "**must be recorded before the evidence is taken**". In the said case, the Court of Appeal having found the absence of promise by the witness of tender age, PW1, it held that, her evidence was invalid. This position was maintained even in the case cited by the respondent of **Bashiru Salum Sudi Vs R, Criminal Appeal No. 379 of 2018 CAT at Mtwara** (unreported).

Then it follows also in this case that, since the trial magistrate failed to comply with the mandatory requirement of S. 127(2) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016 in taking the testimonies of PW2, this Court finds that, the same has no evidential value, thus invalid.

It is a settled principle of law that the best evidence to establish rape is of the victim herself. Since the crucial evidence of PW2, the victim, is invalid, then it

follows that the rest of the prosecution's evidence, that is PW1, PW3, PW4 and PW5 are worthless, this being the case, then conviction by trial court cannot be sustained.

As regards all the grounds of appeal and the subsequent submissions made by the respondent, this court finds no need to dig into, as the very important evidence of the victim, PW2 is invalid.

That said, this Court allows the appeal, quash the conviction and set aside the sentence imposed against the appellant. It is further ordered for an immediate release of the appellant unless held for other lawful reasons.

It is so ordered.

Pronounced at open Court in Dodoma this 5th day of August, 2020.

Latifa Mansoor

JUDGE

5th August, 2020