

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 52 OF 2020

(Arising from Criminal Case No. 303 of 2019 of Kibondo District Court Before: S.G.
Mcharo, RM)

NYABENDA EMMANUEL APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

24th Feb. 2021 & 24th Feb.2021

A. MATUMA, J

The appellant Nyabenda s/o Emmanuel was charged and convicted of Unnatural Offence contrary to section 154 (1) and (2) of the Penal Code, Cap. 16 R.E 2002 in the District Court of Kibondo at Kibondo.

He was sentenced to serve a custodial sentence of life imprisonment.

Having been aggrieved with such conviction and sentence he has preferred this appeal with eleven (11) 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 it has become a tendence of inmates in the Refugees Camp to fabricate cases against others so as they can be regarded as harassed people so that they can get advantage to be transferred in the third country. He also complained in his Petition of Appeal that the evidence of the victim was not taken in accordance to the law section 127 (2) of the Evidence Act as he was a child of tender age.

The learned state Attorney on his party, from the right beginning supported the appeal on the single ground that the victim's evidence was taken contrary to the law as it was held in the case of ***Godfrey Wilson versus Republic, Criminal appeal no. 168 of 2018 (CAT).***

As to the question whether the evidence of PW2 the victim was taken in accordance to the law, I have no doubt that the same was not as rightly pointed out by both parties. PW2 was the victim in this case and he gave evidence at the age of eleven (11) years old.

The witness did not take oath before giving his evidence but was caused to promise telling the truth and not lies.

In terms of section 127 (4) of the Evidence Act, Cap. 6 R.E 2019 and or R.E 2002, PW2 was a child of tender age. 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 rightly argued by Edina Makala learned State Attorney within the spirit of the decision in the case of **Godfrey Wilson** supra.

The Court of Appeal of Tanzania has in several occasions insisted that trial Courts should not rush 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, PW2 was not tested as such but merely gave his evidence 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 PW2 as rightly suggested by the learned State Attorney. I accordingly expunge the same.

Having expunged the evidence of PW2, the prosecution case remains with no legs to stand and the remaining evidence of PW1 Doctor Hamis Kamongo and PW3 Tienganya Edmos the “Sungusungu” does not warrant the conviction of the appellant as observed by the learned State Attorney. PW1 merely examined the victim PW2 and had no positive evidence against the appellant. PW3 on the other hand was a mere arresting officer who assisted the police officer one Abdul to arrest the appellant. He had no positive evidence connecting the appellant with the alleged offence.

I therefore rule out that the prosecution case was not proved beyond reasonable doubts and I quash the conviction of the appellant of the

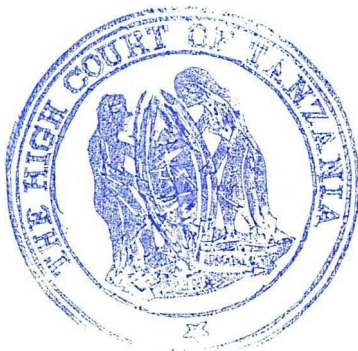


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offence he stood charged and set aside the sentence of life imprisonment meted against him.

I order his immediate release 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

24/2/2021

Court: Judgment delivered today 24th day of February, 2021 in the presence of the Appellant in person and Edina Makala learned State Attorney for the Respondent/Republic.

Sgd. A. MATUMA

JUDGE

24/2/2021