IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MBEYA

HIGH COURT CRIMINAL APPEAL NO. 127 OF 2021

(Originating from the decision of the District Court of Mbarali at Rujewa in Criminal Case No. 94 of 2017)

SYLIVANUS MJIMU ----------APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGEMENT

Date of last order: 28.03.2022

Date of Judgement: 13.05.2022

Ebrahim, J.:

The appellant herein was initially charged way back in 2015 vide Criminal Case No. 44 of 2015 and convicted for the offence of rape contrary to **section 130 and 131 of the Penal Code Cap 16 RE 2002** (now 2019). On appeal, Criminal Appeal No. 44 of 2016, this court ordered a re-trial

after observing that the appellant was charged and convicted on non-existing law.

The case was re-tried, Criminal Case No. 94 of 2017, the appellant was again found guilty and he was accordingly convicted and sentenced to serve life imprisonment.

Aggrieved by the conviction and sentence, he has preferred the instant appeal raising six grounds of appeal that the victim failed to prove to be a truthful witness; there was no corroborative evidence on the evidence of the victim's grandmother; and the cautioned statement was recorded outside the prescribed period. He also faulted the voire-dire test and that the trial court did not consider his defence.

When the case was called for hearing, the appellant appeared in person unrepresented. The respondent was represented by Ms. Rose Mary Mgeni, learned State Attorney.

The appellant prayed to adopt his grounds of appeal and urged the court to consider them as they are.

In response, Ms. Mgeni pointed out a legal anomaly in collecting the evidence of the victim. That instead of the victim (10 years old) being led

to promise to tell the truth as per the requirement of the provisions of **section 127(2) of the Evidence Act as amended by Act No 2/2016**; the trial court conducted a voire dire (page 15 of the typed proceedings) and concluded that the child knows the meaning of telling the truth but does not understand the meaning of an oath. Hence, her evidence was taken unsworn. Ms. Mgeni thus prayed for the court to order a re-trial following such flout of procedure.

The appellant urged the court to set him free following the truth that the case had already been re-tried in 2016 on the mistakes done by the court.

Indeed, as the records would reveal, at the time of the incident, the victim was 8 years old and when she was adducing evidence in 2017, she was of a child of tender age of 10 years old. 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.

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).

For the above reasons and observations, 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 (the victim) only, quash the conviction and set aside the sentence meted by the trial court.

As alluded earlier, this court had once in 2017 ordered a re-trial following a defective charge. The appellant has urged the court to set him free because the mistakes done are not his doings. I have in mind the seriousness of the offence and the fact that the irregularities occasioned do not affect the evidence of other witnesses. Moreover, I am aware that the

irregularities on the procedure came along with the amendment of the law of which by then the court was still in the verge of understanding its interpretation and application.

It is on that background I find that this is one of the cases that justice would best be served if re-trial is ordered again in collecting the evidence of PW1 only who by now I believe she is over the tender age.

At the end result therefore, I remit the file to the District Court of Mbarali at Rujewa and order an expeditious retrial on the aspect of collecting the evidence of **PW1 only**. Then after, judgement be composed. The same be presided over by another magistrate with competent jurisdiction in consideration of the fact that the predecessor magistrate has been transferred to another duty station. The appellant shall continue to be in custody while awaiting a re-trial.

Accordingly ordered.

R.A. Ebrahim

Judge

Mbeya

13.05.2022

Date: 13.05.2022.

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

Appellant: Present.

For the Republic: Ms. Hanarose.

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 the Ms. Hanarose, State Attorney, Appellant and C/C in Chamber Court on 13/05/2022.

A.P. Scout

Ag-Deputy Registrar

13/05/2022

Court: Right of Appeal Explained.

A.P. Scout

Ag-Deputy Registrar

13/05/2022