

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

CRIMINAL APPEAL NO. 54 OF 2021

(Originating from criminal case No. 301/2017 of the District Court of Muleba and criminal application No. 13 of 2020 of the High Court of Tanzania at Bukoba)

HENRY PASTORY.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

10TH November & 19th November 2021

Kilekamajenga, J.

The appellant was arraigned before Muleba District Court for the offence of raping a 14 years old girl contrary to section 130(1) and (2)(e) and 131 of the Penal Code Cap. 16 RE 2019. After the full trial of the case, the trial court was convinced that the prosecution proved its case to the required standard. The appellant was convicted and finally sentenced to serve thirty years in prison. Being aggrieved with the decision of the trial court, the appellant approached this court for justice. He moved the court with a petition of appeal containing four grounds of appeal coached thus:

- 1. That, the Honourable learned trial magistrate erred both in law and facts to hold that 'the question of identification is not doubtful at all';*
- 2. That, the Honourable learned trial magistrate erred both in law and facts by not discovering that the case was a fabricated one;*

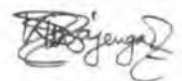


3. *That, the Honourable learned trial magistrate erred bot in law and facts by convicting the appellant basing on evidence which is below the required standard;*
4. *That, the Honourable learned trial magistrate erred in law for his failure to raise an adverse inference on why some of the mentioned key witnesses did not appear to testify.*

The counsel for the appellant also lodged a supplementary petition of appeal containing one ground of appeal thus:

1. *That, the Honourable trial magistrate erred in law by failure to comply with the mandatory provision of section 127(2) of the Evidence Act, Cap. 6 RE 2019.*

When the appeal came for hearing, the appellant appeared by way via virtual court from Bangwe prison in Kigoma. He was also represented by the learned advocate, Mr. Projestus Mulokozi who appeared in person before this court. The learned State Attorney, Mr. Joseph Mwakasege physically appeared for the respondent, the Republic. The counsel for the appellant, after going through the proceedings of the trial court, he alerted the court on the irregularity appearing in the record. He argued that the trial court did not comply with the requirement of **section 127(2) of the Evidence Act, Cap. 6 RE 2019**. Under the law, the victim who was 14 years old during the trial was supposed to promise to tell the truth and not lies before testifying. At page 8 of the typed proceedings, PW2 who was 14 years old did not promise to tell the truth and therefore the above



provision of the law was violated. To cement his argument, he cited the decision of the Court of Appeal of Tanzania in the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018**, CAT at Bukoba (unreported). He invited the court to quash the conviction and set aside the sentence imposed.

When prompted for the response, the learned State Attorney supported the submission from the counsel for appellant arguing that the trial magistrate contravened the above provision of the law.

In this case, it is evident that the court was invited to consider one irregularity which the counsel for the appellant believed that it vitiated the proceedings of the trial court. On this ground, I was prompted to peruse the proceedings of the trial court and found the following information: When the victim who was 14 years testified, the trial magistrate recorded that:

PW2(name reserved for privacy reasons)

Question

Answers

Unasoma darasa la ngapi?

Nasoma darasa la sita

Unasema shule gani?

Nasoma shule ya msingi Kishanda

Mwalimu Mkuu wa shule yako anaitwa nani? Mwl Magreth

Court: PW2 was examined by this (sic) during voire dire test, this court satisfied that PW4 (sic) understand (sic) the nature of question (sic), PW2 gives perception (sic) of the answers, so she can testify.



After recording the above information, the victim continued to testify. But, what does the law say as far as recording the evidence of a child of tender age? The above provision of the law was amended in 2016 and the new provision reads as follows:

127 (1)N/A

*(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.***

In other words, apart from asking some question to test the child to establish her level of understanding, the court must also ask the child whether or not she knows the consequences of telling lies and whether or not he/she promises to tell the truth and not to tell lies. The promise must be recorded by the magistrate before the child gives evidence. Explicitly, the trial magistrate was supposed to record the questions and answers and one of the questions must point to whether the child is ready to speak the truth and not lies. Thereafter, the magistrate was supposed to record thus:

'PW2 after promising to tell the truth and not to tell lies states as follows...'

In the instant case, the record does not show whether the victim, who was of the tender age ever promised to tell the truth and not tell lies before she

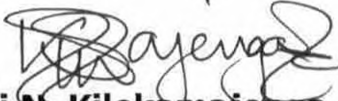


testified. Obviously, her evidence was recorded in contravention of section 127(2) of the Evidence Act, Cap. 6 RE 2019. I hereby allow the appeal, quash the conviction and set aside the sentence meted against the appellant. The appellant should be released forthwith unless held for other lawful reasons. It is so ordered.

DATED at BUKOBA this 19th day of November, 2021.

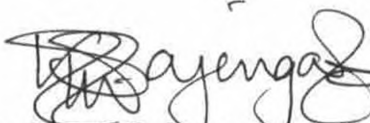


Court:


Ntemi N. Kilekamajenga.
JUDGE
19/11/2021

Judgment delivered this 19th November 2021 in the presence of the appellant present via virtual court from Kigoma (Bangwe Prison); the counsel for the appellant, Mr. Projestus Mulokozi and the learned State Attorney, Mr. Joseph Mwakasege. Right of appeal explained to the parties.




Ntemi N. Kilekamajenga.
JUDGE
19/11/2021

