IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

CRIMINAL APPEAL CASE NO. 73 OF 2022

(Original from the District Court of Kondoa at Kondoa, in Criminal Case No. 76 of 2021)

AMIR HUSSEIN BONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Judgment: 22/08/2023

A.J. MAMBI, J.

In the District Court of Kondoa the appellant **AMIR HUSSEIN BONGA** was charged with an offence of rape, contrary to section 130 (1), (2) (e) and section 131 (1) of the Penal Code, Cap. 16 [R.E. 2019]. Upon being convicted, the appellant was sentenced to serve 30years imprisonment. Aggrieved, the appellant preferred his eleven grounds appealed to this court to challenge the decision of the trial court. The appellant preferred the following grounds of appeal; -

1. THAT, the trial court grossly erred in law and fact when convicted the appellant without considering that the prosecution case totally failed to prove the case beyond all reasonable doubts.
2. THAT, the trial court grossly erred in law and fact by failure to comply with both section 10(3) and section 9(3) of the criminal procedure Act, Cap 20 RE 2019 as this enable the prosecution side to pirate building up its case from the case already in court.
3. THAT, the trial court grossly erred in law and fact when failed to warn himself that to act on the evidence of a person having interest do admit such evidence there should be evidence to corroborate such evidence unfortunately the case at hand there was no corroboration.
4. THAT, the trial court grossly erred in law and fact when convicted the appellant basing on procedural irregularities for failure to comply with section 127(2) of the evidence Act Cap 6 R.E 2019 as amended by Act, No. 4 of 2016.
5. THAT, the trial Court grossly erred in law and fact when failed to notice that the case was fit for DNA test before finding the Appellant guilty for the offense.
6. THAT, the trial Court grossly erred in law and fact when failed to notice that the age of the victim (PW1) was not established.

7. THAT, the trial court grossly erred in law and fact when convicted the Appellant without to adhere the requirement of the mandatory provision of section 192 (3) of the Criminal Procedure Act Cap 20 R.E 2019.
8. THAT, the trial court erred in law and in fact when did not draw adverse inference against the prosecution side by failing to call one essential witness "LAILA" to come and testify during the trial without undisclosed reasons as per page 7 of the court proceedings.
9. THAT, the trial court grossly erred in law and in fact when admitted the evidence of PW4 (Doctor) as the same did not establish section 130(4) (a) of the Tanzania Penal Code Cap 16 R.E 2019.
10. THAT, the trial court grossly erred in law and in fact when admitted on the fabricated evidence and defamed one against the appellant due to the monies which he give grandmother of the victim PW2.
11. THAT, the trial court grossly erred in law and in fact when convicted the appellant without giving due evidence adduced by the appellant.

During hearing, the appellant appeared unrepresented while the Republic was represented by Ms. Sara, the learned State Attorney.

The appellant had nothing to add apart from adopting his grounds of appeal.

Responding to the grounds of appeal, the learned State Attorney Ms. Sara, for the Republic, submitted that, they don't support all grounds of appeal. Responding to the grounds of appeal collectively the learned State Attorney submitted that the prosecution proved the case beyond reasonable doubt. She argued that the court properly complied with Section 127 of the Evidence by asking the victim to promise. Ms. Sara added that trial court complied with section 192 of the CPA as indicated under page 5. Furthermore, that Laila was not a material witness as she was not at the scene.

It was her further submission that the evidence by the victim (PW1) was clear and the trial court based on it in convicting the appellant. She also contended that in sexual offences like the one at hand, the evidence of the victim is crucial as it was held in the case of **Selemani Makumba v. Republic [2006] TLR 379.**

The learned State Attorney also argued that, the evidence of PW1 was also supported by other testimony of the victim's mother, she argued that the age of the victim was proved by her mother that she was fourteen (14)

years old. She further argued that, there was no need DNA evidence since it is a mere expert opinion and that in rape cases the true evidence come from the victim.

Having summarised the submissions from both the appellant and prosecution, I now revert to the appeal at hand. The appellant's grounds of appeal can be reduced to form three grounds of appeal. Starting with ground number four, the appellant in this ground is claiming that the court did not address the child to the requirement of section 127 (2) of the Evidence Act as amended by Act No.2 of 2016. Initially, before the Evidence Act, Cap. 6 [R. E. 2019] was amended in 2016 the law Section 127 (2) mandatorily required the court to conduct *voire dire* for the child who is under the tender age to test the understanding and intelligence of the child. However, after the amendment the court now is required to assess the credibility of the evidence of the child of tender age, through asking that child to promise to tell the truth. The rationale is to make the court to satisfy itself that the child of tender age is able to tell the truth.

This is found under section 26 of *the Written Laws (Miscellaneous Amendment) (No.2) Act, 2016* which amends section 127 of the Evidence Act by inserting the new subsection as follows:

Section 127 of the principal Act is amended by-deleting subsections (2) and (3) and substituting for them the following:

"(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".*

Reading between the lines on the above provision, the interpretation of the word **"shall"** implies mandatory and not option and that is the legal position under section 53 of the Interpretation of Laws Act Cap 1 [R.E.2019]. The above section implies that the court must satisfy itself that a child of tender years has promised to tell the truth to the court and not to tell any lies, a fact which was overlooked by the trial court in our case. This can only be done by the court by properly structuring the questions that will enable the court to be in a better position to determine if the witness who is a child of the tender age understands the duty of speaking the truth before proceeding to record his/her evidence.

Indeed what the amending law require is the child to promise that he/she will tell the truth in his/her evidence, Thus, the duty of the court will be to assess the credibility of the evidence of the child of tender age, to satisfy itself that the child of tender age is telling nothing but the truth". The court

must also record that the child has promised to tell the truth. I have perused the trial proceedings and found that the Magistrate at page 6 appears to have addressed the child to section 26 of *the Written Laws (Miscellaneous Amendment) (No.2) Act, 2016.* However, he failed to record the promise by the child apart from just recording the questions he asked.

My perusal from the trial records reveals that the prosecution witnesses PW1 (the victim) was the child of tender age and the trial court convicted the appellant basing on the evidence of PW1. However, I have perused the trial court proceedings and there is nowhere to show that the court has properly recorded the promise of the child to tell the truth in her evidence. The proceedings does not show how the court did came into conclusion that the child new the meaning of an oath. Indeed, the law provides that before recoding the evidence of the child of tender age the court is required to ask the child if she promises to speak the truth. However, the proceedings of the trial court at page 6 reads as follows;

"PW1

X X X (The name of the Victim), 14 years, Rangi, Muslim.

Court-She knows the meaning of taking oath

SGD; M.J.MASSAO-RM

Affirmed and testified".

Reading between the lines on the above paragraph one may wonder how did the trial magistrate assumed that the witness PW1 knew the meaning of taking oath. If the trial magistrate asked the child, then he was required to record the answers made by the child. It is trite law that in rape cases where a prosecution relies on the evidence of the child of tender age, that witness can give evidence with or without oath or affirmation after making a promise to tell the truth depending on the age of the child. This means that 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 and age of the child. The rationale behind is to determine whether or not the child witness understands the nature of oath or affirmation.

Now if the child did not properly promise to tell the truth, it will be hard to determine if the child understood the meaning of telling the truth and this will be contrary to section 26 the Written Laws (Miscellaneous Amendment) (No.2) Act, 2016. Assuming the trial magistrate did not apply the amendment of section 127 of the Evidence Act, still he was required to ask the child simple question to determine if she understands the meaning of an oath and speaking truth. The trial magistrate could ask the question

such as the age, her religion, her parents, whether she understands the nature of oath or affirmation. Additionally, the trial magistrate could also ask the child whether or not she promises to tell the truth to the court. In the course of asking simple questions, if it happens that the child replies in the affirmative, the next step will be the task of the trial magistrate to ask the child to proceed to give evidence on oath or affirmation depending on the religion he/she professes. In my view at all material time, the trial magistrate is required to record the answers made by the child.

Failure to record if the child promised to tell the truth and failure of the court to ask the child proper questions related to the child understanding of the meaning of telling the truth meant that the court was not able to correctly conclude that the victim (the child) had sufficient understanding on the nature of oath and importance of telling the truth. I am of the considered view that the legal requirements are conditional precedent to receipt of evidence from a child of tender years whose evidence has not been received on oath or affirmation. It is trite law that where there is complete omission by the trial court to correctly and properly address itself to requirements of the provisions of the law governing the competency of a child of tender years, the resulting testimony is to be discounted.

The legal requirements and procedures of taking evidence of the child of tender age (below 14 years old) in line with the provisions of the laws governing evidence was also underscored in ***MOHAMED SAINYENYE V. REPUBLIC CRIMINAL APPEAL NO.57 OF 2010 CAT*** (Unreported) in which the court emphasized that, where the prosecution relies on the evidence of child of tender years who does not understand the nature of the oath, the court must comply with provision of the Evidence Act Cap 6 [R.E. 2002] which has now been amended by Act No.2 of 2016. See **Issa Salum Nambaluka v. Republic, Appeal No. 272 of 2018, Court of Appeal of Tanzania at Mtwara** (unreported).

The Court of appeal in **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** (unreported) and the **Issa Salum case** (supra) highlighted is to the following principles with regard to the evidence of the child of the tender age that:

a) T 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".*

Indeed, the trial records, do not show that, if the trial magistrate asked the child some simple questions to determine whether or not she understood the nature of oath or affirmation. Failure to do so left a lot to be desired. Now if the evidence of the victim is expunged, it means that the prosecution will have probative evidence since the best evidence is that of the victim.

It should also be noted that it is the primary duty of prosecution to prove the criminal cases such as rape beyond reasonable doubt by proving to the court that the victim was actually raped by the accused and there was

penetration or if the offence involved attempted rape then the ingredients or elements of attempted rate must be fulfilled. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. The state or prosecution has the burden of proof in criminal cases. The prosecution therefore, had to establish beyond any reasonable doubt that it was the Appellant who had raped PW1. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.***

Having carefully gone through the proceedings and judgment of the trial court, the grounds of appeal and submissions from both parties, I find the key issue is whether the prosecution proved the case against the appellant beyond reasonable doubts or not. The prosecution in their submission just submitted that the best evidence comes from the victim on the ground that since the victim mentioned the appellant then the offence was proved.

Generally, it is the duty of the prosecution to establish prima facie case. In this regard, the standard of burden of proof on the prosecution is beyond reasonable doubt. Indeed the accused cannot be convicted basing the

strength of the weakness of his case rather, the test shall be the strength of prosecution's case. Failure to do so left a lot of questions to be desired and that should benefit the appellant. The Court of in ***Christian s/o Kaale and Rwekiza s/o Bernard Vs R [1992] TLR 302*** stated that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case.

The position of the law is clear that the standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case beyond reasonable doubts.

I am of the settled view that there is a doubt if the guilt of the appellant was really established and proved beyond reasonable doubt. It is clear from the above observation that the judgment by the trial magistrate was not proper for non-compliance with the law. This is an obvious omission and irregularity that ought to have been observed by the trail Magistrate and even the prosecution. Taking into account that the offence involved grievous sexual abuse, the trial magistrate was required to fully scrutinize, analyses and evaluate the evidence to satisfy himself that all elements of

such offence were made and there was actually a rape made by the accused.

With all irregularities I have observed, it cannot be said that the appellant was availed with fair trial. In the circumstances I am satisfied that the appellant's conviction and sentence was not properly done as the trial court failed to notice some irregularities which lead to injustice on the part of the accused who is now the appellant. Having established that in this case the trial magistrate has failed to comply with the requirements of proceedings and judgment writing that renders both the proceedings and judgment invalid, the question is, has such omission or irregularity occasioned into injustice to the accused/appellant?. If the answer is yes, what will be the proper order to be made by this court at this stage?. The other question at this juncture would now be, having observed such irregularities, would it be proper for this court to order retrial or *trial de novo?.* There are various authorities that have underlined the principles and circumstance to guide the court in determining as to whether it is proper to order retrial or *trial de novo* or not.

I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B***

OF 2013, where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where* ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

Basing on the above decisions of the higher court and my observations, I find my hands are tied up since an order for retrial can only be made where the interests of justice requires it and should not be ordered where it is likely to cause an injustice to the accused person. In my considered and firm view, in our case at hand the irregularities are immense that does not favour this court to order for retrial and the interests of justice does not require to do so, since doing so will in my view create more likelihood of causing an injustice to the appellant and I hold so. Even if the court

could have ordered retrial, in my view is no valuable evidence that can be relied by the prosecution to prove the charges against the appellant beyond reasonable doubt.

On the other hand, I have also noticed clear omission from the proceedings and judgement by the trial court as indicated under the grounds of appeal. If one look at the judgment it is clear that the Magistrate did not consider apart from just basing on the prosecution evidence. Indeed, the trial magistrate focused much in quoting the provisions of the law and summarizing the prosecution facts instead of analyzing and considering the evidence of both parties before making his decision. I have never come across with a single word "DW" to indicate the defence evidence was analyzed and considered. I have only come across with many "PWs" to show that the trial magistrate was busy discussing the evidence of the prosecution. This according to the law is fatal as it can occasioned to injustice to the other party that is the defence or the appellant in our case.

It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. I wish to refer the decision of the court in ***Hussein Iddi and***

Another Versus Republic [1986] TLR 166, where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

See also ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015, the court at Page 16*** which underscored the importance of without considering the defence evidence. It is also imperative to refer the decision of the court that in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported),*** cited in ***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No. 13 of 2012*** where the Court warned that considering the defence was not about summarising it because:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The Court in Leonard Mwanashoka (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well*

taken. ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too****. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."* [Emphasis added].

The fact that the prosecution did not prove the charges against the accused and the fact that the trial proceedings were marred with much irregularities, I am not in the position to order the matter retrial or de-novo, as doing so, as alluded above, will create more injustice to the accused.

Basing on my above reasons, I am of the settled view that the guilt of the appellant was not properly found at the trial court due the fact that the trial court failed to observe some legal principles on the detriment of the appellant. In the premises, I quash the conviction and set aside the sentence imposed on the appellant and other subsequent orders. In the

interest of justice, I order that the appellant be released from prison forthwith unless he is held on other lawful cause. Order accordingly.

A.J. MAMBI

JUDGE

22/08/2023

Judgment delivered in Chambers this 22nd day of August, 2023 in presence of both parties.

A.J. MAMBI

JUDGE

22/08/2023

Right of Appeal explained.

A.J. MAMBI

JUDGE

22/08/2023