THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CRIMINAL APPEAL NO. 69 OF 2021

(Originating from District Court of Dodoma at Dodoma in Criminal Case No. 52/2020)

SALUM JUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Judgment: 07/11/2022

Mambi, J.

In the District Court of Dodoma at Dodoma the appellant **SALUM JUMA** was charged with commission of unnatural offence contrary to section 154(1)(a) of the Penal Code [Cap 16 R: E 2002]. The trial court found the accused guilty as charged. The accused having been convicted was sentenced to serve a life imprisonment sentence.

Aggrieved, the accused appealed to this court challenging the decision of the trial court. In his appeal the appellant preferred seven grounds of appeal.

During hearing, the appellant appeared unrepresented. He briefly stated that he relied on his petition of appeal.

Responding to the grounds of appeal, the learned State Attorney Mr. Chaula, for the Republic, submitted that the prosecution proved the case beyond reasonable doubt. He argued that the evidence of the victim and other witnesses is clear that the appellant actually sodomised the victim.

Having summarised submission from both the defence and prosecution, I now revert to the appeal at hand. I have perused the trial court proceedings and there is nowhere to show that the court recorded the promise of the child. In this regard, it will be hard to determine if the child understood the meaning of telling the truth. Failure to record if the child has promised to tell the truth and failure of the court to ask the child the proper questions related to the child understanding of the importance of speaking the truth meant that the court was not able to correctly conclude that the victim (the child) had sufficient understanding on the nature of oath and importance of telling the truth. This shows that the court and the

prosecution did not lead the child to promise that she will speak the truth in her evidence. The practice is that the prosecution or the court need to lead the child in making her promise to tell the truth in her unsworn evidence and the court must record the words uttered by the child.

I have thoroughly gone through the trial court records such as proceedings. The records shows that the trial magistrate did not record the questions he asked the victim who was the child of the tender years. The provisions of the law require the magistrate to ask the child of tender age some question to test her ability of telling the truth and understating the oath. The magistrate is required to record all questions he asked in line with answers by the child of below fourteen years old. It is not enough to just record answers of the child but the question and promise of the child must be recorded. Failure to do so implies that the trial Magistrate acted on wrong principles of the law. This does not in any way reflect if the child understands the nature of an oath or duty of speaking the truth, which renders the proceedings on that part a nullity.

It is trite law, where the witness is below fourteen years old, she must be asked some simple questions and she must promise to tell the truth. The requirement is found under section 27 (2) of the Evidence Act, Cap 6

[R.E2002]. It is trite law that where there is complete omission by the trial court to correctly and properly address itself to the requirements of the provisions of the law governing the competency of a child of tender years, the resulting testimony is to be discounted. See the decision of the court in ***MOHAMED SAINYENYE V. REPUBLIC CRIMINAL APPEAL NO.57 OF 2010 CAT*** (Unreported) in which the court insisted where the prosecution relies on the evidence of child of tender years who does not understand the nature of the oath, the court must comply with provision of the Evidence Act which has now been amended by Act No.2 of 2016.

It is on the records that the child was neither asked to promise to tell the truth nor asked the question that could make one to conclude that the child was intelligent enough to tell the truth. In this regard, my mind makes me to believe that the legal procedures as laid down under section 26 of the Written Laws (Miscellaneous Amendment) Act No.2 of 2016 read to gather with section 127of the Evidence Act, Cap 6 [R.E.2019] were not complied with. Now, under that circumstance can it be said that the evidence of PW1 was properly received and relied upon? My findings and observations reveal that the evidence of a child of tender age was improperly received and wrongly acted upon in convicting the appellant.

Having observed those irregularities, I don't see the need of embarking on the grounds of appeal filed by the appellant since the non-compliance with the provisions of the law suffices to render the entire proceedings and judgment nullity. It is obvious that the trial Magistrate acted on wrong principles of the law. The magistrate in my considered view failed to comply with the provisions of the law which renders the proceedings a nullity. The Court of Appeal in ***Kimbute Otinieli V. Republic,*** Criminal Appeal No.300 of 2011 underscored that:

> *"Where there is complete omission by the trial court to correctly and properly address itself to the provision of the law section governing the competency of a child of tender years, the resulting testimony is to be discounted".*

Reference can also be made to the decision of the Court of appeal of Tanzania in ***Augustino Lyanga V. R, Criminal Appeal No. 105 of 1991***. In this case, the court observed that:-

> *"a court may only receive evidence of a child of tender years who does not understand the nature of an oath if in the opinion of the court the child is* ***possessed of sufficient intelligence*** *and* ***understands*** *the duty of speaking the truth. These requirements must be recorded in the proceedings ....." emphasis supplied).*

Having made my observations from the trial records, I am of the considered view that the two requirements (***possession of sufficient intelligence*** *and* ***understanding*** *the duty of speaking the truth)* are conditional precedent to receipt of evidence from a child of tender years whose evidence has not been received on oath or affirmation. See also ***Kimbute Otinieli V. Republic,*** **(supra).**

Now having observed those serious irregularities, the question before me is to determine what should be the best way to deal with this matter in the interest of justice. In my considered view the best way to deal with this matter is by way of revision. In this regard I wish to invoke section 272 and 273 of the Criminal Procedure Act, Cap 20 [R.E.2019] which empowers this court to exercise its revision powers to examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. This in accordance with section 372 of the Act. Section 373 further empowers the court that in the case of any proceedings in a subordinate court, the record of which comes to its knowledge, the High Court may in the case of conviction, exercise any of

the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence. I wish to refer section ***372*** of the Criminal Procedure Act, Cap 20 [R.E.2019] as follows:

> *"**372.** The High Court may call for and **examine** the record of any criminal proceedings before any subordinate court for **the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed,** and as to the regularity of any proceedings of any subordinate court.*
>
> Furthermore, section 373 of the same Act provides that:
>
> *"(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise **comes to its knowledge**, the High Court may–*
>
> *(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may* enhance the sentence*; or*
>
> *(b) in the case of any other order other than an order of acquittal, **alter or reverse such order**, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal.*
>
> *(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a*

magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection.

(3) ...

(4) Nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to do in the interest of justice

(5)...."

Reading between the lines on the above provisions of the law, it empowers this Court wide supervisory and revisionary powers over any matter from the lower courts where it appears that there are illegalities or impropriety of proceedings that are likely to lead to miscarriage of justice. Reference can also be made to other laws. In the regard I will refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2019] which clearly provides that:

"44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers* ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:"

From the above findings and reasoning, I hold that from the above provision of the law including various decision by the court, this court is right in exercising its supervisory and revisionary power on the matter at hand. The law is clear it is proper for this court to invoke revisional powers instead of appeal save in exception cases.

Having observed those irregularities that are incurable will it be justice to remit the file back for proper conviction?. I wish to refer the case of ***Fatehali Manji V. R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba V. R Criminal Appeal No. 157B OF 2013***, where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not

necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person...***"

I wish also to refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2019] and see what would be the proper order this court can make in the interest of justice. It is a settled law that failure to comply with the mandatory requirement of the law, is a fatal and incurable irregularity, which renders the purported judgment incapable of being upheld by the High Court in the exercise of its appellate jurisdiction. In my view an order for retrial would be more justice and the interests of justice requires to do so. I am of the considered view that, an order for retrial will not cause any likely of injustice to the appellant.

In the circumstances I therefore remit the file back to the trial court for it to properly deal with the evidence of the victim (PW1) who was the child of tender age in line with the provision of the law. Where it appear that the trial magistrate has ceased jurisdiction for one reason or another, in terms of section 214 (1) of the CPA another magistrate should be assigned the case to proceed with matter. The Trial Court should consider this matter as priority on and deal with it immediately within a reasonable time to avoid

any injustice to the appellant resulting from any delay. It should be noted that all appeals that are remitted back for proper proceedings need to be dealt expeditiously within a reasonable time.

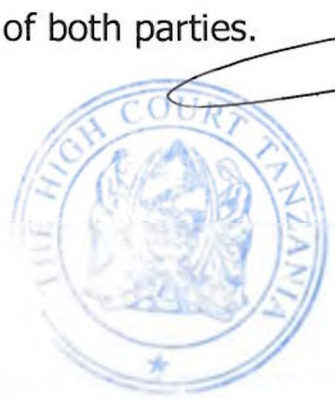
With regard to the position of the appellant I order him to remain in custody pending the outcome of the matter. This means that the evidence of the child (victim) shall be dealt afresh in line with provisions of the law. Depending on the outcome of the new judgment, the appellant shall be at liberty to start afresh the process of appeal.

A. J. MAMBI

JUDGE

07/11/2022

Judgment delivered electronically this 07th day of November, 2022 in presence of both parties.



A. J. MAMBI

JUDGE

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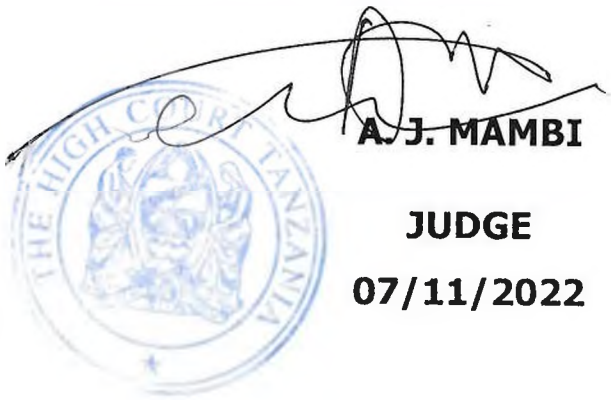
Right of Appeal explained.



A.J. MAMBI

JUDGE

07/11/2022