IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 118 OF 2021

(From the decision of the Resident Magistrates' Court for Mbeya at Mbeya in Criminal Case No. 140 of 2019)

EDWIN ALLY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 15//02/2022
Date of Judgement: 21/02/2022

MONGELLA, J.

The appellant was arraigned in the Resident Magistrates' Court for Mbeya at Mbeya for the offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap 16 R.E. 2019. He was alleged to have raped a girl aged 7 years (hereinafter referred to as the victim, or PW2) on diverse dates between 21st and 23rd December 2018. The incident was reported to have occurred at Izumbwe village within the District and Region of Mbeya.

The trial court found him guilty of the offence and sentenced him to life imprisonment in accordance with the dictates of the law. Aggrieved by the decision, he filed the appeal at hand containing eight grounds.

However, for reasons to be apparent shortly, I shall only deliberate on the 2nd ground.

On this ground the appellant challenges the trial court for relying on the evidence of PW2, the victim, which was recorded in contravention of the law as no *voire dire* test was conducted.

Ms. Hannarose Kasambala, learned state attorney representing the respondent initially opposed this ground whereby she argued that the law as it is currently does not mandate the trial to conduct *voire dire* test before recording evidence of a child of tender age. Instead, she said the law requires the trial court to procure a promise from the child to tell the truth. When probed by the Court as to whether the trial Court adhered to the procedure in procuring the promise to tell the truth, she admitted that the trial court did not adhere to the procedure. Considering the evidence on record, she submitted that if the evidence of PW2, which is taken to be the best evidence in the case is expunged, there shall remain no tangible evidence to hold the conviction against the appellant.

I, in fact agree with Ms. Kasambala that the procedure in procuring the promise to tell the truth from PW2, who was 7 years of age was not followed. As provided under case law, before the trial court procures the promise to tell the truth from a child witness, the trial court has to ask the child simple questions that shall drive her into promising to tell the truth. The process has to be reflected in the proceedings as evidence of the trial court adhering to the procedure set under the law. The promise has to be recorded in the words of the child. In the case of ***Godfrey Wilson v.***

Republic, Criminal Appeal No. 168 of 2018 (CAT at Bukoba) the Court of Appeal discussed this position of the law at length whereby it stated:

> *"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 27 (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 tender age. The question, however, would be on how to reach at that stage. 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.*
>
> *Thereafter, upon making the promise,* ***such promise must be recorded before the evidence is taken*** *(emphasis added)."*

In the matter at hand, the trial magistrate just recorded a conclusion that the child has promised to tell the truth without recording how the said promise was procured. On the strength of the above authority the evidence of PW2 is found to lack evidential value and is hereby expunged. See also: ***Mwalimu Jumanne vs. The Republic***, Criminal Appeal No. 18 of 2019 (CAT at DSM, unreported); and ***Medson Manga vs. The Republic***, Criminal Appeal No. 259 of 2019 (all unreported).

After expunging the evidence of PW2, which is considered the best evidence in the case, for PW2 being the victim, I agree with Ms. Kasambala that there remains on record no tangible evidence to hold

the conviction against the appellant. This is because the rest of the witnesses adduced hearsay evidence. PW3 apart from adducing hearsay evidence, she was of 13 years of age and the same irregularity was committed in procuring her promise to speak the truth before the court.

In the circumstances, the conviction and sentence against the appellant are hereby quashed. The appellant should be released from prison custody forthwith unless held for some other lawful cause.

Dated at Mbeya on this 21st day of February 2022.

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya in chambers on this 21st day of February 2022 in the presence of the appellant appearing in person and Ms. Rosemary Mgeni, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE