IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 58 OF 2020

(Appeal from the decision of the Resident Magistrates' Court of Mbeya at Mbeya in Criminal Case No. 66 of 2019)

MOSES RAPHAEL LYEGO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order : 06/07/2020
Date of Judgement: 25/08/2020

MONGELLA, J.

Moses Raphael Lyego, the appellant herein, is appealing against the decision of the RMs court for Mbeya which convicted him for the offence of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code, Cap 16 R.E. 2002. Since the victim was a child of 4 years, he was ultimately sentenced to life imprisonment. Unsatisfied by the conviction and sentence, he preferred this appeal on six grounds as follows:

1. *That the trial Magistrate erred in law and facts when convicted the appellant despite the fact that the prosecution failed to adduce*

sufficient evidence on identification of the accused person at the alleged scene of crime.

2. *That the trial Magistrate erred in law and facts by solely relying on circumstantial evidence which had major inconsistencies, lack of collaboration and failed to recognise the interval of time elapsed since the alleged commission of crime on the offence of rape to the date when the same matter was reported for investigation and alignment to court.*

3. *That the trial Magistrate erred in law and facts when convicted and sentenced the appellant to life imprisonment while the prosecution's evidence failed to prove beyond reasonable doubt and contains multiple gross contradictions.*

4. *That the trial Magistrate erred in law and facts basing on hearsay evidence adduced by the prosecution witnesses and failed to draw an adverse inference on those material witnesses and evidence which were not tendered without any reasons.*

5. *That the trial Magistrate erred in law and facts when convicted the appellant without considering procedures of criminal trial including preliminary hearing and admission of evidence of a child of tender age.*

6. *That the trial Magistrate erred in law and facts by invoking extraneous matters on the judgment which are neither featured in the typed nor handwritten proceedings of the trial court.*

The appellant was a teacher at Onika English Medium Primary School located at Mbalizi area within the District and Region of Mbeya. In the trial court, it was alleged that, on diverse dates in October 2018, the appellant had carnal knowledge of one J.E.K (initials of the victim), a 4 years girl and a pupil at Onika primary school. It was alleged by PW2, the victim, that the appellant penetrated both of her private parts more than once. She explained that the appellant who was her teacher used to fetch her from the dormitory to an empty class to rape her. On the last incident he took her at night hours and penetrated both her private parts. However, she did not reveal that ordeal until she went home for holidays.

According to PW1, the victim's mother, the incident was revealed on 9th December 2018, which was the third day from when PW2 went home for holidays. PW1 stated that when she was about to bath PW2, PW2 told her of the predicament and showed her the wounds she suffered from the awful act. PW2 also mentioned the appellant as the culprit. PW1 reported the incident at police station whereby she was given the PF3 and took PW2 to Meta hospital. The medical examination revealed that PW2 was penetrated in both her private parts. Later the appellant was arrested in connection with the offence and arraigned in the RMs court.

The appellant enjoyed legal services of Mr. Isaya Mwanry, learned advocate. The appeal was argued by written submissions timely filed by both parties in this Court. The submission by the respondent does not reveal who exactly drafted it, thus I am going to refer to it as submission by the respondent. For reasons to be apparent shortly I shall first deliberate

on the fifth ground regarding improper procurement of the promise to tell the truth by PW2, a child of tender age.

On this ground, Mr. Mwanry argued that PW2 was a child of tender age thus her evidence is subject to all conditions set out under section 127 of the Law of Evidence Act, Cap 6 R.E. 2002 as amended by Act No. 04 of 2016. He said that under this provision, a child of tender age must promise to tell the truth and not to tell lies where he/she is incapable of giving evidence under oath or affirmation. In addition he referred to the case of ***Shaibu Nalinga v. Republic***, Criminal Appeal No. 34 of 2019 (CAT at Mtwara) which underscored this requirement of the law. He argued that in this case it was settled that, to receive evidence of a child of tender age without an oath or affirmation the court must ensure that the child has made two important promises. First the child must promise to tell the truth to the court and second must promise not to tell any lies. Referring to what was written by the Hon. trial Magistrate at page 9 of the typed proceedings, he was of the view that the promise by PW2 was not in accordance with the law as the child did not give any promise not to tell any lies. He also contended that the promise to speak the truth was also improperly recorded as PW2 was supposed to promise to speak the truth to the court and her promise be recorded. He was of the view that the record does not indicate as to who the promise was made.

On the part of the respondent, it appears that the learned state attorney who drafted the written submission did not address this issue as the submission is silent on the same. I shall thus proceed to deliberate on this

point by considering the arguments by Mr. Mwanry and what is apparent on the trial court record.

As argued by Mr. Mwanry, the requirement to cause the child of tender age to tell the truth was introduced into our 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 as argued by Mr. Mwanry requires the child of tender age to give two promises to wit, first, to tell the truth and second, not to tell lies to the court. Nevertheless, the promise given by the child must be recorded in the proceedings in the child's own words. 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 9 of the typed proceedings of the trial court, the Hon. Magistrate wrote:

> ***"PW2; Jaa Ephraim Kalonge, 5 yrs Pupil, Christian. Has promised to speak the truth and states;"***

The proceedings of the trial court do not show the questions asked to PW2 to obtain her promise before recording her testimony. Her promise was also not recorded because what the trial magistrate noted down was her conclusion and not what PW2 stated upon promising to tell the truth and not to tell lies. 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 PW2, a child of tender age, promise to tell the truth and not to tell lies, was adhered to as required under the law. The promise of PW2 ought to have been recorded in her own words. See also: ***Hassan Samson v. The Republic***, Criminal Appeal No. 145 of 2019 (HC at Mbeya, unreported), ***Ahazi Mwakisisye @ Sugu v. The Republic***, Criminal Appeal

No. 66 of 2019 (HC at Mbeya, unreported) and ***Fredy Beatus v. The Republic***, Criminal Appeal No. 183 of 2019 (HC at Mbeya, unreported). In all these cases this Court 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.

After finding that the whole proceeding of the trial court is vitiated by improper procurement of the promise to tell the truth by the child of tender age, I find it pertinent to decide on what should be the way forward. Usually, under the circumstances, the court can order a retrial of the matter after considering other factors, particularly the prosecution evidence as a whole. The position is settled to the effect that a retrial is not to be ordered where there is likelihood of according the prosecution an opportunity to rectify its mistakes. The court thus has to consider the entire evidence. In the case of ***Shabani Madebe v. The Republic***, Criminal Appeal no. 72 of 2002 the CAT quoting the decision in ***Rex v. Vashanjee Liladhar Dossani***, Vol. 12 EACA 150 ruled that:

> *"An order for retrial is the proper order to make when the accused has not had a satisfactory trial."*

The CAT also quoted the case of ***Merali and Others v. Republic*** (1971) HCD no. 145 and 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 oriainal trial was defective or illeaal.*

Quoting further the case of ***Ahamed Ali Dharamsi Sumar v. Republic*** (1964) E.A. 481, the 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 also 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 evidence of prosecution witnesses, particularly that of the victim, PW2, which is considered to be the best evidence in rape cases. See: ***Selemani Makumba v. Republic*** [2006] TLR 379; ***Hamis Mkumbo v. Republic***, Criminal Appeal No. 124 of 2007 (unreported) and ***Rashidi Abdallah Mtungwa v. Republic***, Criminal Appeal No. 91 of 2011 (unreported). What I am going to discuss in this part relates to the claims by the appellant in ground one, two, and three of the appeal. Generally, Mr. Mwanry challenged the credibility of the evidence of PW2 for being

contradictory and unreliable. He first addressed the identification of the appellant by PW2 given that the crime is alleged to have happened at night. Citing the case of ***Abdallah bin Wendo and Another v. REX*** (1953) 20 EAC 116 and that of ***Waziri Amani v. Republic*** [1980] TLR 20, he argued that evidence of visual identification is weak and thus has to be relied on by the court after all possibilities of mistaken identity are eliminated. He argued that PW2 did not describe the kind of lights that she claimed were on in the class the appellant took her and raped her something which raises doubts. He said that the court has always insisted that the source of light is highly important in identification during night hours.

Addressing the issue of contradictions in PW2's testimony, Mr. Mwanry first acknowledged the position settled in ***Goodluck Kyando v. The Republic*** [2006] TLR 363 to the effect that every witness is entitled to credence and his/her evidence to be believed and accepted unless where there are cogent and good reasons to the contrary. He however, challenged the evidence of PW2 to the effect that the same is improbable and implausible, hence not worthy of being believed to form the base of the appellant's conviction. He quoted part of PW2's testimony when being examined in chief, whereby she stated:

> *"After he finished he said "usimwambie mtu- ukimwambia mtu nitakuchapa". The lights were on when he took me...After he finished, he told me to run to my bed, we left class seven together until to the door of the dom where I sleep then he told me to run to my bed. There were young and older children when he came to take me."*

Mr. Mwanry further quoted PW2's testimony upon being cross examined whereby she stated:

> *"I did not make noise when he took me because I was asleep. During the day is when I found that the act was done on me"*

Mr. Mwanry wondered how can a person who was asleep and who discovered later during the day that she was penetrated know that the lights were on when she was picked from the room. He further pointed another contradiction when PW2 was being re-examined whereby she stated:

> *"My friend told me during the day. Teacher Lyego put me on his shoulder and took me to class seven. He did not wake me up. He shook me a bit but I did not wake up. My friend saw."*

Considering the above testimonies of PW2, Mr. Mwanry concluded that the inconsistencies PW2 exhibited during examination in chief, cross examination and re-examination put the credibility of her evidence in question. He summarised the areas on PW2's evidence that shakes her credibility to the effect that; PW2 failed to explain the nature of lights; all the acts were done while she was asleep; she discovered that she was penetrated during the day; and that PW2's friend who never testified told her that she was carried by the appellant. He contended that PW2 being the best witness in this case testified hearsay evidence from her so called friend on the identification of the appellant as being the culprit. Referring to the case of ***Isaya John v. The Republic***, Criminal Appeal No. 167 of 2018

(CAT at Bukoba, unreported) he submitted that this Court still has the chance to check on the accuracy of the credibility of the witnesses.

In reply to these arguments, the respondent first challenged Mr. Mwanry's arguments on the identification of the appellant by PW2. He stated that the identification in this case was not only visual, but identification by recognition whereby the victim knew the assailant. Citing the case of ***Charles Nanati v. Republic***, Criminal Appeal No. 286 of 2017 (CAT at DSM, unreported) in which the CAT quoting its previous decision in ***Nicholaus James Urio v. Republic***, Criminal Appeal No. 224 of 2010 and a Kenyan case of ***Kenga Chea Thoya v. Republic***, Criminal Appeal No. 275 of 2006 held that *"identification by recognition is more satisfactory, more assuring and more reliable than that of identification of a stranger"* the respondent submitted that PW2 in the case at hand knew the appellant as being her teacher.

Addressing the issue of contradictions in PW2's testimony, the respondent argued that the said contradictions as pointed by Mr. Mwanry do not purely affect the root of the matter in the case at hand given the age of the victim. Referring to PW2's statement that *"I did not make noise when he took me because I was asleep"* the respondent argued that this statement connotes that PW2 was asleep at the time she was carried from the dormitory by the appellant, but it does not mean she kept being asleep during the incident and thereafter. He argued that her evidence shows that she even knew the class in which she was taken to and that after the incident she was escorted back to the dormitory. The respondent

was of the view that if PW2 was asleep throughout she could not be escorted, but should have been carried back to the dormitory.

The respondent further argued that the statement by PW2 that "*my friend told me during day, my friend saw*" is not strong enough to distort the truth that she was raped. He argued that the incident was done in more than one time and the appellant ought to have cross examined on that but did not, thus raising the issue at this stage is an afterthought. Also referring to another statement by PW2 to the effect that "*during the day it's when I found out the thing was done to me*" the respondent argued that this statement may connote that during the day its when she saw how she was injured. He still maintained the position that the evidence of PW2 to the effect that she was escorted by the appellant from class seven to the dormitories cannot be defeated by the contradictory statements. She was of the view that ambiguous statements should not only be taken for the benefit of the appellant, but also the victim's rights. He concluded that these are generally minor contradictions which do not affect the root of the case.

In essence, I find that both parties are not in dispute that there were contradictions in PW2's testimony throughout the three stages of examination. The respondent only struggled to argue that the same are minor and do not go to the root of the matter. Mr. Mwanry narrated clearly the contradictions therefore I shall not reproduce them. In my considered view, however, I do not subscribe to the respondent's argument that the said contradictions are minor and ought to be disregarded. One of the main issues raised in this appeal by the appellant

concerned the identification of the appellant during the night when the crime is alleged to have been committed. Even though the victim happened to know the appellant, still it was imperative for PW2 to explain the nature and intensity of the light so as to eliminate the question of mistaken identity. In ***Issa S/O Mgara @ Shuka v. Republic***, Criminal Appeal no. 37 of 2005 (unreported) the CAT stated:

> *"...even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*

In my settled view therefore, the prosecution ought to have led PW2 into explaining the nature and intensity of the lights. See also: ***Republic v. Noah Mwasambosa***, Criminal Sessions Case No. 58 of 2015 (HC at Mbeya, reported at Tanzlii).

PW2 said that she was taken to class seven when she was asleep, but she did not say at what point in time she woke up and found herself in the hands of the appellant. PW2 also stated that she was informed on the next day about the appellant taking her from the dormitory by her friend whom she did not even mention the name. As much as I agree that given the age of the victim, she could not get all the facts right, I still find that the contradictions are so material. The respondent wants this Court to uphold the trial court's conviction and sentence on speculated facts. This is totally not right and shall occasion injustice to the appellant.

Apart from the contradictions, I have considered also other factors being: the rape is alleged to have occurred on diverse dates in the month of October 2018. On 4th November 2018 her mother, PW1 took her after being informed that she was sick and stayed with her for one whole week, but did not discover that she was raped. PW1 discovered the incident on 9th December 2018, which was more than a month, and it appears that PW2 still had fresh wounds in both her private parts. This is from the PF3 report and the testimony of PW1 and PW2 who testified that on 9th December 2018 PW2 refused to be bathed by her mother because she had wounds and was feeling pains from the wound caused by the appellant who raped her. This particular evidence connotes that the penetration was deep.

Considering that the penetration was deep, it therefore does not occur to me that a child of 4 years who has been raped by a 42 years man to the extent of sustaining injuries for a period of more than a month could just proceed with her life normally and go unnoticed for the whole period by her own mother, the matron of the dormitory she used to sleep at school, the person who used to bath her at school every day, and even her teachers. It also does not occur to me that a child of 4 years who has been raped by a man of 42 years to the extent of sustaining injuries for a period of more than a month could be able to walk stably from the place where she was raped to her dormitory on the very same night she was raped. In my view, the Hon. Magistrate ought to have considered these facts while assessing the credibility of the evidence adduced by prosecution witnesses so as to arrive at a just decision. Considering this

observation, I agree with Mr. Mwanry that the prosecution failed to prove the case beyond reasonable doubt.

Following the observation I have made hereinabove, it is my finding that the whole trial was defective for being laid on a defective foundation whereby the promise of the child to tell the truth and nothing but the truth was improperly procured. Considering the whole prosecution evidence as I have demonstrated above, I find that this is not a fit case to order retrial because the prosecution shall definitely have a chance to fill gaps in its evidence. I therefore quash the proceedings and conviction of the appellant by the trial court and set aside the sentence. I order for the immediate release of the appellate from prison custody unless held for some other lawful cause.

Dated at Mbeya this 25th day of August 2020

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya through virtual court on this 25th day of August 2020 in the presence of the appellant and his legal counsel, Mr. Isaya Mwanry and Mr. Hebel Kihaka, learned State Attorney for the respondent.

L. M. MONGELLA

JUDGE