**THE UNITED REPUBLIC OF TANZANIA**
**JUDICIARY**
**IN THE HIGH COURT OF TANZANIA**
**MBEYA DISTRICT REGISTRY**
**AT MBEYA**
**CRIMINAL APPEAL NO. 36 OF 2021**
***(Originating from the District Court of of Rungwe at Tukuyu in Criminal Case No. 84 of 2018)***

**HAMIS ALLY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

# JUDGMENT

*Dated: 5th & 15th November, 2021*

## KARAYEMAHA, J

The Appellant, Hamis Ally, was arraigned before the District Court of Rungwe at Tukuyu for the offence of rape contrary to section 130 (1), (2) (e) and 131(1) and (3) of the Penal Code Cap 16 R.E. 2002 (now 2019). It was alleged that on 13th August, 2018 at about 19:00hrs at Ibungila village within Rungwe District in Region of Mbeya, he had carnal knowledge with a seven (7) years child. To disguise her identity, I shall refer her as 'DM' or as 'PW1'. He was tried, convicted and sentenced to a 30 years imprisonment. The appeal is against both conviction and sentence.

In a bid to support the charge, the prosecution side summoned six (6) witnesses namely, DM (PW1), Mary Ndile (PW2) Uswege Mapunga (PW3 and Justins Malikila (PW4). In addition, one exhibit namely the PF3 was tendered and admitted as exhibit P1. In short, the substance of the prosecution evidence was that on the material date and place alludded to above, the victim was left by PW2 and the appellant and went to the funeral of Nelson Lamson @ Nero's (DW2) sister-in-law. According to PW1 the appellant used that opportunity to call her in the room. As soon as she got in the room he told her to undress her clothes and undressed his. Soon after that, the appellant inserted his penis in her vagina. Although she felt pains, she never raised an alarm. After satisfying his lust, he gave her Tshs. 100/= and left.

When PW2 returned home, became curious of PW1's locomotion. On probing, PW1 told her that the appellant raped her. No sooner had PW1 narrated the ordeal than PW2 reported to PW3. The information spread wide up to local leaders who instructed PW3 to arrest the appellant.

The appellant was arrested and taken to police. The victim was given a PF3 (Exhibit P1) that enabled her to undergo medical examination before PW4. On examining the victim, PW4 found a lot of

blood on her underpants and blood stains on the outer part of her vagina. The PF3 revealed that the victim's hymen was perforated.

The appellant disconnected himself with the commission of the offence. Testifying as DW1, the appellant stated on the contrary that his relatives threatened to make him get lost because of land dispute. After three days he was charged with this case. To protest his innocence, the appellant produced DW2 and Lupakisyo Peter (DW3) to testify in his favour. However, both witnesses denied to have seen the appellant at the funeral of DW2's sister-in-law. DW3 told the trial court that she was not present during the incident but heard that the appellant raped the victim.

Having heard both sides, the trial Magistrate satisfied that the prosecution proved the case beyond reasonable doubt. Consequently, the appellant was convicted and sentenced as shown earlier above. Unhappy, the appellant has emerged in this court with a petition of appeal raising eight (8) grounds. However, for the reasons which will be apparent shortly, for the purpose of this judgment, I do not intend to reproduce them herein.

Having given the trial court's a deserving scrutiny, I found out an irregularity which goes to the very root of this matter. In this matter, the

ordeal was committed against DM a child of tender age. By the time the offence of rape was committed she was 7 years. In a bid to adhere to the requirement of section 127 (2) of the Law of Evidence Act, amendments of 2016, the trial magistrate before taking DM's testimony merely recorded the findings of the court.

On noting this irregularity I called upon Ms. Zena James who represented the republic and the appellant to address the court on it. She submitted that section 127 (2) of the Law of evidence amended by section 26 of Act No 4 of 2016 requires a child of tender age to promise to tell the truth before testifying. Construing the proceedings, Ms. James sated that the child promised to tell the truth in that form. She argued that there is no legal format on how the promise should be taken. However, she took a stance that the trial court ought to ask DM questions and record them but that is not mandatory. She again observed that failure to observe that procedure did not mean that DM did not promise to tell the truth.

In his rejoinder the seemingly unrepresented lay appellant had no useful submission on this irregularity.

Ms. James is very right in her thinking that before testifying a child of tender age must promise to tell the truth. This is the tone and import

of section 127 (2) of the law of Evidence. The provisions of section 127 (2) state that:

> *"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 lies."*** *(Emphasis added)."*

To my understanding, the above cited provision provides for two conditions. **One,** it allows the child of tender age to give evidence without oath or affirmation. **Two**, before giving evidence, such child is mandatorily required to **promise to tell the truth to the court and not to tell lies.** In emphasizing this position the Court of Appeal stated in the case of ***Issa Salum Nambaluka v. R,*** Criminal Appeal No. 272 of 2018 quoted in the case of ***Haibu Nalinga v R,*** Criminal Appeal No. 34 of 2019 (both unreported) that:

> *"under the current provision of the law, if the child witness does not understand the nature of an oath, she or he can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies."*

In this case, before PW1, who was a child of tender age, gave her evidence this is what happened as reflected at page 3 of the trial court's proceedings:

> *"DM, 7yrs old, pupil, ... Christian.*

*Court: PW1 is a girl of tender age and she do (sic) not understand the meaning of oath but she promised to speak nothing but the truth."*

Then the witness proceeded to testify. The record of the trial court does not show whether PW1 promised to tell the truth to the court and not to tell lies. What I gather from the above passages is that after PW1 had that she was seven (7) years, the trial Court concluded that she did understand the meaning of oath but she promised to speak nothing but the truth. It is not known whether the child said those words or were the trial Court's inventions. What the law requires is that the child him/herself must promise to tell nothing but the truth. I think to clear doubts the record must show that the child spoke those words. In view of that a court's conclusion or finding must base on what parties tell it and that must be recorded. I am firm that this is what section 127 (2) requires in a mandatory terms. My position is further hammered home by the decision of the Court of Appeal in the case of ***Godfrey Wilson v R,*** Criminal Appeal No. 168 of 2018 which instructed that the trial Magistrate or judge can ask the witness of a tender age such simplified questions, which may be not exhaustive depending on the circumstance of the case including the question whether or not the child promises to tell the truth and not to tell lies. The Court of Appeal instructed further

that upon making the promise, such promise must be recorded before the evidence is taken.

In the instant case there is no indication that simple questions were asked to get to a point where the child's promised to tell the truth. Had PW1 made a promise, that promise should have been reflected in the proceedings. This was not the case since the trial court just received PW1's evidence without oath with nothing more. This was a fatal irregularity which vitiated PW1's evidence. The Court of Appeal said in ***Godfrey Wilson*** (supra) thus:

> *"In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016. Hence, the same has no evidential value."*

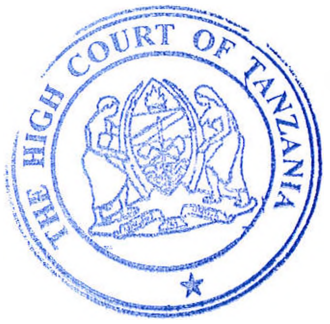
Likewise, in the present appeal, the evidence of PW1 which was taken contrary to the law lacks evidential value and it is hereby discarded from the record. Having vitiated PW1's evidence, the remaining evidence is not sufficient to sustain the appellant's conviction. Since the crucial evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the remaining prosecution witnesses in view of sustaining conviction. With the foregoing analysis, I find the *suo motto* raised ground meritorious which is sufficient to dispose of the

appeal. In the event, I allow the appeal, quash the conviction and set aside the sentence meted out against the appellant.

I order his immediate release from prison unless his continued incarceration is related to other lawful cause.

It is accordingly ordered.

DATED at **MBEYA** this **15st** day of **November, 2021**




**J. M. KARAYEMAHA**
**JUDGE**