IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA
(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 22 OF 2020

(Original Criminal Case No. 145/2020 of Kibondo District Court at Kibondo before Hon M.M. Majula - RM).

BUHANZA JOHN MUGIRI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Dated: 20th & 20th April, 2021

A. MATUMA, J.

The appellant Buhanza S/O John Mugiri stood charged in the District Court of Kibondo at Kibondo for an offence of Rape Contrary to Section 130(1) (2) (e) and 130(1) of the Penal Code, Cap 16 R.E 2002.

It was alleged that on the 15th day of April,2020 during evening hours he did have canal knowledge of a victim girl aged 12 years whose name is withheld for the purpose of this Judgment.

After the full trial, he was found guilty, convicted and sentenced to suffer a custodial sentence of thirty years jail term. Aggrieved with such conviction and sentence, the appellant preferred this appeal with eight

grounds of appeal whose main complaint is to the effect that the prosecution evidence did not prove the case against him beyond reasonable doubts.

At the hearing of this Appeal the Appellant appeared in person while the Respondent had the service of Mr. Clement Masua learned State Attorney.

The Appellant preferred the learned State Attorney to start addressing the Court against the grounds of Appeal and him to reply thereafter. The learned State Attorney from the right beginning stated that he was supporting the appeal on one major ground that the material evidence of the victim who was the child of tender age was received contrary to the law, section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 hence liable to be expunged, and that once such evidence is expunged no any other evidence on record to sustain the conviction of the Appellant.

The Appellant having heard the learned State Attorney, had no more to add but joining hands with him and praying for an acquittal.

I agree with the learned state attorney that the Evidence of PW1 was received contrary to section 127 (2) (supra). I further find that even the general rule under section 198 (1) of the CPA of the Criminal Procedure

Act, [Cap. 20 R.E 2019] was as well violated before the Court resorted into the exception under section 127 (2) (supra)

The evidence of the child victim PW1 who was aged 12 years old was taken without testing her as to whether she knew the meaning and nature of oath and be determined on record whether she qualified to give her evidence under oath/affirmation as so required by the general rule under section 198 (1) supra or whether she had to fall into the exemption under section 127 (2) supra.

In the case of ***Issa Salum Nambaluka V. Republic,*** *Criminal Appeal No. 272 of 2018* for instance, the court of Appeal reiterated what they held in ***Godfrey Wilson Versus Republic****, Criminal Appeal No. 168 of 2018* and had these to say;

> *'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 replies 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 understand the nature of oath, he or she should, before*

giving evidence, be required to promise to tell the truth and not to tell lies'

The Court of Appeal then gave the procedures on which a child of tender age should be tested whether she/he understands the meaning and nature of oath by asking him or her some simple questions such as the age of the child, the religion and whether the child understands the nature of oath, whether the child promise to tell the truth and not to tell lies etc.

In the instant case, the court did not test the child victim as such and merely took her respective evidence on the promise to tell the truth.

The 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 as it was also in the Revised Edition of 2002 that;

> *'**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 Oaths 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 evidence of such a witness of tender age has to be given without oath or affirmation under section 127 (2) of the Evidence Act supra, as an exception to the general rule, the Law mandatorily requires such witness to be required by the court to promise telling the truth and undertake not to tell lies before his or her evidence is received. The evidence received contrary to the said requirements has no evidential value and cannot be acted upon to convict as it was held in the case of **Godfrey Wilson** supra.

In the instant case as herein above reflected, the records do not indicate anyhow, as to whether the court tested the child witness to ascertain whether she could have given her evidence under oath or not. Her respective evidence is thus valueless as rightly observed by the learned State Attorney to be acted upon to convict or sustain the conviction of the appellant.

The learned State Attorney was of the view that in the absence of the evidence of the victim herself the remaining evidence on record is not

sufficient to sustain the conviction of the Appellant. I agree with him. But I would add that not only the evidence of the victim suffered the problems but also that of other several witnesses for the prosecution.

The records of the trial court reveal that in the course of trial the prosecution substituted the charges several times at different stages. At first the substitution was made before PW1 gave evidence. Then five witnesses for the prosecution gave their respective evidence. Thereafter another substitution of the charge was made. Then came four other witnesses who gave evidence on the newly substituted charge, then the prosecution closed their case.

The question for determination under the circumstances was thus; whether the manner in which the charges were substituted is legally accepted and did not prejudice the appellant.

Although it is not the law that witnesses must always be recalled to testify afresh when the charge sheet is substituted, it is a mandatory legal requirement that once the charge is substituted while some evidence has already been taken, the trial court must inform the accused person of his right to have the witnesses who have already testified recalled. This requirement is under section

234 (2) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The requirement is to inform the accused of such right and not to an automatic recall of the witness or witnesses. The accused might even not wish the witnesses to be recalled and the Court may as well refuse the prayer to have the witnesses recalled. In the case of ***Omary Kitambo Vs the Republic, Criminal appeal No. 94/2014*** the Court of Appeal determined the rights of the accused person under the provisions of section 234 of the CPA supra upon substitution of the charge in the course of trial and held that violation of any of the rights thereof vitiates the proceedings.

Under section 234 (2) (b) of the law supra, a witness or witnesses are recalled either to give evidence afresh or be further cross examined and further re- examined. Paragraph (c) of the same provision supra provides for the recall of a witness for further examination in chief on the alteration or addition to the charge.

As it was decided in the case of ***Omary s/o Kitambo*** supra, what is necessary is for the trial court to inform the accused of such right to have the witnesses recalled for either of the remedies herein

stated. The party so demands must give reasons for his demand and the court decide on them. In my view the court may in its absolute discretion allow or deny the recall of any of the witnesses or all of them if it considers that the substitution so made did not touch or affect the evidence materially. But again, the court cannot arbitrarily deny such a right without first giving the party an opportunity to state its view.

In the instance case, it was wrong for the trial court to stay mute without informing the appellant that he had a right to demand the witnesses who had already testified to be recalled for either; to give the evidence afresh or for further cross – examination. It was even worse when the trial court allowed substitution of the charges without any disclosure of the reason or reasons for the substitution. The prosecution ought to have stated in court why the substitution was being sought so that the appellant could know the nature of the substitution. That would put him in a better position to decide whether to exercise any of the rights under section 234 supra.

In the case of the ***Republic Vs. Jumanne Mohamed [1986] TLR 232*** the court in discussing section 234 (2) (b) supra stated.

> *'Where the accused before the court of law is a layman or a lawyer who is not likely to know (sufficiently) the provisions of section 234 (2) (b) of the Act,* ***the court is under duty,*** *in the interests of justice, to inform the accused of his rights under the subjection and find out from him which right, if any, he proposes to exercise'.*

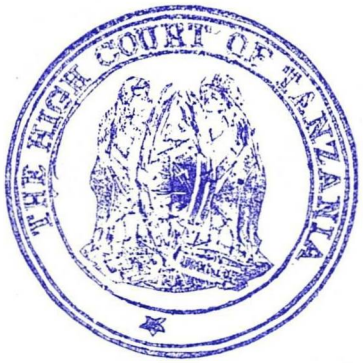
The court went on that;

> *'The accused's reply should be reflected on the record of the case'.*

In this case the provisions of the law supra were completely ignored by both the Prosecutor and the trial magistrate. Failure to adhere to the requirements of Section 234 (2) (b) supra renders the trial a nullity and vitiates the decision arrived at the end of the trial. In the instant appeal, I rule out that failure of the trial court to comply fully with section 234 (2) (b) supra was fatal and rendered the proceedings at the trial a nullity.

Other cases which determined the rights of an accused person upon substitution of the charges includes ***Sylvester Albogast versus Republic, Criminal Appeal no. 309 of 2015*** (CAT) and ***Stephen Munga (1968) HCD 225.***

With the herein above anomalies and as rightly suggested by the learned State Attorney, I allow the appeal, quash the conviction and set aside the sentence of 30 years against the appellant. I order that the appellant be immediately released from custody unless he is held for some other lawful cause. Right of appeal is explained to either party who is aggrieved with this judgment. It is so ordered.



A. Matuma

Judge

20/04/2021

Court: Judgment delivered in the presence of the appellant in person and Mr. Raymond Kimbe learned State Attorney for the Respondent/Republic

Sgd: A. Matuma

Judge

20/04/2021