IN THE HIGH COURT OF TANZANIA

AT TABORA

CRIMINAL APPEAL NUMBER 138 OF 2019

(Arising from Original Criminal Case No. 31 of 2018 of the Resident Magistrate's Court of Tabora at Tabora)

HASSAN SHABAN IDD---------- APPELLANT

VERSUS

REPUBLIC ---------- RESPONDENT

JUDGMENT

23/10 & 13/11/2020

BAHATI, J:

The appellant **HASSAN SHABAN IDD** appealed before this court contesting the decision of the District Court of Tabora at Tabora in Criminal Case No. 37 of 2018 where he was charged and convicted for the offence of Rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code Cap.16, [R. E.2019].

The brief background of this case is that; it was alleged that on 19th day of April 2018 during morning hours at Mihogoni area Mbugani Ward within Tabora Municipality the appellant Hassan Shaban Idd did have carnal knowledge of one XXY a child of six (6) years old.

When the accused was called upon to answer the charge read against him he denied the charge. In a bid to prove its case the prosecution called four (4) witnesses and consequently, the trial court

found the accused guilty of an offence convicted and sentenced him to serve life imprisonment.

The appellant was aggrieved with the decision of the trial court and appealed to this court on the following grounds that;

1. *PW1 (the victim of the offence) being a child of tender age her evidence was received contrary to the requirement of section 127(2) of the Evidence Act Cap 6 as amended by the Written Law (Misc Amendment) Act No. 2 of 2016.*
2. *The trial magistrate erred in law and fact when he composed the new judgment on 27/11/2019 while the new judgment (after the order of the High Court) was pronounced in Court on 6/11/2019. This violated section 312 (1) of the CPA Cap. 20 R.E 2019.*
3. *The appellant was not accorded a fair trial in that the substance of the charge was not put to the appellant by the trial court and record his plea immediately before the first witness for the prosecution started testifying.*
4. *The trial magistrate erred in law and fact by convicting the appellant despite the absence of a death certificate showing that the medical doctor who examined the victim of the offence was indeed dead.*
5. *That, the trial magistrate erred in fact and law by convicting the appellant while the age of the appellant was not cogently established.*

6. *That, the PF3 of the victim was not read aloud in court in the hearing of the appellant, this greatly prejudiced the appellant.*
7. *That the case for the prosecution against the appellant was not proved beyond reasonable doubt.*

When the appeal was called for hearing the appellant appeared in person, through the aid of video conference while the respondent was represented by the learned State Attorney, Ms. Juliana Mokhe.

At the outset, Ms. Juliana Mokhe, learned State Attorney supported the appeal. She submitted on the first, fourth, and sixth grounds of appeal that, the victim was a child of 6 years and according to the law she was under the category of a child of tender age, so her evidence was recorded in contravention of section 127 (2) of Tanzanian Evidence Act, Cap. 6 [R. E. 2019].

The learned State Attorney for the Republic conceded that the trial magistrate omitted to address himself on changes brought by Section 26 of the Written Laws (Miscellaneous Amendment) Act No. 4 of 2016 which amended Section 127 of the Evidence Act, Cap.6 on *voire dire*. It follows that the evidence of the victim (PW1) has no force of law and thus invalid. The magistrate did not record the proceedings, in this stance it contravened with the provision of section 127 and PW1 did not stand by itself as unsworn evidence. To bolster her argument she cited the case of **Emmanuel Migeshi Madatu Vs Republic,** Criminal

Appeal No. 454 of 2007 at Tabora (CA) unreported. On page 10 it has explained that the lower court must record the question.

She further submitted that during the trial the PF3 was an important document in corroborating evidence but in the proceedings, the same was admitted in Court irregularly; it was furnished by one Abas Kapama who was not the author of it. Since the Republic knew that the author of the said PF3 was dead they were supposed to rely on section 34 (b) of the Evidence Act, Cap.6 which explains the procedure on how to deal with such a piece of evidence when it's author has passed away. She prayed to this court to expunge the PF3 from the record which will make the prosecution unable to prove the matter beyond reasonable doubt. She referred the court to the case of **Sylvester Boniface vs R Criminal Appeal No. 421 of 2005 CAT at Tabora (Unreported)** where the court explained how PF3 may be tendered in Court. She prayed the appeal be allowed and the appellant be released.

In reply, the appellant being a layman did not have much to say but conceded with the respondent. He prayed to this court to adopt his grounds of appeal and set him free.

The issue to be determined is whether the grounds are meritious. Having perused the proceedings of the trial Court and submissions from both parties, it is a trite law that under section 127(2) of the Evidence Act, Cap.6;

"Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."

I agree with the parties that, the trial magistrate conducted voire dire test instead of requiring PW1 to promise to tell the truth alone as the law requires and she did not record the proceedings which were against the law. This ground has merit.

On the second ground of appeal, it is on the record that, the appellant first appealed to this Court through Criminal Appeal No. 63 of 2019 and after hearing on 23/10/2019 my learned brother Amour, J. ordered the trial Magistrate to compose a proper Judgment by entering a conviction in conformity with section 312 (2) of the Criminal Procedure Act, Cap. 20 R.E 2019 within five (5) days.

However, on my perusal in the trial court's case file, I have come across two versions of typed judgment, one delivered on 6th November 2019 as reflected on the handwritten proceedings and the other purported to have been delivered on 27th June 2019. Both judgments look the same in content but they differ on the dates they were delivered. I assume that when the trial magistrate is ordered by the

High Court to recompose a judgment he edited the former judgment to make a new one without making changes on the dates it was delivered. Since the record on the handwritten proceedings are clear about the date the judgment was delivered and no signs of injustice that occasioned that error, I see no reason to dwell much on that ground than to order that a copy of the judgment dated 27 June 2019 be expunged from the record of the trial Court.

On the 6th ground of appeal, the appellant alleged that the PF3 of the victim was not read aloud in court in the hearing of the appellant, this greatly prejudiced the appellant. The learned counsel contended that it is true that the PF3 tendered was not read aloud in court during the hearing of the case. The omission greatly prejudiced the appellant. She cited the case of ***Robinson Mwanjisi & Others v. R.*** **[2003] TLR 218** to support his argument. It is a legal requirement that when documentary exhibits are admitted in court the same must be read aloud so that the accused person may understand the content of that document. In ***Mathias Dosela @ Adriano Kasanga vs Republic, Criminal Appeal No. 212 of 2019 HC Mwanza*** (*unreported*) the Court emphasized that failure to read out documentary exhibits after their admission renders the said evidence contained in that document improperly admitted and should be expunged from the record. The respondent went on that the procedure was altered by the trial magistrate thus it occasioned injustice on the part of the appellant.

Therefore it is my firm view that the PF3 is expunged from the record. Consequently having expunged the PF3 from the record, will the remaining evidence suffice to be watertight? The answer is no.

Before I conclude, I would like to remind Magistrates that on 20th March 2018. The Chief Justice of Tanzania gave directions that when composing judgments in which a child is involved in the proceedings either as a witness or victim their identity must be protected so that the dignity of a child so involved is preserved.

I won't waste much time discussing all the grounds leveled by the appellant as those discussed above are sufficient to dispose of this appeal that the prosecution failed to prove the case beyond reasonable doubt.

For the foregoing reasons, I see no need of ordering a retrial but rather do hereby allow the appeal, quash the conviction and set aside a sentence meted against the appellant, and order an immediate release of the appellant from prison unless held for other lawful cause.

It is so ordered.

A.A BAHATI.

JUDGE

13/11/2020

Judgment delivered under my hand and seal of the court in chamber, this 13th day November, 2020 in the presence of the appellant.

A. A. BAHATI

JUDGE

13/11/2020

Right of appeal explained.

A. A. BAHATI

JUDGE

13/11/2020