IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO 2 OF 2020

(Arising from Criminal Case No. 41 of 2019 of the District Court of Maswa at Maswa)

MWITA DAUDI..... ..APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of the last Order 25/3/2020
Date of the Judgement on 27/3/2020

E. Y. MKWIZU, J.

At the District Court of Maswa at Maswa in Shinyanga Region the appellant, MWITA DAUDI was charged with two offences. **Abduction contrary to section 133** and **rape** contrary to **section 130 (1)(2) (e) and 131 (1) of the Penal Code Cap 16, R.E. 2002**. He outrightly pleaded guilty to the offence of abduction, convicted and accordingly sentenced. He, however, pleaded not guilty to the offence of rape. After a full trial the trial magistrate convicted him of rape and accordingly sentenced. Discontented with the decision of the trial Court, the Appellant is now appealing to this Court against both conviction and sentence.

The Appellant filed eleven (11) grounds of appeal which boils down to one main ground that the charge of rape was not proved beyond reasonable doubts.

Short background to this case is that, the victim, PW1 and the appellant are neigbours. On 3rd day of February,2019 at around 17.00 hrs appellant took PW1 with an intention of marry her.PW1's parents got information that their daughter is living with the appellant they on 6th day of February,2019 went to the appellant's home and took the victim back home. The matter was reported to Maswa Police Station and on 14th April, 2019 the appellant was arrested and taken to Court on the following day. In his defence the appellant denied the charge and any involvement in the offence in question.

At the hearing of the appeal the Appellant was unrepresented and the Republic was represented by Ms Immaculate Mapunda, learned State Attorney.

Ms. Mapunda supported the appeal. Arguing the presented grounds of appeal generally, said, PW1, the victim in this matter was aged 12 years

old, a child of tender age and therefore her evidence ought to be taken under observation of section 127 (2) of the Evidence Act. As on section 127 (2) of the Law of Evidence Act, submitted Ms. Mapunda , the evidence of PW1 was recorded without requiring PW1 to promise the court that she would speak the truth and not lies. This was a fatal irregularity, she emphasized.

Submitting on another anomaly in the proceedings, Ms. Mapunda said, the appellant had in the proceedings, questioned PW1, on the status of his private parts with an intention to establish as to whether they had sexual intercourse and if the victim knew him well. He asked whether he is circumcised or not. PW1 said answer was that appellant was not circumcised. Instead of examining the appellant's private parts, the court relied on the information given by the prosecutor, Inspector Rashid and Inspector Mathias. It was Ms. Mapunda's contention that, this fact was a crucial fact which needed observation of the Court, the trial magistrate reliance on the information given by the prosecutor was wrong because, first of all inspector Rashidi was the prosecutor of the case and therefore had interest in the prosecution's case. His information could not safely be

relied upon by the court. Even if it is taken that the information was given by Inspector Mathias, again, he was not a witness and therefore the information relied by the court on this point was a hearsay.

On another point, Ms. Mapunda submitted that, Appellant was not accorded a fair hearing. After the closure of the prosecution case, the appellant had indicated that he would give evidence and will call other three witnesses. He gave their names and physical address that is the village in which they resides. However, the proceedings shows that, summons were prepared and handled to the appellant who was in remand to serve his intended witnesses. The appellant returned the summons informing the court that his relative did not visit him in prison and therefore he could not serve the summons to his witnesses. At page 23, explained Ms. Mapunda, appellant is recorded to have dropped his witnesses on the same ground of failure to serve his witnesses with the summons. The explained series of events on this point is contrary to section 101 (1) of the Criminal Procedure Act which requires witnesses to be served with summons under the supervision of the Court. Ms. Mapunda contended further that, trial court was wrong to serve the in- mate –

appellant with the summons knowing that there is no way he could deliver the said summons to his intended witnesses.

She finally argued that, the anomaly pointed would have called for a retrial but, given the nature of evidence on the record, ordering a retrial would be allowing the prosecution to fill in gaps in the trial. She referred this court to the case of **John Sayi and Another V. Republic**, Criminal appeal No. 544 of 2015 CAT-Tabora (Unreported) at page 12 and 14. Ms. Mapunda concluded that, the rest of the evidence on record is a hearsay which cannot in any rate prove the charge against the appellant. She prayed to have the appeal allowed, conviction quashed and appellant released from prison.

Accurately, section 127(2) as amended 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.

Section 127 (2) says: -

> *"127.- (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 lie"

(emphasis added)

As it can be depicted from the above quoted section, if a child of a tender age is incapable of giving evidence on oath or affirmation, the trial magistrate is obliged of requiring him/her to promise the court that she/he would tell the truth and not lies. This provision has been interpreted by the court in a number of decisions including: **Issa Salum Nambaluka V.R,** Criminal appeal No. 272 of 2018**; Shaibu Nalinga V.R,** Criminal appeal No. 34 of 2019, and **Msiba Leonard Mchere Kumwaga v. Republic,** Criminal Appeal No. 550 of 2015 (All unreported) to mention just a few.

In **Msiba Leonard Mchere Kumwaga's case** (supra) it was state that:

" ... Before dealing with the matter before us, we have deemed it crucial to paint out that in 2016 section 127 (2) *was amended vide Written Laws Miscellaneous Amendment Act No.4 of 2016 (Amendment Act). Currently, a* ***child of tender age may give evidence***

without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies." *[Emphasis added].*

In this case, the evidence of PW1 who was a child of tender was recorded from page 9 of the trial courts record. The record goes thus:-

*"**PW1**. (QY), 12 years old, a resident of Mandela; Sukuma,Pagan.*

***COURT**: Do you promise to tell the truth.*

PW1: Yes, I promise to tell the truth and all what I know

***COURT**: (QY) seems to be aware and mature enough to elaborate each an everything. Since she also promised to tell the truth,her evidence shall be received on oath.*

Sgd: F.R.Lukuna, RM

11/6/2019. "

Then the witness proceeded to testify

With due respect to the learned State Attorney's submission,the PW1's evidence, in my view, was correctly received after the trial magistrate has satisfied himself that the victim, a child of tender age has promised to say the truth as per his conclusion shown above. In the later decision of the Court of appeal quoted above, the court stated that in requiring a child of tender age to promise to tell the truth the trial magistrate or judge can ask the witness such simplified questions, which may not be exhaustive depending on the circumstances of the case.I think the trial magistrate had correctly conducted the inquiry in this case . There is nothing the trial court can be faulted on this point.

On the issue whether reliance by the trial court on the information by the prosecution on whether the appellant was circumcised or not, after the appellant had raised the issue at the trial while cross examining PW1,the records reveals that, while PW1 was testifying in court, appellant has questioned her whether he is circumcised or not. PW1 said, appellant is not circumcised. Instead of verifying this fact itself by inspecting the accused (now the appellant) trial court ordered the prosecutor, Inspector Rashid and Inspector Mathias to inspect the accused person. They confirmed the

answer given by PW1 that the accused person is uncircumcised. The learned State Attorney contented that, the prosecutor is a person with interest in the prosecution's case therefore his information could not safely be relied upon. She said, because the question of the appellant was meant to shake PW1's evidence, then, the appellant was prejudiced by the trial court's reliance on the statement by the prosecutor as there was no fair trial.

Equally, on whether it was fatal for failure by the trial court to summon the appellants intended witnesses, the learned State Attorney submitted correctly that, the appellant did inform the trial court at then closure of the prosecution case and after he was addressed under section 231 (1) (a) and (b) of the Criminal Procedure Act ,of his right of defence and the right to call witnesses that he had three witnesses to call and he mentioned their names and their residence. The records at page 21 go as follows:

"Accused: I will give my evidence on oath and I will call one:

1. Mashauri Isununa from Mandela village

2. Mayunga Isununa from Mandela village

3. Lumbui (the kitongoji)

Section 231 of the CPA C/W

Sgn: F.R. Lukuna ,RM

16/08/2019"

The proceedings were adjourned to 21/8/2019.

The learned State Attorney had suggested that, trial court contravened the provisions of section 101 of the Criminal Procedure Act by not supervising the service of summons and in its place, trial court served the summons to the appellant's witnesses through the appellant who was in remand custody. I have gone through section 101 of the CPA. It falls under PART V – A of the Criminal Procedure Act which deals with the appearances of the accused person in court.

The obligation of the trial court to facilitate the attendance of the witnesses for the accused is provided for under section 231 (4) of the Criminal Procedure Act. The section reads:

"If the accused person states that he has witnesses to call but they are not present in court, and the court is

satisfied that the absence of such witnesses is not due to any fault or negligence of the accused person and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witness."

The trial court under the above cited provision has a mandatory obligation to facilitate the appearance of the witnesses of the accused person either by issuance of summons or taking other steps. The trial courts record shows that the appellant was in remand custody. He explained to the trial court his inability to serve his intended witnesses with the summons. At page 22 of the records appellant is recorded to have said:-

***"Accused**: I received the summons but I have returned them because this weekend no any relative who visited me*

***ORDER**:*
Defence hearing 4/9/2019
1. AFRIC

Sgn: F.R. Lukuna ,RM
2. 16/08/2019"

The trial court made no effort to inquire as to the substance of the evidence the appellant was anticipating from the witnesses so as to ascertain whether or not they were material witnesses. Since the appellant was in remand there was nothing, he could do to ensure the attendance of his witnesses in court. He had no choice but to waive the attendance of his witnesses. At page 24, the appellant is recorded thus: -

> *"**Accused:** I cannot get my witnesses; I sent the summons you gave me through the prison warden but I got no reply. Even my relatives are not visiting me in custody. For this reason, I will not have any witness; I will give my evidence alone'*
>
> ***COURT:** the accused has addressed this court that will not call any witness because he cannot trace them*
>
> ***Sgn: F.R. Lukuna ,RM***
> ***16/08/2019"***

Thereafter, the court proceeded to record the appellant's evidence.

In the case of **Hangwa William V R** Criminal Appeal No. 117 of 2009 (unreported) the appellant indicated, after the closure of the prosecution case, that he had witnesses to call. However, there was no indication in the Court record that the trial Court made any attempt to summon the witnesses. The Court held that:

> *"Those disturbing features in the conduct of the appellant's trial especially his defence; would give doubt to any tribunal, as to whether the appellant received a fair trial."*

See also the case of **Josephat Katabaro V.Republic**,criminal appeal No 166 of 2009 (CAT- Mtwara unreported).

It is obvious therefore from the above analysis that the trial court failed to comply with Section 231(4) of the Act. Court of appeal, in the case of **Ndamashule Ndoshi v. Republic**, criminal appeal no. 120 of 2005 had time to discuss the imports of section 231. It said:

> *"Section 231 of the Act* ***contains a fundamental right of an accused person: the right to be heard before they are judged. It directs that a trial magistrate***

must inform an accused that they have a right to make a defence *or choose not to make one in relation to the offence charged or to any other alternative offence for which the court could under the law convict.* ***Not only is an accused entitled to give evidence in their defence but also to call witnesses to testify in their behalf****. So, the section is an elaboration of the all-important maxim -* ***audi alteram partem*** *and that no one should be condemned unheard."* *(emphasis added)*

In another case of of **Samwel Lesilwa V R** Criminal Appeal No. 160 of 2008 (unreported), the Court held that:

"failure to hear defence witnesses' amount to unfair trial and vitiates the proceeding

With the foregoing, I find merit in this point. On the way forward, the learned State Attorney advised the court not to order a re-trial as by so doing it will allow the prosecution to fill in the gaps. She said apart from PW1's evidence, the rest of the evidence on record is a hearsay.

The case of **Fatehali Manji V R.** (1966) E. A. 343 properly directed on where the court can order a retrial, it was held that:

> *"In general a retrial may be ordered only where 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 purposes of enabling the prosecution to fill in gaps in the prosecution in its evidence at the trial...each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires".*

The same finding is also given in the cases of **John Sayi (supra)** cited by the learned State Attorney**.**

It is settled law that the best evidence of sexual offence comes from the victim **[Selemani Makumba V R** [2006] TLR 384**].** I am also aware that under section 127(6) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim. In the case of **Mohamed Said V. Republic,**

Criminal appeal No. 145 of 2017 the Court of Appeal citing at Iringa had this to say:-

> *"However, we wish to emphasize the need to subject the evidence of such victims to security in order for courts to be satisfied that what they state contain nothing but the truth. Section 127(7) of the Evidence Act Cap. 6 R.E. 2002 provides: -*
>
> > *"Notwithstanding the proceeding provisions of this section, where in criminal proceedings involving 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, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, 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 the truth."*** *(Emphasis added.)*

We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases.:"

I have given the records of this case a thorough scrutiny and I have asked myself whether ordering a retrial would be in the interest of justice. There is no doubt that the vital prosecution evidence was given by PW1, the victim in this case. She gave evidence similar to that of the defence with an addition that during her stay with the appellant, she was raped. PW2, PW3 and PW4 had nothing substantial to testify on the rape incidents .They testified only on how they came to know that PW1 is missing, how they traced her and found her at the appellant's house. PW5, a Doctor, told the trial court that he examined the Victim on 12th day of

April,2019.He found her sixteen (16) weeks pregnant. He tended PF3 as exhibit P1 in court.

In grounding conviction, the trial magistrate said at page 6 and 7 of the typed judgement

> *"The accused also defended that this case is the result of disagreement between the parents on the issue of dowry payment.* ***I will not look at this as a proper defence because the victim is 12 years old and even the law of marriage act cannot bless this marriage. Since PW1 is 12 years of age and since the accused person does not dispute to have stayed with her for about three days;*** *the accused person having sextual intercourse with her committed the offence termed rape. I thus, convict him as charged..." (Emphasis is mine)*

The passage of the judgement quoted above explains the reasons why trial magistrate convicted the appellant. Not because there was a proof of penetration but because appellant did not dispute to have stayed with the

victim. I think, the trial magistrate forgot that appellant pleaded guilty of abduction and he was convicted and accordingly sentenced. The issue that was before the court was whether the appellant raped the victim.

Appellant has refuted to have raped the appellant. He said, the conflict arose due to the disagreement on the dowry payment. In its judgement, trial court had opted not to take this version of the appellant's evidence as a proper defence. The trial court said "I will not look at this as a proper defence." This ,in my view was wrong. It has been said in a number of decision that the duty of the appellant is to raise doubt on the prosecution evidence. This is what the appellant did. The duty of the trial magistrate was to evaluate the evidence on record and see whether prosecution has proved the charge of rape against the appellant.

Now coming to whether rape was proved, PW1's version is that she was raped while at the appellant's home. PW5 in his evidence said, on 12th April, 2019 victim was found to be 16 weeks pregnant. If the at all, victim was raped on 3rd February, 2019 and conceived, simple calculation would

be, by 12th April 2019, the victim would be 9 weeks pregnant. This evidence therefore is inconsistence with PW1'a version and the charge.

Taking into totality the evidence on the records and considering the irregularities pointed above, PW1 evidence, cannot safely by itself, ground appellant's conviction. I thus, find that retrial would not do justice in the circumstances of this case. I accordingly allow the appeal, quash the conviction and set aside the sentence. I order the appellant's immediate release, if he is not being held for another lawful cause.

DATED at **SHINYANGA** this **27th** day of **MARCH**, **2020**.

E.Y.MKWIZU
JUDGE
27/3/2020

Court: Right of appeal explained.

THE HIGH COURT OF TANZANIA

E.Y.MKWIZU
JUDGE
27/3/2020