IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 31 OF 2020

(Arising from Criminal Case No. 167/2020 of Kasulu District Court at Kasulu before Hon M.M. Majula - RM).

SANZAYAMUNGU S/O MTUPEKEE.................................. APPELLANT

VERSUS

THE REPUBLIC.. RESPONDENT

JUDGMENT

Dated: 04/11/2020 & 24/11/2020

Before: A. Matuma, J.

The appellant herein ***Sanzayamungu Mtupekee***, was charged before Kasulu District Court at Kasulu with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, (Cap 16, R.E. 2019) in the first count and Unnatural Offence contrary to section 154 (1) (a) (2) of the same law supra in the second count. It was alleged that on July, 2020 at Nyarugusu Refugee Camp within Kasulu District in Kigoma Region the appellant did have carnal knowledge with a girl aged 14 years old in the two counts. For the purposes of hiding the victim's identity I shall be referring to her as PW1 because she testified as such.

After a full trial in which the prosecution paraded a total of five witnesses while the appellant fended for himself, the trial Court found that, the appellant was guilty of the two offences and it accordingly convicted him. The Appellant was then sentenced to serve 30 years jail term in respect of each count which was ordered to run concurrently. Aggrieved by the conviction and sentence, the appellant is now before me armed with five grounds of appeal against the conviction and sentence. For the reason to be stated herein below there is no need to reproduce such grounds of appeal.

When the Appeal came for hearing the Appellant appeared in person and was represented by Mr. Raymond R.G. Kabuguzi learned Advocate while the Respondent/Republic was represented by Mr. Robert Magige, learned State Attorney.

Both the learned State Attorney and learned advocate agreed that the conviction of the appellant in the circumstances of the case was uncalled for. They however differed why such conviction was uncalled for and again differed on the way forward.

While the learned advocate for the appellant argued that the conviction was uncalled for due to lack of sufficient evidence warranting the conviction, the learned State Attorney was of the view that the evidence was overwhelming but was received contrary to the law governing the receiving of the evidence of Children of tender ages.

They also parted/differed on the way forward whereas the learned advocate called for a total acquittal while the learned state attorney called for a retrial.

The learned Advocate on the weakness of the prosecution evidence to warrant the conviction argued that there was no eye witness apart from the victim herself, that the victim was not credible as she did not disclose the

alleged offence until some other day when Pw4 reported the same to the parents of the victim, that the medical examination of the victim revealed she had not sustained any bruises nor blood was seen, that even PW4 who reported the incident did not do so immediately, that the doctor only established that the victim was not virgin which by itself is not evidence of rape and that the trial court made amendment on the second count of the charge at the time he was composing the judgment which rendered the trial unfair as it was held in the case of ***Qaini Hiary versus The Republic, Criminal Appeal no. 295 of 2016*** (CAT).

The learned State Attorney on his party submitted that the evidence was cogent and enough to convict because; the best evidence of rape comes from the victim herself and she explained how she was raped and sodomized by the appellant, she had her evidence corroborated by PW4 her fellow child who stated to have witnessed the last incident of the crime and the doctor who established that the victim had no hymen, that failure of PW1 and PW4 to immediately report the crime was accounted by themselves in that they faced a threat of being killed from the appellant had they reported to any.

The learned state Attorney argued that the only problem is the manner the trial magistrate received the evidence of PW1 and PW4 who were all children of tender ages. He argued that section 127(2) of the Evidence Act was violated by the trial court as the evidence of the two potential witnesses were taken under the promise to tell the truth and not lies without adhering to the law supra which require the court to test the witness who is of the tender age whether he or she knows the meaning of oath before resorting into the exemption of requiring the witness to promise telling the truth and not lies. He referred this court to the case of ***Godfrey Wilson Versus Republic,***

Criminal Appeal No. 168 of 2018 CAT and ***Issa Salum Nambaluka V. Republic,*** *Criminal Appeal No. 272 of 2018.*

The learned State Attorney was of the view therefore that it was the court itself which committed the wrong but on the strength of the evidence on record a trial denovo would be the best remedy or order to be issued for the purpose of meeting the end of justice.

Having gone through the records of the trial court and listening the arguments of the parties, I find it true that the trial court took the evidence of the child victim PW1 and her corroborating witness PW4 without testing them whether they knew the meaning and nature of oath and determine on record whether they qualified to give their evidence under oath/affirmation or whether they had to fall into the exemption under section 127 (2) supra.

In ***Issa Salum Nambaluka's*** case for instance, the court of Appeal reproducing what they held in ***Godfrey Wilson*** supra had these to say;

> *In the case of Godfrey Wilson, criminal Appeal no. 168 of 2018 (unreported), we stated that, where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If that child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies"*

The Court of Appeal then gave the procedures on which a child should be tested whether she/he understands the meaning and nature of oath by asking him or her some simple questions such as the age of the child, the religion

and whether the child understands the nature of oath, whether the child promise to tell the truth and not to tell lies etc.

In the instant case, the court did not test the two witnesses as such and merely took their respective evidence on the promise to tell the truth;

> *"PW1, 14 years, standard 4 pupil at Amani Primary School, resident of zone 10 Nyarugusu refugee camp, Kasai by tribe.* ***I promise before the court to tell the truth and not to tell lies****"*

> *"PW4, 13 years, W7 in Nyarugusu refugee camp, standard 4 pupil at Amani Primary School, Kasai by tribe Muslim.* ***I promise to tell the truth and not to tell lies before the court****"*

The witness of tender age like any other witness in a criminal trial must as a general rule give his or her evidence under oath or affirmation as it is mandated under section 198 (1) of the Criminal Procedure Act, Cap. 20 R.E 2019 as it was also in the Revised Edition of 2002 that;

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act".*

The child of tender age unlike an adult witness must however, before giving evidence under oath or affirmation be tested by simplified questions and the trial Court be satisfied that such witness can in fact give evidence under oath or affirmation as the case may be. See the case of ***Selemani Moses Sotel @ White versus the Republic, Criminal Appeal no. 385 of 2018*** CAT.

But when the evidence of such a witness of tender age has to be given without oath or affirmation under section 127 (2) of the Evidence Act supra, as an

exception to the general rule, the Law mandatorily requires such witness to promise telling the truth and undertake not to tell lies before his or her evidence is received. The evidence received contrary to the said requirements has no evidential value and cannot be acted upon to convict as it was held in the case of **Godfrey Wilson** supra.

In the instant case as herein above reflected, the records do not indicate anyhow, as to whether the court tested the two material witnesses for the prosecution to ascertain whether they could have given their evidence under oath/affirmation or not.

Their respective evidence is thus valueless as rightly observed by both parties and cannot therefore be acted upon to convict or sustain the conviction of the appellant.

Up to this juncture the readily available remedy as per cases cited supra by the learned state attorney is to expunge such evidence and evaluate the remaining evidence on record to see whether they suffice to sustain the conviction of the appellant. Both parties are not at issue that in the absence of the evidence of the two witnesses no conviction can stand in the circumstances of this case.

Instead of expunging such evidence at this moment, I retain it to have it scrutinized for the purposes of ascertaining whether had such evidence been properly taken, the conviction would stand. I do so for the purposes of ascertaining the proper course to take whether to acquit or order a retrial as the parties argued in their respective sides. I am guided by the decision of the Court of Appeal at Mbeya in the case of ***Nestory Simchimba versus The Republic, Criminal Appeal no. 454 of 2017*** which quoted several

other cases including that of ***Fatehali Manji vs Republic [1966] E.A 341*** to the effect that;

> *"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that, a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made when the interest of justice requires."*

It is apparent on record and undisputed that the two potential prosecution witnesses supra did not disclose the crime to anybody until when they quarreled. PW1 was clear in her evidence that she had carnal knowledge with the appellant four times and at all these times did not disclose to anybody. It was the fourth time when PW4 alleged to have found them on ***fragment-delicto.*** PW4 also did not report. The learned stated attorney argued that the witnesses accounted for why they didn't report in that the appellant had threatened to kill them had they told any.

I am far to believe the alleged threat and even if it would have to be believed the question is what removed the threat when they finally revealed the incident. It is on evidence of PW4 that having witnessed the crime she was promised to be given a gift so that she stays mute and in addition thereof she was threatened to be killed. She thus received the gift which was a shirt in the next day and kept quiet. On the other day when their mother had gone

to church, she quarreled with the victim PW1 and it is when she decided to reveal the episode;

> *"One Sunday the next day after finding the victim and accused in fragment delicto, my mother who is not a Muslim went to church and left me and my sister (PW1) at home. Then me and my sister got into a fight and I told her I would tell Mom what I had found her doing with the accused*
>
> *Then my mother came, we gave her ugali, she then ate, after eating I told her that I found the victim (PW1) who is my sister with the accused on the dock in fragment delicto having sex in the accused's bathroom"*

With the herein above evidence PW4 had nothing threatening her from reporting the crime if at all she witnessed it. This is because she has not stated that the threat was waived. She only decided to report after having fought with the victim. It was a report thus to incriminate the victim because they had quarreled. Had no fight arose between them there would have not been any report to date.

In the circumstances, I agree with Mr. Kabuguzi learned advocate that the conduct of both PW1 and PW4 is wanting and could not be believed. Not only that but also upon examination by PW3 the doctor, his findings are positive that neither the vaginal nor the anus had bruises as he testified;

> *"There was no blood in the vagina or bruises. When I checked the anus there was also no bruises or blood"*

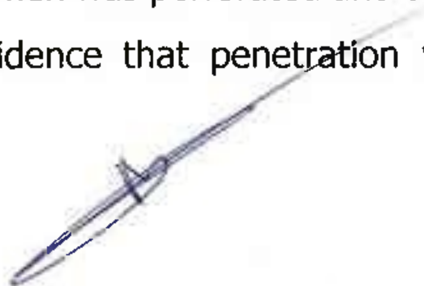
In rape and unnatural offences, penetration must be proved beyond reasonable doubt. The law is very clear that penetration however slight is enough to establish the offence of rape or unnatural offence as the case may be. Penetration has always been proved by establishing among other indicators; some bruises in the vaginal minora walls or anus.

Again, the PF3 exhibit PE1 is clear that there was no any anal laceration. That means PW3 found the victim's anal normal with no scratch or tear. That piece of evidence further discredit PW1 who alleged to have been four times sodomized by the Appellant penetrating his penis into her anus;

> *"Aliniinamisha hivi, kisha* ***akaingiza uume wake*** *kwenye uke wangu na sehemu ya haja kubwa* ***kwenye mkundu...***
>
> *On the other day in the morning....he again* ***inserted his penis in my private parts (vagina)****, he also* ***inserted his penis in my anus****.....*
>
> *On the next time (3rd time) .....he did as usual* ***inserting his penis in my vagina and anus*** *......."*

I could not understand how the penis was so inserted into the anus of the victim four times, but yet the doctor found the anus normal with no any sign of penetration. That draws inference that PW1 was not a witness of truth and should have not be trusted to the detriment of the appellant.

The learned state attorney was of the view that since the doctor PW3 established that the victim's hymen was perforated and thus she was not a virgin, that is sufficient evidence that penetration was there. Mr.



Kabuguzi learned advocate vigorously disputed that argument. He submitted that lack of hymen in itself is not evidence of rape.

I agree with the learned advocate of the appellant that losing virginity has not been evidence of rape in our criminal jurisprudence. It is the manner in which virginity got lost could be established that it resulted from a rape incident. In the instant case the victim PW1 did not state whether her virginity was perforated in the alleged rape incidences nor that it was the appellant who perforated it.

Most important PW3 the doctor who examined the victim during cross examination by the appellant on the issue of virginity in relation to the alleged rape, he was positive that;

> *"Since there was no bruises or blood it was hard to determine **when was the hymen taken out** but all what I can say the victim's hymen had been perforated. **I don't know when the hymen was taken out".***

Not only that but also PW3 in his evidence in chief opined that the hymen of the victim might have been perforated by penetration of blunt object such as penis or finger. He did not therefore link the perforation of the hymen with the penis as a sole cause but also other causes such as finger.

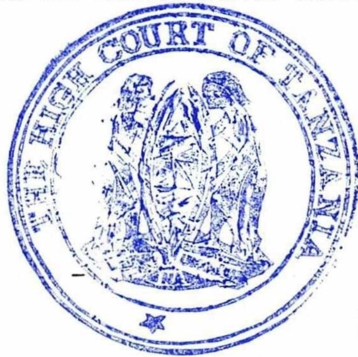
In the circumstances it was the victim to give a clear account on how her hymen got lost and when. Failure so to do left the prosecution case with unfilled gapes which should be resolved in the appellant's favour. To the contrary, it would be acting on conjectures and speculations which have no room in criminal trials as it has been decided in a number of cases including but not limited to; ***Mohamed Musero versus Republic [1993] TLR 290.***

I had also time to rule out in the case of ***Linael d/o Venance Komba and Another versus Republic, Misc. Economic Application No. 4/2020*** HC at Kigoma that;

> *"Speculations and conjectures in criminal trials have not at any time been the business of the Court".*

With the herein observations, a retrial as sought by the learned state attorney is uncalled for as the prosecution evidence on record could not lead to conviction of the appellant even if the same would have been properly taken by the trial court.

In the premises I allow the appeal, quash the conviction and set aside the sentence meted on the appellant. I order his immediate release from prison unless held for some other lawful cause. It is so ordered.



A. MATUMA

JUDGE

24/11/2020

Court: Judgment delivered in chamber this 24th day of November, 2020 in the presence of the Appellant in person and his advocate Mr. Method R.G. Kabuguzi and in the presence of Mr. Robert Magige learned State Attorney. Right of further appeal to the Court of Appeal of Tanzania subject the relevant guiding laws is fully explained.

Sgd. A. MATUMA

JUDGE

24/11/2020