

IN THE HIGH COURT OF TANZANIA
AT TABORA
CRIMINAL APPEAL No. 75 OF 2019
(Arising from Criminal Case No. 184 of 2017 in the Resident Court
of Tabora at Tabora)

MASUNGA MGERE..... APPELLANTS
VERSUS
THE REPUBLIC ----- RESPONDENT

JUDGEMENT

03/04/2020 & 9/4/2020

BONGOLE J.

The appellant, Masunga Mgere herein after called Appellant was arraigned before the Resident Magistrates' court of Tabora at Tabora (herein after called "the trial court") in Criminal case No.184 of 2017. He was charged, tried and convicted for one count of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap 16 RE 2002. He was sentenced to thirty (30) years imprisonment.

Dissatisfied, he has appealed to this court against both conviction and sentence.

In this court, as in the court below, he appeared in person. He filed petition of appeal containing six grounds of appeal coached thus:-

1. That, the charge against the appellant was defective in that the statement of offence in the charge sheet went too far as to refer to sub-section (2) of section 154 of the Penal Code which is completely

inapplicable to the offence the appellant was charged since the victim (PW 2) was not under the age of ten (10) years, adding Sub-Section (2) (Supra) brought contradiction on the offence. See the case of **Laurent Raphael Mutubongwa V. Republic**. Criminal Appeal No. 153 of 2017 (HC). The copy of which is hereby attached.

2. That, the trial Magistrate erred in law when acted on the evidence of the victim (PW2) the child of tender age whose evidence was received or taken in breach of the amendment effected vide written laws (Miscellaneous Amendments) No. 2 Act 2016 which now requires the child of tender age, before giving evidence "shall" promise to tell truth to the court and not tell any lies.
3. That, the trial Magistrate erred for not noting that the way or manner in which the appellant was identified by the victim at the Tobacco farm is questionable and was not beyond all reasonable doubt in that prior to the arrest of the appellant at the Tobacco farm the identifying witness (PW2) the victim had not named or given the descriptive particulars of the appellant to whom the Unnatural Offence in issue was firstly reported.
4. That, the trial Magistrate erred for acting on the Medical Report (PF 3) exhibit P1 without observing that the author of the same did not lay down what special knowledge or qualification he had to be able to give his opinion in terms of section 47 of the TEA Cap.6.
5. That, the trial Magistrate erred for not determining the merit of circumstances in which the cautioned statement of the appellant

(Exh.P2) was taken or obtained, and as a result of his error, acted on the said cautioned statement to ground the appellant's conviction.

6. That, the trial Magistrate erred to find that the case for the prosecution was proved against the appellant beyond reasonable doubt.

At the hearing of this appeal, the appellant appeared in person and he adopted his ground of appeal earlier on filed, and Ms. Upendo Malulu learned state attorney appeared for the respondent Republic and straight away she informed the court that she was supporting the appeal.

She submitted that the evidence by the victim who was a child was received contrary to Misc amendment Act No.2/2017 which amends section 127(2) of the Evidence Act Cap 6, R: E 20002.

That instead of conducting voire die, it requires the child to promise to tell the truth. It was the evidence of this child which carried the weight of the case. Finally she concluded that she prayed for an order of retrial.

On the other hand the appellant submitted that he supported what the state attorney has said with regards of supporting his appeal, he has not joined hand with her prayer of retrial. He submitted that there was no any evidence worth of retrial because even the doctor said he examined the victim and found him with malaria.

He concluded by praying that this court disregarded the state attorney's prayer of retrial and set him free.

On my part, having gone through the records and the submission of both parties, I am to dispose the appeal on the second ground of appeal as follow;-

In the second ground, that the trial Magistrate erred in law when acted on the evidence of the victim (PW2) the child of tender age whose evidence was received or taken in breach of the amendment effected vide written laws (Miscellaneous Amendments) No. 2 Act 2016 which now requires the child of tender age, before giving evidence "shall" promise to tell truth to the court and not tell any lies.

My observation in the Evidence Act,Cap.6.RE 2002 requires that the evidence of child of tender age whose apparent age is not more than fourteen(14) years shall be recorded in proceedings especially where the court has ascertained itself that such child possesses sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth.

The Court of Appeal in **Godfrey Wilson vs. The Republic, Criminal Appeal No. 168 of 2018**.In this case the appellant challenged the voire dire examination that it was not properly conducted by the trial court. The court pointed out that, section 127(2) of the Evidence Act, prior to the amendment, required the trial magistrate who conducts voire dire examination to indicate whether or not the child of a tender age understands the nature of oath and the duty of telling the truth, and if he possessed sufficient intelligence to justify the reception of his /her evidence.

Section 127(2) provides that;-

"Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be

recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."

However, in the wake of the 2016 amendment through Act No.2 of 2016,sub sections(2) and (3) of section 127 of the Evidence Act were deleted and substituted with sub section (2) in the following manner;-

"Amendment 26.section 127 the principle act is of section 127 amended by-

(a) Deleting subsections(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 lies.

The above cited provision as amended, provides for two conditions

(a) It allows the child of a tender age to give evidence without oath or affirmation, and

(b) Before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies. In emphasizing this position the Court of Appeal in the case of **Msiba Leonard Mchere Kumwaga vs. Republic, Criminal Appeal no. 550 of 2015(unreported)** observed as follows;

"....Before dealing with the matter before us, we have deemed it crucial to point out that in 2006 section127(2) was amended Act no.4 of 2016.Curently,achild 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".

To me, I am of the firm view that this court may issue several orders as it may think fair and just to meet the end of justice. It may thus order a complete acquittal, a retrial or restart of a trial from where the trial went wrong. It shall depend on the circumstances arising on each case. Even in the **Omary kitambo vs. the Republic, criminal appeal no.94/2014**, the court of appeal did not allow the appeal and order his release on the failure of the trial court to comply with law.

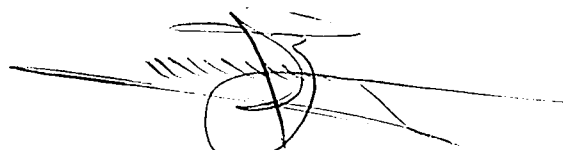
In the instant appeal therefore, failure of the trial court to comply fully with section 127(2) supra was fatal and rendered the proceeding at the trial a nullity.

I have been thinking what would be the appropriate order to issue in the circumstances of this case. The available alternatives are either a retrial or acquittal.

The appeal is allowed, conviction quashed and the sentence is set aside.

The appellant to be free unless lawful held in another course.

It is so ordered.

A handwritten signature in black ink, appearing to be 'S.B. BONGOLE', written over a horizontal line.

S.B. BONGOLE

JUDGE

09/04/2020

Judgement delivered under my hand and seal of the Court in chambers this 9/04/2020 in the presence of the Appellant in person and Ms. Jainess Kihwelu learned State Attorney for the Respondent.



S. B BONGOLE

JUDGE

09/04/2020

Right of Appeal explained.



S. B BONGOLE

JUDGE

09/04/2020