

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF MBEYA**  
**AT MBEYA**

**CRIMINAL APPEAL NO. 07 OF 2022**

(Originating from the District Court of Kyela, at Kyela, in Criminal Case No. 182 of 2020)

**NICHOLOUS MABOGA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

Date of last Order: 28.03.2022  
Date of Judgment: 20.05.2022

**Ebrahim, J.**

In the District Court of Kyela District, at Kyela in Criminal Case No. 182 of 2020, the appellant, NICHOLOUS MABOGA was charged with and convicted of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E 2019. He was sentenced to life imprisonment.

It was alleged before the trial court, according to a charge sheet that, on different occasions between April 2019 and October 2020, at Ndandalo area within Kyela District in Mbeya Region, the appellant did unlawfully have carnal knowledge of one **JF** against the order of nature. **JF** is a branded name to

conceal his identity and protect his dignity. I will also be referring to him as the "victim".

The appellant pleaded not guilty to the charge, hence a full trial. At the end of the day, the trial court found him guilty, convicted and sentenced him as aforesaid.

Aggrieved by the conviction and sentence, the appellant preferred this appeal. He raised five grounds of appeal as follows:

1. That the trial court erred in law and in fact by convicting the appellant while the respondent failed to prove the case beyond reasonable doubts.
2. That the judgment is contradictory and ambiguous.
3. That the trial court erred in law and in fact by convicting the appellant basing on the contradictions and inconsistency of the evidence by the prosecution.
4. That the trial court erred in law and fact by convicting the appellant basing on the hearsay evidence by the prosecution.
5. The trial court erred in law and in fact by convicting the appellant basing on the evidence of a child of a tender age which was uncorroborated and improperly taken.

The respondent/Republic objected the appeal.

At the hearing of the appeal, the appellant appeared in person with the service of advocate Tunsume Angumbwike, whilst the Republic was represented by Ms. Rosemary Mgeni, learned State Attorney.

For the reason to be apparent, I will firstly determine the 5<sup>th</sup> ground of appeal. The complaint on the said ground of appeal is premised on two grounds; that the evidence of a child of tender age was uncorroborated, and that it was improperly taken.

Counsel for the parties did not address the ground in the way it was framed. They only argued it conjunctively with other grounds of appeal. I however, intend to resolve the 2<sup>nd</sup> ground since it has legal implications. It is trite law that the court shall start determining the issues related to the law before reverting into factual issues. **Intertec East Africa vs B & S International**, Civil Appeal No. 46 of 1997 Court of Appeal of Tanzania at Dar es Salaam (unreported).

The issue for consideration is thus, whether the evidence of the victim, a child of tender age was properly received in the trial court.

According to the evidence of PW1, father of the victim, at the time of adducing evidence i.e 2021 the victim was aged 13 years. In terms of section **124 (4) of the Evidence Act, Cap. 6 R.E. 2019** and the case of **Issa Salum Nambaluka v. Republic, Appeal No. 272 of 2018, Court of Appeal of Tanzania at Mtwara** (unreported); the phrase "child of tender age" is defined to mean a child whose apparent age is not more than 14 years.

The issue for consideration is thus, whether the evidence of the victim, a child of tender age was properly received at the trial court.

Section 127 (2) of the Evidence Act regulates the procedure for receiving the evidence of the child of tender age. It provides that:

*"(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."*

The CAT in a number decisions insisted that the promise by a child witness shall be recorded. The decisions include; **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, CAT at

Bukoba (unreported) and the **Issa Salum Nambaluka case** (supra). In order to appreciate the procedures in receiving the evidence of the child witness of the tender age, I am compelled to re-state them as they were narrated by the CAT in the cases cited above. Those are as follows:

- a) That, the child of tender age can give evidence with or without oath or affirmation.
- b) The trial judge or magistrate has to ask the child witness such simplified and pertinent questions which need not be exhaustive depending on the circumstances of the case. This is for purposes of determining whether or not the child witness understands the nature of oath or affirmation. The questions may relate to his/her age, the religion he professes, whether he/she understands the nature of oath or affirmation, and whether or not he/she promises to tell the truth and not lies to the court. If he/she replies in the affirmative, then he/she can proceed to give evidence on oath or affirmation depending on the religion he/she professes. However, if he/she does not understand the nature of oath or affirmation, he/she should, before giving

evidence, be required to make a promise to tell the truth and not lies to the court.

**c)** Before giving evidence without oath, such child is mandatorily required to promise to tell the truth, and not lies to the court, as a condition precedent.

**d) Upon the child making the promise, the same must be recorded before the evidence is taken.**

From the above setup it my understanding that the recording of the promise is how the child him/herself said. It is thus not proper for the trial judge or magistrate to record the promise of the child in a reported speech. In the instant case the trial court, before receiving the evidence of the victim, the learned trial magistrate recorded as follows:

**PW3,..... 12 yrs, Mkinga, Ndandalo street, student at Nkuyu Primary school, Christia; (promises to tell the truth).**

It is my concerted view that the learned trial magistrate did not follow the above procedure. The record does not show as to whether the probing questions were asked by the trial court to the victim in view of determining whether or not she understood the nature of oath or affirmation. It also not indicated if the victim was

asked if she knew the importance of telling the truth. The trial Court only recorded in the bracket and in reported speech as shown above.

Owing to the above discussions, it is clear that the evidence of the victim in this case was not received in accordance to the mandatory provisions of **section 127(2) of the Evidence Act**. For the above reasons, I am impelled to nullify the entire proceedings of the trial court.

Further, I have in mind the seriousness of the offence, and I am of the view that this is one of the cases that warrants a retrial in view of available evidence and thus, it will not prejudice the appellant. For the interest of justice, therefore, I remit the file to the District Court of Kyela at Kyela and order an expeditious retrial before a different magistrate with competent jurisdiction.

Accordingly ordered.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

**R.A. Ebrahim**

**JUDGE.**

**Mbeya**

**20.05.2022**

**Date:** 20.05.2022.

**Coram:** Hon. A.P. Scout, Ag -DR.

**Appellant:** Present.

For the Appellant: Ms. Tunsume, Advocate.

For the Republic: Ms. Hannarose – State Attorney.

**B/C:** Gaudensia.

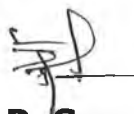
**Ms. Hannarose - SA:** Your honour, the case is coming on for Judgement we are ready to proceed.

**Ms. Tunsume Advocate for the Appellant:** Your honour, we are ready to proceed.

**Court:** Judgement is delivered in the Presence of Ms. Hannarose State Attorney, Ms. Tunsume Advocate for appellant, Appellant in Chamber Court on 20/5/2022.

Sgd: A.P. Scout  
Ag-Deputy Registrar  
20/05/2022

**Court:** Right of appeal explained.



**A.P. Scout**  
**Ag-Deputy Registrar**  
**20/05/2022**