IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO.10 OF 2020

(Arising from Criminal Case No. 178 of 2018, the District Court of Shinyanga)

MAKELEMO LUBINZA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

20/7/ & 28/08/2020

Mdemu, J.;

The Appellant was charged with rape contrary to the provisions of sections 130(1)(2)(e) and 131(1) of the Penal Code, Cap.16 in the District Court of Shinyanga. The prosecution alleged that, on 14th day of November,2018, at about 22:00hours to 23:00 hours, at Mahembe area within Shinyanga District, the Appellant did have carnal knowledge with a girl aged 13 years old. The matter was reported to the police station, followed by the arrest and arraignment of the Appellant.

After a full trial, the Appellant was found guilty as charged and sentenced to thirty (30) years imprisonment. This was on 6th of December, 2019. Aggrieved, the Appellant lodged this appeal on six grounds as follows;

1. *That, the trial Magistrate erred in law and in fact by failure to require PW2 to promise whether or not she would tell the truth and not lies before testifies in trial court as condition precedent as per law.*
2. *That, the trial Magistrate erred in law and in fact by failure to realize that, the evidence of PW1, PW2 and*

PW3 is doubtfully and not credible to prove the offence beyond reasonable doubt.

3. *That, the trial Magistrate erred in law and in fact by failure to realize that, there was delay in reporting the incident to the police by PW2 hence, the evidence is doubtfully and not credible to prove the case beyond reasonable doubt.*
4. *That, the trial Magistrate erred in law and in fact by failure to analyze that, the evidence on examination by PW1 and PW3 on medical report is doubtful and not credible to prove the offence beyond reasonable doubt.*
5. *That, the trial Magistrate erred in law and in fact by failure to analyze the evidence of the Appellant, defense witnesses DW1, DW2 and DW3 against PW1, hence the evidence of PW1 was doubtful and not credible to prove the case beyond reasonable doubt.*
6. *That, the trial Magistrate erred in law and in fact by took PW2 work as gospel, without testing it against the version given by the Appellant, DW2 and DW3.*

At the hearing of the appeal on 20th of July 2020, the Appellant was represented by Mr. Augustino Ijani, Learned Advocate whereas the Respondent Republic had the service of Mr. Nestory Mwenda, Learned State Attorney.

Mr. Augustino Ijani, Learned Advocate submitted in the first ground of appeal that, the victim did not promise to tell the truth as per Written Laws (Misc. Amendment) Act No.4 of 2016 which amended subsection (2) and (3) of section 127 of the Evidence Act, Cap.6. He commented on the use of the

word "shall" in the amendment meaning, it is mandatory for the witness of tender age to promise to tell the truth and not lies before he or she testifies. He referred at pages 16 to 17 of the trial court proceedings that the said mandatory requirement was not complied before receiving the evidence of the victim. In this, He cited the case of **Godfrey Wilson v. R, Criminal Appeal No.168 of 2018**(Unreported).

He further submitted that, the effect on failure to comply with this mandatory legal requirement is fatal, incurable and occasion miscarriage of justice as was held in the case of **Yusuph s/o Molo v. R, Criminal Appeal No.34 of 2017**(unreported). On this, he added, the evidence of PW2 therefore has no evidential value and therefore should be expunged, thus, there is no evidence to sustain conviction against the Appellant. In this he also cited the case of **Seleman Makumba v. Republic (2006) TLR 376.**

As to the second ground of appeal, Mr. Augustino Ijani submitted that, the evidence of PW1 as observed at page 15 and that of PW3 at page 22 of the proceedings, differs materially regarding reddish found in the victim. On another note, PW1 in her evidence stated to have been informed by PW2 regarding the incident but when cross examined, she said to have seen the Appellant in the room of the victim.

In the 6th ground of appeal, he submitted that, the evidence of the victim be treated with caution. It is also doubtful if the victim was a girl of good moral standing. For instance, the Counsel added, at page 17 of the proceedings, the victim stated to be at home with the Appellant, but she did not tell her mother till when she was beaten as reflected in the evidence of PW2.He concluded on this ground that, the complaint of the Appellant that the case was fabricated may not be easily dismissed.

With regard to the fourth ground of appeal, he submitted that, the medical report is doubtful. He added that, it was wrong for the trial court to establish rape while the evidence on record is wanting. In all he thought that there was no proof of sexual intercourse on that date.

In reply, Mr. Nestory Mwenda, Learned State Attorney conceded to the legal requirement raised in the first ground of appeal that, the law require a witness of tender age to make promise of telling the truth and not lies. According to PW2, the victim was born in 2005, meaning that, when she testified, she was of 14 years' age. He cited the case of **Hamisi Chuma @ Hando Mboja v. R, Criminal Appeal No. 371 of 2015** (unreported) that, a witness of tender age should be below the age 14 years. On this, the counsel commented that PW2 was not a witness of tender age. However, he went a step ahead to comment that, even when she was a witness of a tender age, still she testified on oath.

Regarding the second ground of appeal he submitted that, contradiction between PW1 and PW3, and that of PW1 and PW2 alleged by the Appellant is baseless because the best evidence in sexual offence is that of the victim as stated in the case of **Seleman Makumba V.R.** (supra) which he trusted. He therefore concluded on this ground of appeal that, it was proper for the trial court to trust evidence of the victim.

On the other note, he argued that, the Appellant did not cross examine the said witnesses on the alleged contradictions. He also cited the case of **Athanas Ngomai V. R, Criminal Appeal No.57 of 2018** (unreported) where the court discussed the issue of failure to cross examine a witness. He was of the view that, the Appellant would have cross examined PW1 on the allegations regarding claims in his defense. He cited also the case of **Edson Simon Mwombaki V. R, Criminal Appeal No.94 of 2016** (unreported)

where the court stated evidence of medical report unnecessary where the victim of sexual offence has proved the offence. He also dismissed allegation that the fact that the victim had love affairs with others in itself could not bring a green light to the Appellant bearing in mind that this is a statutory rape.

In rejoinder, Mr. Augustino Ijani emphasized that, as the victim was of tender age, she was therefore required to promise to tell the truth and not lies before receiving her evidence. The evidence of a doctor who examined the victim, in his view was relevant in order to ascertain if there was sexual intercourse. He thought this goes to the root of the case. As to good standing morals, his view was that, she had none as how can she stay with the Appellant at home playing music without any fear. These shows even what she testified in court may as well create doubts. He therefore prayed the appeal be allowed.

In the light of what has been submitted by both parties, and having carefully gone through the record of the trial court, I wish to begin with ground number one of appeal on want of compliance regarding the procedure to record the evidence of the victim that required to promise to tell the truth and not lies. In the case of **Hamisi Chuma @ Hando Mhoja and Another v. R** (supra) at page 8 the Court of Appeal observed that as a matter of general principle every witness in a criminal cause or matter shall be examined either on oath or affirmation subject to the provisions of any other written law to the contrary. The only exception is when that witness is a child of tender age as dictated in the provisions of section 127(2) of the Evidence Act, Cap. 6.

The legal position on this requirement is enshrined in the Written Laws (Miscellaneous Amendment) Act No.4 of 2016 which amended section

127 in subsection (2) and (3) of the Evidence Act, Cap.6. That it is mandatory for the victim to promise to tell the truth and not lies before she/he testifies. For clarity, the said amendment is reproduced as here under;

> *"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 appeal, the record of the District Court does not indicate if the victim promised to tell the truth and not to tell any lies. At page 16 and 17 of the trial court proceedings, it reads as follows;

> *"PW2 Magreth Mikidadi,14 years, Sukuma, Pagan, affirmed and she states; I live at maembe village with my mother. I am not a student. I did not go to school...."*

From the record, it is not disputed that PW2 was 14 years of age when she testified. Is she a witness of tender age? Mr. Mwenda, was of the view that, she is not. If I understood him correctly, he meant, a witness is of tender age if he/she is of 13 years and below. Mr. Augustino Ijani on the other hand had a different view. His view was that; the age of 14 years is inclusive in the interpretation of the law as it is. That means, in his view, a witness is not of tender age if he/she is of 15 years and above. To resolve this controversy, I need to reproduce the provisions of Section 127 of the Evidence Act, Cap.16 as amended, which reads;

> *"For purposes of subsection (2) (3) and (4), the expression child of tender age means a* ***child whose apparent age is not more than fourteen years."*** *(emphasis added)*

In my considered view, Mr. Mwenda's interpretation to exclude the age of 14 years in the definition of a child of tender age is misconceived. In the definition as quoted above, the age of 14 years is inclusive in the definition and therefore, as PW2 was 14 years, she was a witness of tender age. In that capacity, she was required to promise to tell the truth and not to tell any lies. Was that job complied? As alluded above, it was not. The Learned Trial Magistrate did not deploy any benchmarks.

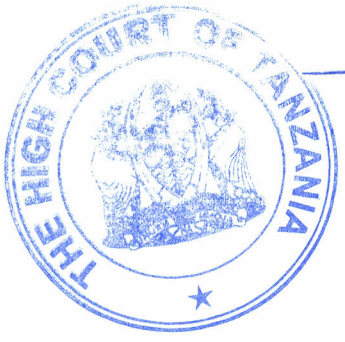
This being a mandatory requirement, failure to comply it as stated in **Yusuph Molo v.Republic** (supra) and **Godfrey Wilson v. Republic** (supra) renders the evidence of PW2 of no evidential value. Having expunged that evidence of PW2, it remains obvious that, this being a sexual offence, there would be no any other meaningful evidence to consider in sustaining the conviction of the Appellant. It is stated so because, according to the case of **Selemana Makumba V. Republic**(supra) the true evidence of rape has to come from the victim. That means, the prosecution did not prove the charge of rape.

Mr. Mwenda appears in his submission to suggest that, much as PW2 did not promise to tell the truth and not to tell lies before reception of her evidence, that irregularity is not fatal because the witness testified on oath. My understanding to the amendment introduced by Act No.4 of 2016 among others is that, a child of tender age is permitted to give evidence without oath or affirmation provided that she/ he make the requisite promise. As the witness testified on oath, and him being a child of tender age, what the trial magistrate did not comply is how did she came to a finding that the witness of a tender age understands the nature of oath? Unless this was done; otherwise the dictates of the amendment requiring a witness of tender age to make a promise before receiving her evidence may not be ignored.

On that account, this ground alone disposes the whole appeal, thus, I am not intending to determine other grounds of appeal. Accordingly, the appeal is hereby allowed. The conviction is quashed and the sentence is set aside. I thus order immediate release of the Appellant from prison, unless held for some other lawful reasons. It is so ordered.

Gerson J. Mdemu
JUDGE
28/08/2020

DATED at **SHINYANGA** this 28th day of August,2020.



Gerson J. Mdemu
JUDGE
28/08/2020