IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 46 OF 2020

Appeal from the judgment of the District Court of Kiteto at Kibaya before N. A. Baro -RM dated the 4th day of October, 2010 in Criminal Case No. 14 of 2010

JOEL SAMSON ..... APPELLANT

VERSUS

THE D. P. P .....RESPONDENT

JUDGMENT

29/09/2021& 22/12/2021

GWAE, J

Before District Court of Kiteto at Kibaya the appellant was indicted and convicted of the offence of rape 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16, Revised Edition of 2002 against a girl (victim) aged 13 years by then. It was in the satisfaction of the trial court that the guilt of the appellant was proved beyond reasonable doubt.

Upon the appellant being found guilty by the trial court of the offence he stood charged with, he was accordingly sentenced to **thirty (30)** years imprisonment. He appealed to the court vide Criminal Appeal No. 55 of 2014 but he lost his appeal. Aggrieved by the decision of this court (**Mwaimu, J),** the appellant further appealed to the Court of Appeal of Tanzania through

Criminal Appeal No. 329 of 2014 where his appeal was struck out on the ground that, the appeal filed in this court was incompetent since the notice of appeal was filed out of ten (10) days prescribed by section 361 (1) (a) of the Criminal Procedure Act Chapter 20 Revised Edition 2002.

The appellant never being tired, he knocked the doors of this court by filing and application for extension of time within which to file a notice of appeal out of time and appeal against the conviction and sentence by the District out of time. His application was granted on the 29th April 2020, thus this appeal as 2nd appeal to the court after the former one being dismissed. The appellant has advanced a total of four grounds of appeal, namely;

1. That, the trial magistrate erred in law and fact by failing to comply with the mandatory requirement of provisions of section 210 (1) (a) of CPA
2. That, the trial magistrate erred in law and fact by failing to comply with mandatory provision of section 127 (2) of Tanzania Evidence Act, Cap 6 Revised Edition, 2002
3. That, the trial magistrate erred in law and fact by not complying with mandatory provisions of section 135 (1) of CPA

4. That, the trial magistrate erred in law and fact by when held that the PW1, PW2, PW3, PW4, PW6 and PW7 proved the prosecution case beyond reasonable doubt

Before this 1st appellate court, the appellant had no legal services; he thus fended himself whereas the DPP was represented by the learned State Attorney, one **Ms. Elice Mtenga** who eagerly supported the appellant's appeal particularly grounds of appeal No. 2 and 3.

Regarding the 2nd appellant's ground of appellant. It is evident from the trial court's record that, the victim and other prosecution witnesses credibly testified in support of the charged. However, I am alive of the law that in sexual offences the best evidence is that of the victim. In our case there is one legal issue which is very important, that is the manner the evidence of the victim was recorded, it is no doubt that, the victim was under the age of 14, to be specific he was aged 13 years by then. Hence, requirement of compliance with provisions of section 127 of the TEA as rightly complained by the appellant and admitted by the learned counsel representing the DPP. The trial court's record plainly reveals that, the victim was aged 13 years by then but her intelligence was not tested as required by the law that is to say the learned trial Magistrate did not record questions paused, if any, to the victim when ascertaining his

intelligence as required under section 127 (2) of the Tanzania Evidence Act. In **Godi Kasenegala v. R,** Criminal Appeal No. 10 of 2008 (unreported), the Court of Appeal with an approval of a passage from a Kenyan case of **Kinyua v. Republic** (2002) 1 KLR 156 stated:

> "it is important to set out the **questions and answers** when deciding whether a child of tender years understood the nature of an oath so that the appellate is able to describe whether this important matter was rightly decided and that; the correct procedure for the court to follow is to **record the examination of the child witness** as to the sufficiency of her intelligence to satisfy the reception of **evidence...** (Emphasis supplied)"

The same position was also stressed in **Remigious Hyerav. Republic,** Criminal Appeal No. 167 of 2002, (unreported) where Court of Appeal of Tanzania held

> "It is settled law that omission to conduct voire dire examination of a child of tender years brings such evidence to the level of unsworn evidence.

That being the case, the testimony of the victim (PW2) is therefore questionable as her evidence is treated as unsworn testimony.

Coming to the **3rd ground** of appeal, section 135 (1) of CPA, in my view coaches to the mandatory requirement for trial magistrate to convict an accused person after he or she has found him or her guilty of an offence. Thus, omission to comply with the mandatory provision of the law renders the judgment of the trial court incompetent. Equally, this appeal which emanates from illegal judgment (See a decision of the Court of Appeal sitting at Dodoma in the case of **Shabani Idd Jollolo and 3 others vs. Republic**, Criminal Appeal No. 200 of 2006 (unreported)).

I have further observed that, the learned trial magistrate did not sign after having completed recording the testimonies of prosecution witnesses to signify the authenticity of such evidence, that was legally wrong and in contravention of provision section 210 (1) (a) of the Criminal Procedure Act (supra) which reads

> 210.-(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-
>
> > (a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal

> direction and superintendence and shall be signed by him and shall form part of the record; and

In the case under consideration, I have closely ascertained both hand written and typed proceedings but the trial magistrate had not signed at the of testimony of each witness. This omission is capable of vitiating the proceedings and judgment.

Basing on the shortfalls aforementioned, this matter was fit for an order directing trial denovo however considering the fact that the appellant had been convicted since 2010 and therefore he had already spent more than ten (10) years. Prudently, it is advisable that the retrial of the case at hand should not be preferrable. I am guided by the judicial precedent in **Manji v Republic** (1966) EA 343 where it was held and I quite;

> "In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purpose of enabling the prosecution to fill in the gaps in its evidence at the first trial ...each case must depend on its own facts and in order for the retrial should only be made where the interest of justice requires".

In our present criminal matter, the appellant has been in prison since 2010 and considering the errors so caused by the trial court as intimated

above, in the circumstances, an order which is viable is, in my considered view, acquittal rather than re-trial of the matter

In the upshot, the appellant's appeal is hereby allowed, he is to be released from prison as soon as practicable unless withheld therein for a different lawful cause.

It is so ordered.

M. R. GWAE
JUDGE
22/12/2021