IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 16 OF 2020

Arising from the decision of District Court of Iramba at Kiomboi in Criminal Case No. 173 of 2019 Hon. C.C. Makwaya RM

YUSUPH SANGAWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

20th April, 2020 & 20th April, 2021.

M.M. SIYANI, J.

At the District Court of Iramba at Kiomboi, Yusuph Sangawe (the appellant) was arraigned for the offence of Rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code Cap 16 RE 2002. It was alleged that around 21:00hrs on 5th October, 2019, while at Nkungi area in Mkalama District, the appellant had carnal knowledge of one Birgita Charles (Pseudo name used to conceal the identity of the victim) a girl aged 11 years. At the conclusion of the trial, Yusuph Sangawe was convicted and awarded a term of thirty years imprisonment. Aggrieved by both the conviction and sentence, Yusuph is now in this temple of justice

challenging the said findings. His Petition of Appeal contains ten (10) grounds of complaints against both the conviction and sentence meted to him. At the hearing of the appeal however, the appellant who had the legal services of counsel Freddy Kalonga, abandoned all of the grounds raised in the petition save for the following:

> 1. *The complaint in respect of the argued ground was that the presiding magistrate grossly erred in law and fact by convicting the appellant basing on the testimony of PW2 (a girl of tender age) which was admitted in violation of the provision of section 127 (2) of the Evidence Act Cap 6 RE 2002 as amended by Act No. 3 of 2016.*

Submitting on the above ground, counsel Kalonga argued that the trial court wrongly received PW2's evidence and acted on it without complying with the provision of section 127 (2) and (7) of the Evidence Act which requires such a witness to promise to speak the truth. He contended that compliance to section 127 (2) of the Evidence Act, was a mandatory requirement of the law before PW2 who was child of tender age, could give her testimonies. Since there was no such compliance, Mr. Kalonga

urged the court to discard such evidence and once that is done, he believed there would be no basis of the appellant's conviction.

Mr. Sarara, the learned State Attorney, who appeared for the respondent/Republic was quick to concede that indeed, the trial court did not comply with section 127 (2) of the Evidence Act. Making reference on the case of **Juma Mkuyu Vs Republic,** Criminal Appeal No. 277 of 2014, Court of Appeal of Tanzania at Tabora (unreported), the learned State Attorney submitted that the presiding magistrate erred by recording PW2's evidence without leading her to promise to speak nothing but truth, an omission which in his view, was a fatal procedural irregularity which rendered the recorded evidence of no value and therefore a subject of being discarded.

Upon revisiting the records and having summarized what was submitted to me by the learned counsels, I would indeed hasten to agree that this appeal must succeed. The record, shows there was no compliance to section 127 (2) of the Evidence Act. With only 11 years of age, Birgita Charles (PW2) who admittedly was a victim in this case, was a child of tender age whose evidence ought to have been recorded only after she has promised to speakthe truth to the court under section 127 (2). That

was not done. There is nowhere in the said records where it is shown that Birgita promised to tell the truth to the court and not lies. Failure to obtain a promise to tell the truth from the witness of tender age, is a fatal irregularity. Such evidence was wrongly admitted and therefore cannot be considered as evidence at all. In **Godfrey Wilson Vs Republic,** Criminal Appeal No. 168 of 2018 the Court of Appeal of Tanzania observed the following:

> *In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127 (2) of the Evidence Act as amended by Act No 4 of 2016. Hence the same has no evidential value. Since the crucial evidence by PW1 is invalid there is no evidence remaining to be corroborated in view of sustaining the conviction. [Underlined emphasis supplied]*

Taking a leaf from the above decision, it is safe to hold that evidence of PW2 in the instant appeal, was improperly admitted by the trial court in terms of section 127 (2) of the Evidence Act as amended by Act No. 3 of 2016 and her evidence therefore holds no value. As it was the cases in **Selemani Makumba Vs Republic**, (2006) TLR 379 and **Ramadhani Samo Vs Republic**, Criminal Appeal No. 17 of 2008, there is no

gainsaying that in sexual offenses case, the best evidence is that of the victim. Since the victim's evidence in the instant appeal has no any evidential value, the remaining testimonies cannot support the prosecution's case. It is therefore clear that this case was not proved beyond reasonable doubt to warrant conviction and sentence meted to the appellant.

The above said, there is merits in the raised ground of appeal and the same is allowed. I therefore quash the appellant's conviction and set aside a sentence of thirty (30) years imprisonment and payment of a compensation of Tshs 2,000,000/= imposed to him by the trial court. I order that the appellant be released from prison forthwith, unless otherwise held for some other lawful cause. It is so ordered.

DATED at **DODOMA** this 20th day of April, 2021.

M.M. SIYANI

JUDGE