IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL REVISION NO. 11 OF 2021

DANIEL MSHANA……APPLICANT

VERSUS

REPUBLIC……RESPONDENT

RULING

16th May, 2022 & 20th May, 2022

E.E. KAKOLAKI, J.

In the exercise of the powers bestowed to this Court under section 372(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019], this revision was preferred by the Court suo mottu for the purposes of satisfying itself as to the correctness, legality or propriety of the proceedings and orders of the trial court, following the complaints received from the above named applicant. And in terms of the provisions of section 373(2) of the CPA, both parties were summoned to appear and address the Court on the said complained of proceedings or orders of the trial court.

Briefly before the District Court of Kigamboni in Criminal Case No. 75 of 2020, the applicant Daniel Mshana stands charged with two offences of **Rape**;

contrary to sections 130(1)(2)(e) and 131 and **Unnatural Offence**; Contrary to section 154 (1) (a) and (2), both under the Penal Code [Cap 16 R.E 2019], commited to the child of 10 years. It was in his complaint through the letter lodged in court by his advocate Mr. Abraham Hamza Senguji dated 08/10/2021, that the learned magistrate presiding over the case is biased on the matter since its commencement as she has been conducting proceedings in contravention of the law. Upon receipt of that letter, the applicant was directed by the Court to swear affidavits in support of his claims upon which two affidavits duly sworn by the applicant himself and his advocate Mr. Abraham Hamza Senguji, were filed in court to that effect, hence the present revisional proceedings.

During hearing both parties who appeared represented were heard viva voce. The applicant proceeded through Mr. Henry Kitambwa, learned advocate whereas the Respondent was fended by Ms. Estazia Wilson, learned State Attorney. It is worth noting , when served with the records for revision purposes, the Respondent raised a preliminary point of objection on the ground that, this application is bad in law for being preferred in contravention of the provisions of section 392A(1) and (2) of the CPA, mandatorily providing that, all criminal applications must be brought either

orally or by way of chamber summons supported by affidavit. It was Ms. Wilson's submission that, this application is nether preferred by way chamber summons nor supported by affidavit. Upon hearing both parties on the said raise objection this court overruled it after agreeing with Mr. Kitambwa, that this Court under section 372(1) of the CPA, has powers to call for any criminal record or proceedings from the subordinate Court for the purposes of satisfying itself as to its correctness, legality and propriety, upon any complaint being received or reported, hence ordered hearing of the application to proceed on merit.

Back to the merit of the application in his submission Mr. Kitambwa advanced two grounds while adopting the two affidavits to support it. **One**, he said that, during defence when his two witnesses were testifying, the applicant was excluded from the proceedings. And **secondly** that, he was denied of court proceedings for the purposes of preparation of his defence. Expounding the first ground he said that, on the 30/10/2021, when the applicant was called to enter his defence, two witnesses were presented before the Court with a prayer to have them to testify first as they were students required to attend school in the afternoon. He lamented that, on allowing the applicant's prayer the trial magistrate ordered him to be

excluded and locked in another room until when the said witnesses finished to testify hence interference of his right to be heard during his trial. On the second ground Mr. Kitanbwa contended that, the applicant was denied of certified copies of proceedings and ruling which were applied by his advocate Mr. Senguji as the trial magistrate was ready to issue him only the ruling on case to answer. When probed by the court as to whether is known to any provision of the law that entitles the applicant to court proceedings before entering his defence, Mr. Kitambwa was quick to respond that he knows none. In view of the above submission he prayed the court to find the trial magistrate was biased and proceed to order for her recusal.

In rebuttal Ms. Wilson invited the court to find the application is unmeritorious as there was nothing to revise in the complained of proceedings. She therefore prayed the court to dismiss the application.

I have closely followed the fighting arguments by both learned counsels as well as spared time to peruse the impugned proceedings and more specifically the part of 30/10/2021. For smooth determination of the matter I find it pleasing to start with second complaint on denial of proceedings for preparation of his defence. It is in record that, applicant's advocate Mr. Senguji in his letter dated 09/08/2021 to the Senior Resident Magistrate in-

charge, applied for certified copy of proceedings and ruling of the court delivered on 26th July, 2021. According to that letter, the said proceedings and ruling were intended to be used **as an exhibit** in his defence. Indeed the purpose for which the said court documents were sought for left this court with shockingly surprise leave alone the fact that, there is no any known law that entitles the accused with those documents before he enters his defence. The court is wondering as to how the applicant would have used the said proceedings as exhibit in his own case. No wonder the trial court fell into the same surprise. Though the law does not set it as a requirement that, the trial court should supply the accused with court proceedings before entering his defence, it an accepted practice for the same to be supplied to the both parties after closure of defence case for final submission purposes if need be. The assumption is that each party is duty bound to record its own court proceedings for being present throughout the proceedings. It is from that premises I hold, the second ground is devoid of merits and the learned trial magistrate was justified to deny him with the said proceedings.

Next for determination is the second ground of exclusion of the accused from the court proceedings during the defence case. Whether the accused person can at any point of time be excluded from court proceedings and whether

the applicant in this matter was excluded from court proceedings during his defence case are the questions this court is called to answer. To start with the first question, the answer is very straight that, there is no law that allows exclusion of accused person by the court from the court proceedings at any point of criminal proceedings. The reason is not far-fetched as the accused being a person whose charge is sought to be proved against has to be present throughout the proceeding for him to follow up and understanding the accusation against him and finally enter an informed defence. Any attempt to exclude him at any stage of proceedings affects his right to be heard and goes against the principle of fair trial as enshrined under Article 13 of the Constitution of the United Republic of Tanzania, 1977.

As to the second question, in order to appreciate the applicant's complaint, I find it imperative to quote the excerpt from the complained of court proceedings of 30/09/2021 as I hereby do:

PROCEEDINGS

CRIMINAL CASE NO. 75 OF 2021

30/09/2021

Coram *: Hon. Mgaya-SRM*

PP *: Kamugisha (State Attorney)*

***Accused** : Present*

***CC** : Oscar Yaredi*

***S/A**: The case is for defense hearing, we are ready to proceed.*

***Court**: Whether or not the child of a tender age understands the nature of oath and the duty of telling the truth.*

***G**(Child): I am in standard three.*

***G**(Child): Today is Tuesday.*

***Court**: the child possess of sufficient intelligence to justify the reception of his evidence.*

***DW1: G.D.M, 10 Yrs, Kisiwani, Student**, promise to tell the truth to the Court and not tell lies:*

I am in standard three (3)….

***Court**: Section 210(3) Cap. 20 R.E Complied with.*

CROSS EXAMINATION

That night I slept in my father's bedroom…

CROSS-EXAMINATION

I don't remember how many times my father did wake wake up that night….

Sgn:

Mgaya-SRM

30/9/2021

From the above cited excerpt of trial court's proceedings of 30/09/2021, the coram of the court shows the applicant was present on that day. However several anomalies are noted. **One**, while the State Attorney appears to have addressed the court on his/her readiness to proceed with defence hearing the record is silent on the applicant's response. **Second**ly, the defence witness DW1 seem to have tendered his evidence in chief and later on re-examined but the record is silent as to who led him when tendering that evidence. Neither the appellant nor his advocate who does not even constitute part of the court's coram on that day seem to have participated in leading defence witnesses. In my opinion this omission by the trial Court no doubt proves the applicant's complaint that, he was excluded from the proceedings as participation in his trial during the defence is not seen. The same is the case to the testimony of DW2. With that illustration the second question is answered in affirmative that, the applicant was indeed excluded from participating in his own defence. Having so found the last question is what is the effect of the said anomalies?

As alluded to the accused is entitled to be present in court throughout the proceedings when his case is under trial, but in this case he was excluded at the start of his defence. In my considered view the omission is incurable under section 388 of the CPA as it has the effect of denying the appellant of his right to fair trial as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (Cap. 2 R.E 2002) to the prejudice of the applicant.

The above noted defects would have been enough to dispose of this matter. However, in the course of perusing the record while composing the ruling this court noted with concern some irregularities on the procedure adopted by the trial court in reception of evidence of a child of tender age. Following that concern parties were therefore re-summoned on 16/05/2022 to address the Court on the propriety of the said procedure more specifically the evidence of PW1 and DW1 taken down by the trial court on the 21/12/2020 and 30/09/2021, respectively as the trial court proceedings are not numbered.

On the said date of 16/05/2022 only advocate Henry Kitambwa appeared in Court and addressed the Court so briefly as the Respondent were absent without notice. It was in his lucid submission that, the procedure adopted to

take evidence of PW1 was improper. He said the learned trial magistrate started to make an inquiry whether the child understood the nature of oath and the duty of telling truth without even establishing first her age which was recorded later after that procedure. Further to that he added, the question put to the child during the inquiry were not recorded to assist this Court satisfy itself whether the conclusion arrived at by the trial magistrate that, the witness child understood the nature of oaths and the duty of telling the truth was properly reached. Referring to the decision of the Court in **George Evarist Vs. R**, HC. Criminal Appeal No. 34 of 2018 and **Nasri Ahmed Hassan Vs. R**, Criminal Appeal No. 243 of 2020(both HC-unreported), where it was held improperly received evidence of the child (victim) cannot sustain conviction and ended up acquitting the appellants. On the basis of that submission he implored the Court to find said anomaly contributed to the illegality of the proceedings, and proceed to nullify them and order for retrial of the case for the interest of justice.

It is true as submitted by Mr. Kitambwa the procedure adopted by the trial magistrate in reception of evidence of PW1 and DW1 who are children of tender age violated the law. It is trite law that before recording evidence of the child of tender age the provision of section 127(2) of the Law of Evidence

Act, [Cap. 06 R.E 2019], must be complied to the letter failure of which renders it valueless with no effect to the conviction of the accused person. A child of tender age is defined under section 127(4) of the Evidence Act to mean a child whose apparent age is not more than fourteen (14) years. And section 127(2) of the Act provides thus:

> *(2) 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****.*

It is a settled law from the interpretation of the above cited provision that, a child of tender age can testify in court through two modes. **One**, upon taking oath or affirmation and **second**, upon giving promise to the court that he/she will tell the truth and not lies. This position was stated in a plethora of authorities such as **Godfrey Wilson v. R**, Criminal Appeal No. 168 of 2018, **Seleman Moses Sotel @White Vs. R,** Criminal Appeal No. 385 of 2018, **Mwalim Jumanne v. R**, Criminal Appeal No. 18 of 2019 and **Wambura Kiginga Vs. R**, Criminal Appeal No. 301 of 2018 (all CAT-unreported). It was observed by the Court of Appeal in the most recent decision of **Wambura Kiginga** (supra) when interpreting the provision of section 127(2) of the Act thus:

*"**...a child of tender age**, which means a child of an apparent age of not more than fourteen (14) years as provided under section 127(2) of the Evidence Act, **may legally give evidence if one of the two conditions is fulfilled. One, if before testifying the child swears or affirms; and two, if he or she promises to tell the truth and not lies in the course of giving evidence.** According to the position of this Court at the moment, if none of the two conditions is fulfilled and the evidence of the child is taken, such evidence is deemed to have no evidential value and it must be expunged from the record." (Emphasis supplied).*

In this matter none of the two child witnesses PW1 and DW1 both aged 10 years old, testified in court under the two modes presenting evidence of the child in court. I will demonstrate that as can conspicuously be seen from the trial court proceedings when rendered their testimonials on 21/12/2020 and 30/09/2021, respectively. As the trial Court adopted similar procedure to both PW1 and DW1 it will be of no use to reproduce the enter evidence as adduced by both witnesses but rather, I am intending to quote the excerpt from the evidence of PW1 only. On 21/12/2020 when recording the evidence of PW1, (the victim) in this matter recorded in the typed proceedings as follows:

CRIMINAL CASE NO 75 OF 2020

21/12/2020

*Coram : **Hon. Mgaya-Rm***

PP : Kitali (State Attorney)

Accused: Present

CC : Oscar Yared

S/A: The case is coming for hearing; we have one witness.

We are ready to proceed.

PROSECUTION CASE OPENS

***Court:** Whether the child understand the nature of oath and duty to tell the truth.*

***Y**(Name of the child): I am in standard four at Kisiwani Primary School-Kigamboni. I am a muslim, I used to go to Madrasa when I was in standard two and three.*

***Y** : My head scarf is blue and not yellow. It is not true; if I say my scarf is yellow, It is a lie. I don't want to tell lies. I learn at Madrasa not tell lies. At school I learn English, Kiswahili and Civil studies.*

***Court:** The child of tender age understands the nature of oath and the duty to tell the truth.*

***PW1: Y. K, 10 YRS, VIJIBWENI-KISIWANI**, promise to tell the truth to the court and not tell lies.*

In December, 2019 I left home to go play with my friend, it was getting dark and raining that day. I wanted to go home, but it was still raining. The accused person came where is was sitting; he asked me why I was there. I told him I was waiting for the rain to stop…."

From the above excerpt several irregularities are noted which I believe will act as good reminder to judicial officers of their duty to adhere to the procedure as provided by the law when receiving evidence of the child of tender age. **One**, the learned trial magistrate started to conduct inquiry establishing whether the child witness understood the nature of oath and the duty of telling the truth, without knowing and recording first the name, age and religion of the child. She ought to have recorded her name, age and religion first before venturing into inquiry exercise. **Second**, she recorded the answers of the child without indicating the questions put to the witness the omission which deprives this court with an opportunity to satisfy itself as to whether the finding reached by her that, the child understood the nature of oath and the duty of telling the truth was properly arrived at. The duty of the trial court to put questions to the child witness and the nature of the questions for the purposes of establishing how did it reach to its finding or

conclusion during the inquiry process was lucidly stated in the case of **Godfrey Wilson** (supra) where the Court Appeal had this to say:

> *"The question however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of 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 lies.*
>
> *Thereafter, upon making the promise, such promise must be recorded before the evidence is taken".*

Thirdly, assuming the inquiry procedure was properly conducted, the learned trial magistrate having found the child witness understood the nature of oath and the duty of telling the truth without disclosing the reasons for not allowing the witness to testify on oath, proceeded to make another finding that PW1, promised to tell the truth to the court and not lies and recorded her evidence. With due respect to the learned trial magistrate, that was a wrong approach. Having established that, the child understood the

nature of oath the learned trial magistrate was expected to proceed receiving PW1's evidence under oath, but she acted to the contrary. **Fourthly**, though the inquiry procedure was improperly conducted, looking at the answers purportedly given by PW1, there is nothing to exhibit to this Court that, she promised to the court to tell the truth and not tell lies in support of the trial magistrate's findings before proceeding to record her evidence. The promise in my considered opinion ought to have been conspicuously seen from the record. **Fifthly**, it is not indicated who was leading the witness during her testimony as it was expected to be prosecutor. This omission does not affect the evidence of PW1 only but also to the rest of the witnesses who testified in this matter. Similarly, save for the evidence of PW4 taken on 24/05/2021 where advocate for the accused person was allowed to cross examine, the rest of record is barren as to who cross examined both prosecution and defence witnesses. The omission by the court in all the above discussed procedures during admission of not only evidence of PW1 and DW1 but also the rest of the witnesses with exception of PW4 rendered the entire proceeding a nullity as both parties were not accorded with a fair hearing as provided Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (Cap. 2 R.E 2002).

In the circumstances, I find this revision application to be meritorious and the same is allowed. I thus invoke the revisional powers bestowed to this court under section 373(1)(b) of the CPA and proceed to revise and nullify the whole trial court's proceedings for being tainted with nullity. Consequently for the interest of justice, I order retrial of the case before another competent magistrate.

It is so ordered.

DATED at Dar es salaam this 20th day of May, 2022.

E. E. KAKOLAKI

JUDGE

20/05/2022.

The ruling has been delivered at Dar es Salaam today on 20th day of May, 2022 in the presence of Mr. Henry Kitambwa, advocate for the applicant and Ms. Monica Msuya, Court clerk and in the absence of the Respondent.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
20/05/2022


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY