IN THE HIGH COURT OF TANZANIA

AT MWANZA

HIGH COURT CRIMINAL APPEAL No. 218 OF 2019

(Emanating from the judgment of the District Court of Nyamagana at Mwanza in Criminal Case No. 97 of 2018, Hon. B.M. Lema-RM)

JOSEPH NYIGANA @ BABA BHOKE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

29th July & 31st August, 2020.

TIGANGA, J.

The appellant herein was charged and convicted by the District Court of Nyamagana of the offence of rape contrary to sections 130(1)(e) and 131(1) of the Penal Code, Cap 16 R.E 2002. He was alleged to have raped one S d/o S, (name in initials) a girl aged eight (8) years old herein after "the victim". Upon conviction, he was sentenced to thirty (30) years imprisonment and corporal punishment of six strokes.

Aggrieved by the decision of the District Court, he is now appealing to this court to have both his conviction and sentence set aside and that he be set at liberty.

Before going to the merits of this appeal, I would wish to give, albeit in brief, the background leading to the case for which the appellant was convicted and sentenced.

It was alleged that the incident took place at Mahina area within Nyamagana District in the City and Region of Mwanza on the 23rd day of April, 2018. It was alleged further that on that fateful day, the victim was collecting firewood at her home when the appellant appeared and asked her to help him drive the goats nearby. It would appear that the appellant grabbed that chance and carried the victim into a nearby bush and immediately took off her clothes and his, put saliva on his private parts and raped the victim. Fortunately the appellant was caught on act by PW3 who took both the appellant and the victim to the victim's home and reported the matter to the victim's family.

Upon inspection, it was discovered that the girl had been raped. The appellant was arrested and the victim was taken to the police where the matter was reported and she was given PF3 and taken to the hospital for medical examination. Later, the appellant was charged with the offence of rape and subsequently convicted hence this appeal before me.

At the hearing of the appeal, the appellant appeared in person and unrepresented; whereas the respondent Republic was represented by Miss Mwaseba, learned State Attorney.

The appellant fronted ten (10) grounds of appeal to the effect that;

1) *The evidence of the victim PW2 was not elaborative enough to implicate the appellant in the offence of rape.*
2) *The trial court erred both in law and in fact to attach much weight to the evidence of PW2 without considering that there was no corroborative evidence to support it.*
3) *The trial court erred both in law and in fact for failure to record questions and answers during conducting voire dire test to the victim.*
4) *The evidence of the prosecution witness was doubtful, unreliable and untruthful which cannot assist the court to convict the appellant basing on it.*
5) *The evidence of the appellant was not properly evaluated and the reasons were not given.*
6) *The evidence of PW3 was not straight to support the prosecution evidence to implicate the appellant in raping the victim.*
7) *It was wrong for PW1 to examine PW2 for the reason that she was not a doctor.*
8) *The trial court erred in law and in fact to convict the appellant basing on the evidence of PW1 and PW3 without considering the conflict between the appellant and PW3 together with PW1.*
9) *Absence of the expert evidence i.e. medical or clinical officer who examined the victim rendered PF3 valueless in the eyes of the law.*
10) *There was no sufficient and cogent evidence to hold the appellant liable for the commission of the offence of rape, so the prosecution had failed to prove the case beyond reasonable doubt.*

When he was given a chance to make submission in support of his appeal, the appellant stated that he was aggrieved by the decision of

the District Court for the reasons contained in the grounds of appeal. He prayed that this court adopts the said grounds to reach its decision.

In response, Miss Mwaseba started by stating that she supports both conviction and sentence meted out against the appellant. The counsel then submitted against all ten grounds of appeal, starting with the first ground, she submitted that the evidence of PW2 at page 22 of the proceedings was very elaborative as she narrated what transpired. She submitted further that the law clearly states that penetration even slight is enough to prove the offence of rape.

On the second ground, counsel submitted that the evidence of PW3 was to the effect that he caught the appellant *in flagrante delicto* after hearing the victim screaming. Also that even if there were no other corroborative evidence, in rape cases the evidence of the victim suffices to found conviction.

Submitting against the third ground, counsel stated that the Magistrate never conducted *voire dire* test. Also, section 127(2) of the Evidence Act, Cap 6 eliminates the need to conduct *voire dire* test but that the witness simply has to promise to tell the truth and not lies. She submitted that the same was done referring to page 22 of the proceedings.

She argued ground four and ten together stating that the prosecution had three witnesses who gave direct evidence which was believed by the trial court which was in a better position to know if the witnesses were telling the truth.

Ground five was argued together with ground eight and counsel submitted that the evidence of both sides was evaluated and the decision was reached at after evaluation of both the evidence of the prosecution and the defence.

Arguing against ground six of appeal counsel stated that in rape cases the evidence of the victim suffices to base conviction. Also that, at page 28, PW3 explained that he found the appellant in the act of committing the offence. His evidence was therefore straight.

As for the grounds seven and nine, counsel submitted that the trial Magistrate stated at page 8 of the judgment that even without medical proof, the offence of rape can still be proved. In the end, she prayed that the grounds be dismissed for being non meritorious, the appeal be dismissed, conviction upheld and sentence be enhanced.

In his short rejoinder, the appellant submitted that he disputes to have been arrested by PW3. That this resulted out of a conflict between the appellant and the PW3 whereby PW3 was arrested after being found with local brew which was with PW1. He claimed that the two were blaming him that he was the one who informed the police that they were making local brew.

That marked the end of the submissions by the parties both in support and against the appeal at hand. Having gone through the submissions and the trial court's records, the main question, I suppose, that has to be asked is whether the case was proved beyond reasonable doubt, sufficient to find the appellant guilty of the offence he stood charged with.

As stated earlier by counsel for the respondent Republic that the evidence of the victim is crucial in cases of rape, which I totally agree, it follows therefore that in the absence of the same one cannot say that the case has been proved beyond reasonable doubt. Below is the reason as to why I made the above statement.

In the appeal at hand, the evidence of PW2 was crucial for she was the victim. With only 8 years, she was still a child of tender age. That being the case, section 127(2) of the Evidence Act, Cap 6 as amended by Written Laws Miscellaneous Amendment Act No 4 of 2016 had to be applied. For ease of reference it is reproduced hereunder;

> *"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 lies****"*

From the above cited section, two conditions have been provided for. **One**, it does away with the requirement of oath or affirmation meaning that a child of tender age can give evidence without being sworn or affirmed**. Two**, before giving the evidence, the child of tender age must make a promise to the court that he/she will tell the truth and not lies.

While the appellant alleges that the victim PW2 was not made to give promise to speak the truth, the learned State Attorney for the republic said that the witness promised to speak the truth in compliance with section 127(2) of the Evidence Act as amended, she refers to page 22 of the typed proceedings. It is true that at page 22 the record shows that the witness gave promise to speak the truth, however the situation

is different in the original hand written copy. In the original copy no promise was ever made, instead, the court conducted voire dire test.

Now, the issue remains as between the typed and the hand written original, where should I resort? I think I should go to the hand written original, because even the typed proceedings are certified from the original hand written. Now going through the trial court's original records, there is nowhere in the said records where it is shown that PW2 was made by the trial Magistrate to promise that she would tell the truth to the court and not lies. I gather from the records that she was made to answer questions as to whether she goes to church and if telling lies is a sin that can be punished by God. Then that was followed by the court's findings, I quote;

> *"The PW2 is having the sufficient intelligence to tell the truth in this court"*

After that finding, the court approved the *voire dire* test and ordered that PW2 be sworn and then she testified.

As the law requires, the trial Magistrate ought to have required PW2 to promise to tell the truth and not lies, before she testified; and the promise had to be recorded. Instead the Magistrate made a finding for himself that PW2 had sufficient intelligence to tell the truth. Failure of the trial Magistrate to record the witness' own statement that she promised to tell the truth and not lies meant that her evidence was wrongly admitted and therefore cannot be considered as evidence at all. It was decided by the Court of Appeal of Tanzania in **Godfrey Wilson versus The Republic,** Criminal Appeal No.168 of 2018 that;

"In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016. Hence the same has no evidential value"

Although counsel for the respondent referred this court to page 22 of the typed proceedings stating that there was a promise by the PW2 that she would tell the truth, after reading the third ground of appeal, this court went further and perused the original records only to find out that the same do not contain the said promise as shown in the typed proceedings. Since the original records carry much weight then this court will not share the same opinion as the counsel for the respondent that the law was adhered to.

In this matter at hand, since PW2's evidence was received without there being a prior promise that she would tell the truth and not lies, it would mean therefore that the trial court did not comply with the required procedure and the said evidence lacks value. As was stated in the case of **Godfrey Wilson** (supra) that;

"Since the crucial evidence is invalid, there is no evidence remaining to be corroborated.....in view of sustaining a conviction"

It is clear going by the above quoted authority, that since the evidence of PW2 is of no value, for it was received contrary to the law, it follows therefore that there is nothing to be corroborated in view of sustaining a conviction. In the normal circumstances, I would have ended here, however, I have asked myself whether this is not the fit case in which retrial can be ordered. In examination as to whether this

case is fit for retrial or not the authority in the case of **Rashid Kazimoto and Masudi Hamis Vs Republic**, Criminal Appeal No. 458 of 2016, will be of much help. It provides inter alia, for the principles governing the situation in which a retrial can be ordered. This authority quoted with approval the authority in the case of **Sultan Mohamed Vs Republic Criminal Appeal No. 176 of 2003** (unreported) which also quoted with approval the decision in **Fatehali Manji vs Republic** (1966) E.A 343 which stated 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 in sufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, however, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of Justice require it"*

Also see **Paschal Clement Branganza versus Republic** (1957) EA 152

Now, looking at the principle in the above cited authorities it is instructive to find that, retrial should be ordered if the following conditions exist:

i) *when the original trial was illegal or defective,*

ii) *where the conviction was set aside not because of in sufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial,*

iii) *Where the circumstances so demand,*

iv) *where the interest of Justice require it.*

This means if the court finds the existence of the circumstances described in the above authorities and where the interest of justice so requires may order retrial.

In this case the reason for allowing the appeal is non compliance of the procedure in recording the evidence of the victim who happened to be a child of tender age. It is not the fault of the victim or the prosecutor, but it was of the court which recorded the evidence without demanding the witness to give promise.

The case is serious, as it is premised in the grave violation of child right which is child sexual abuse. This case needs to be determined on merit so that the right of the victim can also be determined on merits, not on technicalities on the omission done by the court. In the end, and having considered all the above criteria, I find this to be a fit case for retrial. I thus order this case to be tried before another magistrate with competent jurisdiction.

It is so ordered.

DATED at **MWANZA** this 31st day of August, 2020.

J.C.Tiganga

Judge

31/08/2020

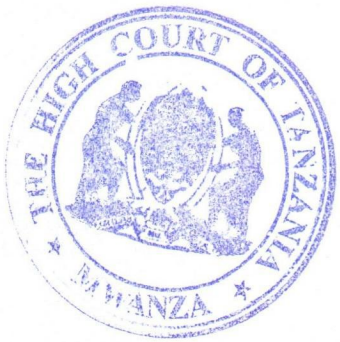
Judgment delivered in open chambers in the presence of the accused person in person and Miss. Mwaseba learned State Attorney for the respondent Republic.

J.C.Tiganga

Judge

31/08/2020

Right of appeal explained and guaranteed



J.C.Tiganga

Judge

31/08/2020