

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO.75 OF 2021

(Originating from Criminal Case No. 13 of 2017 of Kahama District Court)

JUMANNE KADAMA @ MASUNGA APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

10th & 13th May 2022

MKWIZU, J:

This is an appeal arising from Criminal case No. 13 of 2017 of Kahama District Court where the appellant was charged with of offence of **UNNATURAL OFFENCE** contrary to section 154 (1) (a) of the Penal Code [Cap 16 RE 2002]. The particulars of the offence in the charge sheet disclosed that the appellant on 13th January, 2017 at Ilola Village within Shinyanga District in Shinyanga Region did have carnal knowledge of a girl 8 year old against the order of nature. The trial court went into full trial and found the prosecution proved the case beyond reasonable doubt. It proceeded into convicting the appellant and sentencing him to 30 years jail term.

Aggrieved, appellant lodged nine (9) grounds of appeal with one main complaint that the prosecution failed to prove the case beyond reasonable doubts.

When this appeal was called on for hearing, appellant appeared in person, unrepresented and the respondent/Republic was represented by Nestory Mwenda State Attorney. Arguing his appeal, appellant prayed the court to consider his grounds of appeal and set him free.

The appeal was supported by the Learned State Attorney. He said, the prosecution evidence is weak to support the appellants conviction. His support of the appeal was grounded on three reasons, one, that exhibit PE1 at page 8 was tendered by the prosecutor who is not a witness to tender exhibit in court, so the tendered exhibit is liable to be expunged from the records. He cited the case of **Frank Masawe V. R**, Criminal Appeal No. 302 of 2012 (Unreported). Two, that the trial magistrate conducted voire dire test to the witness of tender age instead of requiring her to promise to tell the truth and not lies the contrary to section 127 (2) of the evidence Act. He on this invited the court to expunge the evidence of PW2 from the records. And lastly, that the remaining evidence of PW1, victim's mother and PW3 by itself do not prove the offence against the appellant.

I have evaluated the records together with the parties' submissions. I am in all fours with the learned State Attorney that the appeal is justified. As

rightly submitted, exhibit PE1, the PF3 was tendered by the prosecutor who is not a witness. The proceedings at page 8 of the records reads:

"Pros: I pray to tender a PF3 under section 240(3) of the CPA Cap 20 RE 2002

Accused: I have no objection

Court: PF3 received as PE1 under section 240 (3) of the CPA Cap 20 RE 2002

SGD: N.S. GASABILE-RM

2/5/2017"

The cited case of **Frank Masawe vs The Republic** (Supra) held.

"Since the prosecutor was not a witness, he could not be examined or cross-examined on a short gun he tendered. It is also curious on how the trial court admitted a short gun from a person who was not a witness and who could not validly examine or cross-examined by the appellant..."

Even if, the prosecution could have been a proper person to tender the said exhibit, still its admission could be faulted on two other aspects, **Firstly**, is failure to have its contents read out to the accused to give him an opportunity of understanding its substance. Reading closely the proceedings, after its admission, the trial court proceeded into allowing the appellant to cross examine the witness (Pw1) without unveiling to him the contents of the exhibit. That omission is fatal as it deprived the appellant

his right to know the nature and substance of the exhibit in question as stated in **Robson Mwanjisi and 3 others v Republic** (2003) T.L.R 218.

Secondly, the appellant was not addressed to his right under section 240 (3) of the CPA, (Cap 20 RE 2019) to have the person who prepared the PF3 summoned for cross examination. The section above requires the trial court to inform the appellant of his right to require the person who made the report to be summoned for cross-examination. The section reads

*240 (3) When any such report is received in evidence, the court may, if it thinks fit, and shall if so requested by the accused or his advocate, summon and examine or make available for cross-examination, the person who made the report. **The court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.** (Emphasis supplied)*

This was not done, thereby offending the relevant mandatory provisions of the law. The above taken cumulatively, I find the errors committed fatal leading to the expunging of the exhibit PE1 (the PF3) from the records as suggested by the State Attorney.

The second faulty on the records is on the contravention of section 127 (2) of the Evidence Act (Cap 6 RE 2019). The learned State Attorney blamed

the trial magistrate for conducting a *viore dire* examination, in disregard of the current position of the law. Indeed, the current section 127 of the evidence removed the requirements of *viore dire* examination. The current position dictates that if the child witness does not understand the nature of oath, she or he can still give evidence without taking an oath or making an affirmation but must promise to tell the truth and not to tell lies. The section reads:

"127 (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 any lies."

See also **Msiba Leonard Mchere Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015 (unreported). The guideline on how to arrive into a conclusion that the child of tender age will give evidence under oath, or affirmation, or otherwise was given by the Court of Appeal in the case of **Geoffrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported), where it was stated:

" 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 o f the child.*
- 2. The religion which the child professes and whether he/she understands the nature of oath.*
- 3. Whether or not the child promises to tell the truth and*

not to tell lies."

So, the court is required to ask few relevant questions so as to determine whether or not the child witness understands the nature of oath so as to allow him or her give sworn evidence depending on the nature of his belief/ religion. And in case, the child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies.

In this case, the trial magistrate seemed to have not been aware of this provision of the law. He at page 9 of the trial courts explicitly conducted a vioré dire examination and the interview with the witness was so specifically titled. At the end of his interview, he concluded that :

"Court: The Child explaining herself very well and she understood the question set to her but she failed to answer or understated what is oath so she will give unsworn evidence"

There is no indication at all that the child was led to promise to tell the court the truth and not lies as envisaged under the provisions of section 127 (2) of the Evidence Act Above. Like the learned State Attorney, iam convinced that, PW2's evidence was taken contrary to section 127 (2) of the Evidence Act. The omission is fatal and for that reason PW2's evidence is expunged from the record.

Since in our case, PW2 is a star witness on whose testimony the prosecution's case would stand or fall and since her evidence has been excluded from the records, I find nothing upon which the appellants conviction would base.

The appeal is therefore allowed, conviction is quashed and the sentence of 30 year imprisonment meted against the appellant is set aside. , I order an immediately release of the appellant from prison unless otherwise lawful held. It is so ordered.

DATED at **Shinyanga** this 13th day of **May** 2022.


E.Y. MKWIZU
JUDGE
13/05/2022

COURT: Right of appeal explained.


E.Y. MKWIZU
JUDGE
13/05/2022