IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 32 OF 2020

(Arising from Criminal Case No. 192 of 2019 Kibondo District Court Before: Hon. S.G. Mcharo – RM)

SAMSON ZILAGELA.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

18/11/2020 & 26/11/2020

A. MATUMA, J

The accused Samson s/o Zilagela stood charged in the District Court of Kibondo at Kibondo for an offence of incest by male contrary to section 158 (1) (a) of the Penal Code, [Cap. 16 R.E 2002].

He was alleged to have had carnal knowledge of his own daughter aged nine (9) years old. The offence was alleged to have been committed on the 8th day of July, 2019 at Bitale village within Kibondo District in Kigoma Region.

The prosecution brought five witnesses including the victim whose evidence the trial Court found sufficient to convict as it proved the case to the required standard. The accused was convicted of the offence and sentenced to a custodial sentence of thirty (30) years jail term.

The appellant is aggrieved of the conviction and sentence hence this appeal with seven grounds of appeal. All the grounds raise one major ground ***that the prosecution case was not proved beyond reasonable doubt against him.***

At the hearing of this appeal the appellant appeared in person unrepresented while the respondent/Republic had the service of Benedict Kivuma learned state attorney.

The appellant opted the state attorney to start replying to the ground (s) of appeal and him to make a rejoinder thereof.

Mr. Kivuma learned state attorney from the outset stated that he was opposing the appeal on the strength of the evidence of PW2 and PW5.

The learned state attorney before dwelling into the strength of the evidence of the two witnesses above submitted that the evidence of the victim PW3 was received contrary to section 127 (2) of the Evidence Act,

[Cap. 6 R.E 2002] thus valueless which deserves nothing rather than being expunged.

On that, the Appellant had nothing to contribute as it is a legal issue.

I agree with the learned state attorney that the Evidence of PW3 was received contrary to section 127 (2) (supra). I further find that even the general rule under section 198 (1) of the Criminal Procedure Act, [Cap. 20 R.E 2002] was as well violated before the Court resorted into the exception under section 127 (2) (supra)

The evidence of the child victim PW3 aged 9 years old was taken without testing her as to whether she knew the meaning and nature of oath and be determined on record whether she qualified to give her evidence under oath/affirmation as the general rule under section 198 (1) supra requires or whether she had to fall into the exemption under section 127 (2) supra.

In ***Issa Salum Nambaluka V. Republic,*** *Criminal Appeal No. 272 of 2018* for instance, the court of Appeal reiterated what they held in ***Godfrey Wilson Versus Republic,*** *Criminal Appeal No. 168 of 2018* and 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 of tender age 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 child victim as such and merely took her respective evidence on the promise to tell the truth;

"PW3, L.S 9 years Bitale resident standard 3 Bitale school, a Christian, she promised to tell the truth and not lies before the court. S 127 (2) TEA as amended by Act no. 4 of 2016 complied with"

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 AT MTWARA.

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 be required by the court 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 child witness for the prosecution to ascertain whether she could have given her evidence under

oath or not. Her respective evidence is thus valueless as rightly observed by the learned State Attorney to be acted upon to convict or sustain the conviction of the appellant.

The learned state Attorney rested his case on the evidence of PW2 and PW5 whom he argues to have given strong evidence which is enough to convict or sustain the conviction even in the absence of the evidence of the victim PW3.

Let us visit the evidence of the two witnesses.

PW2 Fedinas Juma is the mother of the victim and the wife of the Appellant. This witness testified under page 13 of the proceedings that on the material date she left home to her farm leaving no body at home.

On her return she found her husband the appellant raping her daughter. She shouted and run to the ten-cell leader one Adolph who came and together they took the victim to hospital.

When the Court asked her for clarification she stated that she saw clearly the appellant's penis inserted into the victim's vagina. At that time the child was lying on the bed and the appellant slept on her.

Such PW2's evidence was disputed by the appellant who stated that they had a long existing grudge in which he once caught her committing

adultery with another man. Their grudge became big and he was even arrested on allegation that he had bitten PW2. At last PW2 threatened to jail him.

The issue is therefore, whether PW2 was credible enough despite the alleged grudges.

I find PW2 not credible at all because she has contradicted other prosecution witnesses in a number of material facts. While she testified to have gone to the ten cell leader one Adolph to report the crime, the appellant testified that it is him who went to Adolph to report after having found his wife (PW2) coaching the child to fabricate the allegation, the said Adolph came in Court as PW5 and in his evidence joined hands with the Appellant against PW2 that it was the appellant who went to call him.

Also, in her evidence PW2 stated that having called PW5 to the crime scene which in fact is not true as I have indicated herein above, she accompanied the said PW5 to the healthy center with the victim for checkup;

'Me and ten cell leader we went to the hospital. Nurses did look her...'

On the other hand, the appellant stated in his defense evidence that it is him and the ten-cell leader who decided to take the victim to hospital for

authentication of the allegations and that at that time PW2 was neither at home nor was in their company. PW5 in his evidence corroborated the appellant's version against PW2 in that;

> *'We were only three who went to the Dispensary'.*

He named the three people to be him, the appellant and the victim. PW5 further gave evidence that when he was called by the Appellant to his home he went there and did not find PW2 there, yet PW2 purports to say she was there.

PW2 thus contradicted PW5 in a number of areas in the prosecution case which discredits her. On the other hand, PW5 corroborated the Appellant's story in a number of aspects in his defense.

PW4 Onesmo Nicodem adds nothing rather than more contradiction in the prosecution case. He also purports to have arrested the appellant at his home in the assistance of Adolph the ten-cell leader and took him to the office (the local office) while PW5 stated that he just went to the Dispensary with the appellant and the victim alone (only three people PW4 not inclusive), and at that time the Appellant was not under arrest. According to PW5 even Onesmo was not on the crime scene, he joined

them when they were already at the Dispensary. PW4 and PW2 seems to lie in this case.

PW2 also contradicted PW4 on the issue of arrest of the appellant. She stated that when PW5 arrived at the crime scene, ***'the accused (appellant) was arrested by other people'*** while herself, PW5 and PW4 taking the victim to the dispensary. That means they left the appellant into the hands of other people who had arrested him. Her evidence contradicts both PW5 who gave evidence to the effect that the appellant was not arrested by any person but he himself friendly walked with him to the dispensary where the police came and took him. PW2 further contradicts PW4 who stated that he arrested the appellant in the assistance of PW5 and took him to the local office.

The variance of the story between PW2, PW4 and PW5 destroys the prosecution case as it was held in the case of ***Jeremiah Shemweta versus Republic [1985] TLR 228*** that;

> *'The Discrepancies in the various accounts of the story by the prosecution witnesses give rise to some reasonable doubt about the guilty of the appellant'.*

I am aware that only major contradictions matters and not minor one as it was decided in the case of ***Dickson Elia Nsamba Shapwata and another v. Republic, criminal appeal no. 92 of 2007;***

'Normal contradictions and discrepancies are bound to occur in the testimonies of the witnesses due to normal errors or observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurence'

But contradictions by the prosecution witnesses in this case cannot be said to be minor due to the fact that the crucial issue for determination is their credibility.

In the circumstances, I find the appellant to have successfully raised reasonable doubts in the evidence of PW2 and PW4, I accordingly discredit their evidence.

The remaining evidence relied by the learned state Attorney is that of PW5.

As I have stated PW5 gave evidence to the effect that the appellant approached him complaining that his wife was coaching his daughter (the victim) to incriminate him as a rapist and she was fabricating him of the offence. He accompanied the appellant and on reaching there he asked the victim of the alleged rape and she affirmatively told him that her father raped her.

The evidence of PW5 is not to the effect that he was giving positive evidence of rape but that he was told by the victim that she was raped by the appellant.

Whether or not the evidence was true, it depended on the testimony of the victim herself and that of PW2 who alleges to have found the appellant committing the crime. The evidence of the victim has been found valueless and that of PW2 has been discredited as herein above.

The evidence of PW5 thus cannot stand alone to convict the appellant.

I have also considered the conduct of the appellant and found it incompatible with the alleged crime against him. It is him who went to report to the ten cell leader PW5 that his wife is coaching their daughter to fabricate him with the offence, it is him who called PW5 the ten cell leader to his home and verify the allegation against him, it is him who along with PW5 took the victim to the dispensary and even when they were told to await the Police who were called, he waited there at the Dispensary until the Police arrived and took him. These conducts are inconsistent with the guilty mind although it is not always the case. For the purpose of this particular case and the available complaints of the Appellant against his wife PW2, I find the appellant's conducts as herein stated of an innocent man and the victim of fabrications.

The question may arise, what about medical evidence to the effect that the victim had signs of being raped? Starting with the PF3; the learned State Attorney rightly in my view submitted that the same was not read to the accused now the appellant after its admission in evidence. That violated the settled principle that documentary exhibits must be read to the accused person to accord him opportunity to know its contents for preparation of his focused defense as it was decided in the case of ***Robinson Mwanjisi & 3 Others versus The Republic (2003) TLR 218.*** The PF3 is thus liable to be expunged as I hereby do.

That being done, it remains the oral evidence of the Doctor PW1 one Emily Malaki. In his examination of the victim he states to have seen bruises on the outer part of the vagina terming as ***mashavu*** and a torn hymen. He further found white fluid mucus like discharging from the vagina. During re-examination he concluded that the laboratory test revealed that the mucus was sperms. The evidence of this witness is wanting on three aspects;

(1); When he was cross examined by the accused about the alleged mucus, he stated that he didn't confirm if the mucus was of the accused or of the child. That means up to the time he was being cross examined

he didn't know what the mucus was. But during re- examination he purports to conclude that the mucus was sperms!

(2); If we have to agree with him that the mucus were sperms, what did he mean when he stated during cross examination that he didn't confirm whether the mucus was of the accused or of the child! Did he meant that even girls or women can discharge sperms?

(3); If PW1 found the victim's hymen torn, in the absence of evidence to the effect that such hymen was lost long time ago in the sense that the victim lost the hymen in the very alleged offence, it is inevitably that the perforation of the hymen would lead to some bleeding. PW1 did not notice any sort of blood even blood spots. How could the hymen be perforated without any sort of bleeding particularly to this very little girl of only 9 years old. And if she bled but the doctor forgotten in his findings, how could the mucus be found whitish. Would they not be mixed with blood and the color of the discharging fluid change from whitish into something else?

The surrounding circumstances of this case as per evidence on record and in the absence of any evidence on the motive behind the crime, taking into consideration that the victim is the Appellant's daughter, I find the defense evidence that he has been incriminated due to the long existing

grudge between him and his wife PW2 holds water and such defense cannot be ignored.

With the herein above analysis, I find that the appellant was wrongly convicted of the offence.

I quash the conviction and set aside the sentence of thirty (30) years meted against him.

I order his immediate release from custody unless held for some other lawful cause. It is so ordered.

A. Matuma

Judge

26/11/2020

Court: Judgment delivered through Video conference (virtual Court) this 26th November, 2020.

Right of Appeal explained.

Sgd. A. Matuma

Judge

26/11/2020