IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO.20 OF 2022

(Originating from criminal case No.67 of 2021 of the District Court of Muleba H. K. Mwetindwa SRM)

ANTONY EMMANUEL@ KALOKOLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

03 & 25/11/2022
E. L. NGIGWANA, J.

In the District Court of Muleba at Muleba, the appellant Anthony Emmanuel @ Kalokola was charged with the offence of Rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code, [Cap 16 R:E 2019] now, R:E 2022.

At the trial court, it was alleged that the appellant on 10th day of May, 2021 at Irogelo within Muleba District in Kagera Region, did unlawfully have sexual intercourse with a girl child aged 5 years old who for the purpose of protecting her identity shall be referred to as E. A or PW2.

The appellant denied the charge. After full trial at which the prosecution relied on the evidence of four (4) witnesses and one (1) exhibit to wit; PF3 while the appellant defended himself under oath, the trial court was satisfied that the case had been proved beyond reasonable doubt. The appellant was consequently convicted and sentenced to life imprisonment. He was also ordered to compensate the PW2 at tune of Tshs. 1,000,000/=.

Aggrieved by both conviction and sentence, the appellant appealed to this court. In the memorandum of appeal, the appellant raised eight (8) grounds of appeal on the basis of which he asked this court to quash the conviction and set aside the sentence; however, the grounds can be conveniently mashed into one ground, that the learned trial Magistrate erred in law and fact by convicting the appellant on the evidence that did not meet the requisite standard of proof beyond reasonable doubt.

At the hearing of this appeal, the appellant who was fending for himself, unrepresented fully adopted the memorandum of appeal but deferred its elaboration to a later stage, if need be after the submission of the Respondent/Republic. On the adversary side, the Respondent /Republic had the services of Mr. Amani Kilua, learned State Attorney. The learned State Attorney declined to support conviction and sentence.

Submitting on the ground of appeal, the learned State Attorney said that, there is no indication that PW2 whose age is between 5-6 made a promise to tell the court the truth and not lies so as to comply with section 127 (2) of the evidence Act Cap 6 R:2019 now R.E 2022. He went on submitting that it is trite law that non-compliance of the said mandatory procedure reduces the evidence to no evidence at all.

The learned State Attorney further argued that, even if it is assumed for the sake of argument that the evidence of PW2 was correctly taken, yet it could not ground conviction because PW2 just said she was **"hurt"** by the appellant without further explanation as to that part of the body was "hurt" and how. In that premise, the learned State Attorney argued that the evidence of PW2 deserves to be expunged from the record, and upon

expunging the evidence PW2, the rest of the evidence given by PW1, PW3 and PW4 remains weak to justify conviction.

The learned counsel added, Exhibit P1 was not read out to the accused as required by the law, thus deserves to be expunged too. The learned State Attorney ended his submission urging the court to allow this appeal for the interest of justice.

I have carefully gone through the ground of appeal, submissions by the learned State Attorney and the record of the trial court. The issue for determination is whether this appeal is meritorious.

The procedure for taking the evidence of a child of tender age is provided for under section 127 (2) of the Evidence Act Cap 6 R.E 2022 which states 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 lies.* "

Reading the herein above provision, it is apparent that a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies. Section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not. Basing on this fact, the Court of Appeal of Tanzania in the case of Geoffrey **Wilson versus Republic,** Criminal Appeal No. 168 of 2018 (Unreported), stated that;

" *Where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such 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 lie."*

The court further observed as follows;

"*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 of 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."*

In the case of **Hamisi Issa versus The Republic,** Criminal Appeal No. 274 of 2018 (unreported), the Court of Appeal approved the procedure which the trial court followed before the witness of tender age gave her evidence in accordance with section 127 (2) of the Evidence Act. The trial magistrate started by asking the child witness whether or not she understood the nature of oath. Having replied to the question in the negative, the child's evidence was taken upon her promise that she would tell the truth and upon her undertaking that she would not tell lies.

In the instant case, page 9 of the trial court typed proceedings revealed that the trial Magistrate did not record the age of the child and called her to promise to tell the truth and not to tell lie, and she did not adduce her evidence under oath or affirmation. The trial magistrate ruled as follows;

"The child is young and she cannot speak Kiswahili properly. Therefore she testified under interpretation."

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 matter, PW1 who is the mother of PW2 testified before the court that PW2 was born on 10/09/2015, thus no doubt that PW2 is a child of tender age, hence ought to have promised to tell the truth and not to tell lies. In the circumstances therefore, I agree with the learned State Attorney that in this case, the procedure used to take PW2's evidence contravened the provisions of section 127 (2) of the Evidence Act.

Now, where there is complete omission by the trial court to correctly and properly address itself in section 127 (2) of the Evidence Act governing reception of the evidence of a child of tender age, the resulting testimony must be treated as invalid. In the case at hand the evidence of PW2 is invalid, thus it is hereby expunged from the record. See **Godfrey Wilson versus R,** Criminal Appeal No.168 of 2018 and **Masanja Makunga versus R**, Criminal Appeal No. 378 of 2018 (Both unreported).

Even if we assume for the sake of argument that the evidence of PW2 was correctly taken, I agree with the learned State Attorney that it could not

ground conviction because in her very brief evidence, PW2 stated that she was **"hurt"** by the appellant, and when cross-examined, she repeated the same word without further explanation or showing or mentioning the part of the body which was hurt and the weapon used if any. It should be noted that the law recognizes penetration only by penis into the vagina for the purposes of the offence of rape, though penetration however slight is sufficient.

It is trite law that, in sexual offences, true evidence must come from the victim. This position was emphasized by the Court of Appeal of Tanzania in its decision; **Selemani Makumba versus Republic [2006] TLR 379.**

Since the pivotal evidence of the PW2 has been expunged from the record, the rest of the evidence given by PW1, PW3 and PW4 remains weak to justify conviction. It should also be noted that the appellant denied the allegations when the charge was red to him, and during his defence, he told the trial court that he did not commit the offence.

Furthermore in the instant matter, PF3 was tendered and admitted as Exh.P1 but the same was not read out in court. With no doubt, the accused person was prejudiced by the omission as he was unable to grasp the contents of the exhibit. In **Issa Hassan Uki versus R,** Cr. Appeal No. 129/2017, the Court of Appeal held that;

"It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court."

Since there was non-compliance of this principle, I hereby expunge Exhibit P1 from the record. In the upshot, having highlighted the omission which undermined the trial proceedings, I am constrained to allow the appeal

and, respectively, quash the conviction and set aside the sentence of life imprisonment imposed on the appellant, as well as compensation order. I further order for an immediate release of the appellant from prison custody unless held for some other lawful cause not connected to this case. Order accordingly.

Dated at Bukoba this 25th day of November, 2022.

E. L. Ngigwana

Judge

25/11/2022

Court: Judgment delivered this 25th day November, 2022 in the presence of the appellant in person, Ms. Evarester Kimaro, learned State Attorney for the Republic/Respondent and Ms. Sophia Fimbo, B/C.

E. L. Ngigwana

Judge

25/11/2022