IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO 34 OF 2020

(Original Criminal Case No 207 of 2018 of the District Court of Nzega, at Nzega)

MHOJA S/O MASUNGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

15/03/2021-21/05/2021

BAHATI,J.:

In this case, **MHOJA S/O MASUNGA** was arraigned to District Court faced with the allegation of committing rape contrary to section 130(1)(2)(e) and 131 (1) of the Penal Code, Cap 16. Upon trial, he was convicted as charged and sentenced to serve thirty (30) years in jail and also imposed six strokes of cane.

Aggrieved, the appellant appealed to this court against both conviction and sentence on eight grounds of appeal, thus;

1. *The case for the prosecutions (sic) against the appellant was not proved beyond reasonable doubt.*
2. *The evidence of PW2 (the victim of the offence). Being a child of tender age was received in violation of Section 127 (2) of the Evidence Act, Cap 6 [R. E. 2019] as amended by the written Law [Misc. Amendment] Act No. 2 of 2016, which made it mandatory that a child of tender age must make a prior promise of telling the truth and not lies to the trial court before her/his evidence is taken.*
3. *The documentary exhibits tendered in court by the prosecutions (exhibits P1, P2, and P3) which are the extrajudicial statement of the appellant and the clinic card respectively, were not read aloud in court in the hearing of the appellant, hence liable to be expunged from records.* ***Robinson Mwanjisi and 3 others Vs. Republic [2003] TLR 2018***
4. *The learned trial magistrate erred in law to shift the burden of proof to the appellant as regards the status of a marriage of the victim (PW2) on page 6, 1st paragraph of the copy of the judgment. See* ***Christina Kale and Another V Republic [1992] TLR 302 and Jonas Nkize Vs. Republic [1992] TLR 2016.***
5. *The extrajudicial statement of the appellant (exhibit P1) was wrongly relied upon by the trial court to ground conviction*

because of the failure by the prosecution to summon the interpreter who allegedly interpreted the confession of the appellant before the justice of the peace from Sukuma to Swahili and vice versa.

6. *The trial magistrate erred in law to ignore the appellant's defence without any evidence going to show any investigation was made to eliminate the doubts raised by the appellant.*
7. *The medical report, PF3, (exhibit P2) had no evidential value worthy of the name since the author of the same did not; mention any scientific criteria used to arrive at his finding and/or what qualification he had to enable him to give his opinion to come to term with section 47 of the Evidence Act Cap. 6 [R.E 2019]. See also* ***Mohamed Ahmed VS. Republic [1957] EACA 523.***
8. *There was a failure of justice in that the hamlet chairperson, to whom the appellant was alleged to have made admission of the offence was not summoned to testify in court to that effect.*

Before venturing into a determination of this matter, it is only prudent that the brief background of the event that led to the current appeal is narrated. On diverse dates of April 2018 at Ilungu village, the accused was alleged to have sexual intercourse with a girl aged 14 years; the name of the victim is protected for her identity. The accused person denied the allegation and upon evidence, the accused was

convicted of the offence and sentenced to serve a custodial sentence of thirty years imprisonment.

On hearing of this appeal, the appellant was unrepresented, whereas the respondent, Republic was represented by Mr. Tito Mwakalinga, State Attorney. Being a layperson he prayed the State Attorney to submit first.

In his submissions, Mr. Mwakalinga did not support the whole appeal. He only supported on the 3rd and 5th ground of appeal on the extrajudicial statement, caution statement, and PF3 that were not read to the accused person during the proceedings. He submitted that the Court of Appeal has already laid some principles.

On the second ground of appeal, that the evidence of PW2 being a child of tender age was received in violation of Section 127 (2) of the Evidence Act Cap.6 [R. E. 2019]. The respondent submitted that this was amended in 2016 but before that amendment, the court used to have "*voire dire*". He further submitted that there is no big such difference in the amendment since in this case, it is only the child who promises to tell the truth and not lies. According to the evidence of PW2 (victim) a girl of 14 years in the court proceedings, the victim attested instead of promising to the court though the learned State

Attorney admitted that she attested, the court had a good reason to assess.

He assertively argued that the evidence of promising is the same as that which is attesting. He urged the court that attesting the child did not prejudice the appellant's justice. He firmly believed that the law was amended to simplify the child's testimony and reduce all previous challenges. He reiterated his submission that even though she attested, the evidence given was stronger than that of being given based on a promise.

On the 4th ground of appeal, he submitted that the prosecution proved its case beyond reasonable doubt. He advanced further that the issue of marriage was new and was not the duty of the prosecution to prove. The accused had the duty to prove. He submitted that this ground has no merit.

In respect of the sixth ground of appeal, the learned State Attorney reiterated the clarifications given in respect of the 4th ground. However, he further submitted that the appellant was not charged with marrying but with rape. He contended that the facts raised are his own according to Section 112 of the Evidence Act. It was his duty to prove beyond reasonable doubt.

On the seventh ground of appeal, he submitted that section 47 of the Evidence Act gives guidance in situations of similar nature. On page 26, PW5, a clinical officer told the court that she works at Nzega District hospital. This suffices to explain that she is a clinical officer. This did not injure the appellant in any way. He prayed this ground to be dismissed for want of merit.

On the 8th ground of appeal, there was a failure for non-summoning the Hamlet Chairman who alleged to be present when he made those statements. He submitted that the issue who is supposed to be called is on the prosecution. He submitted that the Hamlet Chairman had no added value to the evidence. The offence was proved by 5 witnesses who came to court to testify. This ground has no merit.

He reiterated his submission in chief that even though the documents are expunged still PW5, Clinical Officer's evidence who stated clearly that she was pregnant and also PW2, a victim stated that she had an affair with the accused person. He prayed this appeal to be dismissed.

In response, the appellant being a layperson prayed to this court to adopt the grounds of appeal to form part of his submissions.

Having heard from both parties, the crucial issue to be determined in this appeal is whether the appeal is meritorious.

To start with the second ground of appeal that the evidence of PW2, the victim being a child of tender age, was received in violation of section 127 (2) of the Evidence Act, Cap.6 [R. E.2019]

Section 127(2) of Evidence Act, Cap 6 provides that;

"Where in any criminal cause or matter a child of tender age called as a witness does not in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation if, in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth."

It is also common ground that that, the law on the evidence of a child of tender age in this land has changed substantially. The law no longer requires a trial court to conduct a *"voir dire*" test for a witness of tender age. This follows the amendments of the law mentioned. The same has been interpreted by the Court of Appeal in some precedents including **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT, at Bukoba (unreported)** which laid down principles thus;

i. *A child of tender age can give evidence with or without oath or affirmation.*

ii. *The 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 or not the child witness understands the nature of oath or affirmation. The questions may relate to his age, the religion he professes and whether he understands the nature of an oath, and whether or not he promises to tell truth and not lies to the court. If he replies in the affirmative, then he can proceed to give evidence on oath or affirmation depending on the religion he professes. However, if he does not understand the nature of an oath, he should, before giving evidence, be required to promise to tell the truth and not lies to the court.*

iii. *Before giving evidence without oath, such child is mandatorily required to promise to tell the truth, and not lies to the court, as a condition precedent before the evidence is received.*

iv. *Upon the child making the promise, the same must be recorded before the evidence is taken.*

The issue of concern now is, therefore, whether the victim's evidence was properly admitted in court. In the case at hand, the

proceedings of the trial court show that, when the victim appeared before the trial court for her testimony, the trial Resident Magistrate recorded before receiving her evidence as shown on page 6 of the typed proceedings as follows ;

"PW2: MB (Name withheld), 14 years old, peasant and Pagan, attest and states."

The trial court straightforward proceeded to receive the evidence of the victim described above.

It is a requirement of the law that 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 child witness, that she 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 the oath, the child witness shall give evidence without the oath.

From the quotation before the trial court, it is clear to this court that the trial court did not ask any questions to the victim for purposes of determining if she knew the meaning of the oath since it is not disputed by the parties that the victim was only 14 years at the time of her testimony.

It is my considered view that the legal requirement is crucial because section 127 of the Evidence Act, Cap.6 essentially guides on who is a competent witness for testifying before a court of law, and section 127 (2) guides on how to determine the competence of a child of tender age as a witness.

Due to the stance of the current law, I find the error committed by the trial court to be fatal to the prosecution case. I consequently expunge the evidence of the victim from the record since her evidence was not properly recorded. Therefore this ground has merit.

On another ground of appeal that the documentary exhibits tendered in court by the prosecutions (exhibits P1, P2, and P3) which are the extrajudicial statement of the appellant and the clinic card respectively, were not read aloud in court in the hearing of the appellant, hence liable to be expunged from records. **Robinson Mwanjisi and 3 others Vs. Republic [2003] TLR 2018**

Owing to the support by the prosecution on grounds 3 and 5 that the caution statement, PF3, and extrajudicial statement were not read during its admission. The court in the case of **Robinson Mwanjisi and three others v, Republic, Criminal Appeal No. 154 of 1994 and Omari Iddi Mbezi Appeal No. 227 of 2009** (all unreported) held that;

"Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out."

From the record of the trial court, there is no single paragraph showing whether the document was read to the party before it was admitted. In the case of **Lacki Kilingani versus Republic, Criminal Appeal No.404 of 2015,** the court held that; failure to read the contents of the documentary evidence after it is admitted in the evidence is a fatal irregularity. Hence from the above findings, the exhibits P1, P2 and P3 are expunged from the record. This ground has merit.

From the findings, it is the court's verdict that the conviction and sentence against the appellant cannot stand. The findings thus are capable enough of disposing of the entire appeal without testing the rest of the arguments by the appellant against other prosecution evidence.

Therefore the appeal is hereby allowed. I further quash the conviction entered and set aside the sentence by the trial court. I also order the immediate release of the appellant unless he is lawfully held.

It is so ordered.

Right of appeal fully explained.

A.A.BAHATI

JUDGE

21/5/2021

Date: 21/05/2021

Coram: Hon. J. Mdoe, Ag. DR.

Appellant: present

Respondent: absent

B/C: Grace Mkemwa, RMA

Court: Judgment is delivered in presence of the Appellant.

J. MDOE

AG. DEPUTY REGISTRAR

21/05/2021