IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 145 OF 2019

(Appeal from the decision of the District Court of Chunya at Chunya in Criminal Case No. 205 of 2017)

HASSAN SAMSON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Hearing : 03/03/2020
Date of Judgement: 31/03/2020

MONGELLA, J.

The appellant was charged and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R. E. 2002. In the trial court it was alleged that, on diverse dates between May 2017 and October 2017, the appellant had carnal knowledge of one Agnes Charles, a girl aged 13 years. He was ultimately sentenced to serve 30 years imprisonment. Aggrieved by the decision of the District Court, the appellant appealed to this Court on seven grounds which shall be stated in due course herein. He appeared in person and prayed

for the Court to adopt his grounds of appeal as his submission. The respondent was represented by Ms. Tengeneza, learned State Attorney.

On the 1st ground, the Appellant averred that the learned trial Magistrate erred in law and in fact in convicting him relying on single witness, that is, PW2 without any corroboration from other witnesses who saw or arrested him while raping PW2.

Responding to this ground, Ms. Tengeneza argued that the best evidence comes from the victim and the evidence of the victim (PW2) was believed by the trial court. That PW2 testified that she is a step child of the appellant and they lived together at their house. She argued that the appellant is of sound mind and he used to do the act at night as per the evidence of PW2. That PW2 testified that she used to sleep with her siblings and the door was never locked making it easy for the appellant to enter into the room and rape PW2. Ms. Tengeneza further argued that even though there was no witness who arrested the appellant on the act, PW3 who was the head teacher and acting Village Executive Officer, ordered the appellant's arrest. She contended that what is required is the credibility of witnesses and not the number of witnesses as per section 143 of the Evidence Act, Cap 6 R.E. 2002. She also cited the case of ***Hassan Juma Kanenyera v. Republic*** [1992] TLR 100 in which it was ruled that the evidence of a single witness can suffice to convict the accused.

On the 2nd ground the appellant states that the evidence of PW2 was recorded without conducting *voire dire* to ascertain that PW2 as a minor.

knows the meaning of oath and telling the truth as required under section 127 (2) of the Evidence Act, Cap 6 R.E. 2002. Ms. Tengeneza made a short response to this ground of appeal. She submitted that the law has already been changed by Act No. 2 of 2016 whereby the requirement of *voire dire* was done away. She referred the Court to page 11 of the proceedings whereby the child victim (PW1) promised to say the truth as per the current legal position.

On the 3rd ground the appellant contended that the trial Magistrate erred in law and fact in believing that the appellant raped PW2 without taking into account the testimony of PW2 at the trial whereby she said that inside the room three people used to sleep, but she failed to explain how the appellant raped her without her raising an alarm or calling her siblings who were inside the room as well.

Responding to ground three, Ms. Tengeneza argued that PW2 explained how the appellant used to go to her and that she never had sexual intercourse with anyone except her stepfather. That PW2 used to sleep with her siblings who were usually asleep. That PW2 reported the incidents but no one took her statements seriously until she got pregnant. She argued that no DNA was carried out because PW2 miscarried the pregnancy later.

On the 4th ground the appellant stated that the trial Magistrate erred in law and fact in convicting the appellant without evaluating the evidence of PW2 that she informed another person of being raped by the appellant but PW3, PW4 and PW5 denied to have received any

information from her. Responding to this ground, Ms. Tengeneza stated that it is true that some witnesses denied the statement by PW2 that she reported the incident to them. However, she argued that PW2 gave credible evidence that she reported the incident to her mother, grandmother, the appellant's mother and her neighbour one "Mama Mary" but all of them never considered her statements.

On the 5th ground the appellant contended that PW2 got miscarriage but there was no proof from medical doctor to that effect. Ms. Tengeneza responded to this ground by arguing that PW6, Dr. Mdoe testified to have examined PW2 and identified that she was five months pregnant. That PW6 further stated that on 25th October 2017 PW2 was taken to the hospital and there were signs of miscarriage and the same was confirmed after examination. She argued that the PF3 was presented in court but it contained no report on the miscarriage because regarding that PW3 was treated as a normal patient.

On the 6th ground the appellant contended that the charge was framed by the prosecution side. That there was no any police officer who issued the PF3 (Exhibit PE1) or made investigation concerning the case who was called to testify in support of the evidence given by PW2. Responding to this ground, Ms. Tengeneza argued that the PF3 was given to the victim, and went to hospital. PW6 presented the PF3 in court, thus the police had no relevance to be called to testify.

On the last ground the appellant contended that the prosecution case was not proved beyond reasonable doubt and that his defence was

disregarded by the trial magistrate. Ms. Tengeneza disputed the argument by the appellant on this ground. She referred the Court to page 10 of the trial court judgment and argued that on this page it is evident that the trial Magistrate analysed and considered the appellant's evidence and found it was not credible. Thus she contended that the trial court was right in disbelieving the appellant's evidence.

After considering the arguments from both sides and reading the record of the trial court, I can comfortably dispose this appeal on two grounds. The first is on the contention that the trial court erred in convicting the appellant relying on the evidence of a single witness, that is, PW2. In sexual offences, the evidence of a single witness, who is a victim, can be solely relied upon by a court to convict the accused person. As per the case of ***Selemani Makumba v. Republic*** [2006] TLR 379 true evidence in rape cases comes from the victim. What matters is the credibility of such witness as assessed and found by the trial court so long as reasons for such finding are provided.

Under the law also, particularly **section 27 (7) of the Tanzania Evidence Act, Cap 6 R.E. 2019** a conviction may be grounded on uncorroborated of a child of tender age or a victim of sexual offence. The provision provides:

> *"Notwithstanding the preceding provision of this section where in Criminal Proceedings involving a sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the Court shall receive the evidence of the child of tender years or, as the case may be, the victim of the sexual offence, on its own merits, notwithstanding that such evidence is not*

> *corroborated* ***and proceed to convict if, for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but truth.***" *[Emphasis supplied}*

The Court of Appeal in ***Peter Abel Kirumi v. Republic***, Criminal Appeal No.25 of 2016 (CAT-Arusha, unreported) elaborated on the application of section 27 (7) above. The Court insisted on recording the reasons for relying on the uncorroborated evidence. It specifically stated: "***...that the reasons for the satisfaction of the trial court must be apparent on the face of the judgment or record proceedings, the more so as, under certain circumstances, corroboration of the evidence of the victim may be called for.***"

I have gone through the proceedings and seen that the court found the testimony of other witnesses particularly, that of PW4 and PW5, unsatisfactory to hold the conviction because they refused to corroborate the evidence of PW2 to the effect that she told them of being raped by the appellant. The evidence of the rest of the witnesses also did not link the appellant to the offence charged. He thus relied on the testimony of PW2, the victim. However, there is nowhere in the proceedings the reasons for being satisfied with the testimony of PW2 only have been recorded. At page 9 to 10 of the trial court judgment the Hon. Magistrate wrote:

> *"I believe that, it could have been a tough work to prove that, PW2 was impregnated by accused person without undergoing the test of deoxyribonucleic acid commonly referred as 'DNA', since PW2's pregnancy is already miscarried, there is no way out this court cannot believe on the stronger evidence adduced by PW2 which had the*

effect that in adverse dates, accused person used to force PW2 to enjoy sexual intercourse, since PW2 was of thirteen years was automatically raped and that kind of rape is what is normally referred as statutory rape."

From the above quoted paragraph it appears that the trial court relied on the evidence of PW2 because it saw the same was strong. However, as per the dictates of section 27 (7) of the Evidence Act, and as insisted by the CAT in the case of ***Peter Abel Kirumi*** (supra), it is my considered view that it is not enough to only state that the evidence of a single witness is strong. The court must move further to state the reasons for finding such evidence being strong to warrant a conviction. The trial Magistrate did not go to that length as required under the law. I therefore find merit on the appellant's ground of appeal and allow it.

The second ground is on the contention that the trial court did not conduct *voire dire* before taking evidence of PW2 who was a child below 14 years. As argued by the learned State Attorney, the requirement to conduct *voire dire* was amended by 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 replaced 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 requires the child of tender age to promise to tell the truth and not to tell lies to the court. Nevertheless, the promise given by that child must be recorded in the proceedings. 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 11 of the typed proceedings of the trial court, the Hon. Magistrate wrote:

> *"I have carefully and keenly examined the victim and she has promised to testify the truth only, further the victim knows the nature of oaths as such, she ought to take oath, section 127 (2) of Cap 6, R. E. 2002 complied with."*

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 his conclusion and not what PW2 stated upon promising to tell the truth. 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, was adhered to as required under the law. The promise of PW2 ought to have been recorded in her own words. Under the circumstances I also find merit on this ground of appeal.

Considering the observations I have made above I find the two grounds addressed herein to be sufficient in disposing this appeal in its entirety. I therefore allow this appeal and consequently quash the conviction and set aside the sentence imposed on the appellant. The appellant should be released forthwith from custody unless he is otherwise held for some other lawful cause.

Dated at Mbeya on this 31st day of March 2020

L. M. MONGELLA
JUDGE
31/03/2020

Court: Judgment delivered at Mbeya in Chambers on this 31st day of March 2020 in the presence of the appellant appearing in person and Ms. Sara Anesius, learned State Attorney for the Respondent.

L. M. MONGELLA
JUDGE
31/03/2020