

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

CRIMINAL APPEAL NO.88 OF 2020

(Originating from Criminal Case No. 73 of 2020 of the Maswa District Court)

NYANZA SHILINDE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of the last Order: - 25th May, 2021

Date of the Judgment: -11th June, 2021

MKWIZU, J:

The Appellant, **Nyanza Shilinde**, was charged with, and convicted rape contrary to sections 130 (1) (2) (e) and 131(1) of the Penal Code [Cap 16 RE 2019] by the District Court of Maswa District court. He was sentenced to serve thirty (30) years imprisonment, hence this appeal.

The Appellant allegedly on 1/05/2020 at Malta village took the victim to TERESIA B guest house located at Maswa Township within Maswa District in Simiyu Region and committed the offence of rape to the said victim a girl of

14 years. On 2/05/2020, the appellant was arrested and arraigned to Court where he was charged with alleged offence, the offence which he denied.

To prove the charge, the prosecution called three witnesses and one exhibit while defense side had two witnesses with no exhibit. The key witness for the prosecution is the victim (PW1) who testified that on 1/05/2020 at 19.00hrs appellant took her by a bicycle from Malita to Maswa township. At 23.15 hrs they went to TERESIA guest house at where the appellant had taken a room. She said, while inside the said guest house, they both removed their clothes and the accused inserted his penis into her vaginal. They were both arrested on 2/05/2020 at around 12.00hrs at Isulilo village by VEO of Isulilo, taken to Maswa Police station where she was issued with a PF3 and went to the hospital for examination.

PW2, Emanuel Lwalela Luyamba is a father of the victim. His evidence was that victim is 14 years old, a form one student at Buchambi Secondary School. On 1/05/2020 the victim went missing and his effort to find her bore no fruits until 2/05/2020 when the victim and the appellant were arrested at Isulilo village and held in the office of the VEO. On interrogation,

stated PW2, the victim explained that appellant is her lover and that they had slept together at Teresia guest house.

PW3 an assistance medical officer at Maswa District Hospital attended the victim on 4/3/2020 His examination revealed that victim had a loose vaginal, labia minora swollen but no hymen found which signifies that victim used to have sexual intercourse. He tendered PF3 as exhibit P1. Appellant denied to have committed the alleged offence

The trial court found the appellant guilty, it convicted him contrary to section 130 (1) (2) and (e) of the Penal Code [Cap 16 RE 2019] and sentenced him to a term of 30 years imprisonment plus 12 strokes of the cane in his buttocks.

Dissatisfied, the appellant filed this appeal on four (4) grounds which together raises one common ground that the prosecution case against him was not proved beyond reasonable doubt. When the appeal was heard before the Court on the 25th day of May, 2021, the Appellant appeared

through a counsel, Mr Daudi Masunga while the respondent/ Republic had the services of the learned State Attorney, Enosh Gabriel Kigoryo.

Mr Masunga argued all the grounds of appeal together. He first challenged the coherence of evidence. He argued that while the offence is said to have been committed on 1/5/2020, page 2 of the proceedings show that appellant was brought before the court on 6/7/2020 and the victim was attended by PW3 on 4/3/2020, PF3 was completed on 4/3/2020 before commission of the offence. He said, all the above proves that there was no offence committed by the appellant.

Secondly, stated, Mr. Masunga the offence involved a girl child of 14 years of age. Her evidence was taken in contradiction of section 127 (2) of the Evidence Act. The trial court did not take caution on the evidence given. He said, in its decision at page 5, the trial court convicted the appellant without cautioning itself on the nature of the evidence it is relying upon.

Thirdly, Mr. Masunga argued that the trial court failed to evaluate the evidence on the record, had it evaluated the said evidence it could ` not have

concluded the way it did. He contended that, the victim said the Offence was committed on 1/5/2020, the arrest was done on 2/5/2020 and taken to police and later to the hospital. On his part PW2 said her daughter (PW1) went missing on 1/5/2020 and on 2/5/2020 he was called via phone informed of his daughter's arrest by VEO and on cross examination PW2 denied to have been aware of any rape incident.

Mr Kigoryo, State Attorney opposed the appeal. Submitting on ground three, he said appellant was brought to court on 6/5/2020. The date-6/7/2020 appearing at page 2 of the typed proceedings is a topographical error. He, invited the court to take into account the original records and the presented PF3 in court to determine the corrects dates of the alleged events.

Regarding the issue of contravention of section 127 (2) of the Evidence Act by the trial court, Mr. Kigoryo said, though the victim did not promise to speak the truth, her evidence was given under oath and therefore the mischief was cured. The promise to tell the truth is an alternative to the witness who could not take oath or affirm. He said, in this case PW1 gave

evidence on oath. He cited the case of **salim Sudi Vs. The Republic**, Criminal Appeal No. 379 of 2018 CAT-Mtwara he said it was said, when a child of tender age give his evidence on oath or affirmation the phrase that he has promised to tell the truth and not lies is unnecessary because the purpose of the oath or affirmation is to solemnly promise to tell the truth and the truth only.

The learned State Attorney further argued that the prosecution case was proved beyond reasonable doubt by the evidenced adduced in the trial Court by the victim (PW1), (PW2), (PW3) and the Medical Examination Report (Exhibit PI).

In a further argument Mr Kigoryo said, appellant was not convicted on the weakness of his defence. His defence corroborated the prosecution evidence. He finally prayed for the dismissal of the appeal.

In rejoinder, counsel for the appellant submitted that no evidence led to prove that victim was taken to the alleged guest house. He also suggested that prosecution failed to explain why victim was examined by PW3 on

4/5/2020, three days after the incident and it is not disclosed as to where the victim was from 1/5/2020 to 4/5/2020. He cited the case of **Ibrahim Shariff Vs. The Republic**, Cr. Appeal No 175 of 2018.

I have given the appeal, the records as well as the parties submissions a thorough scrutiny. I will begin with ground 3 of the appeal on the variance of dates in the charge sheet and evidence. It is true as complained that while in the charge sheet the offence is said to have been committed on 1/5/2020, party of the typed proceedings show that appellant was brought before the court on 6/7/2020 and PW3 attended the victim on 4/3/2020. However, the original records is different from the typed records. The original-handwritten proceedings shows that, appellant was brought to court on 6/5/2020, the victim was examined on 4/5/2020 and not 4/3/2020 as indicated on the typed proceedings. The judgment (at page 5 paragraph 2 first sentence) referees to the correct date where it says, "**PW3 attended the victim on 4th day of May, 2020.**" This complaint is for that reason hamless.

Next, is the issue that victims evidence was adduced before the trial Court contrary to section 127 (2) of the Evidence Act, [Cap 6]. The complaint was that PW1 did not promise to tell the truth and not lies before giving her testimony.

Victim gave her evidence as PW1 at page 4 of the proceedings. At that time, she was 14 years of age. Thus, according to section 127 (4) of the Evidence Act, [Cap 6. RE 2019] victim was a child of tender age whose evidence was to be recorded in accordance to section 127 (2) of the Evidence Act which says:

127 (2) 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.

In this case, victims' evidence was recorded in contravention to the above provisions of the law. She took oath like an adult witness. On his part, the State Attorney' is of the view that, giving evidence under oath or affirmation has the same meaning as promising to tell the truth and not lies because the purpose of the oath or affirmation is to solemnly promise

to tell the truth and the truth only. I don't have any doubt on the position taken by the State Attorney. The disturbing issue is how the trial magistrate came into a conclusion that this witness, a child of tender age knew the meaning of oath. The records are silent on why the victim gave an oath and not giving a bare promise as it is required under the law.

PW1 was the only prosecution witness in this case in whose evidence the offence against the appellant would either stand or fail. Apart from being a victim, the alleged rape was committed in her presence alone and there is no any other witness with a direct evidence. PW2, victims father was just informed later of the rape incident. While on cross examination he categorically denied to have any knowledge of the rape incident. The Docto's evidence plus the PF3 is a supportive evidence. It can only be helpful in this case if the victims evidence is found to be credible. This is so because, being a sexual offence, the law says, the best evidence comes from the victim. This is the position under section 127 (6) of the law of Evidence at, Cap 6 RE 2019. The section reads:

"127 (6) Notwithstanding the proceeding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or' of a victim of the sexual offence,

the Court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or that of the victim of sexual offence, as the case may be, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings the Court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth."

In this case, the victim 's evidence was given in contravention of the law. She did not promise to tell the truth and there was no indication in the records as to why the trial court opted for administering an oath on the victim, a child of tender age. PW1's ability to give evidence under oath was not ascertained at all. The evidence was therefore worthless. It could have been different if the trial court had ascertained the victims' ability to understand the meaning of oath and had its opinion recorded to that effect before PW1's evidence is recorded. That is lacking in this case and for that reason, the court had no evidence upon which it could do its assessment on credibility of the victim (PW1). The purported Victims evidence have no evidential value liable to be expunged from the records as I hereby do.



Prosecution's case cannot stand in this case without PW1's (Victims) evidence. As stated above, PW2 and PW3's evidence cannot by any standard prove the offence of rape.

That said, I allow the appeal, appellants conviction and sentence is quashed and set aside. The appellant **Nyanza Shilinde** is to be set free immediately unless otherwise so held.

DATED at **Shinyanga** this **11th** day of **JUNE**, 2021.


E.Y.MKWIZU
JUDGE
11/06/2021

COURT: Right of appeal explained.



E.Y.MKWIZU
JUDGE
11/06/2021