IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 37 OF 2020

(Arising from Criminal Case No. 19 of 2020 of Kigoma District Court Before: K.V. Mwakitalu, RM

JEREMIAH KILAHUNDA ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

17th Nov. 2020 & 19th Feb.2021

A. MATUMA, J

The appellant Jeremiah s/o Kilahunda was charged and convicted of five counts of rape in the District Court of Kigoma at Kigoma.

He was convicted of all the five counts and sentenced to serve a custodial sentence of life imprisonment in each of the four counts and 30 years jail term in the firth count.

Having been aggrieved with such conviction and sentence he has preferred this appeal with four (4) grounds essentially lamenting that he

was wrongly convicted and sentenced as the prosecution case was not proved beyond reasonable doubt.

At the hearing of this appeal, the appellant appeared in person while the Respondent was represented by Edina Makala learned State Attorney.

The appellant submitted generally that this case was fabricated against him as the incident was not reported to any local leader if really happened. He also complained that the evidence of the victim was not taken in accordance to the law and that she gave evidence under threat of her mother. The appellant further argued that the doctor did not notice any bruises which is inconsistence with the evidence of the victim's brother who alleged to have assisted the victim to walk after the rape.

The appellant further invited this Court to adjudge on the conduct of the victim who stated to have washed herself after the rape and went to buy food for the appellant, the conduct which is inconsistence with a victim child of only six years old.

Finally, the appellant submitted that this case was fabricated against him as he had grudges with the victim's mother and called this Court to visit the proceedings in criminal case No. 115/2019 in which he was previously tried and discharged for the failure of the prosecution to bring witnesses. The essence of invitation was to satisfy myself that the witnesses who

gave evidence in that case including the victim had changed stories in the current proceedings when the charges were re-instituted.

The learned state Attorney on his party, opposed the appeal arguing that the case against the appellant was proved beyond reasonable doubt, no law was violated in taking the evidence of the victim and that in case I find the evidence of PW2 and PW3 to have been taken contrary to the law, I should order a retrial as it was not their fault but the trial court.

The learned state attorney conceded however that the conduct of the child victim was really questionable.

Starting with the question whether the evidence of PW2 and PW3 was taken in accordance to the law, I have no doubt that the same was not. PW2 was the victim in this case and she gave evidence at the age of eleven (11) years old, and PW3 at the time of giving evidence was 7 years old.

Both the two witnesses did not take oath before giving their respective evidence but each promised to tell the truth and not lies.

The two witnesses in terms of section 127 (4) of the Evidence Act, Cap. 6 R.E 2019 are witnesses of tender ages. A 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 which reads;

> *"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 oath 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 Court examines the witness as such and becomes satisfied that a child witness can only give evidence without oath or affirmation, it is when it resorts into the exemption of section 198 (1) of the CPA (supra).

The exemption is under section 127 (2) of the Evidence Act (supra) in which the evidence will be taken without oath or affirmation subject to the witness promising to the Court that she/he will tell only the truth and not lies.

The records must however be clear as to how the Court arrived into a conclusion that a certain child witness gives evidence under oath or affirmation or should give evidence under the exemption.

The evidence taken contrary to the said requirements of the law becomes valueless and cannot be acted upon to convict as it was held in the case of ***Godfrey Wilson versus Republic, Criminal Appeal No. 168 of 2018 (CAT).***

The Court of Appeal of Tanzania has in several occasions insisted that trial Courts should not jump into requiring the child witness to promise telling the truth and not lies without first examining him/her whether he/she understands the nature of oath and can give evidence on oath.

Thus, forestine in the case of ***Issa Salum Nambaluka versus Republic, Criminal Appeal No. 272 of 2018,*** the Court of Appeal held;

> *"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 replied 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 know the nature of oath, he or she should before giving evidence, be required to promise to tell the truth and not to tell lies".

In the instant case, the two witnesses were not tested as such but merely gave their respective evidences on the promise to tell the truth and not lies. That was wrong according to the herein above explained principle as underscored by the highest Court on the hand.

Under the circumstances, I have no option rather than expunging the evidence of the two witnesses from the record and I accordingly expunge the same.

Having expunged the evidence of PW2 and PW3, the prosecution case remains with no legs to stand and the remaining evidence does not warrant the conviction of the appellant.

The learned state Attorney had called this Court to order a retrial in case it finds that the evidence of PW2 and PW3 was taken contrary to the law. On the other hand, the appellant lamented that these witnesses used to change stores whenever they re-give their evidence. That necessitated me to call for the records of the subordinate Court in Criminal Case No. 115 of 2019 and satisfy myself of the complaint.

I have carefully examined the said records along with the current records and I am satisfied that the prosecution witness had their evidence changing from time to time. I will give a simple example.

In the first trial, the victim herself testified that in each incident of the rape she sustained bleeding but in the current proceedings she expressly stated that she did not bleed in the second incident of the rape.

Also, in the first trial PW3 did not testify that the victim was seriously injured in the last incident of rape which he claimed to have witnessed, but in the current proceedings, the witness claimed to have seen the victim seriously injured to the extent that he assisted her by holding her to enable her to walk from the crime scene.

Those are only few examples in which prosecution witnesses used to change stories. Not only that but also the conduct of the child victim is inconsistence with a raped child of her age. She explained how she washed the blood after the rape and go to **mamantilie** to buy food for the appellant. Her conduct is really wanting.

I am far to believe that a child of only six years could be raped to the extent that she sustained bleeding, yet be able to clean herself and proceed with other businesses as if nothing had befallen her. She could have not conduct herself in the manner that would prevent adult members

of her family to note changes in her condition. The learned state attorney had in fact admitted that such conduct was wanting for the victim child of such age.

In the circumstances, I will not order for a retrial as by doing so will be giving the prosecution opportunity to fill in the gapes.

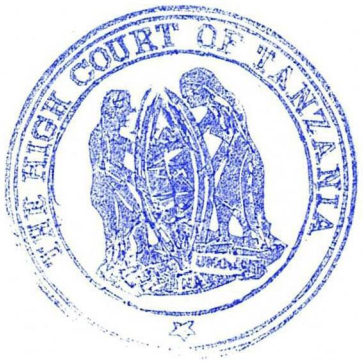
In the case of ***Fatehali Manji versus Republic*** *(1966) E.A 341* the Court held that the retrial will not be ordered to enable the prosecution fill up gaps in its evidence. It went on that;

> *"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".*

The circumstances of this case do not dictate for a retrial, I therefore quash the conviction of the appellant in each of the five counts and set aside the sentence of life imprisonment in each of the four counts as well as that of 30 years in the fifth count.

I order an immediate release of the appellant from custody unless held for some other lawful cause. Right of Appeal to the Court of Appeal of Tanzania to whoever aggrieved with this judgment is hereby explained.

It is so ordered.



A. MATUMA

JUDGE

19/2/2021

Court: Judgment delivered in presence of the respondents and in absence of the appellant.

A.J. Kirekiano

Deputy Registrar

19/02/2021

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(DC) CRIMINAL APPEAL NO. 37 OF 2020

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JEREMIAH KILAHUNDA ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER

The Appellant one **JEREMIAH KILAHUNDA** was charged and convicted in the District Court of Kigoma with the following offences:-

1st count: Rape contrary to section 130 (1) (2) (e)and 131 (3) of the Penal Code [Cap. 16 R.E 2002]

2nd Count: Rape contrary to section 130 (1) (2) (e)and 131 (3) of the Penal Code [Cap. 16 R.E 2002]

3rd count: Rape contrary to section 130 (1) (2) (e)and 131 (3) of the Penal Code [Cap. 16 R.E 2002]

4th count: Rape contrary to section 130 (1) (2) (e)and 131 (3) of the Penal Code [Cap. 16 R.E 2002].

5th count: Rape contrary to section 130 (1) (2) (e)and 131 (3) of the Penal Code [Cap. 16 R.E 2002].

Upon an Appeal to the High Court of Tanzania, sitting at Kigoma, has this **19th day of February, 2021** allowed the appeal and acquitted the herein above-named appellant **JEREMIAH KILAHUNDA** of that offences. The conviction of each of the five counts are quashed and set aside the sentence of life imprisonment in each of the four counts as well as that of 30 years in the fifth count.

IT IS HEREBY ORDERED that; the said **JEREMIAH KILAHUNDA** be released from the prison forthwith unless held for any other lawful cause

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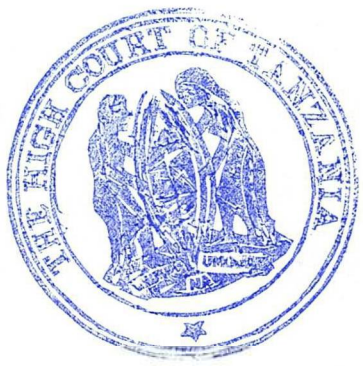
under my **HAND** and the **SEAL** of the Court this **19th day of February, 2021.**



A. Matuma,

Judge,

19/2/2021