THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 95 OF 2021

(Originating From The District Court of Chunya at Chunya, Criminal Case No. 258 of 2016, Before D. A. Magezi- SRM)

JUSTIN CHAINA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 01/03/2022
Date of judgment: 04/03/2022

NGUNYALE, J.

On 4th day of May, 2018, the appellant JUSTIN CHAINA was convicted with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R. E 2019 after the learned Resident Magistrate was satisfied that the offence was proved beyond reasonable doubt the

universal standard in criminal cases. He was convicted and sentenced to serve thirty years imprisonment and undergo corporal punishment.

The genesis of this case which resulted to this appeal may simply be narrated as follows, that, the appellant is the uncle of a standard four girl aged 11 years old hereinafter I shall henceforth refer to her as a victim or PW1 for the purpose of concealing her identity. The appellant and the victim knew each other as relatives living at the same house of Ms. Rahery d/o Mkondya (PW2) the grandmother of the victim. On 9th day of December 2016 at around 08:00 hours PW2 departed to attend funeral of her relative to another village leaving behind the appellant, the victim and other young children, as such the appellant was left to take care of the victim and other children.

On 17th day of December 2016 at around 00:00 hours the appellant entered inside the bedroom of the victim while in possession of a knife and stick. He threatened the victim not to raise alarm otherwise she will be injured by a knife. Subsequently, the appellant undressed the victim her pants and he also removed his trouser and raped her, he proceeded with his dark desire until when he had quenched his thirty and left away. On 21st day of December 2016 the appellant and the victim went to farm. While at the farm the appellant attempted to rape the victim again, the

victim ran away and reported the incidence to her aunt. The said aunt reported the event to Village Executive Officer who reported to police and the wheels of justice were put in motion upon which the appellant was arrested and apprehended before the trial Court. Hence conviction and sentence.

The appellant was aggrieved by conviction and sentence mated by the trial Court, he therefore preferred this appeal with eight grounds of appeal. I reserve to reproduce the grounds of appeal now for reasons which will be apparent in due course.

On the date of hearing the appellant was unrepresented, he asked the Court to leave Ms. Hanarose Kasambala learned State Attorney who appeared for the respondent to start arguing the appeal reserving a right of rejoining, if need arises.

From the outset, Ms. Kasambala declared his stance that she supports the appeal because there is a point of law which she wants to address the Court. She quickly submitted that the victim did not promise to tell the truth as required by law, the trial Court erred when it conducted *voire dire* test which is under the repealed law. The event occurred five months after the law was repealed by Written Laws (Miscellaneous Amendment) Act No. 4 of 2016 which amended section 27 (2) of Evidence Act Cap 6 which

removed *voire dire* test. The child witness was only required to promise to tell the truth and not to be subjected to *voire dire* test. She submitted that the mistake makes the testimony of the child PW1 to be of no effect at all. She referred the Court to the case of **GODFREY WILSON V. R**, Criminal Appeal No. 168 of 2018 Court of Appeal of Tanzania at Bukoba where the Court said that in absence of the promise to tell the truth evidence of a child will have no evidential value. On the same position she invited the Court to see the case of **NGARU JOSEPH & ANOTHER V. R**, Criminal Appeal No. 172 of 2019 Court of Appeal at Mbeya.

It was her further submission that evidence of PW3 also could not comply to section 127 of Evidence Act Cap 6 R. E 2019, she was of the view that such evidence also ought to be expunged from the records. The remaining evidence of PW2 and PW4 cannot ground conviction. She concluded by urging the Court to give benefit of doubt to the accused basing on those mistakes.

The appellant as a layman politely said that he has no more to question, he prayed the Court to set him at liberty.

The Court has examined the records and found that the offence occurred on 17th day of December, 2016 and the said Written Laws (Miscellaneous Amendment) Act No. 4 of 2016 which amended section 127 of the

Evidence Act removing *voire dire* test substituting with a promise to tell the truth was enacted on 8th July 2016. That being the position I am in agreement with the learned State Attorney that the trial Magistrate ought to comply with section 127 (2) of Evidence act which require the child witness to promise to tell the truth.

I have examined the record of appeal in light of the submissions of the learned State Attorney in response to the mistake of conducting *voire dire* test, and I find that there is considerable merit in those submissions. I therefore think that, it is appropriate here to recap the provision of section 127 (2) of the EA which provides:

> *"A child o f 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."*

In view of the submission of Ms. Kasambala and the above provision of the law I wish to visit the records of the trial Court. The proceedings at page 7 and 8 of the trial Court proceedings shows that *voire dire* test was done on 23rd December 2016 against PW1 before she testified and again it was done against PW3 on 27th December 2016. The fact that *voire dire* test was done was also noted in the judgment of the trial Court dated 4 May 2018 which reads in part at page 2:

"Before, the evidence of PW1 and PW3 could be recorded, voire dire test examination was conducted as such section 127 (2) of Cap 6 R. E 2002 was complied with ..."

From what has been endeavoured it is settled that the trial learned Resident Magistrate misdirected himself as far as the requirement of section 127 (2) of the Evidence Act Cap 6 R. E 2019 is concerned. That is to say, *voire dire* test was not necessary. Quite clearly, the provision above is very categorical that a child of tender age will, before giving evidence under circumstances permitted in that provision promise to tell the truth to the court which means that it is upon the trial court to ensure that the child promises to tell the truth and not lies.

The testimony of PW1 and PW2 is therefore expunged from the records. The consequence of such expungement is as rightly submitted by the learned State Attorney that the remaining evidence cannot ground conviction. The best evidence rule is that the best evidence in sexual offences comes from the victim as laid in the case of **SULEMAN MAKUMBA VS. R** (2006) TLR 379, in the present circumstance the rule cannot stand without the testimony of the victim which has been expunged. The evidence of PW2 the grandmother of the victim is very remote to prove penetration which is a key ingredient in rape cases like the one under scrutiny. Likewise, the evidence of PW4 the Clinical Officer

cannot serve any purpose in this scenario. The testimony of PW4 would be relevant to corroborate the testimony of the victim which is already negligible as far as penetration is concerned.

In the light of the above considerations, the Court ends with the settled conclusion that the appellant was not fairy tried hence he deserves a benefit of doubt as rightly submitted by the respondents' attorney. Conviction is hereby quashed and sentence set aside, I order immediate release of the appellant **JUSTIN CHAINA** unless lawful held with another good cause. Appeal allowed.

Dated at Mbeya this 4th day of March 2022.

D. P. Ngunyale

Judge

04/03/2022

Judgment delivered this 4th day of March 2022 in presence of the appellant in person and Mr. Baraka Mgaya learned State Attorney for the respondent.

D. P. Ngunyale

Judge

04/03/2022