IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No.100 OF 2020

(Originating from the judgment of the District Court of Misungwi in Criminal Case No. 24 of 2020, dated 12th May, 2020)

THOMAS DEUS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

02nd & 14th December, 2020.

TIGANGA, J.

The appellant herein was charged, found guilty and consequently 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]. It was alleged that on the 14th day of February 2020 at about 12:30hrs at Ijijawende Village within Misungwi District in Mwanza Region, the appellant did rape one SS (name withheld) a primary school student aged 12 years. Consequent to his conviction, he was then sentenced to thirty years imprisonment.

Aggrieved by the decision, he has now appealed before this court with the following grounds of appeal;

1. That the conviction and sentence was wrongly and unlawful based on unsworn victim's evidence who never promised to tell the truth in court thus unqualified as it was incapable to be corroborated.
2. That failure to immediately arraign the confessed suspected appellant till a lapse of seven days after his arrest could have circumspectively considered; and in his favour, but the trial court overlooked this fact.
3. That the presiding court erred in law and facts by failing to detect and resolve that none of the arresting officers nor village leaders had testified to establish the crux of the appellant's arrest rather the conviction was harshly based on inconclusive and concocted circumstantial evidence which led to serious mistrial.
4. That no evidence was led to establish on whether the victim was a school girl by then hence destroy the claims upon her minor age, and thus lack of consent "if any".
5. That penetration as crucial ingredient of rape was a concoction constructively and/or inconclusively predicted by a non-gynecologist expert PW4 thus unqualified witness.
6. That the prosecution case was/is too dubious as in contrast to the appellant's strong evidence however disregarded into court.

It is his prayer that, this appeal be allowed and he be set free from custody.

On the date this appeal came for hearing, the appellant fended for himself, unrepresented, whereas the respondent was represented by the learned Senior State Attorney, Miss Rehema Mbuya.

The appellant prayed to this court that his grounds of appeal be adopted as his submission as he had nothing to add or elaborate. The learned Senior State Attorney on the other hand began her submission by stating clearly that she opposes the appeal. She conceded that the provisions of section 127 of the Evidence Act have not been complied with but insisted that the procedure was followed.

On the second ground of appeal, she submitted that all the appellant's allegations were not substantiated as they were raised as objections but were overruled by the trial court. She further stated that the appellant did admit as shown in exhibit P1 at page 15 and the evidence of the victim's mother at page 7 shows that the victim identified the appellant and informed her mother just as she was coming from the well. Also the evidence of the medical doctor who examined the victim proved that the victim was indeed raped.

Regarding the fourth ground of appeal, the learned state counsel submitted that, the age of the victim was 12 years and that the same was proved by the mother of the victim.

With regard to the fifth ground that there was no proof of penetration, counsel submitted that there was enough evidence to prove that there was penetration. That the evidence of the victim and that of the doctor proves that there was penetration.

She concluded her submission by making a prayer to this court to find that the case was proved beyond reasonable doubt and that the decision of the trial court be sustained.

In a very short rejoinder, the appellant prayed that his appeal be allowed and he be discharged.

That marked the end of the parties' submissions for and against the appeal at hand. After going through the records, the only question that calls for determination is whether the case was proved beyond reasonable doubt as against the appellant.

I shall begin my discussion with the first ground of appeal, that the conviction and sentence was wrongly and unlawful based on unsworn victim's evidence who never promised to tell the truth in court

thus unqualified as it was incapable to be corroborated. That was conceded by Miss Mbuya, SSA, that section 127(2) of the Evidence Act [Cap 6 R.E 2019] has not been complied with but at page 9 the procedure was followed. To appreciate what the law provides, that is section 127(2) of the Evidence Act [Cap. 6 R.E 2019] 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 lies"*** (Emphasis added).

Section 127(4) of the same law, defines the child of tender age as follows,

> *"For the purposes of this law, the expression "child of tender age" means a child whose apparent age is not more than fourteen years."*

In this case the charge sheet describes the victim to be 12 years old when the offence was allegedly committed; she also informed the court that she was 12 years of age when she was called to testify. This means she was a child of tender age who was subject to the provision of section 127(2) of Evidence Act quoted above.

Now the issue is whether the provision above quoted was complied with during trial at the time when the victim was giving

evidence in court? The answer to this issue is not far to find. The proceedings speak louder and actually prove that the said law was not complied with. This is proved by the records, as going through the trial court's records, there is nowhere in the said records where it is shown that PW2 was made to promise that she would tell the truth to the court and not lies. The law requires the trial Magistrate to require PW2 before she testified, to promise to tell the truth and not lies, and the promise had to be recorded.

Failure of the trial Magistrate to comply with the law, means that such evidence was wrongly admitted and therefore cannot be considered as evidence at all.

The consequences for failure to comply with the said provision has not been provided by the same law, but a plethora of the decisions of the Court of Appeal have given very useful guidance, as follows.

In the case of **Shaibu Naringa vrs The Republic,** Crim. Appeal No. 34 of 2019 (CAT) Mtwara (unreported) in which a number of other decisions of the Court of Appeal were quoted with approval, to wit **Godfrey Wilson vs The Republic**, Crim. Appeal No. 168 of 2018, **Msiba Leonard Mchelekumwaga vs The Republic**, Crim. Appeal No. 550 of 2015, **Hamis Issa vs Republic**, Crim. Appeal No. 274 of

2018 and **Issa Selemani Nambaluka vs The Republic** Crim. Appeal No. 272 of 2018 (all unreported decisions of the Court of Appeal). Of these decisions, the decision of **Issa Selemani Nambaluka vs The Republic** (supra)

> *"...under the current provision of the law, if a child witness does not understand the nature of an oath, he or she can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies".*

For instance in **Godfrey Wilson versus The Republic** (Criminal Appeal No.168 of 2018) TZCA 109 it was held that;

> *"In the absence of promise by Pw1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016. Hence the same has no evidential value. Since the crucial evidence by PW1 is invalid there is no evidence remaining to be corroborated in view of sustaining the conviction."*

While in **Shaibu Naringa Vrs Republic, (supra)** it was held inter alia that;

> *"...in the instant appeal although the trial court conducted voire dire test which is no longer a requirement of the law, after it was satisfied that Pw1 did not understand the nature of oath, it ought to have required her promise to tell the*

truth and not to tell any lies, that promise should have been reflected in the proceedings, the evidence of PW1 which was taken contrary to the law, lacks evidential value and it is hereby discarded from the record'.

As was decided in **Godfrey Wilson versus Republic (Criminal Appeal No.168 of 2018) TZCA 109** that:

> *"In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016. Hence the same has no evidential value. Since the crucial evidence by PW1 is invalid there is no evidence remaining to be corroborated in view of sustaining the conviction."*

As the evidence of the victim was un-procedurally, it deserves nothing but to be expunged form the record, as I hereby do. Having expunged the evidence of the victim, it is clear therefore that without the evidence of the victim, this case cannot be said to have been proved beyond reasonable doubt to warrant conviction and sentence of the appellant.

In the final analysis, I find merit in the first ground of appeal and allow it. As this first ground of appeal has managed to dispose the entire appeal, I find no need waste time in discussing the rest of the grounds of appeal, as doing so, will be indulging into academic exercise which for

the interest of time it un economical to do so. I thus, accordingly allow the appeal; the conviction is quashed and sentence of the trial court is set aside. In the normal course, I would have acquitted the appellant, however, I have asked myself one question, at whose fault has this appeal crumbled? Is it not a fit case in which retrial can be ordered?

The authority in the case of **Rashid Kazimoto and Masudi Hamisi vs The Republic,** Criminal Appeal No. 458 of 2016 provides for the principles governing the situation in which a retrial can be ordered. This authority quoted with approval the authority in the case of **Sultan Mohamed vs The Republic,** Criminal Appeal No. 176 of 2003 (unreported) which also quoted with approval the decision in **Fatehali Manji vs Republic** (1966) E.A 343 which stated that:-

> *"In general, a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, however, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it"*

Also see **Paschal Clement Branganza vs Republic,** (1957) EA 152

Looking at the principle in the above cited authorities, it is not a condition that the order for retrial can only be made where it is sought by the parties.

But it should be made where the following conditions exist:

i) *When the original trial was illegal or defective;*

ii) *Where the conviction was set aside not because of in sufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial.*

iii) *Where the circumstances so demand*

iv) *Where the interest of justice require it"*

This means if the court finds that the circumstances described in the above authorities are established and where the interest of justice so requires, may order retrial. Now, while determined to look into the circumstances of this case to see whether retrial can be ordered or not, the proceedings and the record will be of much assistance. In this case the fault as to why the victim failed to give promise was caused by the court as it was the one which was duty bound to require and obtain such a promise. I believe retrial will not give the chance to the prosecution to fill gaps in its evidence at the first trial, there is the interest of the victim and that of the republic, that being the case, I find this case to be the fit case for retrial. That said, it is hereby ordered that

the case be tried *de novo* before another magistrate of competent jurisdiction.

It is so ordered

DATED at **MWANZA** this 14th day of December, 2020.

J. C. Tiganga
Judge
14/12/2020

Judgment delivered in open court in the presence of the appellant in person and Miss Mwaseba, SA. Right of appeal explained and guanteed.

J. C. TIGANGA
JUDGE
14/12/2020