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

CRIMINAL APPEAL NO. 60 OF 2021

(Appeal from the Decision of District Court of Maswa at Maswa Hon. RUGUMIRA, RM)

NONI MATHIAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

2nd October&10th November, 2023.

MASSAM, J.:

Noni Mathias referred to as the Appellant in this appeal, was charged in the District Court of Maswa for the offence of Rape Contrary to Section 130 (1) (2) and (e) and 131(1) of the Penal Code, Cap. 16 RE 2019.

It was alleged that on 8th day of August, 2021 at mid day time Malampaka Village within Maswa District in Simiyu Region the accused person did rape a girl of 6 years old. In a nutshell the prosecution case as was unfolded by its witnesses is that, the appellant was the victim's neighbor on the said date the accused was in his room where he called the

victim in his room when entered he put her on the bed and rape her. The accused person when continuing in raping her one Ngasa entered to the room and the accused person chased him away. Ngasa decided to call another neighbor called Paulina Herman who decided to call Jeremiah Felician who is sungusungu (police Auxiliary) who helped to arrest the accused person. The offence was reported to the police station and the victim was taken to Malampaka health center. When medical examination was conducted, it was revealed that, the victims' vagina had some sperms and bruises. On that account then, the appellant was arraigned to court.

Though the appellant denied to have committed the offence but to the conclusion of the trial, the appellant was accordingly found guilty of the offence charged. Upon conviction, a life imprison sentence, was met to him.

Aggrieved by that decision, the Appellant preferred the instant appeal on four grounds which may be summarized as follows: **One**, it was wrong for the trial court to rely and acting upon the evidence of PW1 and PW2 while they did not comply with section 127(2) of TEA. **Two**, it was wrong to convict him without considering the translator who was translating the Pw1's evidence if he was competent with Sukuma language. **three,** it was

wrong to convict the appellant with the inconsistence and contradictive evidence while penetration was not proved, **four**, the prosecution failed to prove the offence beyond all reasonable doubt.

On the date of hearing the appeal, the Appellant appeared in person whereas the Respondent/Republic had the service of Mr. Leonard Kiwango, learned State Attorney who resisted the appeal.

In supporting his appeal, the appellant's stated that he did not commit the alleged offence. In reply to the 1st ground of appeal Mr. Kiwango submitted that, he is supporting it as it is true that trial court did not comply with section 127(2) of TEA. He added that he also supports the ground no 2 that the translator did not show that the victim knew the meaning of oath or not and if she promises to say the truth. He continued to say that PW3's testimony which is found at page 10 in court proceedings show that the victim was penetrated as her vagina was found with bruises together with sperms. PW4 also told the court that at 14.00hrs when she was along the river she was called by her neighbor and being told that her daughter/victim was raped by the accused/appellant. The respondent added that at page 14 the appellant when he was given right to cross

examine PW4 he said that he had nothing to ask. So his failure to cross examine means that he admitted what PW4 was testifying was true.

The defects which done by trial court in taking the evidence of pw1 and pw2 was procedural errors as elaborated in the case of **Ayubu S/O Musa @senyamanza v Republic** Criminal appeal No. 103 of 2022 page 7-8 when citing the case of **Gilbert Ntambala and Another vs Republic** Criminal Appeal No. 3 of 2020 High court Kigoma which held that ***"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 there trial is not there to accord the prosecution opportunity to fill*** **in gaps"**

Mr. Kiwango added that the evidence brought by the prosecution proved that the appellant committed the charged offence but the only problem was only the errors which were conducted in recording the

evidence of PW1 and PW2. Lastly he pray this court to nullify the trial proceedings and order the retrial. In rejoinder appellant prays this court to left him free.

I have entirely gone through earnestly all the parties' submissions, authorities supplied and the available records. The issue for determination is **whether the appellant's appeal is meritorious**.

In finding the same, I will attend to the grounds of appeal no 1 and 2 which respondent also supported the same. This court on perusal of the trial proceedings especially pg. no 5-7 when pw1 and pw2 was testifying their evidence were recorded without comply with section 127(2) of TEA. PW1 was a child of only 6 years unlike an adult witness must however before giving the evidence under oath or affirmation be tested by simplified question and the trial court be satisfied that such witness can in fact give evidence under oath or affirmation as well elaborated in the case of **Seleman Moses Sotel @ white vs. Republic** Criminal Appeal no 385 of 2018 court of Appeal.

Again in the case of **Issa Salum Nambaluka vrs Republic** Criminal Appeal No. 272 court of appeal held that;

"In the case of Godfrey Wilson in criminal appeal no 168 Of 2018 we stated that where a witness is a child of tender age a trial court should at the first foremost ask few pertinent question so as to determine whether or not the child witness understands the nature of oath .If he replied in 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 to the present case the records are silent as nowhere show that PW1 was tested her ability to give evidence on oath or otherwise, but the record reveal that before the court proceed with the hearing the court has established that witness does not understand Swahili language other than Sukuma, therefore his statement will be translated by the translator who is Mathias s/o Charles, Majebele area Maswa, 53yrs, office attendant Maswa district court, Sukuma, Christian;

The above piece of the records are silent and does not show how the trial magistrate arrived to the said conclusion that the victim knows the meaning of oath or she promised to tell the truth as PW2 who was translator could be also in position to tell us if PW1 said that he knows the meaning of oath or she promised to speak the truth. This means that PW1 testified without knowing the nature of oath nor promising to tell the truth.

That was procedural irregularities and against the provision of law under section 127(2) of TEA. This court after finds out that the said errors was done, the question to ask is, what is the proper procedure to follow, as the Court of Appeal directs that, the defects in recording the evidence should supposed to be expunged for being held valueless but in some instances, it has been ruled out that a retrial can serve the better end of justice for the victim as the victim should not be condemned by mistakes committed by the court as stated in the case of **Gilbert Ntambala and another vs Republic**, Criminal Appeal No. 3 of 2020 High Court Kigoma(supra).

Respondent in his reply supported the appeal in ground no 1 and 2 and proposed that this court to order re trial. This court is in support with Mr. kiwango proposal of re trial in order for the victim to be given her right

to be heard as it is the mistake of the court in recording the evidence of PW1 and PW2 because the victim was a child of 6years has a right to be heard and cannot be condemned by the court's mistake.

From the above reasons this court is allowing the appeal on the ground that the proceedings of the trial court was found in serious procedural irregularities in recording the evidence of Pw1 and Pw2 .So I hereby nullify the trial court proceedings, quash the judgment and set aside the sentence meted against the appellant. I order the re trial before another magistrate with competent jurisdiction.

It is so ordered.

DATED at **SHINYANGA** this 10th day November, 2023

THE HIGH COURT OF TANZANIA

R.B.Massam
JUDGE
10/11/2023