IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 30 OF 2020

(Originating from Masasi District Court Criminal Case No. 61 of 2019)

JAPHARI ADRIANO DISMAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

4th & 27th October, 2021

DYANSOBERA, J.:

The appellant Japhari Adriano Dismas was charged with and convicted of the offence of two counts: namely, rape c/ss 130 (1) (2) (e) and 131 (1) and unnatural offence c/s 154 (1) (a) (2) both of the Penal Code [Cap. 16 R.E.2019]. He was found guilty and sentenced to thirty (30) years term of imprisonment in the first count and life imprisonment in the second count. The sentences were ordered to run concurrently. He was not

satisfied with the trial court's decision hence this appeal. According to the petition of appeal filed on 19th March, 2020, the following grounds have been raised by the appellant:-

1. The trial Magistrate erred in law and fact by convicting the appellant using exhibit P1, which was tendered and admitted unprocedurally the trial Magistrate failed to address the Appellant on his rights under section 210(3) of the criminal procedure Act [R.E 16 2002].
2. There was misdirection in the judgment since the Magistrate dealt with the prosecution evidence only without considering the defence evidence.
3. The charge sheet was incurable defective as failure to sight the right section of the law under which the appellant was charge as a result, the appellant failed to enter the correct defense.
4. The trial Magistrate erred in law and fact by convicting appellant while the charge was not proved beyond all shadows of doubt since there was a need of proving the age of the alleged victim, demanding medical proof or biological parent, there was no direct evidence was a fact of her age the age is a great requirement in established the offence of statutory rape under section 130 (1) (2) (e) and section

154 (1) (a) (2) of the penal code [Cap 16 R.E 200]. Since it is a mandatory the victim should be under eighteen years.

5. The trial Magistrate erred in law and by convicting the appellant while the victim never mentioned her assailant on earliest moment, she took 10 days to name the appellant while the diagnosis had shown the girl (PW3) had sex repeatedly leaves doubt if it is the appellant who did the alleged rape.
6. The trial Magistrate erred in law and fact by convicting the appellant using uncorroborated evidence of the prosecution side.
7. The trial Magistrate erred in law and fact by convicting the appellant based in the evidence of PW3, PW4, and PW2 who were not credible witness since there evidences were not consistence and was contradicting. According to PW4 claimed PW3 told him that the appellant raped her at Chigugu grave yard (page 4 of Judgment) while PW3 in here testimony claimed that she was raped inside the house of the appellant.

The brief facts of the case are that the victim HEB is a resident of Chigugu and is schooling at Chigugu Primary School in STD I. She resides with her aunt one Mwajabu Swalehe (PW 2). On 13th day of April, 2019,

the victim retired from school, took some food and went to her father at Mbuyuni village. When back, she was complaining of pain in her waist and thigh and was tiptoeing. Her sitting manner was unusual. PW 2 gave her Panadol to ease the pain. As the days passed, the victim started emitting pungent odour, was unable to sit and she started discharging stool with pus. She did not reveal what had befallen her. On 21st day of April, 2019 Peter Nguyani Shayo, a Medical Officer at Ndanda Hospital (PW 1), attended the victim, a girl aged 8 years, who was complaining to have been raped. The victim told him that she was feeling pain during urinating and was discharging stool non-stop. . PW 1 medically examined her. He did not find any bruises in both the vagina and anus but the victim had lost her hymen and the anal sphincters were loose with little faecal matter. PW 1 filled in the PF 3. He tendered it in court (exhibit P 1).

F. 8906 investigated the case by interrogating the victim, PW 2, PW 1 and the appellant. The appellant denied to have committed the offence.

In her unsworn evidence, the victim who testified as PW 3 told the trial court that on 13th day of April, 2019 while going to her father she, on the way, met the appellant who took her inside his house, raped her *nyuma na mbele* and she felt pain. The victim did not tell anyone as she

had been warned not to tell anybody lest her be killed. She insisted that she was raped twice-two days.

In his defence, the appellant testified that he had been convicted of a case of attempted rape and served five months' term of imprisonment and after the serving of the sentence he went back home and continued with his life. This displeased the mother of the victim in the previous case and on 22nd day of April, 2019 he was apprehended and beaten by a bodaboda. He contended that the source of the case was a land dispute.

The learned Resident Magistrate was satisfied that the appellant committed rape and unnatural offence. She found him guilty and sentenced him accordingly.

During the hearing of this appeal, the appellant appeared in person and prosecuted the appeal. The respondent was represented by Mr. Wilbroad Ndunguru.

The appellant prayed the court to permit the learned Senior State Attorney to respond first. Mr. Ndunguru supported the appeal on account that there was irregularity particularly under S. 127(2) of the Evidence Act.

He submitted that the evidence of the victim Happiness Erick Benjamin (PW3) at P.8 of the typed judgment, apparently, shows that she was 8 years but she did not promise to tell the truth before she was permitted to testify. Hers, was a crucial evidence. Such evidence should be expunged. If that is the, case, there is no any other evidence implicating the appellant, Mr. Ndunguru argued. He sought support from the case of **Issa Salum Nambamka v. R**, Crim. Appeal No. 272 of 2018 and invited this court to expunge such evidence. Notwithstanding the position taken on part of the respondent of supporting the appeal, learned Senior State Attorney prayed a retrial to be ordered as the irregularity was caused by the court. It was also submitted that the victim's evidence proved rape and an impeccable identification of the culprit. It was contended for the respondent that such evidence is as strong as to suffice to convict the appellant and that in order for the interest of justice to be served.

The appellant, in his rejoinder, joined hands with the position taken by the respondent but was against the respondent's prayer for retrial pointing out that he has been in prison from 2019 as such he does not agree the case to start a fresh.

I have perused the trial court's record, the grounds of appeal and the submissions particularly that of the learned Senior State Attorney.

With respect, I agree with the learned Senior State Attorney that the evidence of PW 3, the victim in this case, was taken in violation of Section 127 (2) of the Evidence Act [CAP. 6 R.E.2019]. Section 127(4) of the Act defines who a child of tender age is. It provides as follow:-

"for purpose of sub-sections (2) and (3), the expression 'child of tender age' means a child whose apparent age is not more than fourteen years"

As the record shows, at the time when PW 3 was giving evidence she was aged 8 years hence falling under the definition of a 'child of tender age' as her age was not more than 14 years.

Sub-section (2) of Section 127 of the Act details the procedure of giving evidence for the child of tender age as follows:-

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

From the plain meaning of the provisions of sub-section (2) of Section 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, they must make a promise to tell the truth and undertake not to tell lies. Section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not. Being aware of this lacuna, the Court of Appeal of Tanzania has, in its various decisions, set out some principles as guidance to the courts in such situations. For instance, in the case of **Geoffrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), the Court of Appeal stated:-

> '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 above cited case, the Court further observed that:-

" We think the trial magistrate or judge can ask the witness of a tender age such simplified questionse which may not be exhaustive depending on the circumstancses of the case as follows:-

1. Age of the child
2. The religion in which the child professes and whether they he/she understands the nature of oath.
3. Whether or not the child promises to tell the truth and whether or not to tell lies.'

In the case of **Hamisi Issa v. R,** Criminal Appeal No. 274 of 2018 (unreported), the Court approved the procedure which the trial court followed before the witness of tender age gave her evidence in accordance with s. 127(2) of the Evidence Act. In that case, the trial magistrate started by examining a child of tender age whether or not she understood the nature of oath. Having replied to the question in the negative, the child's evidence was taken upon her promise that she would tell the truth and upon her undertaking that she would not tell lies.

In the instant case, the learned trial Magistrate, after conducting the former voire dire test and after making a finding that the child witness did not understand the nature of an oath and the duty of speaking the truth proceeded to receive her evidence. He did not require her to promise to tell the truth and not to tell lies as the law required and directed by Court of Appeal through the principles it has propounded.

Besides, there is another serious anomaly in the trial of the case exhibited by the learned Resident Magistrate. No conviction was entered against the appellant before the sentence was meted out. This is clear at p. 9 of the trial court's judgment where it was recorded as follows:-

> 'after having satisfied that the case against the accused person is proved beyond reasonable doubts, this courts hereby finding the accused guilty of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E.2019] and unnatural offence c/s 154 (1)(a) (2) both of the Penal Code [Cap. 16 R.E.2019]'
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> Sgd, R.Y. Idd
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> RM
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> 21/10/2019

As clearly indicated in the record, learned trial Resident Magistrate, after finding the appellant guilty, she did not convict him as required by section 235 (1) of the Criminal Procedure Act. It is provided under the said section thus:-

> The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the penal code".

The compliance with those provisions was emphasised by the Court of Appeal in many of its decisions. For instance, in the case of **Amani Fungabikasi v. R**. Criminal Appeal No. 270 of 2008 (unreported), the Court has this to say:-

> *"it was imperative upon the District Court to comply with the provisions of section 235(1) of the Act by convicting the appellant after the magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubt. In the absence of a conviction it follows that one of the prerequisites of a true judgment in terms of section 312 (2) of the Act was missing. So, since there was no conviction entered in terms*

of section 235 (1) of the Act; there was no valid judgment upon which the High Court could uphold or dismiss"

In a more emphatic manner, the same Court in the case of **Abdalah Ally Vs Republic, Criminal Appeal No.253 of 2013** (unreported), stressed:-

> "It is now settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the high court in the exercise of its appellate jurisdiction".

Since failure to ender conviction by any trial court is fatal and incurable irregularity, this court has no any option other than declaring the proceedings and judgment a nullity. This is particularly so because the failure to enter conviction rendered the judgment and sentence a nullity as such there is nothing this court can uphold or dismiss.

Invoking revisionary powers conferred upon me by section 373 (1) of the Criminal Procedure Act, Cap.20 R.E.2019, I quash and set aside the alleged judgment and sentence of the trial District Court in Criminal Case No. 30 of 2020.

Mr. Wilbroad Ndunguru, learned Senior State Attorney invited this court to order a re-trial. The appellant opposed this motion. I think the appellant is right. Since the evidence of the victim was received in violation of the law and Mr. Ndunguru has invited this court to expunge this victim's evidence from the record, which invitation I accept, there is no any other evidence which can support the conviction. A re-trial will not be in the interest of justice.

I order the appellant to be set free from custody forthwith unless lawfully held for other causes.

Order accordingly.

W.P. Dyansobera

Judge

27.10.2021

This judgment is delivered under my hand and the seal of this Court on this 27th day of October, 2021 in the presence of the appellant in person and Mr. Wilbroad Ndunguru, learned Senior State Attorney for the respondent.

W.P. Dyansobera

Judge