IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

APPELLATE JURISDICTION

DC. CRIMINAL APPEAL NO. 58 OF 2019
(From Mufindi District Court at Mafinga,
in Criminal Case No. 122 of 2018)

TITO S/O PAULO KUCHUNGURA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

KENTE, J;

This appeal is from the judgment of the District Court of Mufindi in which the appellant Tito Paulo Kuchungura was charged with rape contrary to Sections 130 (1) (2) (e) and 131 (1) of the **Penal Code (Cap 16 R.E 2002).** He was found guilty of the charged offence, convicted and sentenced to life imprisonment. Aggrieved by the said conviction and sentence, he has now appealed to this court.

In his supplementary petition of appeal, the appellant is complaining in a marred English language, thus:-

1. *The learned trial Magistrate erred in law and fact to conduct the Viore Dire test to PW1 as a witness of a tender age, which was forbidden by the laws to do so, hence the conviction and sentence was no leg to stand when the trial Court violates the provisions of the law.*

2. *The learned trial Magistrate erred both in law and fact to pass the unfair judgment when the social welfare was no present/sitting on court Coram to met the requirement of the laws when the PW1 and PW2 were a witnesses to tender ages whereby should be presented by the social welfare according to the laws.*

3. *The trial court wrongly basing on contradictory evidence adduced by PW1 and PW2 when PW1 said that appellant ordering them to watch a television on sitting room while PW2 said that the appellant when to his room when PW2 complaining against him to stop touching her body, then PW1 and PW2 evidence it better be not considered when its mostly contradicted.*

4. *The learned trial magistrate misdirected himself to pass the unfair judgment when the prosecution side failed to call any independent witness before the court of law and*

societies surrounding when the whole case was witnessed mostly by relatives with one blood PW1, PW2 and PW3, hence made a doubts on planting the case.

5. *The prosecution side failed totally to prove this case against the appellant beyond reasonable doubt.*

The complainant (PW1) who was a girl child aged nine years at the time which is material to the commission of the charged offence told the trial court that on 13th June 2018, the appellant phoned her father (PW3) and requested for her and her sister one Jestina Kalinga (PW2) to go to his (appellant's) residence and help him to safe guard his home as he himself went to work. When the appellant turned home, in the evening they prepared food for him and some warm water for shower. PW1 went on saying that after getting dinner, the appellant prepared a mattress on which they all slept. According to PW1 the appellant slept in the middle of her and her sister.

Sometimes around midnight PW1 heard her sister complaining that the appellant had wanted to rape her. The appellant then ordered them to wake up and watch the TV. Sometimes, thereafter, he allowed them to continue sleeping as he himself retired to his bedroom. PW1 told the trial court that on 15th June 2018 at about

8:00 am, their father (PW3) phoned the appellant and asked him to allow PW2 to go back home and help her father to do some shopping and household chores. PW2 then left leaving PW1 behind together with the appellant. After PW2 had left, the appellant allegedly told PW1 to comb her hair. According to PW1, after she finished combing the appellant led her into the sitting room. He then closed and locked the doors before he undressed her and himself. Thereafter he inserted what PW1 called "his mdudu" into her private parts. PW1 told the trial court that she cried a great deal but the appellant could not stop. She said that after the appellant had accomplished his desire, she put on her clothes and got out. The appellant allegedly ordered her to take shower and when she did so she discovered a watery substance on her genital area. PW1 took some oil and smeared it thereon. She then made fire with a view to making tea. She also told the appellant that she wanted to go back home and he readily let her go. On the way, she met her sister (PW2) who told her that the appellant had wanted to rape her on the previous night. In reply, PW1 told her sister that in fact the appellant had raped her (PW1) immediately after she (PW2) had left them behind. This

incident was reported to their father one Pius Kalinga (PW3) who in turn reported the same to the Police Station at Mafinga. PW1 was then referred to hospital where she was examined by one Doctor Hangwa (PW4) and confirmed to have been raped.

The evidence of PW2 is materially a replica of what her young sister PW1 told the court save for the rape incident which is said to have occurred after PW2 had left the appellant's home. PW2 told the trial court that she and PW1 had spent a night at the appellant's home and that the appellant had tried to rape her after having forcibly slept between them on one mattress. She said that on the following day she went to the shop to buy some items for her father and that, at about 11 am while on the way back to the appellant's home, she met PW1 who told her that the appellant had raped her. She told the trial court during cross-examination by the appellant that, she believed what her young sister had told her because of some indications, which the appellant had shown when he vainly sought to rape her the previous night.

The appellant denied the charged offence saying that on 15th June 2018 at about 10:30 pm he heard some people who introduced

themselves as Police Officers knocking the door and when he opened they took him to the police station where they accused him of having raped a young girl. He said that he denied those charges. He challenged the prosecution side for what he called leading hearsay evidence. He also criticised PW4 on the grounds that his expert evidence did not show the real culprit in this case. When he was cross-examined by the public prosecutor, the appellant told tthe trial court that he did not know the victim and any of her family members and that he was framed up by the persons who were determined to ruin his family. He thus implored this court to allow the appeal, quash his conviction, and set aside the custodial sentence imposed on him and consequently set him free.

Now, as can be noted, in this case the appellant is complaining in his written submissions that the trial magistrate had wrongly conducted a *viore dire* test on PW1 who was a child witness of tender age. He said that, that was contrary to law and therefore he urged this court to disregard or even expunge the evidence of PW1 from the record. Otherwise, the appellant claimed, the said evidence becomes not strong enough to form the basis of a conviction.

Submitting in reply, Ms. Nungu learned State Attorney appearing for the respondent conceded that indeed *viore dire* test is no longer a procedural requirement under our law. The learned State Attorney submitted and correctly so that section 127 (2) of the **Evidence Act (Cap 6 R.E 2019)** as amended by section 26 (a) of the **Written Laws (Miscellaneous Amendment) Act (No. 4 of 2016)** requires a child of tender age to only promise to tell nothing but the truth. Moreover, Ms. Nungu admitted that the trial Magistrate had conducted *voire dire* test on PW1 but according to her, that did not in any way invalidate PW1's evidence. The learned State Attorney further submitted that the method adopted by the trial magistrate when determining the ability of PW1 to give evidence was not fatal and in any way it did not prejudice the appellant's rights. She cited the case of **Bashiri Salum Sudi V. Republic, Criminal Appeal No. 379 of 2018** (unreported) in support of her argument.

For my part, I tend to agree with the learned state Attorney. As it will be noted at once, there is no precise and inviolable procedure of leading a witness of tender age in any criminal cause or matter to promise the court that he will tell nothing but the truth. In other

words the amendments of section 127 (2) of the **Evidence Act** by section 26 (a) of the **Written Laws (miscellaneous amendment) Act (No. 4 of 2016)** did not prescribe any particular words to be used by the child witness when promising to tell the truth in a criminal trial. For the avoidance of doubt, section 127 (2) of the Evidence Act as amended provides that:-

> *"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 above quoted provision of the law is clear that the evidence of a child of tender age will be received by the court after the child witness has promised to tell the truth and not lies. In my opinion, the trial Magistrate is required to either record in the proceedings that the provisions of section 127 (2) of the **Evidence Act** have been duly complied with or to record the actual words as used by the child witness when promising to tell the truth.

In the present case, the trial magistrate appears to have mixed and applied both the procedure obtaining under the former and the current law. He begun by conducting a *voire dire* but he did not end up there. He went on asking PW1 what was she promising to tell the court whereupon PW1 answered thus:-

> *"I am promising to this court that, I will tell only the truth, I won't lie anything."*

In my opinion, if in the interest of justice, we can separate the grain from the chaff, as we should, it will follow that the condition precedent to the proper reception of evidence from a child of tender age was duly complied with by the learned trial Magistrate. For the duty of the court under that section, is to ensure that the child witness has promised to tell the truth and not to lie before receiving his evidence and that is exactly what the trial magistrate did in this case. It follows therefore that, so long as PW1 had promised the court that she was going to tell the truth and not to lie, her evidence was properly received and the trial Magistrate cannot be faulted for that. He can only be reminded to acquint himself with the current position of the law on that aspect so as to avoid mixing the two

procedures in future. But, all in all, under these circumstances the complaint by the appellant in the first ground of appeal is found to have no merit and is consequently dismissed.

The other aspect of the appellant's complaint is well answered by Ms. Nungu learned State Attorney that, pursuant to sections 97 (1) and 99 (1) (d) of the **Law of the Child Act**, a Social Welfare Officer is required to be present in all proceedings of a criminal nature when a child is in conflict with the law and not in a situation like the present one where the child was a victim of a criminal act committed by an adult. In such a situation, the court is not required to seek the assistance of the Welfare Officer and for that matter the appellant's complaint on that aspect has no legal basis.

As for the complaint that there was contradiction between the testimony of PW1 and PW2, it is clear that the said contradiction had nothing to bear on the material events that took place early in the morning on the 15th June 2018 after PW2 had left the appellant's home. The question as to whether the appellant had on the previous night ordered PW1 and PW2 to watch the TV or he just left them and retired into his bedroom after he had exhibited some acts of sexual

assault, is indeed a trivial matter which cannot be said to have materially affected the evidence of the two witnesses as to lead to their being discredited. In any case whether the appellant retired into his bedroom or stayed and ordered PW1 and PW2 to watch TV, that has no direct and material correlation with the commission of the offence of which the appellant was convicted.

Another ground of complaint by the appellant, which I wish to deal with, is the question of an independent witness. The appellant is complaining that apart from PW1, PW2 and PW3 who he said were relatives, there was no independent witness to the prosecution case.

Submitting in rebuttal, Ms. Nungu maintained and correctly so that there is no law, which prevents relatives from testifying in cases involving their fellow relatives. The learned State Attorney referred me to the unreported case of **Charles Kalungu and Charles Kalinga V. The Republic, criminal Appeal No. 96 of 2015** and **Goodluck Kyungu V. Republic [2002] TLR 263** in support of her arguments.

With due respect to the appellant, I agree with Ms. Nungu's arguments. As it is, the law does not rate the evidence of witnesses who are relatives in the second or third class category. I would add that, once a witness is found by the court to be competent to testify his evidence does not become more or less superior to the other. In my view, unless it is shown that a witness who is relative of one of the parties to the case had is own interests to serve in the particular case, there is no need for corroborating his evidence by the evidence of an independent witness. And if I may further add, in my opinion, in sexual related offences a court can and may act on the testimony of even a single witness though uncorroborated. That is the import of the holdings by the Court of Appeal in the cases of **Selemani Mkumba V. Republic [2006] TLR 339**, **Hamisi Mkumbo V. Republic, in Criminal Appeal No. 124 of 2007 (unreported)** and **Rashidi Abdallah Mtungwa V. Republic, Criminal Appeal No. 91 of 2011 (unreported)** amongst others. Of course, I am live to the fact that, in the present case, one could go further and argue that corroboration of PW1's evidence was necessary as she was a child witness but that was taken care of by the prosecution

side when through the evidence of Doctor Enos Hangwa (PW4) it was established beyond reasonable doubt that indeed PW1 was raped. In my further opinion, given the absolute state of secrecy under which sexual related offences such as rape are ordinarily committed, the law would be demanding for supernumeraries if it put the emphasis on the need for corroboration by the evidence of an eye-witness to support the evidence of the victim. Such a requirement would invariably make it very hard if not impossible for prosecutors to prove cases of rape beyond a reasonable doubt. In the end, there would be no winnable case by the prosecution and they would be proved rapists will triumphantly walk out of the courts of law with complete impunity.

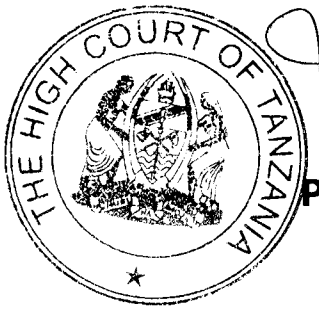
The last complaint by the appellant, which I should say right from the outset that it has no merit, is PW1's mild expression of the appellant's manhood as "mdudu" as opposed to penis. As correctly submitted by Ms. Nungu learned State Attorney, that expression was not only right but also something which was expected from PW1 who was a very young child then aged nine years old. I also take into cognisance of the fact that in many traditional African societies, if a

child is well brought up, it is common for such a child to choose a mild or indirect word expression than the word which is considered to be too harsh or blunt when referring to human genitalia. That is what PW1 did in the present case and she cannot be discredited for that.

For these reasons, I am firmly of the view that the evidence led in support of the prosecution case had demonstrated the appellant's guilt beyond reasonable doubt. His conviction for rape was, in these circumstances, well founded. Accordingly, this appeal has no merit and it is dismissed in its entirety.

It is so ordered.

DATED at IRINGA this 30th day of October, 2020.



P. M. KENTE

JUDGE