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

DC. CRIMINAL APPEAL NO. 20 OF 2023

(Original Criminal Case No. 21 of 2022 of the District Court of Bariadiat Bariadi)

LUHINDA MUCHA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

24th October & 8th December, 2023

MASSAM, J:

The appellant, Luhinda Mucha was charged before the District Court of Bariadi at Bariadi with the offence of Rape contrary to section 130(1) and (2)(e) and 131(1) ofthe Penal Code, Cap. 16 R:E 2022.

In brief, the substance of the evidence which led to his conviction was that:

The victim M.M (PW1)14 years old, was a student of standard six at Bupandagila Primary school on 21st February, 2022 at around 17:00 hours at Bupandagila village, in Nyakabindi ward, within Bariadi District in Simiyu region, on her way to fetch water from the river she met the

appellant who forced her to have sexual intercourse by pulling her under pant and inserted his penis into her vagina, while covering her mouth with hands so she could not raise an alarm/shout, there after the appellant run away. The victim who was in pain and bleeding she went home and told her mother about the incidence who went to report at Nyakabindi police station and later the victim was taken to Somanda Hospital for examination.

Subsequent to the said allegation, the appellant was arrested and charged with rape, whereas the trial was conducted and the appellant was convicted and sentenced to 30 years imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to this court with the following four grounds:

1. *That the learned trial court erred in law and fact to pass sentence in hearsay evidence adduced by the PW1 which was not collaborated to each other.*
2. *That, the learned trial court erred in law and fact when he did not properly evaluate the evidence and ignored my defence.*
3. *That, the prosecution side failed to prove the case beyond reasonable doubts thus left a shadow of doubts.*

4. *That, the learned trial court erred in law and fact to pass sentence without calling any independent witness in court to testify the allegation.*

The appellant's counsel added two supplementary grounds,

5. *That the trial court erred in law and fact in sentencing the appellant without evaluating that the appellant was aged below 18 years and not 19 years.*
6. *That the learned magistrate erred in law and fact in sentencing the appellant based on unreliable prosecution evidence of the victim who was a child of tender age and for failure to comply with section 127(2) TEA, CAP 6, R.E 2019.*

When the appeal was called up for hearing, Mr. Leonard Kiwango, learned State Attorney appeared for the respondent while the appellant was presented by Mr. Vitus Dudu the learned advocate.

In his submission, the appellant's counsel argued ground 1,2 and 4 jointly and 3 separately and for the supplementary ground of appeal he started with ground 2 and lastly ground 1, he submitted that the trial magistrate erred in law to convict the appellant on unreliable evidence as the victim was a girl of tender age, and the trial magistrate did not comply with section 127(2) of TEA which require the child of tender age

to testify to the court by oath or without oath by promising the court to tell the truth.

He argued that, at page 10 of the court proceedings the trial court did not comply with the mentioned provision and therefore the evidence of the victim must be expunged as was decided in **Masanja Makunga Vs Republic, Criminal Case No 378 of 2018** also in **Julius King'ombe Vs Republic, Criminal Case No 73 of 2021, HC at Musoma.**

He contended that, in this case at hand the evidence of the victim is important and expunging the same, the remaining evidence can not have weight and for that reason he drops other grounds of appeal as this one goes to the root of the case, and prayed this court to allow the appeal.

On his reply, the counsel for the respondent conceded that there were procedural irregularities, he prayed this court to set aside conviction and sentence and because the appellant did commit the offence,he prayed for retrial so the accused can not benefit for the procedural irregularities as was decided in **Ayubu Musa Vs Republic, Criminal Appeal No 103 of 2022.**

He added that at page 12 the evidence of PW2 (Doctor) proved that the victim's vagina was penetrated the age of the victim was proved and was supported by PW3 at page 15 by producing the birth certificate, thus there is no doubt that the victim was penetrated but what happened was procedural irregularities, he then prayed this court for retrial.

In his rejoinder Mr. Dudu maintained that the mentioned case of **Ayubu Musa (Supra)** is distinguishable as the victim was 7 years and this case the victim is 14 years and in the appellant was 18 years, given that the appellant has been in prison since 6.12.2022 is enough punishment, therefore this court could give different sentence and that is letting him free.

I have reviewed and considered the parties rival submissions, and the main issue for determination is ***whether this appeal has merit.***

The appellant's counsel submitted that, the learned magistrate erred in law and fact in sentencing the appellant based on unreliable prosecution evidence of the victim who was a child of tender age and for failure to comply with section 127(2) TEA, CAP 6, R.E 2019.

It is a general rule that every witness be examined upon oath or affirmation as provided 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"***

This position was narrated in the **Mwami Ngura V. Republic,** Criminal Appeal No. 63 of 2014, the court stated that:

> *".....as a general rule, every witness who is competent to testify, must do so under oath or affirmation,unless, she falls under the exceptions provided in a written law....."*

From the evidence, the victim was 14 years old who is defined to be a child of tender age according to section 127(4) of the Evidence Act (Supra) where as her evidence is ought to be taken under oath like any other witnesses as provided under section 198(1) of the Criminal Procedure Act, Cap 20 R.E 2022 but with exemptions provided under section 127(2) of The Evidence Act (Supra) that;

"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"

This narration was stated in **"Issa Salum Nambaluka Versus Republic,** Criminal Appeal No. 272 of 2018, CAT while citing the case of ***Godfrey Wilson Vs Republic, Criminal Appeal No. 168 of 2018 (unreported)*** *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 affirmationdepending 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"* ***(emphasis is mine)***

I have taken time to peruse the trial court's records in respect of the complaint raised in this ground of appeal as well as carefully considered the rival submission by both parties regarding that the respondent conceded that it is true as submitted by the appellant that

the requirement of the law under section 127(2) of the Evidence Act (Supra) was not complied with.

At page 10 of the court proceedings the trial magistrate posed only one question to the victim as to whether she understand the importance of telling the truth and not lies where as the victim responded in affirmative, then the trial magistrate concluded that the victim had sufficient knowledge in speaking the truth and proceeded to take her evidence. I quote:

COURT: Do you understand the importance of telling the truth and not lies.

PW1: I will tell the truth as speaking lies is not good and it is forbidden to speak lies.

C.E KILIWA-PRM
15/08/2022

COURT: A witness possess sufficient knowledge and understanding in speaking the truth.

C.E KILIWA-PRM
15/08/2022

Then the trial magistrate proceeded to record the victim'sevidence. From the extract above the trial magistrate posed only one question to

the victim asking if she knew the importance of speaking the truth, whereas the law required her to put simplified question to the victim with the purpose of ascertaining if the victim had sufficient intelligence to justify the reception of her evidence, an understand the duty of speaking the truth.

In **Godfrey Wilson** (supra) the Court of Appeal had this to say:

"The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:

1. The age of the child.

2. The religion which the child professes and whether he/she understands the nature of oath.

3. Whether or not the child promises to tell the truth and not to tell lies. Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

Upon ascertaining the knowledge of the victim thus, if the victim had no sufficient knowledge the trial magistrate was to ask the victim to promise the court to tell the truth and the same would be done by the victim on the other hand if the victim had sufficient knowledge as

evident in the proceedings the trial magistrate was supposed to sworn/affirm the victim and take her evidence.

Nevertheless, it is not mandatory for the questions put to the victim to be reflected in the court records but the answers obtained from the child witness on the guiding questions as suggested in **Godfrey Wilson** (supra).

In regard to this case at hand there were no questions to the victim to ascertain her intelligence but the trial magistrate concluded that the victim had sufficient knowledge but again took unsworn evidence of the victim, thus the trial magistrate offended section 127(2) of TEA(supra) hence her evidence has no evidential value.

The question is what is the consequences of non-compliance of section 127(2) of TEA, from the submission the appellant's counsel submitted that the evidence of the victim must be expunged as was decided in **MasanjaMakunga Vs Republic,** Criminal Case No 378 of 2018 also in **Julius King'ombe Vs Republic,** Criminal Case No 73 of 2021, HC at Musoma. And since the remaining evidence will be hearsay then the prosecution has failed to prove the case in the required standard. While the respondent contended that the mistake was done by the court and therefore allowing the appeal the appellant will benefit for

the procedural irregularities as was decided in **Ayubu Musa Vs Republic,** Criminal Appeal No 103 of 2022. He also added that the remaining evidence especially of the doctor proves that there was penetration and the age of the victim was properly proved as corroborated by PW3 hence retrial was the best remedy.

For the court to decide whether to order retrial or to expunge the evidence of the victim will depend on the circumstance of the case at hand, in this case I will agree with the respondent that the appellant should not benefit from the court mistakes (Procedural irregularities) and retrial will serve justice to the victim. In the case of **Gilbert Ntambala& Another Vs Republic,** Criminal Appeal No 3 of 2020 High court of Kigoma, it was 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 a criminals should not benefit on procedural irregularities to the detriment of substantive justice....."*

Therefore, as far as the victim deserves the right to be heard, the evidence ought to be properly received so both parties can be served by

justice. Since the appellant dropped other grounds of appeal, I find no reason to tackle them.

I therefore allow this appeal in the circumstance explained herein above and this court is hereby nullifying the entire proceedings, quash the judgement of the trial and set aside sentence of 30 years imprisonment.

It will be for the interests of justice to order for retrial; hence, I remit the matter to the District Court of Bariadi at Bariadi for a retrial before another magistrate of competent jurisdiction.

It is so ordered.

DATED at **SHINYANGA** this 08th Day of December, 2023

R.B Massam
JUDGE
08/12/2023.