IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA
(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 89 OF 2021

(Original Criminal Case No. 217/2020 of Shinyanga District Court at Shinyanga before Hon M.P. Mrio - PRM).

GERALD S/O SIMON @ SAMAGANGA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Dated: 8th April & 8th March, 2022
A. MATUMA, J.

The appellant Gerald S/O Simon @ Samaganga initially stood charged in the District Court of Shinyanga at Shinyanga for an offence of Rape Contrary to Section 130(1) (2) (e) and 131(3) of the Penal Code, Cap 16 R.E 2019. After all the prosecution witnesses had finished giving their respective evidences, the charge sheet was substituted in which the Appellant entered his defence.

On the initial charge, it was alleged that on the 6th day of December, 2020 the appellant did have canal knowledge of a victim girl aged 4 years whose name is withheld for the purpose of this Jugdment. On the later charge the substituted one, it was alleged that 7th December, 2020. The charging section 131 (3) was also substituted into section 131 (1).

substituted one, it was alleged that 7th December, 2020. The charging section 131 (3) was also substituted into section 131 (1).

After the full trial, he was found guilty, convicted and sentenced to suffer a custodial sentence of life imprisonment. Aggrieved with such conviction and sentence, the appellant preferred this appeal with seven grounds of appeal whose main complaints are two;

i. that the prosecution evidence did not prove the case against him beyond reasonable doubts.
ii. That there were serious procedural irregularities which led to miscarriage of justice.

At the hearing of this Appeal the Appellant appeared in person while the Respondent had the service o Mr. Jairo learned State Attorney.

The Appellant did not have much to submit on his grounds of appeal. He merely prayed his grounds of appeal to be considered and be released.

The learned State Attorney at first stood firm opposing the appeal but after some reflections by the Court on various legal issues and evidence, he changed his stand and supported the appeal to the extent that this matter deserves a retrial and not total acquittal.

He submitted that the evidence of PW2 ought to have been taken upon promising to tell the truth and not lies because the test made against her to ascertain her capability of understanding the nature of oath revels that she was not understanding the nature of oath but at least she indicated to know the nature of speaking the truth. In that regard she ought to have

been led to promiss telling the truth and not to be sworn as it was done in the instant case.

On the issue of Substitution of the charge, the learned State Attorney observed that the provisions of section 234 of the Criminal Procedure Act was violated. He however argued this Court to order a retrial for what he termed; **interest of justice.**

The Appellant as I have said had nothing to add. He is waiting for the Court to determine his grounds of appeal.

I agree with the learned state attorney that the Evidence of PW2 was received contrary to section 127 (2) of the Evidence Act, Cap. 6 R.E 2019.

I say so because when the trial Magistrate made a test to the witness at page 16 of the proceedings, it is clear she disclosed not to go to church and there was no any question put to her on whether she knew the nature of oath and the consequences of taking such oath. Instead she was asked the consequences of telling lies, and she stated that if she speaks lies her mother will beat her.

In the circumstances, the witness was incapable of giving her evidence under the general rule as per section 198 (1) of the Criminal Procedure Act, [Cap. 20 R.E 2019] that every witness in criminal trial shall give his evidence under oath or affirmation as the case may be. She was fitting to adduce her evidence under the exception of section 127 (2) of the Evidence Act supra.

In ***Issa Salum Nambaluka V. Republic,*** *Criminal Appeal No. 272 of 2018* for instance, the court of Appeal reiterated what they held in

Godfrey Wilson Versus Republic, *Criminal Appeal No. 168 of 2018* and had these to say;

> *"In the case of Godfrey Wilson, criminal Appeal no. 168 of 2018 (unreported), we 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 that 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"***

The Court of Appeal then gave the procedures on which a child of tender age should be tested whether she/he understands the meaning and nature of oath by asking him or her some simple questions such as the age of the child, the religion and **whether the child understands the nature of oath,** whether the child promise to tell the truth and not to tell lies etc.

In the instant case, the court did not test the child victim as to whether she knew the nature of oath but merely subjected her to the same.

The witness of tender age like any other witness in a criminal trial must as a general rule give his or her evidence under oath or affirmation as it is mandated under section 198 (1) of the Criminal Procedure Act, Cap. 20 R.E 2019 as it was also in the Revised Edition of 2002 that;

> *"**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".*

The child of tender age unlike an adult witness must however, before giving evidence under oath or affirmation be tested by simplified questions and the trial Court be satisfied that such witness can in fact give evidence under oath or affirmation as the case may be. See the case of ***Selemani Moses Sotel @ White versus the Republic, Criminal Appeal no. 385 of 2018*** CAT.

But when the evidence of such a witness of tender age has to be given without oath or affirmation under section 127 (2) of the Evidence Act supra, as an exception to the general rule, the Law mandatorily requires such witness to be required by the court to promise telling the truth and undertake not to tell lies before his or her evidence is received. The evidence received contrary to the said requirements has no evidential value and cannot be acted upon to convict as it was held in the case of **Godfrey Wilson** supra.

In the instant case as herein above reflected, the records do not indicate anyhow, as to whether the court tested the child witness to ascertain whether she could have given her evidence under oath or not. The trial magistrate tested her on **the nature of telling the truth** but subjected her on the other side of relating to **oath.** Look for instance the findings of the Court at page 17 of the Proceedings;

"Court: For the question imposed especially on the nature of telling the truth, the child understand the nature of oath."

Understanding the nature of telling the truth is something different altogether from understanding the nature of oath. Oath is something tied to beliefs while telling the truth is not necessarily be tied to any belief. The evidence of PW2 was thus valueless to be acted upon to convict or sustain the conviction of the appellant.

In the absence of the evidence of the victim herself, the remaining evidence on record is not sufficient to sustain the conviction of the Appellant. This is because only the victim possessed the evidence of identification of the assailant, now the appellant.

About Charge sheet substitution, the records of the trial court reveal that in the course of trial the prosecution substituted the charges when all her witnesses had testified. In other word there was no evidence given to the newly charge against the Appellant.

The question for determination under the circumstances was thus; whether the manner in which the charges were substituted is legally accepted and did not prejudice the appellant.

Although it is not the law that witnesses must always be recalled to testify afresh when the charge sheet is substituted, it is a mandatory legal requirement that once the charge is substituted while some evidence has already been taken, the trial court must inform the accused person of his right to have the witnesses who have already

testified recalled. This requirement is under section 234 (2) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The requirement is to inform the accused of such right and not to an automatic recall of the witness or witnesses. The accused might even not wish the witnesses to be recalled and the Court may as well refuse the prayer to have the witnesses recalled. In the case of ***Omary Kitambo Vs the Republic, Criminal appeal No. 94/2014*** the Court of Appeal determined the rights of the accused person under the provisions of section 234 of the CPA supra upon substitution of the charge in the course of trial and held that violation of any of the rights thereof vitiates the proceedings.

Under section 234 (2) (b) of the law supra, a witness or witnesses are recalled either to give evidence afresh or be further cross examined and further re- examined. Paragraph (c) of the same provision supra provides for the recall of a witness for further examination in chief on the alteration or addition to the charge.

As it was decided in the case of ***Omary s/o Kitambo*** supra, what is necessary is for the trial court to inform the accused of such right to have the witnesses recalled for either of the remedies herein stated. The party so demands must give reasons for his demand and the court decide on them.

In my view the court may in its absolute discretion allow or deny the recall of any of the witnesses or all of them if it considers that the

substitution so made did not touch or affect the evidence materially. But again, the court cannot arbitrarily deny such a right without first giving the party an opportunity to state its view.

In the instance case, it was wrong for the trial court to stay mute without informing the appellant that he had a right to demand the witnesses who had already testified to be recalled for either; to give the evidence afresh or for further cross – examination. It was even worse when the trial court allowed substitution of the charges without any disclosure of the reason or reasons for the substitution. The prosecution ought to have stated in court why the substitution was being sought so that the appellant could know the nature of the intended substitution. That would put him in a better position to decide whether to exercise any of the rights under section 234 supra.

In the case of the ***Republic Vs. Jumanne Mohamed [1986] TLR 232*** the court in discussing section 234 (2) (b) supra stated.

> *"Where the accused before the court of law is a layman or a lawyer who is not likely to know (sufficiently) the provisions of section 234 (2) (b) of the Act,* ***the court is under duty,*** *in the interests of justice, to inform the accused of his rights under the subjection and find out from him which right, if any, he proposes to exercise".*

The court went on that;

> *"The accused's reply should be reflected on the record of the case".*

In this case the provisions of the law supra were completely ignored by both the Prosecutor and the trial magistrate. Failure to adhere to the requirements of Section 234 (2) (b) supra rendered the trial a nullity and vitiated the decision arrived at the end of the trial. In the instant appeal, I rule out that failure of the trial court to comply fully with section 234 (2) (b) supra was fatal and rendered the proceedings at the trial a nullity.

Other cases which determined the rights of an accused person upon substitution of the charges includes ***Sylvester Albogast versus Republic, Criminal Appeal no. 309 of 2015*** (CAT) and ***Stephen Munga (1968) HCD 225.***

Now what should be the way foward. The learned State Attorney suggested that a retrial is an appropriate order to issue. The appellant on his party, stands for his acquittal though he has no explanation for why not a retrial.

Having carefully gone through the records of the trial court I find that ordering a retrial will prejudice the Appellant and it is not the interest of justice to do so. This is because the evidence of PW2 as stated herein above is valueless and I have expunged the same on the strength of the

decisions of the Court of Appeal cited above. In the absence of her evidence the Coviction cannot stand as I have already said.

Also there are some material contradictions on record destroying completely the prosecution's case. One, although the grounds upon which the substitution was made is undisclosed, it is apparent that the first charge accused the appellant to have committed the offence on the 6th December, 2020. The substituted charge accused him to have committed such offence on the 7th December, 2020. It seems the prosecution did so because its witnesses had given evidence contradicting the charge. So the amendment was made to the prejudice of the appellant and that is why he was even not made aware of the reasons for the amendment for him to make any comment.

Again the charging provisions were changed from the right provisions into the wrong provisions in the circumstances of the facts of the case. Therefore, allowing a retrial would necessitate the prosecution to further amend the charge against the prosecution and if that happens then it would be persecution and not prosecution. The Court of law stands for prosecution and not Persecutions.

Not only that but also it is on record that when the facts were read against the appellant, one of his reply in respect of the Cautioned Statement was that he was forced to confess and subjected to torture. During trial when the police officer prayed to tender such statement, it is recorded that the appellant had no objection. At the hearing of this appeal the appellant lamented that he objected it. His claims at the hearing of this appeal are corroborated by the proceedings on record during preliminary hearing as

against the record that he did not object the same at the hearing. In that respect, the proceedings of the trial court are suspicious and the complaints of the appellant that this case is a framed up because of the existed grudges cannot be ignored. I will therefore not order a retrial. I quash the conviction and set aside the sentence of life imprisonment meted against the appellant. I order that the appellant be immediately released from custody unless he is held for some other lawful cause. Right of appeal is explained to either party who is aggrieved with this judgment. It is so ordered.

A. Matuma

Judge

08/03/2022

Court: Judgment delivered this 8th March, 2022 in the presence of the appellant in person and Mr. Jairo learned State Attorney for the Respondent/Republic

Sgd: A. Matuma

Judge

08/03/2022