IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL CASE NO. 79 OF 2021

(Originating from the District Court of Momba at Kyela in Criminal Case No. 47 of 2018)

ZAWADI FLACKSON SIKAVIZYE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 25.04.2022

Date of Judgment: 20.05.2022

Ebrahim, J.

The appellant herein was charged and convicted for the offence of rape contrary to **sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (now 2019)**.

It was alleged by prosecution that the appellant had on 14th February, 2018 at 1500hrs at Chafuma Village within Momba District in Songwe Region raped one MNS (name concealed) aged 13 years. In addressing this appeal, I shall refer to the girl as the "victim" for convenience purposes.

The appellant pleaded not guilty to the charge, hence a full trial. The trial court found the appellant guilty, convicted and sentenced him to 30 years imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred this appeal raising seven grounds of appeal hinged on the complaint that prosecution did not prove their case beyond reasonable doubt. Among the reasons advanced being that the evidence of a victim was received in contravention of the law. Other grounds are that PF3 was not read in court, evidence of a doctor is more suggestive than real, failure to properly analyse evidence, appellant's defence was not considered and that the age of the victim was contradictory.

When the case was called for hearing, the appellant who appeared in person unrepresented prayed to adopt his grounds of appeal and urged the court to consider them.

In response, Counsel for the respondent Ms. Hanna-Rose Kasambala supported the appeal on the ground that the victim being 13 years old did not promise to tell the truth in terms of **section 127(2) of the Evidence Act, Cap 6 RE 2019 as amended**. She concluded therefore that the evidence of the victim was improperly received hence loosing evidential value. To cement her argument, she referred to the

case of **Godfrey Wilson V R**, Criminal Appeal No. 168/2018 (CAT) which discussed in detail on the requirement of a witness of tender age to promise to tell the truth. She argued that apart from the victim's evidence, there is no other direct evidence to establish the offence. She however left it to the court to decide on the appropriate root from the raised legal point.

Certainly, according to the law i.e., **section 127 (2) of the Act as amended by the Written Laws (Miscellaneous Amendments) Act No 2 of 2016 (GN No. 4 of 8th July 2016)**, and as per the principle illustrated in the decisions by the CAT in the cases of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** (unreported) and the **Issa Salum Nambaluka** (supra), the evidence of a child of a tender age is received as follows:

a) That, the 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 or affirmation, 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 or affirmation, he/she should, before giving evidence, be required to make a promise to tell the truth and not lies to the court.

c) Before giving evidence without oath, **such child is mandatorily required to promise to tell the truth**, and not lies to the court, **as a condition precedent.**

d) Upon the child making the promise, the same must be recorded before the evidence is taken.

In **Issa Salum Nambaluka case** (supra) the CAT observed at page 12 that:

> *"In the case at hand, PW1 gave her evidence on affirmation.* ***The record does not reflect that she understood the nature of oath.*** *As stated above, under the current position of the law, if the child witness does not understand the nature of 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,* ***the procedure used to take PW1's evidence contravened the provision of s. 127 (2) of the Evidence Act...****"*(emphasis added).

In this case, as the records would reveal that at the time of incident, the victim was 13 years old and when she was adducing evidence in 2018 the year that the incident occurred it would suppose that she was still 13 years of age much as it was recorded that she was 14 years. Again, according to the evidence of PW2 (victim's mother) the victim was 13 years old. What was the exact age of the victim, it is a contradiction? Nevertheless, in terms of **section 127 (4) of the Evidence Act, Cap. 6 R.E. 2019**; and as explained in the case of **Issa Salum Nambaluka v. Republic, Appeal No. 272 of 2018**, Court of Appeal of Tanzania at Mtwara (unreported); the phrase **"child of tender age"** is defined to mean a child **whose apparent age is not more than 14 years.**

Thus in applying the law to our instant case, the victim was a child of tender age and I hasten to agree with the counsel for the respondent that the voire-dire test was conducted contrary to the law and I am impelled to nullify the evidence of PW1. Now the question would be

what should this court do? Before I could proceed to order a re-trial or not, I found it imperative to visit the evidence on record and see whether the same is overwhelming to justify the re-trial. To the contrary, beginning with the issue of age as alluded earlier, while PW1 said she was 14 years old, PW2, said her daughter was 13 years old. That's beside the point, going by the evidence of PW1, she said the appellant raped her at the bush, beat her using sticks and tied her hands. However, she said that she raped her from 1500hrs till the next morning when she managed to escape. The question now comes, where did all that happened? Still at the bush or they went to the appellant's house. PW1 said she was with Esther when the appellant beat her and tied her hands. She also said that the next day she was accompanied by the Samaritans. However, neither Esther nor any Samaritan appeared in court to support the story. PW1 said she managed to escape early in the morning. PW2 said the victim returned at 1000hrs. Again, PW2 said she was told by Esther that the victim was taken by the appellant at 0000hrs and went to report to the village leaders but no action was taken until the next day when the victim returned and she took him to VEO. Suprisingly, the VEO or any village leader was not called to corroborate the story.

It is trite principle that failure to bring important witness without a plausible explanation invites the court to draw adverse inference as to the evidence of the said important witness would probably have proven another adverse scenario. I subscribe to the position of the Court of Appeal held in the case of **Samwel Joseph Kubaya V R**, Criminal Appeal No. 40 of 2017 pg 14-15 on failure to bring important witness. Verily, for a very serious offence like the instant one, the evidence of the said Esther and VEO would have corroborated the testimonies of PW1. Thus, this court draws adverse inference on none calling of such important witnesses who would have supported the story of the victim and her mother.

Looking further at exhibit PE1 (PF3), the observation of the doctor shows that the victim's vagina was penetrated but she was physically normal. Hence, there was no any observation of beating marks or tied hands.

As for the evidence of PW4 that he interviewed the appellant and he admitted to have had sex with him because they were having love affair, the law requires that since he is a police officer, unless he had tendered the cautioned statement of the accused, the contents of the Appellant's admission would not be orally admitted in court. Once the accused

admits the offence before the police, the provisions of **section 57(1) and (2) of the Criminal Procedure Act, Cap 20 RE 2019** requires the said police officer to immediately reduce such admission into writing. This position of the law has been extensively illustrated by the Court of Appeal in the case of **The DPP V Sharifu Mohamed@ Athumani and 6 Others**, Criminal Appeal No. 74 of 2017 when discussing the similar situation and cited with approval the case of **Mashaka Pastory Paulo Mahengi@ Uhuru and 5 Others V Republic**, Criminal Appeal No. 49 of 2015 (unreported). That being the position therefore, I accordingly expunge from the record the testimony of PW4 pertaining to the admission of the appellant that he had sex with the victim and with her the whole day while his wife watching!!!! Unfortunately, the trial court considered such piece of evidence in finding the appellant guilty and forming a conviction.

Indeed, it is the law that in sexual offences the best evidence is that of the victim of offence. This is according to **section 127 (6) of the Evidence Act** and the CAT decisions in a number of cases like the **Selemani Makumba v Republic** [2006] TLR 379; and the case of **Edward Nzabuga v. Republic, Criminal Appeal No. 136 of 2008,**

Court of Appeal of Tanzania at Mbeya (unreported) to mention but a few.

However, it is not always the case that whenever the victim of sexual offence narrates the story on what befallen on her it should be taken wholesale without scrutinizing and testing the truthfulness of the same. This was also observed by the Court of Appeal of Tanzania in the case of **Mohamed Said v. Republic, Criminal Appeal No. 145 of 2017 CAT at Iringa.**

Need I say more, the evidence of the victim and PW2 leaves a lot to be desired and raises a lot of doubts. Moreover, the gaps on failure to call important witnesses cannot also be overlooked. As such, I am firm that prosecution's case has gaps hence ordering a re-trial for the irregularities occasioned in receiving the testimony of the victim would not meet end of justice in so far as the facts and circumstances of this case are concerned.

It is on that background, I follow the wisdom of the Court of Appeal in the cited case of **Godfrey Wilson V R (supra)** and allow the appeal, quash the conviction and set aside the sentence imposed. I further order for immediate release of the appellant from prison unless held for other lawful reasons.

Accordingly ordered

R.A. Ebrahim

Judge

Mbeya

20.05.2022

Date: 20.05.2022.

Coram: Hon. P.A. Scout, Ag-DR.

Appellant: Present.

For the Republic: Ms. Hanarose – State Attorney.

B/C: Gaudensia.

Ms. Hanarose – State Attorney:

Your honour, the case is coming on for judgment. We are ready to proceed.

Appellant: I am ready too.

Court: Judgement is delivered in the presence of Ms. Hanarose State Attorney, Appellant and C/C in Chamber Court on 20/05/2022.

Sgd: A.P. Scout

Ag-Deputy Registrar

20/05/2022

Court: Right of Appeal explained.

A.P. Scout

Ag-Deputy Registrar

20/05/2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA