IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPLICATION NO. 10 OF 2021

(From the decision of the Resident Magistrates' Court of Mbeya at Mbeya in Criminal Case No.148 of 2018, Hon. Z.D. Laizer, RM.)

MACHIA S/O MALENDEJA.....1ST APPELLANT

MAHONA S/O MALENDEJA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 23/03/2021
Date of Judgement: 23/06/2021

MONGELLA, J.

In the RMs' Court of Mbeya the appellants were charged and convicted for the offence of gang rape contrary to section 130 (2) (e) and section 131A (1) and (2) of the Penal Code, Cap 16 R.E. 2002. During the trial it was alleged that on 04th September 2018 at Iyanga, Chang'ombe ward within the district and region of Mbeya the appellants jointly and together did have carnal knowledge of HS (initials of the victim), a girl aged 14 years. The trial court was satisfied that the prosecution proved the case beyond reasonable doubt, thus convicted the appellants of the said offence and sentenced each of them to life imprisonment.

Disgruntled with the conviction and sentence they filed the appeal at hand containing seven grounds. During the hearing of the appeal however, their counsel, Mr. Samson Suwi, abandoned the rest of the grounds and argued on ground four and five. I shall first dispose ground 4 and if need be proceed to ground five. Under ground four of appeal, the appellants claim that:

> *"... the trial court erred in law and in fact for failure to properly conduct voire dire examination to legally establish the truth of the evidence of the witness of tender age; as a result, serious miscarriage of justice was caused on the part of the appellants."*

Arguing on this ground, Mr. Suwi contended that it is undisputed that the victim witness was aged 14 years. Thus referring to section 127 (2) of the Evidence Act, Cap 6 R.E. 2019, he said that the law clearly stipulates on the manner of recording the evidence of a child of tender age whereby the child is required to promise to tell the truth. He argued that the proceedings show that PW1 who was 14 years of age affirmed, but the affirmation was taken without the court satisfying itself that she understands the nature of oath. Referring to the case of ***Issa Salum Nambaluka v. The Republic***, Criminal Appeal No. 272 of 2018 (CAT at Mtwara, unreported), he was of the stance that the effect of such defect is to have the evidence expunged from the record.

He argued further that if the evidence of PW1 is expunged from the record, there remains no other tangible evidence to sustain the conviction. He argued so basing on the trial court judgment which at

page 3 shows that the trial court relied on the evidence of PW1 considering her as the best witness on the offence.

The Republic on the other hand was represented by Ms. Xaveria Makombe, learned state attorney. In her reply, Ms. Makombe argued that the requirement to conduct voire dire was repealed vide section 26 of the Written Laws (Misc. Amendments) Act, 2016 by introducing the requirement of "promise" by the witness of tender age to tell the truth and not to tell lies. She argued that with the development under the law, the child of tender age can still affirm or swear and the trial court was correct in making her affirm. However, on the other hand she agreed with Mr. Suwi's argument that the record does not indicate whether the trial court satisfied itself if the child understood about oath. She referred to the case of ***Godfrey Wilson v. The Republic***, Criminal Appeal No. 168 of 2018 (CAT at Bukoba, unreported), which stipulates the procedure to be followed. She conceded that the procedure as laid down in this case was not adhered to by the trial court.

On the other hand however, referring to the case of ***Geofrey Sichiza v. D.P.P.***, Criminal Appeal No. 176 of 2017 (CAT at Mbeya, unreported) Ms. Makombe prayed for the court to order a retrial as the mistake in recording the evidence of PW1 was committed by the court and not the parties. She prayed so arguing that there is other strong evidence particularly that of PW2, PW4 and PW5. She said that PW2 testified to have seen the appellants taking the victim to an unknown place while PW4 and PW5 testified to have found the appellants with the victim.

In rejoinder, Mr. Suwi challenged Ms. Makombe's prayer for an order for retrial. He stood up one major reason to the effect that the evidence of PW1 was recorded in 2018 whereby she was 14 years of age. In the premises he argued that if the case is retried the victim shall be more than 16 years.

After considering the arguments from both counsels I find that there is no dispute that the evidence of PW1, who was the material witness in the case was not recorded in accordance with the law. The CAT in the case of ***Godfrey Wilson*** (supra) cited by Ms. Makombe stipulated the procedure of procuring the promise to tell the truth from a child of tender age before recording his/her testimony. Specifically the Court stated:

> *"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 a tender age to give a 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 a tender age. The question, however, would be on 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:*
> 1. *The age of the child.*
> 2. *The religion which the child professes and whether he/she understands the nature of oath.*
> 3. *Whether or not the child promises to tell the truth and not to tell lies.*
>
> *Thereafter, upon making the promise,* ***such promise must be recorded before the evidence is taken*** *(emphasis added)."*

At page 2 of the typed proceedings of the trial court, the Hon. Magistrate recorded that PW1 has affirmed. I agree with both counsels that a child of tender age can as well take oath, but under the circumstances the trial court has to satisfy itself that the child understands the meaning of oath. Failure to do that rips off the evidential value of the evidence tendered. Since the trial court did not adhere to the laid down procedure under the law, the evidence of PW1 is hereby expunged from the record.

Having gone through the records as well, I agree with Mr. Suwi that the rest of the evidence on record does not carry enough weight to sustain the conviction against the appellants. This is simply because the rest of the witness did not witness the act of rape. Their testimony is highly circumstantial and uncorroborated by other tangible evidence.

I have considered the prayer by Ms. Makombe to have the case retried. I however, subscribe to Mr. Suwi's argument that if the said order is given and the evidence recorded, PW1 shall be above 14 years of age. The purpose of retrial in the case at hand is to have the testimony of PW1, a child of tender age by then, recorded in accordance with the law. Her testimony was recorded in 2018 where she was 14 years. If the case is retried she will be 16 and or above and thus her testimony cannot be recorded in terms of section 127 of the Evidence Act. In the circumstances a retrial cannot be ordered.

In consideration of the foregoing, I find the appellants' appeal having merit. I therefore quash the conviction and sentence of the trial court and

order for immediate release of both appellants unless held for some other lawful cause.

It is so ordered.

Dated at Mbeya on this 23rd day of June 2021

L. M. MONGELLA

JUDGE

Court: Ruling delivered at Mbeya through video conference on this 23rd day of June 2021 in the presence of the appellants and their advocate Mr. Samson Suwi. Also in the presence of Mr. Davis Msanga, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE