IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 59 OF 2023

(Originating from Criminal Case No. 29 of 2022 District Court of Bukoba)

HAMZA SWAIBU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

23rd November & 11th December, 2023

BANZI, J.:

The appellant was arraigned before the District Court of Bukoba (the trial court) charged with the offence of Incest by Males contrary to section 158 (1) (a) of the Penal Code [Cap. 16 R.E. 2019]. It was alleged that, on 9th January, 2022 at Kagondo ward, within Bukoba Municipality in Kagera Region, the appellant had prohibited sexual intercourse with a girl of four years whom I shall refer to as victim or PW5 who to his knowledge is his daughter.

Before the trial court, the prosecution side paraded six witnesses in a bid to prove the case against the appellant. In the main, the prosecution evidence leading to the conviction of the appellant reveals that, the victim was living with her father, the appellant. According to their co- tenant, PW1,

the appellant usually left home with the victim around 5:00am. On 10th January, 2022, PW1 out of sympathy decided to take the victim and stayed with her until her father returned. In the course of bathing her and when PW1 was trying to wash her private parts, the victim refused claiming to feel pain on her thighs and backbone. Upon being asked, the victim informed her that, when she sleeps with her father, he used to insert something on her private parts. PW1 and PW2 examined her and found pus discharge. They reported the matter to local authority and on 11th January, 2022, the victim was taken to hospital where she was examined by PW4 who found bruises on her genitals. He also found her with perforated hymen and after inserting fingers, they came out with blood but with no trace of sperms.

In his defence, the appellant categorically denied to have committed the alleged offence. He claimed that, on 9th January, 2022 while he was at home, PW1 came and requested for the victim in order to stay with her. The appellant hesitated but after she insisted, he accepted to leave the victim with PW1 and left for work. Around 3:00 pm, he decided to return home but couldn't find the victim or PW1. He asked the neighbours only to be told that, PW1 has not returned since she left around 6:00 am. He washed the victim's clothes and left. About 6:30 pm, he returned from work but PW1 was not yet home. He waited until 8:45 pm, when she returned with the victim. After being asked where they were, PW1 told him that, they were just walking

around. When he wanted to bath her, PW1 told him that, she had already washed her. Later on, while he was in his bedroom, someone knocked the door and after opening, he told him that, he was there after being informed that, the victim had stomach problem. Upon touching the child's stomach, he told the appellant to carry the victim to hospital. They passed at police station and it was at that point when he was alleged to rape his child. He blamed PW1 to be responsible as she was with the victim the whole day. He insisted that, he would never rape her daughter whom he took care since she was nine months.

At the end of the trial, the appellant was convicted and sentenced to life imprisonment. At first, he filed an appeal before this Court whereby, my learned brother, Hon. Mwenda Judge quashed the conviction, set aside the sentence and remitted back the record before the trial court for trial magistrate to recompose the judgment according to law. After complying with the order of this Court, on 14th August, 2023, the trial magistrate delivered the judgment whereby, he convicted the appellant and sentenced him to life imprisonment. The appellant is once again before this Court challenging his conviction and sentence. Mr. Nathan Alex, learned counsel who represented the appellant pursuant to section 33 (1) of the Legal Aid Act [Cap. 21 R.E. 2019] raised four grounds of appeal, thus:

1. *THAT, the trial District Court grossly erred in law to receive the evidence of PW5 contrary to mandatory provision of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2022;*
2. *THAT, the learned trial Magistrate grossly erred in law to receive and rely on the evidence of PW1 which was neither on oath nor affirmation hence in contravention of section 198 (1) of the Criminal Procedure Act, Cap. 22 R.E. 2022;*
3. *THAT, the trial Senior Resident Magistrate grossly erred in law and facts for convicting the Appellant on offence of incest by male while the same was not proved beyond reasonable doubt;*
4. *THAT, the learned trial Magistrate grossly erred in law and facts to sentence the Appellant to life imprisonment contrary to the law and failed to take into consideration mitigating factors.*

At the hearing, the appellant was represented by Mr. Nathan Alex, learned counsel while Mr. Yusuph Mapesa, learned State Attorney appeared for the respondent.

Arguing in support of the first ground, Mr. Alex submitted that, section 127 (2) of the Evidence Act [Cap. 6 R.E. 2022] (the Evidence Act) was not complied with as the victim was not asked if she knows the meaning of oath and her promise to tell the truth was incomplete. Since the law was not

complied with, he prayed that, the evidence of the victim be expunged from the record. To support his argument, he cited the case of **John Mkorongo James v. Republic** [2022] TZCA 111 TanzLII. In respect of the second ground, he argued that, the evidence of PW1 was received in contravention of section 198 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) because her testimony was taken without oath which makes it to be with no evidential value deserving to be expunged from the record. He cited the case of **John Julius Martin and Another v. Republic** [2022] TZCA 789 TanzLII to buttress his argument.

Reverting to the third ground, he submitted that, it was stated in the case of **John Julius Martin and Another v. Republic** (*supra*) that, when the charge sheet indicates specific date, the prosecution should bring evidence to prove that, the offence was committed on that specific date. In the matter at hand, the charge sheet indicates that, the offence was committed on 9th January, 2022. However, all six witnesses did not explain about the appellant to have committed the alleged offence on 9th January, 2022 as indicated in the charge sheet. In that regard, he submitted that, the prosecution had failed to prove the offence against the appellant. Returning to the last ground, he contended that, the appellant who was the first offender was sentenced to life imprisonment without considering his mitigating factor which is against the settled principle stated in the case of

Ramadhan Salehe v. Republic, Criminal Appeal No. 349 of 2013 CAT at Mwanza (unreported). He concluded his submission with a prayer for this Court to allow the appeal by quashing the conviction, setting aside the sentence and releasing the appellant from custody.

Responding to the first ground, Mr. Mapesa submitted that, the requirement to conduct test to verify whether the child witness knows and understands oath or affirmation is applicable and necessary if the child witness testified under oath or affirmation as it was stated in the case of **Mathayo Laurance William Mollel v. Republic** [2023] TZCA 52 TanzLII. He further submitted that, in the matter at hand, at page 19 of the proceedings, PW5 promised to tell the truth. Although his promise looked incomplete, it is a settled principle that, a person who promises to tell the truth is in effect promising not to tell lies. He supported his argument with the same case of **Mathayo Laurance William Mollel v. Republic** (*supra*).

Concerning the second ground, he conceded that, the testimony of PW5 and DW1 was received without oath or affirmation contrary to the dictates of the law under section 198 (1) of the CPA and section 4 (a) of the Oaths and Statutory Declarations Act [Cap. 34 R.E. 2019]. According to him, the omission vitiates the proceedings and the only remedy is to nullify them and order a retrial as stated in the case of **Hamisi Chuma @ Hando Mhoja**

and Another v. Republic [2016] TZCA 217 TanzLII. Nonetheless, he further conceded to the third ground that, none among the prosecution witnesses did mention the date of incident as alleged in the charge sheet. This is a clear indication that, the offence was not proved as alleged in the charge. He proposed that, with such flaw, the order of retrial is no longer viable and he prayed for this Court to quash the conviction, set aside the sentence and release the appellant from prison.

I have carefully considered the submissions of learned counsel of both sides in line of record of the trial court. For purpose of convenience, I find it pertinent to begin with the second ground of appeal concerning non-compliance of section 198 (1) of the CPA.

Section 198 (1) of the CPA provides that:

> *"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 Oaths and Statutory Declarations Act."*

It is clear from the provisions of the law above that, every witness in criminal proceedings must give his evidence under oath or affirmation. In the case of **Hamisi Chuma @ Hando Mhoja and Another v. Republic** (supra), it was underscored that:

> *"Every witness in a Criminal Cause or matter shall be examined either on oath or affirmation subject to the provisions of any other written law to the contrary... the only exception to the dictates of Section 198 (1) as provided under section 127 (2) of the Evidence Act is the evidence of a child of tender age, that is, a person below the age of 14 years who does not understand the nature of an oath."*

In the present matter, the record of the trial court reveals that, PW1 and DW1 professed Christian and Islamic religion respectively. For that reason, PW1 ought to have been sworn and DW1 to be affirmed before the reception of their testimony. However, PW1 was examined without oath or affirmation. Likewise, despite the appellants' expression to testify under oath at page 23 of the proceedings, the trial magistrate went and received his defence without affirmation. What he did is completely against the dictates of the law under section 198 (1) of the CPA. In that regard, as stated in the cases of **Hamisi Chuma @ Hando Mhoja and Another v. Republic** (supra), **Jafari Ramadhani v. Republic** [2019] TZCA 388 TanzLII and **Nestory Simchimba v. Republic** [2020] TZCA 155 TanzLII, their evidence was invalid and deserved not be considered by court to determine the guilt or otherwise of the appellant.

On the way forward, it is established principle that, generally a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. See the cases of **Fatehali Manji v. Republic** [1966] EA 341 and **Selina Yambi and Others v. Republic**, Criminal Appeal No. 94 of 2013 CAT (unreported).

In the matter at hand, Mr. Alex, learned counsel for the appellant and Mr. Mapesa, learned State Attorney both agreed that, the evidence of prosecution was insufficient because none among the witnesses was able to prove that, the appellant committed the offence on 9th January 2022 as alleged in the charge sheet. Reaffirming its position laid down in the case of **Salum Rashid Chitende v. Republic**, Criminal Appeal No. 204 of 2015 (unreported), the Court of Appeal in the case of **John Julius Martin and Another v. Republic** (*supra*) held as follows:

> *"When specific* ***date****, time and place* ***is mentioned in the charge sheet****, the* ***prosecution is obliged to prove that the offence was committed on that specific date****, time and place."* (Emphasis supplied).

As intimated above, in the matter at hand, none among six prosecution's witnesses gave evidence to prove that, the alleged offence was committed on the 9th January, 2022 as mentioned in the charge sheet. Under

these circumstances, an order of retrial will open up an unlimited opportunity for the prosecution to fill in the gap.

For those reasons, I find the appeal with merit and I allow it by quashing the conviction of the appellant and setting aside the sentence meted against him. I hereby order his immediate release from prison unless, he is held for another lawful cause.

It is so ordered.

I. K. BANZI
JUDGE
11/12/2023

Delivered this 11th December, 2023 in the presence of Ms. Pilli Hussein, learned counsel holding brief of Mr. Nathan Alex, learned counsel for the appellant who is also present and Ms. Evarista Kimaro, learned State Attorney for the respondent. Right of appeal duly explained.

I. K. BANZI
JUDGE
11/12/2023