IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL No. 13 of 2021

(Arising from the District Court of Muleba at Muleba in Criminal Case No. 155 of 2020)

DEOGRATIAS PETER @ RUHALALA ---------- APPELLANT

Versus

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

06.05.2021 & 20.05.2021

Mtulya, J.:

An appeal attached with four (4) grounds was lodged in this court on 4th February 2021 by Mr. Deogratias Peter @ Ruhalala (the Appellant) disputing the decision of the **District Court of Muleba at Muleba** (the court) in **Criminal Case No. 155 of 2020** (the case). As the grounds were drafted by the Appellant himself, a layperson, they were in large texts and full of narrations of stories of what transpired. May be the Appellant was trying to depict how the case was conducted and his dissatisfaction on his conviction.

However, in brief, the Appellant was complaining on three issues, viz: first, the court did not comply with section 127 (2) of the **Evidence Act** [Cap. 6 R. E. 2019] (the Act); second, Exhibit PE. 2 was not admitted to prove the case; and third, no plausible explanation recorded

on the reasons of delay to report the complained offences from 2nd August 2020 to 17th August 2020.

In order to appreciate the Appellant's complaints, a background of the matter as from the record of this appeal may be displayed, albeit in brief: on 3rd August 2020, Mzee Dominic Kagumulo (the deceased) expired at his home village in Ruanda and buried on 6th August 2020, and finally all burial rituals and ceremonies were complete by 10th August 2020. The burial activities were attended by sons, daughters, grandsons and granddaughters of the deceased, including Achelaus Dominic (PW4) and granddaughter of the deceased, the victim [name withheld (PW1)] of the age of fourteen years. PW1 had left her home residence where she was living with her father, the Appellant to funeral area in the same village of Ruanda.

After the end of funeral activities on the 10th August 2020, communications between PW4 and the Appellant started on the return of PW1 to her home residence. The communications between the two persons had up and downs attached with lies, quarrels and fight incidences which were reported to the police and one person, young brother to PW4 was arrested by the police on 14th August 2020. On 17th August 2020, PW4 went and reported to the police that the Appellant

had raped his daughter of fourteen (14) years, PW1, on 2nd August 2020. Following the report, the Appellant was arrested and after police investigations, he was arraigned before the court for the offence of incest by male & sexual harassment contrary to sections 158 (1) (a) & 138D (1) of the Penal Code [Cap. 16 R.E. 2019]. After full hearing of the case, the Appellant was convicted on the charge of incest by male and was sentenced to thirty (30) years imprisonment. The reasoning of the court is found at page 9 of the decision in the following texts:

> *I had inspiration on the following cases in* ***Abasi Ramadhani v. Republic*** *(1969) HCD 226;* ***Tatizo Juma v. Republic****, Criminal Appeal No. 10 of 2013; and* ***Abdallah Kondo v. Republic****, Criminal Appeal No. 322 of 2015, where the court held that the evidence of the victim herself is regarded as the best evidence to prove sexual offences. It was evidence of PW1 that on 2nd August 2020, her father undressed her clothes and inserted penis into her vagina and started sexual intercourse...*

With regard to long delay without any reasons being registered during the proceedings in the court, the court *suo moto* reasoned at page 12 that:

...the victims of sexual offences, especially minors may not always cry for help earlier. The reasons behind such delays in reporting are varied, multiple and complex...the victim was sexually molested by her father and it was difficult for her to reveal the same until when it was to the apex when she revealed to PW2 and PW3. In our societies of rural areas it could be attributed by customary rituals and prohibitions, duress, trauma, fear of retaliations, psychological conditions and fear of being out-casted by the families as per decision in ***Abdillah Mshamu Mnali v. Republic****, Criminal Appeal No. 98 of 2010.*

The Appellant was dissatisfied with both the conviction and reasoning of the court hence preferred the present appeal disputing the decision as whole. When the appeal was scheduled for hearing on 6th May 2021, the Appellant had nothing more to express rather than stating that his four (4) grounds of appeal be adopted to be part of his submission and this court may search for justice. Appellant's brief submission may be attributed from the fact that he is a lay person and registered detailed grounds of his appeal.

However, Appellant's prayer was received well by Mr. Grey Uhagile, learned State Attorney, who supported the appeal in all four (4) grounds. According to Mr. Uhagile, PW1, who was the victim of the alleged incident, was at tender age of fourteen (14) years when was summoned to testify, but did not promise to tell the truth to the court as per requirement of the law in section 127 (2) of the Act. To the opinion of Mr. Uhagile, the evidences registered by PW1 have no any value and must be expunged from the record as per precedent in **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018.

I have gone through the record of this appeal and found that on 16th September 2020, PW1 was invited to testify was properly sworn, but did not promise to tell the truth without any lies to court. This is a fault which renders the evidences registered by PW1 to have no any value and must be expunged from the record to comply with the directives of our superior court. The Court of Appeal (the Court) in **Godfrey Wilson v. Republic** (supra), categorically stated, at page 11 and 13 of the decision, that:

> *To our understanding, the above cited provision [section 127 of the Act] as amended, provides two conditions. One, it allows the child of tender age to give evidence without*

oath or affirmation. Two, ***before giving evidence, such child in mandatorily required to promise to tell the truth to the court and not to tell lies... The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies...this is a condition precedent before reception of the evidence of a child of a tender age****. The question, however, would be how to reach at that stage. 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: the age of the child; the religion he professes; whether he understands nature of an oath; and whether the child promises to tell the truth and not lies.*

(Emphasis supplied)

This statement of the Court was part of the appreciation of the previous decision of the same Court in Msiba Leonard Mchere Kumwaga v. Republic, Criminal Appeal No. 550 of 2015, where it was observed that:

Before dealing with the matter before us, we have deemed it crucial to point out that in 2016, section 127 (2) of the Act was amended vide Written Laws (Miscellaneous Amendments) Act No. 4 of 2016. ***Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies.***

(Emphasis supplied)

In the present case, before PW1, who was a child of tender age of fourteen (14) years gave her evidence, the following situation transpired as depicted on the record of 16th September 2020:

PW1: [Name withheld] 14 years, Ruanda, student, standard five, Christian, sworn and states as follow: I am living at Ruanda with my father...

What is displayed from the record is that PW1 was answering questions regarding her names, age, where she stays, where she takes her studies, the class of studies she belongs, and her religion. No finding was recorded in respect of her intelligence and promise to tell the truth and not lies. The trial magistrate ought to have required PW1 to promise to tell the truth and not lies. In this case, since PW1 gave her

evidence without making prior promise of telling the truth and not lies before the court, the procedure enacted in section 127 (2) of the Act was not complied hence the evidence has no any evidential value. As the evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the evidences of PW2, PW3, PW4 and PW5 in view of sustaining the conviction. In such circumstances, the first ground of appeal is meritorious and hereby sustained.

Mr. Uhagile also submitted that exhibit PE. 2, which establishes the case against the Appellant, was admitted in violation of procedural laws and precedent of the Court of Appeal in **Frank Kanani v. Republic**, Criminal Appeal No. 425 of 2018 as it was not read before the Appellant to understand the contents and be able to reply on the subject. According to Mr. Uhagile, proceedings in the courts show that PW5 prayed to tender PE.2, but it was neither tendered nor admitted in the court, although the Appellant did not protest the admission. To the opinion of Mr. Uhagile, PE.2 cannot qualify to be evidence of any value and may be expunged from the record as it was not only admitted but also was not read before the Appellant to be able to reply the contents of the exhibit.

The record in the court conducted on 12th October 2020 shows that PW5 was summoned to testify against the Appellant. During registration of her evidence, she prayed PE.2 to be admitted, but it was not admitted or read before the Appellant to understand the contents and be able to reply on the exhibit. This is contrary to the directives in the precedent of our superior court in **Frank Kanani v. Republic** (supra) where the Court unconditionally stated at page 16 that:

> *The exhibit he tendered (exh. P.5), a copy of voters registration book was admitted as evidence without the same being read over to the appellant after admission. This was unprocedural, rendering the same liable to be expunged [from the record].*

In the present case, the PF.3 which was neither admitted nor read before the court, must be expunged from the record, as I hereby do. Having expunged this piece of evidence, I am left to believe that there is no any further evidence which establishes the offence with which the Appellant is charged. Therefore, Appellant's conviction and sentence based on this evidence was not proper.

In the present appeal the record shows that the facts leading to the arrest and prosecution of the Appellant are quietly engaging. The

incident which registered the allegation against the Appellant occurred on 2nd August 2020 and was reported to the police station on 17th August 2020, more than two weeks delay. According to PW2 and PW4, the delay was caused by the funeral activities. However, the record shows that the burial activities started on 2nd August 2020 and completed on 10th August 2020. I understand the learned magistrate in the court considered other factors for delay, such as customary rituals and prohibitions, duress, trauma, fear of retaliations, psychological conditions and fear of being out-casted by the families. However, in the present case record shows that witnesses PW2 and PW4, who are adults, were well aware of the alleged offence since 2nd August 2020.

The practice of this court and court of Appeal has shown that it is unsafe to convict the Appellant in the circumstances like the present one where there were more than two weeks of delay without plausible explanations (see: **Onesmo Kashonele v. Republic**, Criminal Appeal No. 225 of 2012 and **Marwa Wangiti Mwita v. Republic** [2002] TLR 39). In **Onesmo Kashonele v. Republic** (supra), the Court observed that:

> *...the record makes it clear that PW1 named the appellants to PW3,* ***two days after the occurrence of the robbery****...upon this piece of evidence, we are satisfied that*

the victims' failure to name the appellants at an earliest opportunity cast doubt to their reliability and credibility.

(Emphasis supplied)

Similar wording were recorded in 2002 in the precedent of **Marwa Wangiti Mwita & Another v. Republic** (supra). In this year, the Court stated that:

...the ability of a witness name a suspect at the earliest opportunity is in all important assurance of his reliability, in the same ways as ***un-explained delay*** *or* ***complete failure to do so should put a prudent court to inquiry.***

(Emphasis supplied)

In the present case, I think, in my opinion, there were no plausible explanations which were registered by the prosecution, including those mentioned by learned magistrate in the case. It is elementary rule of law that the burden of proof in criminal cases is on the prosecution side and the standard is beyond reasonable doubt (see: section 3 (2) (a) of the Act and precedent in **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005). It is not the duty of the

Appellant to prove its innocence. That is why the Court in **Mohamed Matula v. Republic** (supra), stated that:

> *In a criminal case like this one that burden is always on the prosecution; it never shifts and no duty is cast on the appellant to establish his innocence.*

Noting the background leading to the present appeal, and considering that I have expunged the evidence registered by PW1 and exhibit PE.2, and recognising the absence of plausible explanation on the part of the prosecution on the cited delay, I find merit in this appeal. I therefore quash the conviction, set aside the sentence of thirty years (30) imprisonment imposed against the Appellant and further order for an immediate release of the Appellant from jail unless otherwise held for some other lawful reasons.

It is accordingly ordered.

F. H. Mtulya

Judge

20.05.2021

This Judgment was delivered in Chambers under the seal of this court in the presence of the learned State Attorney, Mr. Grey Uhagile and in the presence of the Appellant, Mr. Deogratias Peter @ Ruhalala.

F. H. Mtulya

Judge

20.05.2021