IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 8 OF 2022

(Arising from the District Court of Tarime at Tarime in Criminal Case No. 341 of 2020)

CHACHA MWITA @ KISEGI ..... **APPELLANT**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

08.06.2022 & 21.06.2022

Mtulya, J.:

The Parliament in Tanzania sitting in capital city of Dodoma in 2016 amended the requirement of *voire dire test* in section 127 (2) of the **Evidence Act** [Cap. 6 R.E. 2019] (the Act) via section 26 of the **Witten Laws (Misc. Amendment) Act, No. 4 of 2016** (the Amending Act) with a view of protecting the rights of child of tender age and lubricate easy recording of oath or affirmation of a child of tender age.

This was so done following several complaints with regard to competence, credibility and reliability of evidence produced by the child during hearing of criminal cases. After the amendment, the section currently reads as follows:

> *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 any lies.

[Emphasis supplied].

It was inviting to learn that the enactment was celebrated by our superior court in judicial hierarchy, the Court of Appeal (the Court), in a bunch of precedents (see: **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018; **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018; **Hamisi Issa v. Republic**, Criminal Appeal No. 274 of 2018; and **Hamisi Ramadhani Lugumba v. Republic**, Criminal Appeal No. 565 of 2020).

From the text in the new enactment and cited bundle of precedents of the Court, it was plain that a child of tender age may testify in court after taking oath or affirmation or without oath or affirmation. However, the flexibility brought in section 127 (2) of the Act by the Amending Act requires the intended witness of tender age to make a promise before the court, to tell the truth, and not lies.

It is unfortunate that the provision is silent on how that can be procured from such a child of tender age. The practice available in the cited precedents shows that a few pertinent questions must be asked to determine: first, if the child witness understands the nature of oath or affirmation; second, if the child witness understands the nature of the oath or affirmation, a testimony shall

be recorded under oath or affirmation; and finally, if the child witness does not understand the nature of oath or affirmation, he shall be require to promise to tell the truth.

The mostly cited passage on the subject is found in the precedent of **Godfrey Wilson v. Republic** (supra), which displays the following directives:

> *We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case as follows:*
>
> 1. *The age of the child;*
> 2. *The religion which the child profess and whether he/she understands the nature of the oath; and*
> 3. *Whether or not the child promises to tell the truth and not tell lies.*

In the present appeal, the victim (PW1) was recorded at page 14 of the proceedings to reflect the following:

> ***Court: PROSECUTION CASE OPENS***
>
> *PW1 [Name withheld], a Student of Standard IV, Nkende Primary School, 8 Years, promises to speak the truth, and not lies.*

According to Mr. Paul Kipeja, learned counsel, who appeared for the Mr. Chacha Mwita @ Kisegi (the appellant), the record displays non-compliance of the provision in section 127 (2) of the

Act and precedent in **Hamisi Ramadhani Lugumba v. Republic** (supra). In his opinion, the excerpt does not sound per directive of the Court in the cited precedent as the learned magistrate is not clear as to what exactly was recording. During the submission in chief in favour of the appeal, Mr. Kipeja contended that the appellant was prosecuted for rape under section 130 (1) & (2) (e) and 131 (3) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code) and the victim (PW1) was a child of eight (8) tender age and could not produce oath or affirmation hence was supposed to promise to tell the truth, and not lies.

According to Mr. Kipeja, the only evidence which connects the appellant with the event of rape is from PW1 and since it did not follow the law, it must be expunged from the record and once expunged there is no any offence of rape could be established by the prosecution side. In order to bolster his argument, Mr. Kipeja cited page 13 in the decision of **Hamisi Ramadhani Lugumba v. Republic** (supra) contending that the directives displayed in the page require production of materials related to age, religion she/he profess, and a promise to tell the truth. Finally, Mr. Kipeja prayed this court to peruse and scrutinize the record and come up with its own conclusion based on facts and evidence produced during the hearing of the case as this is a first appellate court.

I borrowed the advice from the last prayer of Mr. Kipeja. I glanced and inspected the record of appeal and perused the

precedent in **Hamisi Ramadhani Lugumba v. Republic** (supra). The record shows that on 20th November 2020 the appellant was arraigned before the **District Court of Tarime at Tarime** (the district court) in **Criminal Case No. 341 of 2020** (the case) to reply a charge of rape pressed against him. The allegation against the appellant shows that on 8th October 2020, at Nkende Village within Tarime District in Mara Region he had carnal knowledge of the victim girl aged eight (8) years. The offence to which the appellant was alleged to have committed was enacted in the provisions of section 130 (1) & (2) (e) and 131 (3) of the Code.

During the hearing of the case on 12th April 2020, the appellant denied the allegation levelled against him. In order to prove the allegation, the prosecution had brought in the district court a total of three witnesses. PW1, apart from the contest of procedure indicated above, she testified to have been raped by the appellant on 8th October 2020 at 10:00hours in the morning when her mother (PW2) left for Mugumu and informed her of the rape at evening hours. Finally, PW1 stated that PW2 had called her husband who immediately showed up and scolded the appellant and grabbed him to the police station.

PW2 on her part testified that on the 8th October 2020 she left for business at Sirari and returned home at 19:00 hours when PW1 informed her of the rape, and in the next morning took the victim to Tarime Police Station and was provided PF.3 for medical

examination at Tarime Government Hospital. According to PW2, the examination showed that the victim had lost her virginity. With what transpired after the appellant arrest, PW2 testified that the appellant escaped away after the incident and was arrested a month later, November 2020.

An expert human doctor who examined the victim at Tarime Government Hospital was marshalled as prosecution witness number three (PW3) to testify on the alleged rape to the victim against the appellant and contents of exhibit PF.3 which was admitted as exhibit P.1. In his evidence, PW3 stated that the victim was raped as he found spermatozoa in the victim's private part which indicated sperms and bruises suggesting penetration. With when he examined the victim, PW3 testified to have conducted the examination in morning hours of 8th October 2020. Similarly. Exhibit P.1 shows that the examination was conducted at 10:04 AM, four minutes just after the alleged rape.

On defence, the appellant registered materials to show that he did not rape the victim and was arrested on the 8th October 2020 by the father of the victim following allegation of rape initiated by PW1 who at one time seduced him for love. According to the evidence of DW1, the father of the victim had assaulted him with the machete and took him to the chairman and police station, who later released him unconditionally.

Based on the above produced evidence, the district court believed the prosecution had discharged its duty beyond reasonable doubt hence convicted the appellant for the offence of rape and sentenced him to thirty (30) years imprisonment. The decision of the district court aggrieved the appellant hence instructed learned counsel Mr. Kipeja to draft and file six (6) grounds of appeal in this court to protest the judgment of the district court.

The grounds of appeal in brief show that the appellant is complaining of: first, contradictions in time and witnesses credibility; second, circumstances in which the alleged rape occurred; third, consideration of defence case; four, consideration of prosecution evidence as a whole; no police machinery was marshalled in the district court; and finally, the district court heavily relied on hearsay evidence.

When the appeal was scheduled for hearing on 8th May 2022, Mr. Kipeja had decided to drop four (4) grounds of appeal and argued only two (2) grounds of appeal, which in his opinion, will display doubts and depict that the prosecution had failed to prove its case beyond reasonable doubt. In the first ground, Mr. Kipeja complained on the evidence of the victim (PW1) and enactment in section 127 (2) of the Evidence Act as indicated above.

On the second reason of protest, Mr. Kipeja contended that the evidences brought in the district court by the prosecution side,

provide contradictory materials which go to the root of the matter and credibility of witnesses. In order to bolster his argument, Mr. Kipeja cited the evidence of PW1 who testifies that she was raped in morning hours of 8th October 2020 whereas PW2 testified to have been informed on the same day at 19:00hours. However, PW1 testified to have been examined on the same day whereas PW2 testified that the victim was examined on the next day, 9th October 2020.

According to Mr. Kipeja the evidence of PW3 and exhibit P.1 contradicts the evidence as he testified to have examined the victim on 8th October 2020 morning hours, even the alleged offence was not yet committed. In his opinion, it is impossible to have evidence of rape in P.1 before the offence was committed. On the same level, Mr. Kipeja complained on contradictions and confusions of PW1 and PW2 with regard to what exactly happened immediately after the alleged offence occurred. Citing the evidence of PW1 who testified that the appellant was arrested by his father and taken to police station, whereas PW2 testified that the appellant escaped after the event and was arrested a month later.

To Mr. Kipeja, the prosecution had other hidden agenda which was bought before the district court hence the defence evidence was not given the weight it deserves as it gave the whole story on what transpired, including mentioning of Street Chairman, husband of the PW2/ father of PW1 and police involvement. However, the

prosecution had declined to marshal all the cited persons who were involved in the whole saga, and no sufficient reasons were registered. Finally, Mr. Kipeja prayed this court to expunge or give less weight the evidence of PW1 and PW2 and once expunged or considered of less weight, there would be no case against the appellant.

The submission of Mr. Kipeja was well received and supported by Ms. Agma Haule, learned State Attorney, who appeared for the Republic. Being aware of the nature of evidences on record with regard to displayed contradictions, the precedents of the Court in **Hamisi Ramadhani Lugumba v. Republic** (supra) on recording oath or affirmation of a child of tender age and **Onesmo Kashonele & Others v. Republic**, Criminal Appeal No. 225 of 2012 on material contradictions produced by prosecution witnesses, Ms. Haule readily conceded the appeal and briefly contended that the doubts are to be resolved in favour of the appellant.

The final statement of Ms. Agma is supported by the Court in a bundle of precedents. The standard practice of the Court has been that doubts are to be resolved in favour of accused persons (see: see: **Maduhu Nhandi @ Limbu v. Republic**, Criminal Appeal No. 419 of 2017; **Mohamed Said Matula v. Republic** [1995] TLR 3; **Makuru Joseph @ Mobe v. Republic**, Criminal Appeal Case No. 146 of 2021; and **Mathias Maisero Marwa @ Omi & Another v. Republic**, Criminal Appeal Case No. 104 of 2021).

This court has also celebrated the precedents without any reservations and will do the same in the present appeal (see: **Marwa Daniel @ Omary Daniel @ Omi v. Republic**, Criminal Appeal Case No. 136 of 2021; **Philimon Joseph @ Chongera v. Republic**, Criminal Appeal Case No. 114 of 2021; and **Zakaria Benjamin Keraryo v. Republic**, Criminal Appeal Case No. 119 of 2021).

In the outset, I must state that I am aware of the precedent of the Court in **Selemani Makumba v. Republic** [2006] TLR 376 on the best evidences in rape cases are produced by victims. I am also quietly well aware that expert opinions are persuasive in criminal cases like the present one (see: **Marwa Daniel @ Omary Daniel @ Omi v. Republic** (supra); **Edward Nzabuga v. Republic**, Criminal Appeal No. 136 of 2008; and **Agnes Doris Liundi v. Republic** [1980] TLR 46).

However, the words of victims of sexual offences cannot be taken as gospel truth, but their testimonies should pass the test of truthfulness (see: **Mohamedi Saidi v. Republic**, Criminal Appeal No. 145 of 2017). The qualification that was inserted by the Court in rape cases was also considered by this court in a bunch of precedents (see: **Alex Rwebugiza v. The Republic**, Criminal Appeal Case No. 85 of 2020; **Marwa Daniel @ Omary Daniel @ Omi v. Republic**, Criminal Appeal Case No. 136 of 2021; and **Philimon Joseph @ Chongerea v. Republic** (supra).

The standard practice which has been put in place by the Court is that the victim must pass the test of truthfulness and consideration of the same depends on consistency and nexus of the materials produced by the prosecution side in criminal cases (see: **Mohamedi Saidi v. Republic** (supra) and **Maduhu Nhandi @ Limbu v. Republic** (supra). In the present appeal, the record shows that PW1, PW2 and PW3 produced inconsistence materials without any nexus of event of rape, as indicated in this judgment.

Their contradictions brought doubts in the case hence vitiated their credibility and the merit of the case. The law regulating the subject is obvious that the case cannot be said to have been proved beyond reasonable doubt (see: **Onesmo Kashonele & Others v. Republic** (supra); **Abdallah Rajabu Waziri v. Republic**, Criminal Appeal No. 116 of 2004; and **Yohanis Msigwa v. Republic** [1990] TLR 148).

The record shows further that the district court in the case had declined to consider defence witness. The appellant in the district court had cross examined the prosecution witnesses on important materials with regard to contradictions in time and material witnesses who were involved in the saga, including the father of PW1/husband of PW2, chairman and involvement of investigation machinery on 8th October 2020. However, the district court declined to analyse all facts and evidences produced by the parties in the case. In the opinion of the district court, as displayed at page 7 of the judgment is that:

...the accused person defence did not raise any reasonable doubt in the prosecution case to the effect that the victim was raped and it was the accused person who raped her...I am therefore satisfied that the victim is credible witness and her evidence was consistence throughout her testimony and it was not shaken by the accused person during cross-examination.

However, the learned magistrate declined to cite the record at page 8 of the proceedings where the appellant cross-examined PW1 on the of victim's father and his arrest to the police station; page 11 on PW2 evidence of presence of many neighbors and Street Chairman during his arrest; and page 14 with regard to PW3 on exhibit P.1 and the alleged offence of rape. From the available record, as the sanctity, the district court was not disturbed by the defence materials. The available practice in our superior court on failure to consider defence evidence is irregular and renders the decision fatal and vitiates the conviction against accused persons (see: **Daniel Severine and Two (2) Others v. Republic**, Criminal Appeal No. 431 of 2018; **Yusuph Amani v. Republic**, Criminal Appeal No. 255; and **Marwa Daniel @ Omary Daniel @ Omi v. Republic** (supra).

Regarding the foregoing deliberations and noting the evidence of PW1, reading together with other evidences, is disturbing, I have decided to expunge the same to abide with the directives of the Court in the precedent of **Godfrey Wilson v. Republic** (supra).

Having expunged the evidence of PW1 and noting several faults in contradictions of evidences produced in the present case, I think, in my considered opinion, the prosecution case was not proved beyond reasonable doubt as per requirement of the law in section 3 (2) (a) of the Act and precedents in **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005.

I therefore find present appeal was brought in this court with good reasons in protest of the district court decision and accordingly allow it and proceed to quash the conviction and sentence meted to the appellant and set aside proceedings of the district court in the case. I further order the appellant be released forthwith from prison unless he is held for some other lawful cause.

It is so ordered.

Right of appeal explained.

F.H. Mtulya

Judge

21.06.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant, Mr. Chacha Mwita @ Kisegi based at Kwitanga Prison in Kigoma Region and his learned counsel, Mr. Paul Kipeja, based in Mwanza Region and all heard the judgment through teleconference placed at this court within Bweri area of Musoma Municipality, Mara Region.

F.H. Mtulya

Judge

21.06.2022