THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL NO. 97 OF 2019

(Originating from Criminal Case No. 65 of 2017, in the Court of Resident Magistrates of Mbeya, at Mbeya).

ZAWADI EZEKIEL JABILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

09/06 & 31/08/2020.

UTAMWA, J.

This is a first appeal. The appellant ZAWADI EZEKIEL JABILI challenges the judgement (impugned judgement) of the Court of Resident Magistrates of Mbeya, at Mbeya (the trial court) in Criminal Case No. 65 of 2017.

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 the 2nd day of February, 2017, at Soweto area within Mbeya City and Region, the appellant did unlawfully have carnal knowledge

of one Rehema d/o Philimon, a girl of 7 years (hereinafter called the victim for purposes of preserving her dignity).

The appellant pleaded not guilty to the charge, hence a full trial in which he made a sworn defence. At the end of the day, through the impugned judgment, the trial court found him guilty, convicted and sentenced him to life imprisonment.

Aggrieved by the entire impugned judgment, the appellant preferred this appeal through Mr. Shambwee Mwalyego Shitambala, learned counsel of LHS Advocates (a Law Firm). The petition of appeal is based on five grounds of appeal. However, they can be smoothly condensed to only one, that, the trial court erred in law and facts in convicting and sentencing the appellant though the prosecution had not proved the charge beyond reasonable doubts against him. Owing to this ground of appeal, the appellant urged this court to allow the appeal and ultimately quash the conviction and sentence.

In this appeal, the respondent Republic, was represented by Ms. Xaveria Makombe, learned State Attorney. She resisted the appeal. The appeal was argued by way of written submissions.

In his written submissions supporting the appeal, the learned counsel for the appellant maintained that, the prosecution evidence was weak for proving the charge against the appellant beyond reasonable doubts. He attacked various aspects of the prosecution evidence. He for example, argued that, there was no proof of penetration of the appellant's penis into the victims private parts, there was a delay in subjecting the victim to medical examination, the evidence of the victim was improperly received

without any proper *voire dire* as require by section 127 (1) and (2) of the Evidence Act, Cap. 6 as amended by Act No. 2 of 2016 and the victim's relatives improperly visited the scene of crime before reporting the matter to police. He further contended that, the identification parade launched by the police for identifying the appellant was improper since the victim and her parents knew him before and it was conducted in public. He added that, there were contradictions in the prosecution evidence. The learned counsel thus, concluded that, the prosecution evidence left doubts.

On her replying submissions, the learned State Attorney for the Republic contended that, there was sufficient evidence to prove the charge against the appellant beyond reasonable doubts. The evidence by the victim was properly received and proved penetration of the appellant's penis into her private parts. Her age of seven years was also proved. The *voire dire* test is no longer a legal requirement vide the amendments of section 127 (2) of the Evidence Act through section 26 (a) of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016. The amendments came into force on the 8th July, 2016 before the victim testified in court. Currently, it suffices for a witness of tender age like the victim in this case, to only make a promise for speaking the truth.

It was also the contention by the learned State Attorney for the respondent that, there were no any major contradictions in the evidence of the prosecution. She however, conceded that, the identification parade was unnecessary since the appellant and the victim knew each other before the event.

The major issue for determination in this appeal is therefore, whether or not the prosecution evidence proved the case against the appellant beyond reasonable doubts.

According to the evidence of the victim who testified as PW. 1 (Prosecution Witness No. 1), on the material date and place, when she was on her way from school, the appellant, whom she knew before the material date, held her hand to a room and promised to buy her ice-cream. In the room, he undressed her and undressed himself. He then lied her on a mattress which was put on the floor. He inserted his penis into her private parts. He then warned her not to tell anybody. Nevertheless, she reported the matter to her sister who informed the victim's mother of the event. The matter went to police, and she was later medically examined. She then identified the appellant in an identification parade at a police station.

The rest of the prosecution witnesses testified to the following effect, that, the victim informed her parents that the appellant had ravished her. She was seven years old. The matter was reported to police and she was medically attended. The PF. 3 was made and showed that, there was penetration into her private parts. The appellant was arrested. He wanted to negotiate the matter with the parents of the victim, but they did not agree to the proposal.

On his part, the appellant testified that, on the material date, when he was on his way home, he met the victim. She asked money from him but, he did not give her. They then separated ways and he went to his home. He was later arrested at his parents' home for ravishing her.

I now tackle the major issue posed above. According to the record, the prosecution case was mainly pegged on the victim's evidence since she was the only eye witness. All other five prosecution witnesses were not at the scene of crime on the material date. They thus, only corroborated the victim's evidence. I will thus, firstly test the appellant's complaint against the evidence of the victim. If need will arise, I will also test the rest of the prosecution evidence. This plan is also based on the fact that, the law guides that, the best or true evidence for sexual offences like the one under consideration, comes from the victim of the crime; see the decision by the Court of Appeal of Tanzania (the CAT) in the case of **Seleman Makuba v. Republic [2006] TLR. 379** (at page 384), cited in the replying submissions by the learned State Attorney of the respondent. In fact, as a general rule, the evidence of a victim in sexual offences can, alone, base a conviction without any corroboration by another evidence; see section 127 (7) of the Evidence Act.

The sub-issue which arises at this juncture is therefore, *whether the victim's evidence was properly admitted in evidence.* In the first place, I agree with the learned State Attorney for the respondent that, the law no longer requires a trial court to conduct a *voire dire* test for a witness of tender age. This follows the amendments of the law mentioned above. However, there is still sense in the contention by the learned counsel for the appellant that, the evidence of the victim, as a witness of tender age was improperly received. This view is based on the following grounds: that, it is not disputed by the parties that the victim was only seven years at the time of her testimony. She was thus, a witness or 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 law cited earlier. 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) as follows:

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 contemporary law is thus, that: It is a crucial requirement for a child of tender age like the victim in the case at hand, 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 she understands the nature of oath or affirmation. Otherwise, where the trial court finds, upon making the brief inquiry, that he/she 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, which said promise must be recorded by the trial court.

I consider the legal requirements 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 of tender age as witness. The determination of an issue of competence of a witness is thus, vital before the court receives his/her 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 (as shown at page 4 of the typed proceedings of the trial court):

> "**PW1: Rehema d/o Philemon Mwangomo**, 7 years old, Christian, Mnyakyusa, Standard II, Gamaliel Primary School.
> **Court:** informs the witness, if she will promise to tell the truth in court. The witness promises to speak nothing but truth."

Upon recording as shown above, the trial court straightforward proceeded to receive the evidence of the victim narrated above.

From the above quotation of what transpired before the trial court in the matter at hand, it is clear that, the trial court did not ask any questions to the appellant for purposes of determining if she knew the meaning of oath. It is not thus, clear as to how he reached into the decision that the victim did not know the meaning of oath so that she could be required to make the promise. Again, the promise to speak the truth allegedly made by the victim was not recorded by the trial court. The learned presiding magistrate just indicated the existence of the said promise by his mere reported speech that the witness had made the promise.

In my view, therefore, the trial court did not comply with the mandatory legal requirements numbered **b)** and **d)** herein above. There was indeed, no transparency in determining the competence of the victim for giving her evidence. The law guides that, transparency and justice are inseparable; see the case of **Gilbert Nzunda v. Watson Salale, (PC) Civil Appeal No. 29 of 1997, High Court of Tanzania (HCT), at Mbeya** (unreported). The importance of the requirement to record important matters in criminal trials was underscored by the CAT in the case

of **Misango Shantiel v. Republic, Criminal Appeal No. 250 of 2007, CAT at Tabora** (unreported). In this case, the CAT underscored 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.

Owing to the omissions committed by the trial court, it cannot be said that the evidence of the victim was properly received. I thus, answer the sub-issue posed above negatively that, the victim's evidence was not properly admitted in evidence. It follows thus, that, due to the stance of the current law highlighted above, I find the blunder committed by the trial court fatal to the prosecution case. I consequently expunge the evidence of the victim from the record.

Now since the victim was the key prosecution eye witness, and since the trial court based the conviction mainly on her evidence, and since her evidence has been expunged from the record, it cannot be said that the prosecution evidence proved the case against the appellant beyond reasonable doubts. As to the averment that the appellant tried to negotiate with the victim's parents, I am of the view that, it cannot be seriously taken since the detailed circumstances under which he tried to do so were not explained so as to show that he actually, admitted the material facts constituting the offence he was charged with. I therefore, answer the major issue posed above negatively that, the prosecution evidence did not prove the case against the appellant beyond reasonable doubts.

For the findings I have just made above, the conviction and sentence against the appellant cannot stand. The findings thus, are capable enough of disposing of the entire appeal without testing the rest of the arguments by the appellant's counsel against other pieces of the prosecution evidence. I will not thus, consider such other arguments.

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 and the conviction and I quash them. I also set aside the entire impugned judgment and the resulting sentence.

Furthermore, I order for a retrial of the appellant. This is because, he has served only three years and about three months in prison as he was convicted and sentenced on the 19th May, of 2017. This is a very small percentage of the sentence of life imprisonment. There is also apparently tangible prosecution evidence from the victim save for the improper style adopted by the trial court in receiving her evidence. The retrial is therefore, necessary so that justice can take its course. Such retrial will not cause injustice to either side of the case. 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**. In that case it was guided *inter alia*, that, an order for retrial should only be made where the interests of justice require it, and should

not be ordered where it is likely to cause an injustice to the accused person.

I further order that, the retrial shall take place within a period of only two months from the date of this judgment. It shall be conducted 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 without affecting the law. It is so ordered.

JHK. UTAMWA.
JUDGE

31/08/2020.

31/08/2020.
CORAM; Hon. JHK. Utamwa, J.
For Appellant: present (by virtual court link when in Ruanda Prion, Mbeya).
For Respondent; Mr. Hebel Kihaka, State Attorney (by virtual court link).
BC; Mr. Kibona, RMA.

Court: Judgment delivered in the presence of the appellant (through virtual court link) and Mr. Hebel Kihaka, State Attorney, in court, this 31st August, 2020.

JHK. UTAMWA.
JUDGE

31/08/2020.