**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SONGEA DISTRICT REGISTRY)**

**AT SONGEA.**

**DC CRIMINAL APPEAL NO. 25 OF 2020**

*(Arising from Criminal Case No. 170 of 2019 of Songea District Court at Songea)*

**LUCAS MWAKISAMBWE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

*Date of last order: 24/03/2021*

*Date of Judgment: 28/04/2021*

**JUDGMENT**

**I. ARUFANI, J.**

The appellant, Lucas Mwakisambwe was arraigned before the District court of Songea with the offence of rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002. It was alleged in the particulars of the offence that, on divers dates from 2016 to September, 2017 at Lyangweni Vilage within Rural District of Songea in Ruvuma Region the appellant did have sexual intercourse with one K. K (not her real name) a girl aged 11 years. After full hearing of the matter the appellant was found guilty, convicted and sentenced to serve thirty

years imprisonment. The appellant was aggrieved by the decision of the trial court and appealed to this court basing on six grounds.

In order to appreciate the issue involved in this matter the court has found it is pertinent to have a look on a brief background of the matter as it can be deduced from the record of the trial court. The appellant is the step father of the victim in this case as the appellant was married to the victim's mother namely Devotha Gerold Mkinga who testified in the matter as PW1. The victim testified before the trial court as PW2 and stated that, in 2016 when she was a standard five student she was raped by the appellant.

PW2 said in her testimony that, on the date of event the appellant called her in their bedroom. She said after entering into the bedroom the appellant undressed her underpants and took out his penis and inserted the same in her vagina. She said when she was called by the appellant her siblings had been sent by the appellant to go to fetch water from the river and her mother had gone to saccos meeting. She said the appellant raped her three times on different days when her siblings were playing in the garden.

PW2 said that, later on she started being sick and after being taken to Peramiho Hospital she was examined and found she was HIV positive and while when her mother, PW1 was tested was found she was HIV negative. PW2 said that when she was asked by the doctor about where she got the HIV she said she was raped by the appellant. The matter was reported to the police station and after the appellant being arrested he was taken to the hospital and tested and found he was HIV positive. Thereafter the appellant was arraigned before the trial court with the offence of rape whereby after being convicted he was sentenced to serve the sentence mentioned hereinabove.

When the appeal came for hearing the appellant appeared in the court in person and the respondent was represented by Ms. Shose Sinare, learned Senior State Attorney. The appellant simply prayed the court to adopt his grounds of appeal as presented and use them to allow his appeal and set him free. The Senior State Attorney told the court they are opposing the appeal and they are supporting the conviction entered for the appellant and the sentence imposed to him. She started arguing the fifth ground of appeal which she said is carrying other grounds of appeal which

states the prosecution failed to prove the charge leveled against the appellant beyond reasonable doubt.

The Senior State Attorney told the court that, in proving the offence of rape leveled against the appellant the prosecution called five witnesses before the trial court and the victim was among those witnesses. She said after the victim, (PW2) promised to tell the court the truth she told the trial court how she was raped by the appellant and how she was examined and found she was HIV positive while her mother was found she was negative and the appellant was found he was HIV positive. She said the evidence of PW2 was not shaken by cross examination made to her by the appellant as she remained steady that she was raped by the appellant who threatened her and warned her not to tell her mother.

She said PW2 said clearly that, she was not raped by any other person than the appellant and submitted that, the evidence of PW2 was sufficient enough to convict the appellant with the offence of rape leveled against the appellant. She argued that, the evidence of PW2 was corroborated by the evidence of PW1 and PW3 who were mother of the victim and the medical practitioner who examined the victim respectively.

She said PW3 said when he examined the victim he found she had no hymen which shows she had been known carnally.

The learned Senior State Attorney said that, PW3 tendered to the trial court the PF3 which was admitted in the case as exhibit P1 without objection from the appellant which shows PW2 had been known carnally more than once and she was found she was HIV positive. She argued further that, PW3 said after examined the appellant he filled the PF3 which was admitted in the case as exhibit P2 without objection from the appellant. She said exhibit P2 shows the appellant was HIV positive and the evidence of PW3 was not challenged by the appellant. She stated further that, the evidence of PW3 corroborated the evidence of PW2 and the finding in exhibit P1 and P2 supported the finding that both PW2 and the appellant are HIV positive.

She went on saying that, the evidence of PW2 is also supported by the evidence of PW5 who was the nurse attended her at Peramiho Hospital. She said PW5 said after PW2 being taken to her by PW1 and one Anna Makumbuli with a medical card showing PW2 was HIV positive she interviewed PW2 and PW2 told her she was raped by the appellant. She based on the above stated reason to submit that, the prosecution proved

the case leveled against the appellant to the standard required by the law which is beyond reasonable doubt.

As for the second ground which states the appellant was convicted on uncorroborated evidence as PW1, PW3, PW4 and PW5 gave hearsay evidence the State Attorney disputed the same. She argued that, section 127 (6) 0f the Evidence Act, Cap 6 R.E 2019 states clearly that, in sexual offence a court may convict on uncorroborated evidence of a child of tender years or victim of sexual offence after assessing credibility of the witness and satisfied is telling nothing but the truth.

She submitted that the record of the case at hand shows the trial court believed the victim was telling the truth and not lies and that was sufficient evidence to convict the appellant without requiring corroboration. She however said the evidence of the victim was corroborated by the evidence of the witnesses testified before the trial court and the exhibits admitted in the case. She referred the court to the case of **Seleman Makumba V. R**, [2006] TLR 379 where it was stated at page 384 that, the true evidence of the offence of rape is supposed to come from the victim of the offence herself and said in the case at hand PW2 said she was raped by the appellant and not anybody else.

As for the third and fourth grounds of appeal which states PW3 who examined the victim did not say who raped the victim the State Attorney said that, as stated in the case of **Seleman Makumba** (supra) the evidence of medical practitioner do not prove who raped the victim. She said the evidence which is required to establish who the offender of a sexual offence is, is the victim herself. She submitted that, the evidence of PW2 was sufficient enough to convict the appellant.

While arguing the sixth ground of appeal the State Attorney referred the court to the case of **Godluck Kyando V. R**, [2006] TLR 363 which states every witness is entitled to credence and must be believed and his or her testimony accepted unless there are good and cogent reasons for not believing a witness. She said in the case at hand there is no any reason which can make the court to find the prosecution witnesses were not credible.

She also referred the court to the case of **Omary Ahmad V. R,** [1983] TLR 52 where it was stated that, finding of a trial court on credibility of a witness is binding on an appellate court. At the end she prayed the court to base on the above stated submission to find the

appellant was properly convicted, dismiss the appeal and order the appellant to continue to serve the sentence imposed to him.

In his rejoinder the appellant reiterated his prayer that the court accord weight to his grounds of appeal to allow his appeal and set him free. He denied to have committed the offence leveled against him and said it was just given to him.

The court has carefully considered the submissions made to the court by both sides and after going through the record of the trial court it has found that, before going to the merit of the appeal there are irregularities committed by the trial court in the course of hearing the evidence of the appellant's case. Initially the court entertained doubt whether none compliance with the requirement provided under section 210 (3) of the Criminal Procedure Act, Cap 20 R.E 2019 at the time of hearing the evidence of the witnesses testified before the trial court affected the case of the appellant.

However, after being addressed by the parties and going through the cases cited to the court by the Senior State Attorney the court has read the holding made by the Court of Appeal of Tanzania in case of **Yuda John V.**

**R**, Criminal Appeal No. 238 of 2017, CAT at DSM (unreported) and find that, as rightly submitted to the court by the Senior State Attorney it is now settled that, the stated irregularity is not fatal and is curable under section 388 of the Criminal Procedure Act.

The court has also found that, apart from the stated irregularity there is another irregularity relating to the way the evidence of PW2 who was the victim of the offence and a child of tender age was taken by the trial court. The court has found that, although the Senior State Attorney told the court in her submission that PW2 promised to tell the court the truth and stated how her evidence proved the charge leveled against the appellant but the record of the trial court shows there is an irregularity in taking the promise of PW2 which cannot be left without being considered.

The court has found that, section 127 (1) of the Evidence Act, Cap 6 R.E 2019 requires court to test the competency of every person appears before it to testify to see whether he or she is capable to testify. After the court being satisfied a person is capable to testify the evidence of that person is required to be taken under an oath or an affirmation as provided under section 198 (1) of the Criminal Procedure Act, Cap 20 R.E 2019. However, section 127 (2) of the Evidence Act is giving exception to the

above requirement of the law for the evidence of a child of tender age to be taken without taking an oath or making an affirmation. The said provision of the law states that:-

> *"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 expression *"a child of tender age"* used in the above quoted provision of the law is defined under section 127 (4) of the Evidence Act to mean a child whose apparent age is not more than fourteen years. As insisted in the case of **Makelemo Lubinza V. R**, Criminal Appeal No. 10 of 2020, HC at Mwanza District Registry (unreported) a child whose age is fourteen years is falling under the category of a child of tender age. Since the record of the trial court shows at page 13 of its typed proceedings that when PW2 was giving her evidence her age was fourteen years it is crystal clear that PW2 was a child of tender age and before receiving her evidence the trial court magistrate was required to comply with what is provided under section 127 (2) of the Evidence Act.

The requirement to be complied as stated in the cited provision of the law is that of a child of tender age whose evidence has been taken

without an oath or making an affirmation to be required to promise to tell the court the truth and not any lies. That requirement was insisted by the Court of Appeal of Tanzania in the case of **Godfrey Wilson V. R**, Criminal Appeal No. 168 of 2018, CAT at Bukoba, (unreported) where it was stated that:-

> *"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 27 (2) as amended imperatively requires a child of tender age to give promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of tender age."*

That being the position of the law the court has found the issue to determine in the case at hand is whether the requirement provided under section 127 (2) of the Evidence Act and insisted to be complied with in the above case was properly complied with by the trial court before taking the evidence of PW2. The court has found that, before taking the evidence of PW2 the trial court magistrate recorded at page 13 of its typed proceedings as follows:-

*"**PW2:** K. K.* (not a real name), *14 years, std VII, Pupil at Kilawalawa at Lyangweni, Christian, Resident of Lyangweni.*

*Promises to speak the truth."*

To the view of this court it cannot be said the above quoted part of the proceedings of the trial court established the victim was required to promise to tell the trial court the truth and not any lies and she promised to do as required by the law. The court has arrived to the above view after seeing that, the above quoted part of the proceedings of the trial court shows what was recorded by the trial magistrate is the personal particulars or profile of the child and thereafter the court made a finding that the child promised to speak the truth.

There is nowhere indicated the child was required to promise the trial court to tell the truth and not any lies and the child promised to do so before her evidence being received as required by the law. To the contrary the court has found what is appearing in the record of the trial court is an expression that, *"promises to speak the truth"* which is recorded after the personal particulars of the child. The question is whether it can be said the said expression suffices to establish the child promised to tell the trial court the truth and not any lies as required by the law. The court has found that,

the guideline as to how to obtain a promise of a child of tender age to tell the court the truth and not any lies before receiving his or her evidence was well articulated in the case of **Godfrey Wilson** (supra) where the court stated that:-

> *"We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:*
>
> 1. *The age of the child.*
> 2. *The religion which the child professes and whether he/she understand the nature of oath.*
> 3. *Whether or not the child promises to tell the truth and not lies.*
>
> *Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."*

To the view of this court the questions proposed in the above quoted part of the judgment of the Court of Appeal shows they are intending to comply with the requirements provided under section 127 (1) and (2) of the Evidence Act cited earlier in this judgment. Those questions require the court to be satisfied a child is competent to testify and whether her or his evidence should be received on an oath or by making an affirmation.

Where is found a child cannot give her or his evidence on an oath or by making an affirmation because of her or his tender age, the court is required to require the child to promised whether she or he will tell the court the truth and not any lies and the answer given by the child is required to be recorded in the record of the case.

That being the position of the law the court has found in relation to the case at hand that, as stated earlier in this judgment it is not recorded anywhere in the proceedings of the trial court the child was required to promise to tell the trial court the truth and not any lies. If she was required to do so the answer given by the child was not recorded in the proceedings of the trial court. What is recorded in the proceedings of the trial court is the finding of the trial magistrate that the child promises to speak the truth.

To the view of this court and as stressed in the case of **Godfrey Wilson** (supra) the trial magistrate was required to record in the proceedings of the case the promise given by the child on her own words of mouth before making his finding that the child promises to speak the truth. It was not proper and enough for the trial magistrate to record only his finding that the child promised to speak the truth while what was said

by the child in relation to her promise to tell the trial court the truth and not any lies is not reflected in the record of the case.

The requirement to record in the proceedings of a case the promise made by a child on her own words of mouth to tell the court the truth and not any lies has been insisted by the court in number of cases. Some of those cases are **Anania Patrick Zagamba V. R**, Criminal Appeal No. 37 of 2020, HC at Songea, **Ahazi Mwakisisye @ Sugu V. R**, Criminal Appeal No. 66 of 2019, **Michael Nicodem V. R**, Criminal Appeal No. 103 of 2020 and **Adam Christopher @ Kibuta V. R**, Criminal Appeal No. 107 of 2020, HC at Mbeya (all unreported). As there is no promise recorded from the wording of PW2 as stressed in the above cited cases that she promised to tell the trial court the truth and not any lies before her evidence being received it cannot be said her evidence was properly received in terms of section 127 (2) of the Evidence Act.

Since the position of the law as stated in the case of **Selemani Makumba**, (supra) the true evidence of rape is required to come from the victim of the offence herself the court has found that, it cannot rely on the evidence of the other prosecution witnesses to determine whether they have established the indictment laid against the appellant as the main role

of their evidence is to corroborate the evidence of PW2. The court has also found that, as stated in the case of **Godfrey Wilson** (supra) the evidence of a child of tender age received without abiding to the requirement provided under section 127 (2) of the Evidence Act has no evidential value. That being the status of the evidence of PW2 the court has found her evidence cannot be used to find as submitted by the Senior State Attorney that it managed to prove the offence leveled against the appellant.

Now the question is what the court is required to do under that circumstance. The court has found that, as provided under section 388 of the Criminal Procedure Act where the court has been satisfied the irregularity appearing in the record of the trial court has in fact occasioned a failure of justice it can order retrial or make such other order as it may consider just and equitable. The circumstances upon which an order for retrial of a case can be made was stated in the case of **Fatehali Manji V. R**, [1966] E.A 343 where the erstwhile Court of Appeal of East Africa stated as follows:-

> *"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 purpose of enabling the prosecution to fill in gaps in its evidence as the first trial ..... each case must depend on its own facts and circumstances and an order for re-trial should only be made were the interest of justice require it."*

While being guided by the position of the law stated in the above case the court has found that, the irregularity appearing in the record of the trial court was caused by the trial court which failed to abide to the requirement of the law of taking the promise of PW2 before start taking her evidence. Since the stated irregularity is not about insufficiency of the evidence of the prosecution and as there is no gap which can be said will be filled by the prosecution if the court will order the matter to be tried de novo the court has found this is a proper case to order to be tried de novo for the interest of justice to the parties. The court has also come to the above finding after seeing there is nothing showing if the court will order the case to be tried de novo it will cause any injustice to the appellant.

In the premises the court is hereby quashing the whole of the proceedings and judgment of the trial court and is setting aside the sentence of thirty years imprisonment imposed to the appellant. The court is ordering the matter to be tried de novo before another magistrate of competent jurisdiction. Meanwhile the appellant shall remain in custody to

await the time of being taken to the trial court for re-trial of his matter. If the appellant will be convicted the time he has served in prison shall be deducted from the sentence which will be imposed to him. It is so ordered.

Dated at Songea this 28th day of April, 2021

**I. ARUFANI**

**JUDGE**

**28/04/2021**

**Court:**

Judgment delivered today 28th day of April, 2021 in the presence of the appellant in person and in the presence of Mr. Hamimu Nkoleye, learned Senior State Attorney. Right of appeal is fully explained to the parties.

**I. ARUFANI**

**JUDGE**

**28/04/2021**