IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 64 OF 2022

(Arising from Criminal Case No. 57 of 2021 Bariadi District Court)

DAMAS MFUNGO @MGANE ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of Last Order; 31st May, 2023
Date of Judgment; 30th June, 2023

S.M. KULITA, J.

This is an appeal from Bariadi District Court. The appellant herein, **DAMAS MFUNGO @MGANE** was charged and convicted of Rape contrary to the provisions of sections 130 (1), (2) (e) and 131 (3) of the Penal Code [Cap. 16 RE 2019]. He was sentenced to 30 (thirty) years imprisonment plus 12 (twelve) strokes. Aggrieved with conviction and the said sentence the Accused preferred this appeal basing on four grounds which can be summarized into two as follows;

1. That, the case at the District Court was not proved beyond reasonable doubts.

2. That, the trial court didn't consider the appellant's mitigation before passing the sentence.

The appeal was argued through oral submissions. While the Respondent, Republic is represented by Ms. Wampumbulya Shani, State Attorney, the Appellant is unrepresented.

In his oral submission the appellant prayed for his grounds of appeal to be adopted as the submissions for his appeal. He concluded by praying for his appeal to be allowed.

In her reply thereto, the State Attorney submitted that the Republic has noticed that, in applying section 127 of the Tanzania Evidence Act [Cap 6 RE 2019] the trial Magistrate just stated that PW1 who is the victim in this matter was capable of telling the truth. The Magistrate didn't show the interview that she had made to the said witness that led her to reach into the said findings, which is contrary to the requirements of the law. She said that, this is what the trial court's record transpires in its proceedings.

The State Attorney, Ms. Shani also submitted that, apart from that said procedural defects the case at the District Court was proved beyond all

reasonable doubts. She concluded by praying for the trial court's proceedings to be nullified, the judgment to be quashed and the sentence imposed against the Appellant be set aside. She added that, for the sake of justice, the said nullification of lower court's proceedings be followed by an order for re-trial of the original case.

The Appellant had nothing to rejoin.

From the submissions, I start to deal with the legality on the application of **section 127 of the Tanzania Evidence Act [Cap 6 RE 2019]** by the trial court. As submitted by the State Attorney that the proceedings of the trial court are vitiated with the irregularities which led to miscarriage of justice.

Right from the beginning the State Attorney 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**. She said that the trial Magistrate did not reflect on record as to how she examined the witness who was under tender age to ascertain whether she could not give her evidence under oath. The said Magistrate merely recorded her conclusion that the witness could not give her evidence on oath because she was of minor age of 9 (nine) years. She then added

that the said witness promised to tell the truth. In doing so she purported to have complied with the requirements of **section 127(2) of the Evidence Act,** as she had so noted in the record.

According to **section 127(4) of the Evidence Act,** 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** which states;

> *"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"*

However, unlike an adult witness, the child of tender age must, before giving evidence under oath or affirmation, be tested by the trial court on simple questions if he/she can give evidence under oath or affirmation as the case may be. See the case of **Selemani Moses Sotel @ White V. R, 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 Criminal Procedure Act.** The said exemption is

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

However, the records must be clear as to how the Court arrived into a conclusion that the said 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 the Accused. See **Godfrey Wilson v. R, Criminal Appeal no. 168 of 2018, CAT at Bukoba (unreported).** In several occasions the Court of Appeal of Tanzania has 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.

While citing the case of **Godfrey Wilson V. R, Criminal Appeal No. 168 of 2018, CAT at Bukoba (unreported)** the Court of Appeal stated in **Issa Salum Nambaluka V. R, Criminal Appeal No. 272 of 2018, CAT at Mtwara** 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 replies 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 record does not speak by itself whether PW1 was tested to ascertain her ability to give evidence on oath or otherwise. We only find the conclusion remarks of the trial Magistrate that the witness should give her evidence without oath because she was of tender age and promised to tell the truth. As there is nothing on record to assist this appellate court to know how the learned trial Magistrate arrived into such conclusion, I cannot rely on such general conclusion remarks by the learned Magistrate reflecting in the record.

In deciding on such fatality, the Court of Appeal and even this court have been taking different stances, depending on the facts of each case. There are instances that the evidence recorded under such anomaly were

expunged for being regarded valueless. See the case of **Godfrey Wilson (supra)**. In some other instances it has been ruled out that a re-trial would serve the better end of justice for an innocent, that the victim should not be condemned for the mistakes of the court itself, nor the criminal (accused) should not benefit for the irregularities done by the court.

What is a way forward then? While the Appellant is silent, the State Attorney suggests for re-trial. The principles of law suggest that when the court considers that, even if the evidence on record would have been properly received, still the conviction would not follow, then an acquittal is an appropriate order, because the re-trial can be used by the prosecution as an opportunity to fill in the gaps. See **FATEHALI MANJI V. R [1966] EA 333** case.

In the instant case I find the proposal argued by the learned State Attorney on re-trial is sounding, but the same should not involve the whole testimonies adduced by the prosecution. The fact that the detriment has been noticed on the PW1's (victim's) testimony only, that person's testimony only is to be re-taken and recorded afresh for the purpose of clearing the trial court's fault in containing the requirements of **section 27(2) of the Tanzania Evidence Act.**

Therefore, in the instant case, only the victim (PW1) should testify afresh. The aim is to avoid the prosecution to use the opportunity of re-trial for the whole case to fill the gaps. As PW1 is going to testify afresh, the opponent party, Accused (the Appellant herein) will have the opportunity to defend his case afresh.

The logic behind that finding is that the appellant should not benefit from the wrongs of the court itself and the respondent should not be condemned for the wrongs that were not caused by her witness, but the court.

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 the said victim who testified as PW1 get opportunity to have her evidence properly recorded in accordance with the law, so that it can be examined for the better end of justice. That will lead to the composition of the ruling by the trial court on whether the Accused (appellant) has a case to answer or not, then defense hearing, if any.

To avoid prejudicing the re-trial process, I am not going to reproduce the facts or evidence that had been given by the victim during trial in the impugned case. It suffices to say that the same dictates to be re-recorded

under the proper procedure and determined to adjudge the rights of the parties.

I therefore **partly allow this appeal** to the extent that, the proceedings of the trial court, particularly the testimony of PW1 (victim) and that of DW1 (accused/appellant) are hereby quashed. It is ordered that they should be recorded afresh. For the sake of justice, the said **re-trial** involving recording of the **testimonies of PW1 and DW1** should be done by another Magistrate with competent jurisdiction.

THE HIGH COURT OF TANZANIA

S.M. KULITA
JUDGE
30/06/2023