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

CRIMINAL APPEAL NO. 103 OF 2022
(Arising from Criminal Case No. 83 of 2022 of Kahama District Court Before: E.P. Kente, SRM)

AYUBU S/O MUSSA @ SENYAMANZA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

29th & 30th March, 2021

A. MATUMA, J

The appellant Ayubu Mussa @ Semanyanza was charged and convicted of Rape contrary to section 130 (1), (2) (e) and 131 (3) of the Penal Code, Cap. 16 R.E 2019 in the District Court of Kahama at Kahama.

He was sentenced to serve a custodial sentence of life imprisonment because the victim was a girl aged 7 years.

Having been aggrieved with such conviction and sentence he has preferred this appeal with several grounds but for the purposes of this Appeal only one ground suffices to dispose of this appeal. This is the ground to the effect that his conviction and sentence cannot stand given

the fact that the proceedings of the trial court are vitiated by serious irregularities which led to miscarriage of justice.

At the hearing of this appeal, the appellant appeared in person while the Respondent was represented by Wapumbulya Shani learned State Attorney.

The appellant did not have much to say and relied on his grounds of appeal which he filed initially and the subsequent additional grounds.

The learned state Attorney on her party, from the right beginning supported the appeal on the ground of irregularities on the trial court proceedings.

She submitted that the evidence of the victim was recorded contrary to section 127 (2) of the Evidence Act because the trial magistrate did not reflect on record how he examined the witness who was under tender age to ascertain whether she could not give her evidence under oath. That the trial magistrate merely recorded his conclusion that the witness was not capable of giving evidence on oath.

The learned state attorney further argued that despite of such anomaly the facts and evidence on record dictates that the appellant be retried rather than being totally acquitted.

The appellant on his party also lamented against the proceeding stating that he was not given the right to fully cross examine the victim because the trial magistrate restricted him to only three questions. He further lamented that the evidence of his witnesses was also partially recorded.

In terms of section 127 (4) of the Evidence Act supra, PW1 was a child of tender age as she was only seven years old. A 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 2022 which reads;

> *"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 oath 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 Court examines the witness as such and becomes satisfied that a child witness can only give evidence without oath or affirmation, it is when it resorts into the exemption of section 198 (1) of the CPA (supra).

The exemption is under section 127 (2) of the Evidence Act (supra) in which the evidence will be taken without oath or affirmation subject to the witness promising to the Court that she/he will tell only the truth and undertake not to tell lies.

The records must however be clear as to how the Court arrived into a conclusion that a certain child witness should give evidence under oath or affirmation or should give evidence without oath or affirmation under the exemption.

The evidence taken contrary to the said requirements of the law becomes valueless and cannot be acted upon to convict as it was decided in the case of ***Godfrey Wilson versus Republic, Criminal appeal no. 168 of 2018 (CAT)***.

The Court of Appeal of Tanzania has in several occasions insisted that trial Courts should not rush into requiring the child witness to promise telling the truth and not lies without first examining him/her whether he/she understands the nature of oath and can give evidence on oath.

Thus, forestine in the case of ***Issa Salum Nambaluka versus Republic, Criminal Appeal No. 272 of 2018,*** the Court of Appeal held;

> *"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 replied 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 know the nature of oath, he or she should before giving evidence, be required to promise to tell the truth and not to tell lies".*

In the instant case, the records does not speak by themselves whether PW1 was tested to ascertain her ability to give evidence on oath or otherwise. We only find the conclusion of the trial magistrate that the witness should give her evidence without oath because she was of a tender age;

> *"PW1 is a child of tender age, she is only seven years, she has promised to tell nothing but the truth. Under such circumstances I proceed to record her testimony without oath*

because she has not indicated to have knowledge of appreciating the nature of telling the truth"

We have nothing on record to assist us to know how the learned trial magistrate arrived to such conclusion. We cannot therefore rely on such general conclusion by the learned magistrate as reflecting the reality to the effect that PW1 fitted into the exemption of giving evidence without oath. Even taking the conclusion supra the same is confusing. It tells us that PW1 did not even indicate to possess knowledge of appreciating the nature of telling the truth; ***"she has not indicated to have knowledge of appreciating the nature of telling the truth".*** At the same time the conclusion tells us that the witness promised to tell the truth and not lies. How could a witness who does not possess knowledge of appreciating the nature of telling the truth could promise to tell the truth.

Under the circumstances, it was imperative that the records speak by themselves so that we could know the reasons behind which drove the learned trial magistrate to reach the conclusion he reached. His conclusion suggests that the witness could not know even the need to tell the truth nor it suggested that the witness did not know the nature of oath. She was thus subjected to give her evidence without oath

merely because she was of the tender age. That is absolutely wrong on the strength of the authorities I have cited supra.

What should then be the proper cause to take under the circumstances? The learned State Attorney pressed for a retrial arguing that the facts of the case and the evidence on record dictate as such. The appellant on his party added more complaints against the proceedings of the trial court stating that he was restricted to only three questions when cross examining the victim PW1 and that his witnesses' testimonies were partially recorded.

This court and even the Court of Appeal has taken different stances depending on the facts of each case. There are instances the evidence recorded under such anomaly were expunged for being held to be valueless like in Godfrey Wilson's case supra. In some other instances it has been ruled out that a retrial would serve the better end of justice for an innocent victim should not be condemned by mistakes committed by the court itself nor the criminal should benefit from irregularities committed by the court. Thus, for instance in the case of ***Gilbert Ntambala & Another versus The Republic, Criminal Appeal no. 3 of 2020***, High Court at Kigoma, this court held;

> *"In the situation where the Court considers that taking the evidence on record as whole the appellants would have been found guilty had the evidence been properly received, the*

Court would normally order a retrial as Criminals should not benefit on procedural irregularities to the detriment of substantive justice. But when the Court considers that even if the evidence on record would have been properly received, the conviction would not follow, then an acquittal is an appropriate order because the retrial is not there to accord the prosecution opportunity to fill in the gaps".

In the instant case I find the proposal argued by the learned state attorney sounding. The victim in this case and the appellant both deserves justice. The appellant should not benefit from the wrongs of the court itself and the victim should not be condemned for the wrongs she did not commit. Having gone through the victim's evidence and that of other witnesses including the doctor who examined her after the crime, I find it better that she gets opportunity to have her evidence properly recorded in accordance to the law so that it can be examined for the better end of justice. To avoid prejudicing the retrial process I will not reproduce the facts or evidence given by the victim. It suffices to say the same dictates to be re-recorded under the proper procedure and determined to adjudge the rights of the parties.

I therefore allow this appeal on the ground that the proceedings of the trial court suffered serious irregularities as complained of. I do hereby nullify the entire proceedings, quash the judgment of the trial court and set aside the life sentence meted against the appellant. I

order that he be tried afresh before another magistrate with competent jurisdiction. Taking into consideration that returning this case to the register of the trial court makes it automatically a backlog, I direct that the same should be heard expeditiously and concluded within the shortest possible time. It is so ordered.

A. MATUMA

JUDGE

30/03/2023