IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 73 OF 2021

(Originating form the Criminal Case no 17 of 2020 in the District Court of Musoma at Musoma)

JULIUS CHING'OMBE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

8th & 30th March 2022

F.H. MAHIMBALI, J.:

The appellant Julius Chingómbe was sentenced to 30 years imprisonment after being convicted on the charged offence of statutory rape against the victim girl of 14 years contrary to section 130(1), (2) (e) and section 131 (1) of the Penal Code, Cap 16, R.E 2019.

It was alleged by the prosecution that the appellant on the 14th day of January 2020 at Tegeruka Village within Musoma District in Mara Region, the appellant had a carnal knowledge of the victim girl while on her way back from school. That it was around 13.00hrs, the victim girl on her way back from school, met the appellant along the way while only two, whereby the appellant took her by force to a nearby unfinished building. By that time, the appellant had held a panga and

knife and threatened the victim girl not to raise any alarm or else he would harm her. He then undressed the victim's pant, issued out his penis and inserted it against the victim girl's vagina. After he had finished his lavishness, he allowed the said victim girl to take her way. As she was then heading home while crying, on the way she met her father and informed him of the whole episode. Her father (PW2) testified how he met his daughter on the way while crying. He inquired what was wrong, she replied that she was raped by the appellant in the nearby unfinished building. She pointed it to him where shortly, he saw the appellant leaving from that unfinished building. He called him, but could not respond the call and wanted to run away. No sooner had he started running than when PW3 appeared from ahead, he arrested him as he was chasing him. He then informed the accusations against the appellant as has raped his daughter (PW1). They saw him his zip down and that his trouser had its whilst belt loose and hanging. They then took him to police station where he was detained for the said allegations and PF3 was given for the medical examination and treatment of the victim girl (PW1). Upon being examined by PW4 on 16th Jnauary 2021, it was established that the PW1's vagina was perforated, had bruises, blood and seminal fluids discharging from her vagina. He also ordered tests of HIV and any VDRL if has been affected, which all tested

negative. He tendered PF3 of the victim girl which was admitted as exhibit PE2.

On his defense testimony, the appellant denied the charge and disputed all that was laid against him. He admitted being arrested by PW2 and PW3 but at his home and not along the way as testified. His arrest was witnessed by DW2 who had visited him at his home on the material date and time.

Upon digest of the evidence of the case, the trial court convicted the appellant and sentenced him to 30 years imprisonment on the charged offence of statutory rape. Aggrieved by both conviction and sentence, the appellant has preferred this appeal based on five grounds of appeal namely;

1. *That, since legal representation is a right that the law recognizes, the trial court misdirected itself to thwart such a right without any explanation and order detailing why such a move and that the right of legal representation was seriously broken to the prejudice of the appellant.*
2. *That the trial court misdirected itself on points of facts and law when it failed to look at the evidence of the prosecution, critically and analytically as the same was marred with inconsistencies and contradictions.*
3. *That the trial Magistrate erred on points of law and facts, when she failed to evaluate evidence produced before her.*

4. *That since the accused (now appellant) had advanced a defence of alibi, the trial Magistrate erred on point of law when she failed totally to consider it.*
5. *That the trial magistrate misdirected herself to convict the accused (now appellant) before considering his defence and thus acted biasedly against him.*

During the hearing of appeal, Mr. Makowe, learned advocate appeared for the appellant whereas Mr. Malekela learned state attorney who resisted the appeal, appeared for the respondent.

In arguing the appeal, Mr. Makowe with the leave of the Court, the 2nd and 3rd grounds of appeal were jointly argued, and so was for the 4th and 5th grounds of appeal. The 1st ground of appeal was argued separately.

With the 2nd and 3rd grounds of appeal, concern about evaluation and analysis of the whole evidence. Mr. Makowe's argument has been this that the trial magistrate failed to evaluate properly the evidence by prosecution. It is the prosecution's evidence that this victim was raped noon time while coming from school. The records don't establish as to what extent the said building (scene) is isolated from the other residents. He doubted on the truthfulness of the prosecution's evidence via PW1, PW2 and PW3 for failure to state the whole circumstances of the said case. He further queried if the evidence of the victim girl (PW1)

was properly recorded/taken considering the fact that she is a child of tender age of 14 years who testified without giving promise to tell the truth pursuant to section 127 (2) of the TEA (see page 9 of the typed proceedings). Giving evidence on oath is not bad but promise to tell the truth is paramount to child witnesses. He referred this Court to the case of **Masanja Maunga Vs Republic**, Criminal Appeal No. 378 of 2018 – Dar es Salaam (unreported) whereby the Court of Appeal had pointed out how the evidence of a child witness must comply with the provision of section 127 (2) of the Tanzania Evidence Act. The omission is fatal. This is Contrary to what is stated by the trial magistrate at page 5 of the typed judgment that she had no doubt with the witnesses' credence. As the court's record is silent on that, it cannot be assumed on one's credence. In the case of **Manyaki Wambura @ Manyanki vs Republic,** Criminal Appeal No 225 of 2016 – Mwanza (unreported at page 12) the Court of Appeal insisted on the clarity of the Court's record. The same should not be assumed. He insisted that as the evidence by PW1 didn't comply with the law, the evidence was subject to expunge. Upon that expunge, he argued that there is nothing valuable to hold the conviction.

With the first ground of appeal, it is about the right to legal representation. Mr. Makowe submitted that according to court record,

the accused person was at one time under legal representation (12 -13 proceedings) as per proceedings dated 18/8/2020. There was Imani Mapunda advocate for Masudi Masudi. The subsequent proceedings proceeded without the attendance of the said advocate. On the absence of clear order in the court file, proceeding with the trial in the absence of the introduced advocate amounted to denial of his guaranteed right of right to legal representation. As the court record is silent on that, suggests that right was not fully accorded. By not being accorded, suggests that it was violated. In the absence of any court order, that was improper. He relied his stance in the case of **Muhamed Abadal Mkuwili vs Republic,** Criminal Appeal No. 235 of 2012 CAT at Dar es Salaam (page 130) provided that there was indicated to be defense lawyer, the court was precluded from proceedings with the case without getting satisfaction of the accused's attorney. That was unfair trial. He was therefore of the firm view that the accused person was denied his right of legal representation.

On 5th and 6th grounds of appeal, the argument is the appellant raised a defense of alibi. How was this evidence considered by the trial magistrate is wanting. Mr. Makowe was of the opinion that the appellant's defense was completely not considered. As he was not at home and that he had witnesses to prove his evidence ought to have

been discussed and considered by the trial magistrate. Failure to consider the defense case is fatal, he relied his stance in the case of **James Bulolo vs Republic** [1991] T. L. R. 283.

Responding to the submissions made by Mr. Makowe, Mr. Malekela learned state attorney submitted as follows:

On failure to evaluate the case's evidence, he admitted that there was no legal compliance to section 127 (2) of the TEA, Cap 6. Nevertheless, he was of the different opinion that reading section 127 (6) of the TEA, the credibility of that child of tender age as witness is still relevant. Thus, as PW1 testified under oath, her evidence is then tested on credence pursuant to section 127 (6) and not under 127 (2) of TEA.

On the right to legal representation he observed that in the court record apart from the proceedings transpiring on pages 12 and 13, there is nowhere seen that the accused person has ever informed the court that he had legal representation. As the accused person had been attending to court in person, a mere appearance of Advocate Iman saying that he was holding brief of another advocate who himself never informed the court so, that right was not automatic. Otherwise as there was active attendance of the appellant at the trial court, he was not

prejudiced at all. Further, the cited case is irrelevant in the circumstances of this case as in that case dealt with witnesses while this case dealt with advocate. These are two different scenarios.

Lastly, on ground 4 and 5 (defense of alibi and evaluation of defense evidence) he submitted that the defense of alibi is provided under section 194 (4) of the CPA. There must be due notice to court and the adverse party. Otherwise, one ought to provide particulars of the alibi. None of the two has been provided by the appellant. Secondly the defense witnesses on that issue of alibi are contradictory. That is equivalent to lie. Thus, the decision was properly analysed.

That said, he prayed that the appeal be dismissed for lack of sufficient ground to alter the same.

In his rejoinder submission, Mr. Makowe learned advocate submitted that in his understanding of section 127 (6) of the TEA is not an optional provision or substitute to the requirement of promise if one gives evidence under oath. He was of the firm view that, non-compliance to section 127 (2) is fatal as held so in the case of Masanja Masunga (supra).

With the right to legal representation, he insisted that the learned state attorney had misunderstood his point. He clarified that, so long as

there was in court record that Iman advocate held brief of Mr. Mapunda, then that was sufficient notice of legal representation. That was a legal error for the trial court to proceed without taking into account of the right to legal representation.

Lastly, is consideration of a defense testimony. It is true that there was no due notice of alibi. However, the whole defense of the accused person has not been considered. As he was not at the scene, the prosecution's evidence is also confusing. Thus, these doubts must have been resolved to the benefit of the accused person. This suggests, he was not fairly treated. It was his prayer that the appeal be allowed.

Having heard the rival submissions by both parties, the vital question now is whether the appeal is meritorious as argued. In reaching this end, I will digest the submissions by the parties against the grounds of appeal, evidence in record and the findings of the trial court.

First and foremost is whether the evidence of PW1 being a child witness of tender age was correctly taken pursuant to the law. The relevant section here is section 127(2) of the Tanzania Evidence Act, Cap 6 which provides:

> *"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 added]*

This is the provision of law Mr. Makowe, learned advocate has made reference in challenging the decision of the trial court, that it has not been complied with by the trial magistrate. That there was no promise to tell the truth by PW1 before the reception of her evidence. Mr. Malekela learned state attorney on the other hand first conceded that the said legal requirement has not been complied with. However, he added that non-compliance to it does not result to the expunging the same, but rather the Court can take reliance subsection 6 of Section 127 of the Tanzania Evidence Act and give credence to what has been testified by the witness of tender age. For better of understanding what the cited section provides, I hereby reproduce it:

*"(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, **the court shall receive the evidence**, and may, **after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict**, if for reasons to be recorded in the proceedings, the court is*

satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth" [Emphasis added].

My understanding of section 127(2) of Cap 6, is making strict compliance to the reception of evidence of a child of tender age only upon making a promise of telling the truth. In the absence of that promise, the evidence is liable to be expunged.

On the other hand, what is provided under section 127 (6) of Cap 6, is this that the evidence of a child of tender age who is the victim of the said sexual offence is actionable on conviction even if is not corroborated by any other witness provided that the court is satisfied that the said child witness (victim) says nothing but the truth. To my understanding then, if a child of tender age gives testimony, if she is a victim, then in the absence of any other evidence, if the court is satisfied that the said victim child says nothing but the truth, her/his evidence is incriminating against the sexual doer even if not corroborated. What is stated in this provision is exactly what is restated in the case of **Selemani Maumba vs Republic,** amongst other cases. The argument that the PW1 gave testimony on oath thus justified her evidence, was once discussed by the Court of Appeal in the case of **Masanja Makunga vs Republic**, Criminal Appeal No 378 of 2018 CAT at Dar es

Salaam distinguishing it with a similar scenario where the child witness testified under oath but after voire dire test (old position). The latter situation was considered in the case of **Ally Ngozi vs Republic**, Criminal Appeal No 216 of 2018. In this case it was emphasized that despite swearing in of a child of tender age, if no there is promise to say truth the evidence is valueless. However, even if the said evidence is incriminating and the Court is satisfied so, in the absence of promise to tell the truth, that evidence is legally ineffectual as it has no any legal value.

As well stated by Mr. Makowe, senior counsel compliance to that legal requirement is not optional and in anyway cannot be substituted with credence. In this scenario the credence is valuable upon compliance to the first condition of promise to tell the truth.

The proceedings regarding the testimony of PW1 (a child of tender age) appears to be taken from page 17 – 19. She is recorded being 14 years, a pupil of standard six, Mkwaya and Christian, she swears. The PE1 exhibit describes her being born in 2006. As that fact was not disputed, we consider her being a child of tender age in line with section 127(4) of Cap 6 that the expression "child of tender age" means a child whose apparent age is not more than fourteen years.

The proper interpretation of compliance to section 127(2) was once given by the Court of Appeal in the case of **Selemani Moses Sotel @ White V. Republic**, Criminal Appeal No. 385 of 2018, while making reference the case of **Godfrey Wilson V. Republic,** Criminal Appeal No. 168 of 2018. It stated that it is clear from the amendment to s. 127 of the Evidence Act that the purpose was to do away with the old procedure of conducting voiredire examination on the child witness. That procedure was intended to ascertain first, whether the child understands the nature of oath and whether or not he or she has sufficient intelligence to justify reception of the evidence of a child witness. Obviously, the provision is silent on the procedure which a trial court should apply to decide whether a child witness should give evidence on oath or affirmation or upon a promise to tell the truth and on undertaking not to tell lies. Addressing that lacuna, the Court had this to say while making reference to the case of **Godfrey Wilson V. Republic**, Criminal Appeal No. 168 of 2018

> "*The question, however, would be on how to reach at that stage. 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 o f the case as follows:*
>
> *1. The age o f the child.*

2. *The religion which the child professes and whether she/he understands the nature of oath.*

3. *Whether or not* ***the child promises*** *to tell the truth and not to tell lies."*

See also Masanja Makunga vs Republic, Criminal Appeal No 378 of 2018, CAT at Dar es Salaam.

This then ought to have been considered by the trial magistrate when receiving the evidence of a child of tender age as witness. In the current case, the said simplified questions leading to the promise of telling the truth don't appear in the proceedings. What is evident is that the trial magistrate skipped her mind to consider the said witness not as a child who was supposed prior to the reception of her evidence to give promise to tell the truth. That said, there was no legal promise by the said child witness. Her evidence as thus has not qualified for the reception as it was irregularly received. It ought to have been discarded as I hereby do.

Having discarded the PW1's evidence, the remaining evidence falls short of range to maintain the conviction of the appellant. This is because, PW2 and PW3 are just arresting persons not upon witnessing the act but sometimes later. Furthermore, PW4's testimony tells that he

examined the victim girl on 16/01/2020 and not 14/01/2020 as alleged by PW2.

All said, I allow this appeal for this one reason only as it is capable of disposing of this appeal. I thus quash the conviction and set aside the sentence. The appellant should be released forthwith from prison unless he is otherwise lawfully held.

DATED at MUSOMA this 30th day of March, 2022.

F.H. Mahimbali

Judge

Court: Judgment delivered this 30th day of March, 2022 in the presence of the Appellant and represented by Helena Mabula, advocate for the appellant, Frnak Nchanila, state attorney for the respondent and Mr. Gidion Mugoa – RMA

Right of appeal is explained.

F.H. Mahimbali

Judge

30/03/2022