THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
AT MBEYA
CRIMINAL APPEAL NO. 35 OF 2020.

(Original from Criminal Case No. 103 of 2019, in the District Court of Rungwe District, at Tukuyu).

BAKIFU KASWITI MWAKALYELYE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGEMENT

04. 05 & 24/08/2021.
UTAMWA, J:

In this first appeal, the appellant, BAKIFU KASWITI MWAKALYELYE, challenged the judgment (impugned judgment) of the District Court of Rungwe District, at Tukuyu, (the trial court) in Criminal Case No. 103 of 2019. Before the trial court, the appellant stood charged with a single count of rape contrary to sections 130 (1), (2) (e), 131 (1) and (3) of the Penal Code, Cap. 16 R.E. 2002 (Now R.E. 2019), henceforth the Penal Code. It was alleged in the particulars of the offence that, on the 7th day of August, 2019, at about 19: 00 hours, at Suma village within Rungwe District in Mbeya Region, the appellant did unlawfully have sexual intercourse with one M d/o F (a branded name for protecting her dignity), a child aged 10 years old.

The appellant pleaded not guilty to the charge. However, at the end of the full trial, he was convicted as charged and sentenced to serve in prison for thirty years.

Aggrieved by the conviction and sentence, the appellant preferred the present appeal. His petition of appeal had a total of seven grounds of appeal. The same were couched in the common layman's language we use to encounter in appeals lodged by unrepresented convicts serving sentences in prisons. The grounds of appeal however, can be condensed to only one ground that, the trial court erred in law and facts in convicting and sentencing the appellant though the prosecution had failed to prove the charge against him beyond reasonable doubts.

In fact, the above improvised single ground of appeal was constituted by a multi-complaint narration in the petition of appeal as follows: that, the appellant did not plead guilty to the charge and the testimony by prosecution witness (PW) No. 3 (a doctor who examined the complainant) that he found her with a swollen vagina and whitish discharge therein did not suffice as a proof of the incident. It is more so since the doctor did not find any bleeding and sperms in her vagina though her age was only nine years as testified by PW. 2, her own father. Again, the evidence by PW. 4 that he found the appellant half naked with the complainant who was fully naked was a lie since there was no evidence that the complainant was found crying. The prosecution had also unreasonably failed to summon key witnesses like one Mama Dori and the police investigator, hence its case created doubts. Moreover, the complainant's evidence, being the sole prosecution witness needed

corroboration, but there was no evidence to corroborate her testimony. The case was thus, fabricated due to jealous and economic grudges between the appellant and his stepmother who lives with the complainant.

Owing to the single ground of appeal supported by the above listed complaints, the appellant prayed in his petition of appeal for this court to allow the appeal at hand. He further urged it to quash the conviction and set aside the sentence imposed by the trial court against him.

When the appeal was called upon for an oral hearing, the appellant appeared in person without any legal representation. He declared to the court that he had nothing to add to his petition of appeal. On the other side, the respondent was represented by Ms. Rosemary Mgeni, learned State Attorney who did not support the appeal.

In resisting the appeal, the learned State Attorney for the respondent submitted that, though it is true that the appellant did not plead guilty to the charge before the trial court, that fact did not mean that he did not commit the offence at issue. This was more so since the prosecution paraded four witnesses to support the charge. The evidence by the PW. 3 (Dr. Justine) who medically examined the complainant showed that, the complainant had been penetrated several times though she was only nine years old. This evidence was also supported by the testimony of the complainant herself who testified as PW. 1. She maintained (from page 4 of the typed proceedings of the trial court) that, on the material date the appellant whom she knew before as uncle Bakifu, asked her if she had money. He then took her into a tea farm, undressed her and had sexual intercourse with her. The law guides that, true evidence in offences of this

nature comes from the victim of the crime: The learned State Attorney supported this legal stance by the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Seleman Makumba v. Republic, [2006] TLR. 384.**

The learned State Attorney contended further that, the PW. 4 (one Edward) also testified that, on the fateful date, he found the appellant on top of the complainant. The complainant was fully naked while the appellant was half naked. This corroborated the prosecution evidence. The appellant's complaints against the evidence by PW. 4 is thus, baseless. Again, the appellant's contention that, the fact that there is no evidence showing that the complainant was crying when PW. 4 allegedly found her with the appellant created doubts, is weightless. This is because, a cry by a victim of sexual offence is not crucial in proving rape.

The learned State Attorney also argued that, the complaint by the appellant that lack of blood in the complainant's vagina created doubts is baseless. This is so because, according to the evidence of the PW. 3 (Dr. Justine), the complainant was taken to him for medical examination on the 18th August, 2019 though the event had occurred on the 7th August, 2019. The complainant was thus, subjected to medical examination after a lapse of eleven days. It could not be possible therefore, for the PW. 3 to detect any bleeding from the complainant. Besides, failure to find blood or sperms into the complainant's vagina could not mean that the appellant did not commit the offence. This is because, the offence of rape under section 130 (4) of the Penal Code can be proved by even a slight penetration.

Regarding the appellant's complaint that the failure by the prosecution to call the said Mama Dori and the investigator of the case as key witnesses created doubts, the learned State Attorney argued that, the same is also untenable. This is because, the law does not set a specific number of witnesses for proving a fact. She based this particular argument on section 143 of the Evidence Act, Cap. 6 R. E. 2019. The four witness who testified sufficed and proved the case against the appellant beyond reasonable doubts. The trial court also observed the demeanour of the witnesses and found theme credible.

It was also the contention by the learned State Attorney that, the allegation that the case was framed against the appellant due to grudges between him and his step mother is unbelievable since the said stepmother did not testify in court. The appellant did not even raise this concern in his defence before the trial court. Furthermore, he did not cross-examine the prosecution witnesses who testified in court on the alleged grudges. His failure to do so showed that he admitted the evidence of such witnesses. Such failure in law is considered against the accused who fails to cross-examine the prosecution witnesses; she supported the contention by a decision of the CAT in the case of **George Maili Kambage v. Republic, Criminal Appeal No. 327 of 2013, CAT at Mwanza** (unreported). The learned State Attorney thus, concluded that, the allegation on grudges was an afterthought which cannot help the appellant at this appellate stage.

In his rejoinder submissions, the appellant contended that, when he was taken to police he was not accompanied by his relatives. The police also beat him before he wrote his confession and they compelled him to

plead guilty when he would appear in court, but he did not do so when appeared before the trial court.

I have considered the single ground of appeal, the record, the submissions by the parties and the law. The major issue here is whether or not the prosecution proved the evidence against the appellant beyond reasonable doubts before the trial court. In my view, though the prosecution invited four witnesses to support the charge, only two witnesses testified as key and eye witnesses. These were PW. 1 (the complainant herself) who was aged nine years and PW. 4 (Edward Manyelele) who was twelve years old. In law, these were indeed, children of tender age. The phrase "child of tender age" is defined to mean a child whose apparent age is not more than 14 years; see section 127 (4) of the Evidence Act and the decision by the CAT in **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported). It is also common ground that, our contemporary law sets a specific procedure on how to receive or record the evidence of a child of tender age.

Now, before I proceed to test the major issue posed above, I must test a crucial sub-issue. This is *whether the evidence of the two key and eye witnesses (the complainant and PW. 4) was properly taken by the trial court.* In my view, the circumstances of the case at hand do not speak in favour of a positive answer to the sub-issue on the following grounds: In the first place, following the amendments of the law effected by Act No. 4 of 2016 to section 127(2) of the Evidence Act, these 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."

In my settled opinion, the above quoted provisions of law guide that, a child of tender age is required to make the promise only when the court finds that she does not understand the nature of oath or affirmation. In other words, if the court finds that he/she understands the nature of oath or affirmation, he/she takes the oath or make the affirmation and proceeds to give evidence without making the promise. This opinion is based on the following understanding: 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. This requirement is set under the Oaths and Statutory Declarations Act, Cap. 34 R.E 2019, especially sections 3, 4(a) and the proviso thereto. In criminal proceedings like the ones under consideration, section 198(1) of the Criminal Procedure Act, Cap. 20 R.E 2019 also underscores that general rule.

It follows thus, that, section 127(2) of the Evidence Act quoted earlier, 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 does not understand the nature of oath or affirmation, he/she only makes the promise before testifying as observed previously, as an exception to the general rule. In case he/she understands the nature 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.

It is also clear that, following the above cited amendments of the law, the CAT has construed the provisions of section 127(2) of the

Evidence Act in various occasions including in the following cases: **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** (unreported), **Msiba Leonard Mchere Kumwaga v. Republic, Criminal Appeal No. 550 of 2015** (unreported), **Shaibu Nalinga v. Republic, Criminal Appeal No. 34 of 2019, CAT at Mtwara** (unreported) and the **Issa Salum case** (supra). The contemporary procedure for recording the evidence of a child of tender age can thus, according to the generality of the precedents just cited above, be summarised 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.

In the case at hand however, the proceedings of the trial court demonstrate that, when the complainant (as the PW. 1) appeared before the trial court for her testimony, the trial magistrate recorded (at page 4 of the typed proceedings) as follows before he started recording her evidence:

> "...**PROSECUTION CASE RESUMES**
>
> **PW.1:** Mary Furaha 9 yrs residence Suma pupil standard III at Suma Primary School Christian.
>
> **PW.1:** I am Christian I use to attend at church an (*sic*) every day. I don't know what the word oath means. I promise to speak nothing but the truth."

Again, when PW. 4 appeared for his testimony, the trial magistrate endorsed (at page 8 of the typed proceedings) as follows before he began recording his testimony:

> "...**PROSECUTION CASE PROCEEDS**
>
> **PW.4:** Edward Mwanyelele 12 yrs old standard V pupil at Busona Primary School Christian.
>
> **Court:** PW4 is a person of tender age.
>
> **PW4:** I know the meaning of oath when I take oath then it is a sin to speak lies. I will take oath.
>
> **Court:** PW. 4 know (*sic*) the meaning of oath and a duty to speak truth thus swears and states..."

In my view, the record of the trial court does not show that, the law summarised above was substantially complied with by the trial court. Regarding the evidence of the complainant, it is clear that, though the trial magistrate put some probing questions to the complainant, he did not make and record his own finding or determination on whether or not the

complainant, as a Christian child of tender aged, understood the nature of oath as the law would expect him to do.

Regarding the evidence of PW. 4, the record shows that, the trial magistrate in fact, asked him the probing questions. He ultimately made a finding or determination that he understood the nature of oath. Nonetheless, the PW. 4 did not take any oath before he testified. This witness thus, neither took the oath nor made the promise to speak the truth and not lies to the court, before his evidence was recorded by the trial magistrate.

Owing to the above omissions committed by the trial court in receiving the evidence of the complainant and PW. 4, I determine the sub-issue posed above negatively that, the evidence of the two key and eye witnesses (the complainant and PW. 4) was improperly taken by the trial court. The irregularity was, in my view, fatal to the proceedings. This is because, the significance of section 127(2) of the Evidence Act is that, it sets the test of the competence of a child of tender age as a witness. The evidence of the complainant and that of the PW. 4 are thus, liable to be expunged from the record.

Having made the above findings, I am of the view that, it is no longer practical and fair to determine the appeal at hand on merits by testing the major issue posed previously since the irregularities at issue were caused by the trial court.

Another sub-issue arises at this juncture, it is this: what should be the way forward in disposing of the present appeal? In my view, the record

shows that there is tangible evidence against the appellant as correctly contended and narrated by the learned State Attorney for the respondent, save for the irregularities discussed earlier. Justice will thus, require this court to make necessary orders that will promote fair trial to both sides under the prevailing circumstances.

Due to the above reasons, I exercise my revisional powers and make the following orders: I nullify and quash the proceedings of the trial court. I also quash the conviction and set aside the impugned judgement and the sentence imposed against the appellant.

I however, consider this matter as a fit case for ordering a 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 a year and eight months since

he was convicted and sentenced on the 6th January, 2020. This is a small portion of the sentence of thirty years imprisonment that was imposed against the appellant. Again, as I observed earlier, there is tangible evidence against him save for the irregularities committed by the trial court in receiving the evidence of the two key and eye witness.

I therefore, order for an immediate retrial of the appellant. It is further ordered that, the retried shall be conducted before another magistrate of competent jurisdiction. The retrial shall commence in not more than two months (60 days) from the date of pronouncing this judgment to avoid delays. If such period lapses without any steps being taken for the retrial, the appellant shall be discharged and released from the prison until when the prosecution will be ready to retry him, in which said case, the law on trials and bail regarding cases of this nature will be observed. Meanwhile, 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 upon the retrial, the period he erroneously stayed in prison following 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

16/08/2021.