THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL No. 133 OF 2020.

(Original Criminal Case No. 270 of 2019, in the District Court of Mbarali District, at Rujewa).

MIKA S/O MTWEVE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

23/11/2020 & 22/02/2021.

UTAMWA, J.

In this first appeal, the appellant, MIKA S/O MTWEVE challenged the judgement (impugned judgement) of the District Court of Mbarali District, at Rujewa (the trial court), in Criminal Case No. 270 of 2019. Before the trial court, the appellant stood charged with a single count of rape contrary to section 130 (1), (2) (e) and 131 (3) of the Penal Code, Cap. 16 R. E. 2002 (Now R. E. 2019), henceforth the Penal Code.

It was alleged before the trial court, according to an amended charge sheet dated 13th December, 2019 that, on diverse dates of November, 2019, at Chimala village within Mbarali District in Mbeya Region, the

appellant did wilfully and willingly have sexual intercourse with one SM (a branded name to protect her dignity), a girl aged 7 years old. The girl will hereafter be called the complainant for convenience purposes.

The appellant pleaded not guilty to the charge, hence a full trial. At the end of the day, the trial court, through the impugned judgment, found him guilty, convicted and sentenced him to life imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred this appeal. His petition of appeal was based on eight grounds. However, the grounds can be smoothly condensed to only 5 as shown below:

1. That, the trial court erred in law and facts in convicting and sentencing the appellant, though the prosecution had not proved the charge against him beyond reasonable doubts.
2. That, the trial court erred in law and fact in not complying with section 127(1) and (2) of the Evidence Act, Cap. 6 R. E. 2019 (the Evidence Act) in receiving the evidence of the complainant being a child of tender age.
3. That, the trial court erred in law and fact in putting reliance on the weakness of the defence case and shifting the burden of proof to the appellant.
4. That, the trial court erred in law and fact in its failure to properly consider and analyse the defence evidence.
5. That, the trial court erred in law and fact in imposing the sentence against the appellant.

Owing to these grounds, the appellant pressed this court to allow the appeal, quash the conviction and sentence, set him free and grant him any other relief it deems fit and just.

When the appeal was called upon for hearing, the appellant appeared in person. The respondent (Republic) was represented by Ms. Rosemary Mgeni, learned State Attorney. The appellant had nothing to add to his petition of appeal.

On her part, the learned State Attorney for the respondent, conceded to the second ground of appeal and objected the other grounds. She thus, only submitted regarding the conceded ground of appeal. In her oral submissions, she was of the view that, the trial court in fact, offended section 127(2) of the Evidence Act in receiving the evidence of the complainant. She did not properly make the promise to speak the truth as required by the law as shown at page 6 of the typed proceedings of the trial court. This is because, the record shows that, the complainant only said that she can tell the truth, but the trial court recorded that she had made the promise. That was a wrong way of doing it. The trial magistrate ought to have recorded exactly what the complainant had said, but she did not do so. The learned State Attorney for the respondent further submitted that, the procedure for recording evidence of a child of tender age was elaborated by the Court of Appeal of Tanzania (the CAT) in the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2013, CAT at Bukoba** (unreported).

The learned State Attorney thus, prayed for this court to order for a retrial because, there is sufficient evidence against the appellant in this

matter. The complainant testified against him as shown at page 6-7 of the proceedings of the trial court. Her evidence was corroborated by PW. 3 (the doctor who examined her).

In his rejoinder submissions, the appellant contended that, since the respondent supported the second ground of appeal, that support renders the evidence of the complainant untrue. Besides, he could not rape her in his office as she testified because, he (appellant) works with two other persons in that same office. He thus, urged this court to acquit him in lieu of ordering for the retrial.

I have considered the second ground of appeal, the arguments by both sides of the case, the record and the law. Owing to the nature of the appeal, I will firstly test the second ground of appeal which is partly not disputed. In case need will arise, I will also test the rest of the grounds of appeal. This plan follows the fact that, the finding regarding the second ground of appeal is likely to dispose of the entire matter even without testing the rest of the grounds.

Certainly, parties do not dispute that section 127(2) of the Evidence Act was offended. Their friction is on the consequences of the violation. While the respondent presses this court to nullify the trial and order a retrial, the appellant wants to be acquitted altogether.

In my view however, though the parties agree on one aspect of this ground, this court still has a legal duty to examine the merits of the entire second ground of appeal. This follows the firm and trite legal stance that, courts of law are enjoined to decide matters before them in accordance with the law irrespective of the attitude taken by the parties to court

proceedings; see also the holding in **John Magendo v. N.E.Govani (1973) LRT. 60**. This is the very spirit underscored under article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution). I also underscored this position of the law in my previous decisions including **Rashid s/o Khalid @ Masanja v. Republic, High Court of Tanzania (HCT) Criminal Application No. 36 of 2015, at Tabora** (unreported). I also reiterate the position in the appeal at hand. I will now proceed to test the second ground of appeal while observing the above mentioned firm principle.

Owing to the reasons shown above, the issues to be determined under the second ground of appeal are two as follows;

i. Whether or not the trial court actually, offended the provisions of section 127(2) of the Evidence Act in taking the evidence of the complainant in the matter at hand.

ii. In case the answer to the first issue will be affirmative, then what is the legal remedy for the abnormality, to order a retrial or an acquittal?

In answering the first issue, I have to examine the record of the trial court. The record (at page 6 of the typed proceedings) shows that, when the complainant appeared before the trial court for her testimony as the first prosecution witness (PW. 1), the trial magistrate entered the following endorsement and I quote him for a quick orientation:

PROSECUTION CASE OPEN IN CAMERA

"Details of PW. 1- Subira A. Mwashitete a student of Chimala mission, 7 years old, residing at Chimala, I don't pray anywhere, but I can tell the truth to this Hon. Court.

> **Court:** The witness promises to tell the truth and not lies as per the Evidence Act."

Upon the court making the endorsement shown above, it proceeded to record the evidence of the complainant which in fact, implicated the appellant.

In my further view, for a proper understanding of the context of section 127(2) of the Evidence Act one has to read it together with the preceding section 127(1). These provisions guide thus, and I quote them cumulatively for a readymade reference;

> **"127(1):** Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.
>
> **(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 lies."

The phrase "a child of tender age" under section 127(2) means a child whose apparent age is not more than fourteen years; see section 127(4) of the same Evidence Act. This definition was underscored by the CAT in the case of **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported).

In the appeal at hand, it is not disputed that the complainant was in fact, aged 7 years old. She was therefore a child of tender age as per the definition just highlighted above.

Now, my task is to check if the procedure adopted by the trial court in the matter under discussion tallied with the provisions just quoted above. As shown above, the current law on the evidence of a child of tender age is underlined under section 127 (2) of the Evidence Act. The same has been interpreted by the CAT in some precedents including the **Godfrey** (supra) and the **Issa Salum case** (supra) as follows:

a) A child of tender age can give evidence with or without oath or affirmation.

b) A trial judge or magistrate has to ask the child witness such simplified and pertinent questions which need not be exhaustive depending on the circumstances of the case. This is for purposes of determining whether the child witness understands the nature of oath or affirmation. The questions may relate to his/her age, the religion he/she professes, whether he/she understands the nature of oath and whether he/she promises to tell the truth and not lies to the court. If he/she replies in the affirmative, then he/she can proceed to give evidence on oath or affirmation depending on the religion he professes. However, if he/she does not understand the nature of oath, he/she should, before giving evidence, be required to promise to tell the truth and not lies to the court.

c) In case the child has to give evidence without oath or affirmation, he/she, before testifying, must make the promise to tell the truth, and not lies to the court, as a condition precedent before his/her evidence is received.

d) Upon the child making the promise, the same must be recorded before the evidence is taken.

My construction on the contemporary law is thus, that: It is a crucial requirement for a child of tender age like the victim in the case at hand, to give evidence on oath only when the trial court is satisfied, upon conducting a brief inquiry through putting some relevant questions to him/her, that she/he understands the nature of oath or affirmation. Otherwise, where the trial court finds, upon making the brief inquiry, that he/she does not know the meaning of oath, the child witness shall give evidence without oath. Nevertheless, the witness shall make the promise to speak the truth and not lies to the court, which said promise must be recorded by the trial court.

In the matter at hand, and due to the above quotation from the record of the trial court depicting what had transpired before it during the trial, the facts shown below are clear. The trial court did not disclose the pertinent questions asked to the complainant and her answers to such questions, in the process of determining whether or not she knew the meaning of oath. It is not thus, clear as to how the trial court reached into the decision that she did not know the meaning of oath and was thus, required to make the promise instead of taking an oath. Again, the promise to speak the truth allegedly made by the victim was not recorded at all by the trial court. The learned presiding magistrate just indicated the existence of the said promise by his mere reported speech in the proceedings that the witness had made the promise.

Indeed, the first paragraph of the above quotation from the proceedings of the trial court discloses some particulars of the complainant. It also shows that she could tell truth to the trial court. However, according to the record, it is not clear if such words were from the complainant herself or from the trial magistrate. Even if it is taken that those were the words of the complainant herself, such utterances could not amount to a "promise to tell the truth to the court and not to tell any lies" envisaged under section 127(2) of the Evidence Act. In fact, if anything, such statement could only indicate the preparedness or ability of the complainant in making the promise.

Owing to the reasons just shown above, it is clear that there was no transparency before the trial court in determining the competence of the complainant in giving her evidence. The law guides that, transparency and justice are inseparable; see the case of **Gilbert Nzunda v. Watson Salale, (PC) Civil Appeal No. 29 of 1997, High Court of Tanzania (HCT), at Mbeya** (unreported). The importance of the requirement to record important matters in criminal trials was also underscored by the CAT in the case of **Misango Shantiel v. Republic, Criminal Appeal No. 250 of 2007, CAT at Tabora** (unreported). In that case, the CAT underscored that, in criminal trials everything that takes place in the proceedings, must be on record so as to enable an appellate court to decide fairly any question brought before it challenging the conduct of the trial.

I actually, consider the legal requirements discussed above as crucial in the administration of criminal justice because, section 127 of the

Evidence Act generally guides on who is a competent witness for testifying before a court of law. Section 127 (2), as construed in the precedents cited previously thus, specifically guides on how to determine the competence of a child of tender age as witness. The determination of an issue on the competence of a witness is vital before any court receives his/her testimony if fair trial has to be promoted as required by the law.

Due to the reasons adduced above, I find the omissions committed by the trial court as fatal to the trial under discussion. It is more so because, the omission was related to the complainant (PW.1) as the victim of the said rape and whose evidence substantially influenced the trial court in convicting the appellant. Indeed, the law also guides that, the best evidence in sexual offences comes from the victim; see the decision by the CAT in the case of **Seleman Makumba v. Republic [2006] TLR. 379.** This was also the holding by the same CAT in the case of **Jaffary Ndabita @ Nkolanigwa v. Republic, Criminal Appeal No. 270 of 2016, CAT at Tabora** (unreported).

Owing to the above discussions, it cannot be said that the evidence of the complainant in the case at hand was received in accordance with the mandatory provisions of section 127(2) of the Evidence Act. I therefore, answer the first issue posed above affirmatively that, the trial court actually, offended the provisions of section 127(2) of the Evidence Act in taking the evidence of the complainant in the matter at hand. This finding attracts the examination of the first issue as planned earlier.

Regarding the second issue (under this same second ground of appeal), the law clearly makes a guidance on the conditions for ordering or

for refraining from ordering a retrial. The CAT in the case of **Kaunguza s/o Machemba v. Republic, Criminal Appeal No. 157B of 2013, at Tabora** (unreported at page 8 of the typed version of the Judgment) following the case of **Fatehali Manji v. R [1966] EA 343** guided thus, and I quote it for an expedient reference;

> "...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 up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and its circumstances and an order for retrial should only be made where the interests of justice require it, and should not be ordered where it is likely to cause an injustice to the accused person..."

In the matter at hand, I have considered the fact that the appellant has served his imprisonment sentence for only about 8 months since he was convicted and sentenced on the 17th July, 2020. The record also indicates that, there is tangible evidence against the accused save for the improper reception of the complainant's evidence. I have also considered the stance of the law that, the best evidence in sexual offences comes from the victim of the offence as observed earlier. The interests of justice thus, demands for a retrial as proposed by the learned State Attorney and not for an acquittal suggested by the appellant.

Due to the above reasons, I uphold the second ground of appeal. I also find it unnecessary to test the rest of the grounds of appeal since the findings I have made above regarding the second ground of appeal are capable of disposing of the entire appeal.

I consequently, make the following orders; I nullify and quash the proceedings of the trial court and the conviction against the appellant. I

also set aside its impugned judgment and the sentence imposed against him. The appellant shall be retried immediately before another magistrate of competent jurisdiction. The retrial shall commence in not more than two months from the date hereof to avoid delays. The appellant shall remain in prison custody as a remand-prisoner and not as a convicted-prisoner pending the commencement of the retrial. It is so ordered.

JHK. UTAMWA.
JUDGE
22/02/2021.

Date; 22/02/2021.

CORAM; Hon. JHK. Utamwa, J.
Appellant; present (by virtual court link while in Ruanda Prison-Mbeya).
For Respondent; Ms. Hanarose Kasambala, State Attorney.
BC; M/s. Gaudencia, RMA.

Court: Judgment delivered in the presences of the appellant (by virtual court while in Ruanda Prison-Mbeya) and Ms. Hanarose Kasambala, learned State Attorney for the Respondent, in court, this 22nd February, 2021.

JHK. UTAMWA
JUDGE
22/02/2021.