IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 22 OF 2021

(Arising from Criminal Case No. 252 of 2020 of Kibondo District Court Before F.Y. Mbelwa, RM

WACHAWASEME S/O JOHN..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

02nd & 02nd July, 2021

A. MATUMA J.

The appellant was charged of Rape Contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002. He was arraigned in the District Court of Kibondo at Kibondo allegedly to have had sexual intercourse or carnal knowledge of a victim girl aged 10 years.

At the end of trial, the trial court (F.Y. Mbelwa) learned Resident Magistrate found him guilty of the offence, convicted him and sentenced him to imprisonment for life.

The appellant was aggrieved hence this appeal with four grounds challenging the prosecution case to have not been proved beyond reasonable doubts.

At the hearing of this appeal, the appellant was present in person through Video conference from Bangwe Prison while the respondent (The Republic) was represented by Mr. Benedict Kivuma learned State Attorney.

The learned State Attorney at the option of the appellant started to respond to the grounds of appeal which he had formed an opinion and rightly so, that their contents had raised only one major complaint to the effect that the prosecution case was not proved beyond reasonable doubts.

He supported the appeal by arguing that the potential and only direct evidence against the appellant, that of the victim girl who was aged 10 years old, was taken in contravention to the requirements of the law. He referred me at page nine of the proceedings where the court asked some questions to the witness prior to her evidence being taken. She had positive reply which according to the learned state attorney entitled her evidence to be taken under oath. He submitted however, that the trial magistrate did not make any finding as to whether the witness did not

know the nature of oath so that to be exempted from taking oath before giving her evidence. He cited the cases of Issa Salumu Nambaluka versus Republic, Criminal Appeal no. 272 of 2018 and that of Godfrey Wilson versus Republic, Criminal appeal no. 168 of 2018.

The learned state attorney winded up by calling this court to order a retrial for the sake of justice not only to the appellant but also the victim girl as the error was committed by the court.

The appellant on his part had nothing useful to add except that he insisted to a total acquittal on the strength of the ground that the case against him was not proved beyond reasonable doubts.

The law is well settled; that whenever a witness gives evidence in a criminal trial he or she must give such evidence under oath or affirmation unless excused under any written law. See section 198 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019. As the witness was a child of tender age, she was covered under the provisions of section 127 (2) of the Evidence Act supra as a witness who could give her evidence without oath or affirmation. That is an exception to the general rule under section 198 (1) of the CPA supra.

But to resort into such exception the trial court has to strictly comply with the laid down procedures as per the cases cited by the learned state

attorney supra and that of ***Selemani Moses Sotel @ White versus Republic,*** *Criminal appeal No. 385 of 2018 and* as rightly relied by the said learned state attorney. The principle is that the trial court must make a determination on record whether the witness of tender age should give the evidence under oath or not, or should give the evidence under the exception rule under section 127 (2) of the Evidence Act supra. That is done through the trial court putting simplified questions to the witness to ascertain whether the witness understands the nature of oath, sufficiently to have his evidence on oath or affirmation.

In the instant case, the evidence of PW2 (the victim) was taken after some questions were put to her relating to her brief history, school, religion faith and whether she promises to tell the truth and not lies.

At the end of the questions the trial court remarked;

> ***'Court: Victim (Witness) is competent to testify, and promises to tell the truth only and undertake not to tell lies.'***

Thereafter the trial court started to record the evidence of such witness;

> *'I am living at Nengo with my mother. Before living with my mother, ...'*

The question is; was the court's remark as herein above, a determination as to whether the witness was incapable of giving her evidence under oath or affirmation? Or was it a remark to the effect that the evidence of the witness was to be taken without oath or affirmation?

The answer is in the negative. Such court's remarks do not answer either of the questions herein above. It does not reflect whether the trial court determined that the witness was incapable of giving her evidence on oath nor directed that her evidence be taken without oath or affirmation as mandatorily guided by the Court of appeal decisions supra. In the circumstances, the evidence of PW2 (the victim) was wrongly recorded and the same is liable to be expunged as rightly argued by the learned state attorney.

In the absence of the victim's evidence, the conviction of the appellant cannot stand due to the fact that the two other witnesses did not give evidence as to the identity of the appellant in the commission of the alleged offence. But since there is direct evidence against the appellant which cannot be ignored without due determination, and since we cannot justifiably determine such evidence of PW2 on the reasons herein above stated, I am inclined to agree with the learned state attorney that a retrial

of the appellant would be the appropriate order to issue for the interest of justice provided that the victim and the appellant are related. She is a daughter of the appellant's step daughter. That means the victim is a biological granddaughter of the appellant's wife and the alleged rape was committed within the family.

I therefore quash the conviction of the appellant and set aside the life imprisonment sentence meted against him. I order that he be retried by the trial court before another magistrate of competent jurisdiction. It is so ordered. Right of further appeal is hereby explained.

A. Matuma

Judge

02/07/2021

Court: Judgment delivered and right of appeal explained.

Sgd: A. Matuma

Judge

02/07/2021