IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL CASE NO. 47 OF 2021

(Original from the District Court of Mbarali District, at Rujewa, in Criminal Case No. 20 of 2021)

ANORD MSIGARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 21st.6.2021

Date of Judgment: 13th.7.2021

MAMBI, J.

In the District Court of Mbarali the appellant **ANORD MSIGARA** was charged with an offence of Grave Sexual Abuse, contrary to section 138C (1), (2) (b) of the Penal Code, Cap. 16 [R.E. 2019]. Upon being convicted, the appellant was sentenced to serve 20 years imprisonment.

Aggrieved, the appellant preferred his nine grounds appealed to this court to challenge the decision of the trial court.

During hearing, the appellant appeared unrepresented while the Republic was represented by Ms Prosista, the learned State Attorney.

The appellant has nothing to add apart from adopting his grounds of appeal.

Responding to the grounds of appeal, the learned State Attorney Ms. Prosista, for the Republic, submitted that, they don't support all grounds of appeal. She argued that in principle they don't agree with the appellant grounds of appeal on the following reasons:-
Responding to the grounds of appeal collectively the learned State Attorney submitted by the prosecution that the prosecution proved the case beyond reasonable doubt. She argued that the court properly complied with Act No.2 of 2016 by asking the victim to promise.

It was her further submitted that the evidence by the victim (PW1) was clear and the trial court based on it in convicting the appellant. She also contended that in sexual offences like the one at hand, the evidence of the victim is crucial as it was held in the case of **Selemani Makumba v. Republic [2006] TLR 379.**

The learned State Attorney also argued that, the evidence of PW1 was also supported by other testimony of the victim's brother, PW2. She further argued that, there was no need of medical report since

the offence the appellant was charged with, requires no medical report as, there was no penetration therefore the appellant was correctly convicted with the charged offence.

Having summarised submission from both the appellant and prosecution, I now revert to the appeal at hand. The appellant's grounds of appeal can be reduced to form three grounds of appeal. Starting with ground number one, the appellant in this ground is claiming that did not address the child to the requirement of section 127 (2) of the Evidence Act as amended by Act No.2 of 2016. Initially, before the Evidence Act, Cap. 6 [R. E. 2019] was amended in 2016 the law Section 127 (2) mandatorily required the court to conduct *voire dire* for the child who is under the tender age to test the understanding and intelligence of the child. However, after the amendment the court now is required to assess the credibility of the evidence of the child of tender age, through asking that child to promise to tell the truth. The rational is to make the court to satisfy itself that the child of tender age is able to tell the truth. This is found under section 26 of *the Written Laws (Miscellaneous Amendment) (No.2) Act, 2016* which amends section 127 of the Evidence Act by inserting the new subsection as follows:

> *Section 127 of the principal Act is amended by-deleting subsections (2) and (3) and substituting for them the following:*
>
> *"(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".*

Reading between the lines on the above provision, the interpretation of the word **"shall"** implies mandatory and not option and that is the legal position under section 53 of the Interpretation of Laws Act Cap 1 [R.E.2019]. The above section implies that the court must satisfy itself that a child of tender years understands has promised to tell the truth to the court and not to tell any lies, a fact which was overlooked by the trial court in our case. This can only be done by the court by properly structuring the questions that will enable the court to be in a better position to determine if the witness who is a child of the tender age understands the duty of speaking the truth before proceeding to record his/her evidence.

Indeed what the amending law require is the child to promise that he/she will tell the truth in his/her evidence, Thus, the duty of the court will be to assess the credibility of the evidence of the child of tender age, to satisfy itself that the child of tender age is telling nothing but the truth". The court must also record that the child has promised to tell the truth. I have perused the trial proceedings and found that the Magistrate at page 6 appears to have addressed the child to section 26 of *the Written Laws (Miscellaneous Amendment) (No.2) Act, 2016.* However, he filed to record the promise by the child apart from just recording the questions he asked.

My perusal from the trial records reveals that the prosecution witnesses PW1 (the victim) and PW2 were the child of tender age and the trial court convicted the appellant basing on the evidence of PW1 and PW2. However, I have perused the trial court proceedings

and there is nowhere to show that the court has properly recorded the promise of the children to tell the truth in their evidence. Now if the children did not properly promise to tell the truth, it will be hard to determine if the children understand the meaning of telling the truth and this will be contrary to section 26 the Written Laws (Miscellaneous Amendment) (No.2) Act, 2016. Failure to record if the children promised to tell the truth and failure the court to ask children the proper questions related to the child understanding of the meaning of telling the truth meant that the court was not able to correctly conclude that the victim (the child) had sufficient understanding on the nature of oath and importance of telling the truth. I am of the considered view that the legal requirements are conditional precedent to receipt of evidence from a child of tender years whose evidence has not been received on oath or affirmation. It is trait law that where there is complete omission by the trial court to correctly and properly address itself to requirements of the provisions of the law governing the competency of a child of tender years, the resulting testimony is to be discounted.

The legal requirements and procedures of taking evidence of the child of tender age (below 14 years old) in line with the provisions of the laws governing evidence was also underscored in ***MOHAMED SAINYENYE V. REPUBLIC CRIMINAL APPEAL NO.57 OF 2010 CAT*** (Unreported) in which the court emphasized that, where the prosecution relies on the evidence of child of tender years who does not understand the nature of the oath, the court must comply with provision of the Evidence Act Cap 6 [R.E. 2019] which has now

been amended by Act No.2 of 2016. See **Issa Salum Nambaluka v. Republic, Appeal No. 272 of 2018, Court of Appeal of Tanzania at Mtwara** (unreported).

The Court of appeal in **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** (unreported) and the **Issa Salum case** (supra) highlighted is to the following principles with regard to the evidence of the child of the tender age that:

a) *T the 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 or affirmation, 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 or affirmation, he/she should, before giving evidence, be required to make a promise to tell the truth and not lies to the court.*
c) *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".*

Indeed, the trial records, do not show that, if the trial magistrate asked the children some simple questions to determine whether or not they understood the nature of oath or affirmation. Failure to do so left a lot to be desired. See **Misango Shantel v. Republict, Criminal appeal No. 250 of 2007, CAT at Tabora** (unreported). Now if the evidence of the victim is expunged, it means that the prosecution will have probative evidence since the best evidence is that of the victim.

It should also be noted that it is the primary duty of prosecution to prove the criminal cases such as rape beyond reasonable doubt by proving to the court that the victim was actually raped by the accused and there was penetration or if the offence involved attempted rape then the ingredients or elements of attempted rate must be fulfilled. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. The state or prosecution has the burden of proof in criminal cases. The prosecution therefore, had to establish beyond any reasonable doubt that it was the Appellant had raped PW3. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.***

Having carefully gone through the proceedings and judgment of the trial court, the grounds of appeal and submissions from both parties, I find the key issue is whether the prosecution proved the case against the appellant beyond reasonable doubts or not. The

prosecution in their submission just submitted that the best evidence comes from the victim on the ground that since the victim mentioned the appellant then the offence was proved.

Generally, it is the duty of the prosecution to establish prima facie the case. In this regard, the standard of burden of proof on the prosecution is beyond reasonable doubt. Indeed the accused cannot be convicted basing the strength of the weakness of his case rather, the test shall be the strength of prosecution's case. Failure to do so left a lot of questions to be desired and that should benefit the appellant. The Court of in ***Christian s/o Kaale and Rwekiza s/o Bernard Vs R [1992] TLR 302*** stated that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case.

The position of the law is clear that the standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case beyond reasonable doubts.

I am of the settled view that there is a doubt if the guilt of the appellant was really established and proved beyond reasonable doubt. It is clear from the above observation that the judgment by the trail magistrate was not proper for non-compliance with the law. This is an obvious omission and irregularity that ought to have been observed by the trail Magistrate and even the prosecution. Taking into account that the offence involved grievous sexual abuse, the trial magistrate was required to fully scrutinize, analyses and evaluate the evidence to satisfy himself that all elements of

such offence were made and there was actually an attempted rape made by the accused.

With all irregularities I have observed, it cannot be said that the appellant was availed with fair trial. In the circumstances I am satisfied that the appellant's conviction and sentence was not properly done as the trial court failed to notice some irregularities which lead to injustice on the part of the accused who is now the appellant. Having established that in this case the trial magistrate has failed to comply with the requirements of proceedings and judgment writing that renders both the proceedings and judgment invalid, the question is, has such omission or irregularity occasioned into injustice to the accused/appellant?. If the answer is yes, what will be the proper order to be made by this court at this stage?. The other question at this juncture would now be, having observed such irregularities, would it proper for this court to order retrial or *trial de novo?*. There are various authorities that have underlined the principles and circumstance to guide court in determining as to whether it is proper to order retrial or *trial de novo* or not.

I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013,*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

> *"...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 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****..."*

Basing on the above decisions of the higher court and my observations, I find my hands are tied up since an order for retrial can only be made where the interests of justice requires it and should not be ordered where it is likely to cause an injustice to the accused person. In my considered and firm view, in our case at hand the irregularities are immense that does not favour this court to order for retrial and the interests of justice does not require to dos so, since doing so will in my view create more likelihood of causing an injustice to the appellant and I hold so. In terms of section 388 (proviso) of *the Criminal Procedure Act*, Cap 20 [R.E.2019] it is the finding of this court that on the account of contradictory evidence and improper conviction and sentence that were also based on unread charge sheet, this court is satisfied that such errors, omissions or irregularities has in fact occasioned on failure of justice to the accused/appellant. Even if the court could have ordered retrial, in my view is no valuable evidence that can be relied by the prosecution to prove the charges against the appellant beyond reasonable doubt.

Basing on my above reasons, I am of the settled view that the guilt of the appellant was not properly found at the trial court due the

fact that the trail court failed to observe some legal principles on the detriment of the appellant. In the premises, I quash the conviction and set aside the sentence imposed on the appellant and other subsequent orders. In the interest of justice, I order that the appellant be released from prison forthwith unless he is held on other lawful cause. Order accordingly.

DR. A.J. MAMBI
JUDGE
13/7/2021

Judgment delivered in Chambers this 13th day of July, 2021 in presence of both parties.

DR. A.J. MAMBI
JUDGE
13/7/2021

Right of Appeal explained.

DR. A.J. MAMBI
JUDGE
13/7/2021