THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL NO. 143 OF 2019

(Original from Criminal Case No. 48 of 2019, in the District Court of Chunya District, at Chunya)

CHILU S/O MHUNDU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

23. 03 & 08/06/2021.

UTAMWA, J:

In this first appeal, the appellant, Chilu s/o Mhundu, challenged the judgment (impugned judgment) of the District Court of Chunya District, at Chunya, (the trial court) in Criminal Case No. 48 of 2019. Before the trial court, the appellant stood charged with the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (Now R.E. 2019). It was alleged in the particulars of the offence that, on the 3rd day of March, 2018, at Matundasi Village within Chunya District of Mbeya Region, the appellant did have carnal knowledge of one NN (a

branded name for protecting the dignity of the complainant), a school girl of 13 years old.

The appellant pleaded not guilty to the charge. However, at the end of the trial, he was convicted and sentenced to serve in prison for thirty years and to compensate the victim of the crime at the tune of Tanzanian shillings 1,000, 000/=.

Aggrieved by the conviction, sentence and the compensation order, the appellant preferred this appeal. His petition of appeal had a total of eight grounds of appeal couched in a layman's language. They can however, be condensed to only two grounds as follows:

1. That, the trial court erred in law and facts in convicting, sentencing and ordering the appellant to pay compensation to the complainant though the prosecution had failed to prove the charge against him beyond reasonable doubts.
2. That, the trial court erred in law and facts in not considering the defence case.

Indeed, the rest of the grounds of appeal were mere complaints against the prosecution evidence aimed at supporting the above improvised first ground of appeal. Now, owing to the above listed grounds of appeal, the appellant urged this court to allow the appeal, quash the conviction and set aside the sentence.

When the appeal was called upon for an oral hearing through a virtual court link, the appellant appeared without any legal representation. He had nothing to add to his petition of appeal. On the other side, the respondent was represented by Ms. Prosista Paul, learned State Attorney.

During the hearing of the appeal, the learned State Attorney partly supported the appeal and partly objected it. In doing so she contended that, she partly supported the appeal on the grounds that, the appellant's complaint against the evidence of the complainant was genuine. The complainant was aged 13 years and the complainant complained that, her evidence was taken without any prior *voire dire* test. Though the *voire dire* test was based on an outdated law, the fact that her evidence was wrongly taken is supported by the current law. The current law provides that, a child of tender age (i. e. below the age of 14 years) has to make a promise that she will tell the truth to the court, and not lies. He/she has to do so before giving evidence. This is in accordance to section 127(2) of the Evidence Act, Cap. 6 R. E. 2019 as amended by section 26 of Act No. 4 of 2016.

The learned State Attorney further contended that, the complainant in the matter at hand testified on oath and without making any promise though she was 13 years old at the time of her testimony (i. e. 23rd May, 2018). Her testimony was taken when the amendments of the law mentioned above were in force. According to her, any child of tender age has to make the promise before giving evidence. He/she makes it even where he/she takes oath or makes the affirmation. Now, since the complainant testified on oath, but without making the promise, her evidence was wrongly taken. She supported the contention by citing the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** (unreported).

The learned State Attorney did not wish to argue on the other complaints of the appellant and the other ground of appeal. Nonetheless, she prayed for this court to order for a retrial since there was sufficient evidence against the appellant save for the erroneous reception of the complainant's evidence.

In his rejoinder submissions, the appellant did not concede to the prayer for the retrial. She based his contention on the fact that, the trial court did not do justice to him.

I will now test the first ground of appeal. In my settled view, it is compelling to firstly test the undisputed complaint by the appellant on the manner the evidence of the complainant was taken before testing other complaints in support of the first ground of appeal. If need will arise, I will also test the rest of the complaints and the second ground of appeal. This approach is based on the ground that, the deliberation regarding the manner of taking the complainant's evidence may lead to a determination of the first ground of appeal and dispose of the entire appeal in case the complaint by the appellant will be upheld.

Indeed, the parties essentially agree that the evidence of the complainant was erroneously taken by the trial court. However, they base their views on different reasons. The appellant complained that the error occasioned by the trial court was due to the fact that the *voire dire* test was not conducted before she could testify. On her part, the learned State Attorney contended that, the error was due to the fact that the complainant did not make the promise to tell the truth and not lies to the court before she testified.

Despite the fact that the parties are in consensus, I must decide the matter according to law since this is the first obligation of courts of this land. The issue has thus, been reduced to whether or not the complainant's evidence was erroneously received. In my view, I agree with the learned State Attorney that, the *voire dire* test no longer applies to children of tender age following the amendments effected by Act No. 4 of 2016 to section 127(2) of the Evidence Act. Again, I agree with her that, the complainant in the case at hand was 13 years at the time of her testimony as per the evidence on record. She was thus, a child of tender age. The provisions currently read thus, and I will quote them for the sake of a readymade reference:

> "A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."

While I agree with the learned State Attorney that a witness of tender age has a duty to make the promise mentioned above, I do not agree with her that the law requires such witness to make the promise even where he/she takes the oath or makes the affirmation. Indeed, the learned State Attorney suggested that a single child of tender age must be subjected to both processes, i. e. taking the oath or making the affirmation and making the promise at the same time. I am not in favour of this procedure which I may brand, for purposes of smooth discussion in this ruling, the unnecessary "double-processes" procedure.

In my settled opinion, a child of tender age is required to make the promise only when the court finds that she does not understand the meaning of oath or affirmation. In other words, if the court finds that

he/she understands the meaning of oath or affirmation, he/she takes the oath or make the affirmation and proceeds to give evidence without making the promise. For smooth discussion in this ruling, I will call this envisaged procedure as the "alternative-processes" procedure. I do so because, the child of tender age may make the promise as an alternative to the taking of oath or making the affirmation. This "alternative-processes" procedure is differentiated from the "double-processes" procedure advocated for by the learned State Attorney.

My above highlighted view in favour of the "alternative-processes" procedure is based on the following reasons: that, as a general rule, every witness testifying in court is required to take an oath or make affirmation before giving evidence, subject to certain provisions of the law; see the requirement under the Oaths and Statutory Declarations Act, Cap. 34 R.E 2019, especially sections 3, 4(a) and the proviso thereto. In criminal proceedings section 198(1) of the Criminal Procedure Act, Cap. 20 R.E 2019 also underscores the general rule. It follows thus, that, section 127(2) of the Evidence Act, is among the provisions of law which create an exception to the general rule mentioned above. This means that, if a child of tender age understands the meaning of oath or affirmation, he/she testifies like any other witness who is obliged to take oath or make affirmation as per the general rule. However, if he/she does not understand the meaning of oath or affirmation, he/she only makes the promise before testifying as an exception under section 127(2) of the Evidence Act. It follows thus, that, the "double-processes" procedure

envisaged by the learned State Attorney is a serious misconception of the law, which sober courts of this land are not expected to commit.

I understand that, the learned State Attorney purportedly based her view in favour of the "double-processes" procedure mentioned above on the **Godfrey case** (supra). In my view, however, she might have misconstrued that precedent. I had the opportunity of reading the typed version of that precedent which construed section 127(2) of the Evidence Act. Indeed, it supported the stance I have highlighted above. At page 11 for example, the CAT observed that, and I quote the pertinent paragraph for ease of reference:

> "To our understanding, the above cited provision as amended, provides for two conditions. One, it allows the child of a tender age to give evidence without oath or affirmation. **Two, before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies.**" (Bold emphasis is provided).

My settled opinion is that, the bold phrase "...**before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies**" in the above quoted paragraph, refers to a child of tender age who is allowed by the law to give evidence without oath or making affirmation. That bold phrase does make reference to a child of tender age who can take oath or make affirmation as per the general rule highlighted above.

Furthermore, the CAT in deciding the **Godfrey case** (supra) followed its previous decision in the case of **Msiba Leonard Mchere Kumwaga v. Republic, Criminal Appeal No. 550 of 2015** (unreported). In this precedent, the CAT considered the provisions of section 127(2) of the Evidence Act and observed thus:

> "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."

On my part, I take this just quoted paragraph as instructing that, due to the contemporary law, making the promise to tell the truth and not to tell lies is only the condition precedent for taking the testimony of a child who, according to the trial court, has to give evidence without taking oath or making affirmation and not otherwise.

I further understand that, the learned State Attorney might have been impressed by some observations of the CAT at page 13 of the **Godfrey case** (supra) which apparently indicated that a child of tender age is obliged to make the promise before giving evidence. However, in my view, such observation was involved in the discussions by the CAT in relation to that particular case in which the trial magistrate was supposed to require the child witness to make the promise, but the magistrate did not do so. I do not thus, take that the *Ratio Desidendi* in the **Godfrey case** (supra) was in favour of the "double-processes" procedure advocated for by the learned State Attorney for the respondent in the present case.

Indeed, the CAT in other occasions, also advocated for the "alternative-processes" procedure and not the "double-processes" procedure. In the case of **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported) for instance, where reference was also made to the **Godfrey case** (supra), the CAT observed, in interpreting the same section 127(2) of the Evidence Act at page 10-12 of the typed version of its Judgment as follows:

> "From the plain meaning of the provisions of sub-section (2) of s. 127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath

> or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. **In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies**....It is for this reason that in the case of **Geoffrey Wilson v. Republic, 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 such 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**...In the case at hand, PW1 gave her evidence on affirmation. The record does not reflect that she understood the nature of oath**. As stated above, under the current position of the law, if the child witness does not understand the nature of oath, she or he can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies**." (Bold emphasis is mine).

As if the above guidance was not enough, the CAT in the case of **Shaibu Nalinga v. Republic, Criminal Appeal No. 34 of 2019, CAT at Mtwara** (unreported) made the same emphasis while making reference to and approving the position it had taken in its various previous decisions including the **Godfrey case** (supra) and the **Issa case** (cited above). The CAT observed in construing the same provisions of section 127(2) of the Evidence Act, at page 7 of its judgment thus:

> "According to this provision, **where the court is satisfied that a child of tender age is incapable of giving evidence on oath or affirmation, it should make him promise to tell the truth to court and not to tell lies**. Some of the Court's decisions which have interpreted this provision are: **Godfrey Wilson v. R** (supra), **Msiba Leonard Mchere Kumwaga v. R, Criminal Appeal No. 550 of 2015, Hamisi Issa v. R, Criminal Appeal No. 274 of 2018** and **Issa Salum Nambaluka v. R, Criminal Appeal No. 272 of 20**18 (all unreported). (Bold emphasis was added)."

In my settled opinion therefore, all the precedents cited above and the quoted paragraphs herein above do not favour the "double-processes" procedure envisaged by the learned State Attorney. Instead, they underline the "alternative-processes" discussed above.

The contemporary law on the evidence of a child of tender age can therefore, be summarised thus: though the general rule highlighted above requires every witness to take an oath or make an affirmation before giving evidence, section 127(2) of the Evidence Act as construed by the precedents of the CAT just cited above, sets an exception to the general rules as follows:

a) That, a child of tender age can give evidence with or without oath or affirmation.

b) 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/her age, the religion he professes, whether he/she understands the nature of oath and whether or not he/she promises to tell the truth and not lies to the court. If he/she replies in the affirmative, then he/she can proceed to give evidence on oath or affirmation depending on the religion he/she professes. However, if he/she does not understand the nature of oath, he/she should, before giving evidence, be required to make a promise to tell the truth and not lies to the court.

c) Upon the child making the promise, the same must be recorded before the evidence is taken (see especially the **Godfrey case** (cited above) and the **Shaibu case** (supra).

In the case at hand however, the proceedings of the trial court indicate that, when the complainant appeared before the trial court for her testimony, the trial magistrate recorded thus:

> "I have carefully and kindly examined the victim of this case and be of the settled opinion that, though she is of tender age, but knows the nature of oath as such, she will take oath."

The record however, does not show that, probing questions mentioned above were actually asked by the trial court to the complainant to determine whether she understood the nature of oath. This was against the legal guidance marked **b)** hereinabove. In fact, I am of the view that, according to the legal requirements listed above, even the probing questions to the child witness need to be recorded by a trial court. This is because, court record must represent all important events that transpired in court for indicating that the law has been followed and so that an appellate court can satisfy itself, in case of an appeal, that the law was in fact, complied with; see the holding by the CAT in the case of **Misango Shantel v. Republic, Criminal appeal No. 250 of 2007, CAT at Tabora** (unreported). Showing the probing questions would have also assist this court, in the matter at hand, to determine whether or not the trial court was justified in finding that the complainant understood the meaning of oath.

Owing to the reasons just shown above, it is clear that there was no transparency before the trial court in determining the competence of the complainant as a witness. This was against the law since the law guides that, transparency and justice are inseparable; see the case of **Gilbert Nzunda v. Watson Salale, (PC) Civil Appeal No. 29 of 1997, High Court of Tanzania (HCT), at Mbeya** (unreported).

Due to the reasons adduced above, I find the omissions committed by the trial court as fatal to the trial under discussion. It is more so because, the omission was related to the complainant (PW.1) as the victim of the said rape and whose evidence substantially influenced the trial court in convicting the appellant. The law also guides that, the best evidence in sexual offences comes from the victim; see the decision by the CAT in the case of **Seleman Makumba v. Republic [2006] TLR. 379.** This was also the holding by the same CAT in the case of **Jaffary Ndabita @ Nkolanigwa v. Republic, Criminal Appeal No. 270 of 2016, CAT at Tabora** (unreported).

Owing to the above discussions, it cannot be said that the evidence of the complainant in the case at hand was received in accordance with the mandatory provisions of section 127(2) of the Evidence Act. I therefore, though for distinct reasons from those adduced by the parties, answer the issue posed above affirmatively that, the trial court actually, erroneously took the evidence of the complainant. Such evidence is thus, liable to be expunged from the record, and I accordingly expunge it.

I have also considered the prayer made by the learned State attorney for the respondent on the retrial. The law clearly makes a guidance on the

conditions for ordering or for refraining from ordering a retrial. The CAT in the case of **Kaunguza s/o Machemba v. Republic, Criminal Appeal No. 157B of 2013, at Tabora** (unreported at page 8 of the typed version of the Judgment) following the case of **Fatehali Manji v. R [1966] EA 343** guided thus, and I quote it for an expedient reference;

> "...in General a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and its circumstances and an order for retrial should only be made where the interests of justice require it, and should not be ordered where it is likely to cause an injustice to the accused person..."

In the matter at hand, I have considered the fact that the appellant has served his imprisonment sentence for only two years and nine months since he was convicted and sentenced on the 27th August, 2021. This is a small portion of the sentence of thirty years imprisonment that was imposed to the appellant.

The record also indicates that, there is tangible evidence against the appellant, especially from the complainant herself, save for the improper reception of her evidence. It is on record for instance that, the complainant told the trial court that the appellant took her from her village to another village. On the way, they passed night in bushes and he had sexual intercourse with her. He went on repeating the same act while they were in that other village. The PW. 4, Mazuya Halawa (sibling of the complainant) also testified in court that she was with the complainant at the time when the appellant took her away. She saw him taking her away and she reported the incidence to their father.

Moreover, PW. 3 (Dr. Pascal Loychi), the medical practitioner who examined the complainant testified that, upon examining her, he discovered that her vagina discharged semen, her hymen had ben perforated and she was thus, penetrated. He felt the PF. 3 showing such facts and tendered it in evidence as exhibit P. E 1. The evidence in the PF. 3 and that of PW. 2 (Nh'onge Mashishanga, the father of the complainant) showed that the complainant was only 13 years old.

I have also considered the stance of the law that, the best evidence in sexual offences comes from the victim of the offence as observed earlier. The interests of justice thus, demands for a retrial as proposed by the learned State Attorney and not for an acquittal as suggested by the appellant. It is more so considering the seriousness of the offence at issue which fetches a serious sentence, the minimum of which is 30 years imprisonment.

Due to the above reasons and the findings I have made, I find it unnecessary to test the merits of the grounds of appeal. This is because, the findings are legally capable of disposing of the entire appeal at hand.

I consequently, make the following orders; I nullify and quash the proceedings of the trial court and the conviction against the appellant. I also set aside its impugned judgment, the sentence imposed against the appellant and the compensation order. The appellant shall be retried immediately before another magistrate of competent jurisdiction if the Republic believes that there is still evidence to prove the charge after the lapse of time of two years and nine months mentioned above. The retrial shall commence in not more than two months from the date hereof to

avoid delays. The appellant shall remain in prison custody as a remand-prisoner and not as a convicted-prisoner pending the commencement of the retrial. In case the appellant will be convicted after the retrial, the period he erroneously served in prison for the nullified and discarded trial shall be deducted from the sentence that will be imposed upon him. It is so ordered.

J. H. K. UTAMWA

JUDGE

08/06/2021.

08/06/2021.

CORAM; JHK. Utamwa, J.

Appellant: present physically in court.

For Respondent: Mr. Baraka Mgaya (State Attorney).

BC; Ms. Gaudensia, RMA.

Court: Judgement delivered in the presence of the appellant in person and Mr. Baraka Mgaya, learned State Attorney for the respondent/Republic, in court this 8th June, 2021.

JHK. UTAMWA.

JUDGE

08/06/2021.