IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 151 OF 2021

(Originating from Criminal Case 58 of 2020, in the District Court of Morogoro, at Morogoro)

GWAMAKA JOMAHA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

29th April, & 1st June, 2022

CHABA, J.

Before the District Court of Morogoro, at Morogoro the appellant, Gwamaka Jomaha was charged and convicted on two offences namely, 1st Count: Rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code [Cap. 16 R. E, 2002], now [R. E, 2022) and the 2ND Count: Grave Sexual Abuse Contrary to section 138 C (1) (a) and (2) (b) of the Penal Code [Cap. 16 R. E, 2002], now [R. E, 2019). The victim of the alleged offences is a girl aged five years old. Her name is anonymised as "the victim".

It was alleged before the trial court that on 21st day of December, 2019 at Sabasaba street within Morogoro Municipality the appellant had a carnal knowledge of the victim, a girl of 5 years old and that on the same date and place, for sexual gratification he inserted his male genital organ and fingers onto the private parts of the victim.

To prove the case against the appellant, the prosecution paraded a total of three (3) witnesses whose evidence in general glances as follows:

PW1, Ms. Mariam Juma is the mother of the victim (PW2), who at the time of the alleged incident was a Standard One Pupil at K/Ndege Primary School. The appellant was a teacher and running a tuition centre at Sabasaba in Morogoro Municipality. Hence, the appellant, PW1 and the victim knew each other. PW1 agreed with the appellant that the victim would attend extra studies at the appellant's Tuition Centre. This was manifested, where the victim attended to the tuition centre for almost three weeks. She was returning home alone, but sometimes PW1 went to pick the victim.

On 21st December, 2019 at around 14:00 hours, PW1 went at the appellant's tuition centre for the purpose of picking the victim back home after noticing that she was late for more than half an hour. When she reached there, there were no other pupils around. She knocked to the office once without any reply. When knocked twice the appellant replied and PW1 asked him of the victim's whereabouts. The appellant replied that the victim was just around. But by persistently asking the appellant, he then told PW1 that the victim was in the toilet. She then asked the location of the said toilet, but the victim herself replied "Mimi hapa" and emerged. When she asked the victim as to why she did not return home, she did not explain. By the look, the victim was unhappy. She took her back home; she questioned the victim why she was unhappy and sad. The victim hesitated for a while, stating her fear of being beaten. Upon a promise that she would not punish her, the victim stated that when she was at the tuition class the appellant undressed her and inserted his fingers in her vagina. She narrated, the appellant carried her on his thighs, unzipped his trouser and insert his penis into the victim's private part (vagina) while exhibiting to her a pornographic material on his phone of a man and a woman naked having sex and incited her to see what the people were doing. The gist of

this story is also carried by the testimony of the victim before the trial court who featured as PW2.

Without delay, PW1 phoned her husband and notified him accordingly. Afterward, the incident was reported to the Street Chairman, and to the nearest police station where the PF3 was issued. The victim was taken to Morogoro Regional Hospital. According to the PF3 which was admitted as exhibit PE1, it shows that there were bruises at the private parts of the victim, but her hymen was intact and no infection was medically discovered. The evidence of the medical doctor who featured at trial as PW3, one Dr. Kalista Mayomba also testified to that effect.

The appellant defended himself on oath as DW1 without other witnesses. He firstly denied to have committed the offence though admitting to have had the agreement with PW1 of teaching the victim on extra studies. On the fateful date 21/12/2019, the victim attended at the tuition centre for her studies, he taught her and marked her work then let her go home. But before leaving, the victim asked for a permission to go toilet, which he allowed. After a while, PW1 came and picked the victim as stated by PW1. After some conversation, PW1 left. Later, the victim's parents along with other persons came and took him to police station. However, DW1 denied having involved to commit the offence, and further denied that he did not show the victim any pornographic photos but said PW1 was using his phone. This was the appellant's defence before the trial court.

Having heard the evidence from both sides, the trial court was satisfied with the prosecution's evidence and the appellant's defence was disbelieved, hence convicted him and sentenced to suffer life imprisonment in respect the 1st Count (for the offence of rape) and twenty years for the

2nd Count, the offence of grave sexual abuse, respectively. The appellant was aggrieved by both conviction and sentences, hence this appeal containing six grounds: -

1) That, the learned trial SRM erred in law and fact to accord enough weight to evidence of the victim (PW2) that was recorded contrary to section 127 (2) of the evidence Act (Cap. 6 R. E, 2019) as simplified questions were not asked to her to determine: -
   i) Whether she understood the nature of an affirmation and ground to testify without being affirmed.
   ii) How she reached at promising to tell the truth and not to tell lies.

2) That, the learned trial SRM misdirected by entertaining the charge and proceedings with the hearing of the case, without considering that the Act referred in it was repealed, and new Revised Edition was in operation since November, 2019.
3) That, the learned trial SRM erred in law and fact to believe incredible and unreliable of the victim (PW2) whose evidence appear to contradict itself between evidence in chief and during cross examination which implies that she was taught how to implicate the appellant.
4) That, the learned trial SRM erred in law and fact to believe the unjustified and uncorroborated evidence of victim's mother (PW1) as:
   i) PW1 failed to explain if she physically inspected the victim's vagina to see whether she had indicators of being immediately raped.

ii) PW1 who walked to their home with the victim, failed to explain the walking status of the victim, if at all she was recently raped.

5) That, the learned trial SRM erred in law and fact to convict the appellant without considering the defence evidence that raised reasonable doubt to the prosecution case.

6) That, the learned trial SRM erred in law and fact to hold that the case was proved beyond reasonable doubts, while: -

i) The doctor (PW3) evidence didn't explain the causes of bruises on the victim's vagina whether due to being raped or any other diseases like fungus.

ii) There is contradiction in time (period) of the fateful day when the incident took place.

Based on the above grounds of appeal, the appellants prayed this court to allow the appeal, quash the conviction, set aside the sentences and set him at liberty. As the appellant wished to be present at the hearing of his appeal, he appeared under custody and the matter was scheduled to be heard by way written submissions. On 08/12/2021, both parties appeared. Whereas Mr. Edigar Bantulaki entered appearance for the Republic, he prayed that this matter be heard by way of written submissions and consented by the appellant. Indeed, the prayer was granted as prayed. According to the court's scheduling orders, the appellant to file his written submission in chief on or before 21/12/2021 and the respondent had to file reply on or before 30/12/2021. Rejoinder (if any) had to be filed by the Respondent/Republic on or before 06/01/2022. The appellant complied with the court's scheduling orders but the Respondent/Republic did not heed to. The matter was called on five

diverse dates, but without the Respondent/Republic filing their reply despite a kind reminder. This court decided the matter should come for judgment without the Respondent's reply to written submission in chief.

Having considered the trial court proceedings and the judgment thereof, and upon considered the grounds of appeal advanced by the appellant and further painstakingly considered the appellant's written submission in chief which were not disputed by the respondent/Republic, I find it apposite to deal with the present appeal by considering each ground of appeal in seriatim.

Starting with the first ground, the same stand on the issue of procedural propriety. The appellant complaint is that the trial court did not comply with the provisions of section 127 (2) of the Evidence Act [Cap. 6 R. E, 2019] now (R. E, 2022]. The law provides that:

> *"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"*

For the sake of appreciating what transpired on 19/05/2020 when the testimony of the victim (PW2) was recorded, I have preferred to reproduce relevant part of the trial court's proceedings at page 17 of the word - processed copy of the proceeding. It is read: -

> "PW2: The Victim, resides in Sabasaba, of 6 years old, a student at K/Ndege Primary School, Standard One, then: -

Court: This court addressed witness to promise this court that she will adduce the truth evidence.

Witness: I promise this court that I will adduce the truth evidence.

Court: Since witness promise to adduce the truth evidence, hearing continue.

S. 127 (2) of TEA R. E, 2016 c/w."

At the outset, I wish to state that it is a requirement of the law that a child witness of tender age, must firstly be examined to test his competence and know whether he or she understands the meaning and nature of an oath before it is concluded that his or her evidence is to be recorded after giving a promise to the court to tell the truth and not tell lies. The court of Appeal of Tanzania in the case of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 held *inter alia* that: -

> *"Section 127 (2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age".*

From the record, it is evident that the trial court complied with this requirement though partially. I say so because, the record as alluded to above, displays that the witness was addressed only to the effect that she should adduce "the evidence of truth" that is why she promised the same, that she will adduce "the evidence of truth". But what the law requires, from its letters, as above quoted is to promise to tell the truth to the court and not to tell lies. I am holding a strong stance that a

promise to tell the truth only or a promise not to tell lies only would not be a full compliance of the legal requirement. The law does not allow adherence in splits. This is the proper interpretation of section 127 (2) of the Evidence Act (Supra). I have made a meditative reference to another decision of the Court of Appeal of Tanzania in the case of **John Mkorongo James v. Republic,** Criminal Appeal No. 498 of 2020, CAT, Bukoba. In this case, the Court held inter-alia that: -

> *"PW1's promise was incomplete, and it was in form of an indirect or reported speech instead of a direct speech. It was incomplete because while section 127 (2) of the Evidence Act, require that the promise should be in telling the truth and not telling any lies, what PW1 is said to have promised is only to tell the truth. He did not promise not to tell any lies. It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete."*

From the above findings of the Apex Court and the interpretation of the provisions of the law under section 27 (2) of the Evidence Act (Supra), it is my considered opinion that the trial court did not adhere to the spirit of the law and finally follow the proper procedure required by the law before letting the child witness of tender age testify before it. This is only one aspect. The other complaint raised by the appellant that needs attention of this court and which must be addressed as well in this first issue, concerned with the question how the witness (victim) reached her promised to tell the court the truth. Whether or not the trial court was required to examine the witness of her relevant understanding

before requiring her promise to tell the truth and not telling lies. If it is in affirmative, whether the trial court adhered to the legal requirement.

Though section 127 of the Evidence Act was amended to do away with what was formerly known as *voir dire* test, there is an identical requirement in the new amendment imported by Written Laws (Miscellaneous Amendment) (No. 2) Act, 2016 (Act No. 4 of 2016) which now features under section 127 (2) of the R. E, 2022. Even if the same allows a child witness of tender age to give evidence without an oath or affirmation, a reasonable interpretation is that the court cannot just opt for the witness to give testimony with or without oath or affirmation, but it must test his or her status first. Depending on the circumstance, let section 127 (2) of the Evidence Act come into play accordingly. This section therefore should be interpreted while contemplating in mind the provisions of section 198 of the Criminal Procedure Act [Cap. 20 R. E, 2022]. The provision of the law provides: -

> *"Section 198 (1) - Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

In this case, the trial court was duty bound to examine the witness (victim) before asking her to make a promise. In **John Mkorongo's case** (Supra) the Court of Appeal in expressing its interpretation of section 127 of The Evidence Act among other matters, observed the following:

"The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court to tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court tell the truth and not tell lies."

As hinted above, the foregoing excerpt from the decision of our Apex Court gives strength to the reasoning made above. With the amendment of section 127 of The Evidence Act (supra), it does not mean that all child witnesses of tender age must give evidence without an oath or affirmation, but instead it should be treated as an exception to the general rule requiring every witness to be under oath or affirmation before examination. Otherwise, a child witness of tender age may appear to be fit for affirmation or oath before testifying. Again, this reminds this court of the observation made by the Court of Appeal in **John Mkorongo's** case, where it stated that: -

"It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is brought before the court

as a witness is required to be examined first, albeit in brief, to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court to tell the truth and not to tell lies as per section 127 (2) of the Evidence Act."

From the above, it was imperatively necessary for the trial court to examine the victim, featured as PW2 and make its finding in respect of her normal understanding in relation to giving testimony in the case. But the trial court, as the court record demonstrations did not follow the requirements of the law. The first ground of appeal is therefore meritorious and thus allowed.

Due to the nature of the procedural irregularity observed in determination of the first ground, this court finds no need of dealing with the remaining grounds of appeal. This is because procedural irregularity like this at hand, reduces the evidence of the victim (PW2) into nothing and thus make it bound to be disregarded. As correctly submitted by the appellant, the evidence of the victim was improperly admitted, and the trial court erred to have taken it in flout of the procedure and accorded weight to it. Accordingly, I expunge the evidence of the victim as taken and recorded by the trial court.

Having expunged the evidence of the victim, the only available evidence remaining in the court record is that of PW1 and PW3. On my scrutiny, none of these prosecution witnesses viewed the commission of any of the two offences. Their evidence only stands as corroboration evidence to that of the victim, which according to our law is the best evidence. PW1's evidence is mainly hearsay on the issue of rape and

grave sexual abuse. On the other hand, the evidence adduced by the medical doctor (PW3) depended much on evidence adduced by the victim, just on how she medically examined the victim when she was brought before her. I am convinced as the appellant endeavoured to submit, that what remains in the prosecutions evidence is very loose and cannot maintain the appellant's conviction in any of the two offences.

In the final analysis, I allow the appeal based on the first ground, and hold that the conviction and sentences on both counts namely; rape contrary to sections 130 (1) (2) (e) and 131 (3) and grave sexual abuse contrary to section 138 C (1) (a) and (2) (b) of the Penal Code [Cap. 16 R. E, 2022] are quashed and set aside, respectively. The appellant is to be set at liberty unless held for any other lawful cause.

It is so ordered.

DATED at MOROGORO this **1st** day of June, 2022.

M. J. Chaba

Judge

01/06/202

Court:

Judgement delivered at my hand and Seal of this Court in Chamber's this 1st day of June, 2022 in the presence of the appellant, **GWAMAKA JOMAHA** who appeared in person, unrepresented, but in absence of the Respondent/Republic.

M. J. Chaba

Judge

01/06/2022

Rights of the parties fully explained.

M. J. Chaba

Judge

01/06/2022