IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

CRIMINAL APPEAL NO. 20240311200006344

(Arising from Criminal Case No.38 of 2023 before Busega District Court)

ROMANUS S/O CALISTUS .....APPELLANT

VERSUS

REPUBLIC .....RESPODENT

JUDGMENT

17/4/2024

F.H. MAHIMBALI, J

The appellant Romanus S/O Calistus was charged and convicted of Rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2022 in the District Court of Busega at Busega. He was sentenced to serve a custodial sentence of thirty years imprisonment.

Having been aggrieved with such conviction and sentence he has preferred this appeal with four grounds but for the purposes of this Appeal only one ground suffices to dispose of this appeal. This is the ground to the effect that his conviction and sentence the fact that the proceedings of the trial court are vitiated by serious irregularities which led to miscarriage of justice. At the hearing of this appeal, the appellant

appeared in person while the Respondent/republic was represented by Leonard Kiwango learned State Attorney. The appellant did not have much to say and relied on his grounds of appeal which he filed and prayed for his appeal to be allowed and be acquitted.

The learned state Attorney on his party, resisted the appeal on facts but partly conceded with it on procedural issues.

Mr. Kiwango contented that, it is true that the victim (PW1) was of tender age. As she was 11 years old, the legal requirement under section 127 (2) of The Evidence Act, prior to the recording of her evidence ought to have been strictly complied with. Reading the testimony of PW1 as from page 7 of the typed proceedings, it is clear that PW1 is not recorded to the have known either the nature of oath or promised to tell the truth. He also averred that the fact that the trial magistrate just marked that the PW1 promised to tell the truth, it is not reflective how the victim promised to tell the truth; the proceedings are silence. The trial Magistrate's failure to record how he reached that finding was a procedural legal error.

He banked his argument by refering to the case of: **Godfrey Wilson vs Republic, Criminal Appeal No.168 of 2018 (CAT).** He however stated that Section 127 (2) of the Evidence Act, was not compiled with. If the said PW1's testimony is expunged from the records what then

remains after the said nullification is the evidence of PW5, who clearly testified that the victim was carnally known as per bruises encountered into her vagina. This evidence is not sufficient to conclude one being known carnally. As usual, the best evidence in sexual offences comes from the victim of rape herself.

Mr. Kiwango further contented that for the interest of justice, let the matter be ordered retrial in the aspect of proper recording of PW1's evidence in compliance as per law.

In rejoinder the appellant stated that he has keenly heard the learned state attorney's submission, but he only insisted for is appeal to be allowed.

In terms of section 127 (4) of the Evidence Act supra, PW1 was a child of tender age as she was only 11 years old. 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, 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"*

As correctly argued by Mr. Kiwango that the child of tender age unlike an adult witness must however, before giving evidence under oath or affirmation be tested by simplified questions and the trial Court be satisfied that such witness can in fact give evidence under oath or affirmation as the case may be. See the case **of Selemani Moses Sotel @ White versus the Republic, 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 CPA (supra). The exemption is under section 127 (2) of the Evidence Act (supra) in which the evidence will be taken without oath or affirmation subject to the witness promising to the Court that she/he will tell only the truth and undertake not to tell lies.

The records must however be clear as to how the trial court arrives into such a conclusion that a certain 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 as it was correctly submitted by Mr. Kiwango when he referred

this Court to the case of **Godfrey Wilson versus Republic, Criminal appeal no. 168 of 2018 (CAT).**

The Court of Appeal of Tanzania has in several occasions 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 and give evidence on oath. Thus, for instance in the case o**f Issa Salum Nambaluka versus Republic, Criminal Appeal No. 272 of 2018,** the Court of Appeal held;

> *"In the case of Godfrey Wilson, Criminal Appeal No. 168 of 2018 (unreported), we stated 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 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 give evidence, be required to promise to tell the truth and not to tell lies"*

In the instant case, the records do not speak by themselves whether PW1 was tested to ascertain her ability to give evidence on oath or

otherwise. Only the conclusion of the trial magistrate is found remarking that the witness promised to tell the truth.

On page 7 of the trial typed proceedings the Hon. magistrate only indicated that **"promised to state the truth"**

Under such circumstances he proceeded to record testimony without oath because she has not indicated to have knowledge of appreciating the nature of oath. There is nothing on record to assist to know how the learned trial magistrate arrived to such conclusion. One cannot therefore rely on such general conclusion by the learned magistrate as reflecting the reality to the effect that PW1 fitted into the exemption of giving evidence without oath. Under the circumstances, it was imperative that the records speak by themselves so that it could be known the reasons behind which drove the learned trial magistrate to reach the conclusion he reached.

His conclusion suggests that the witness did not know the nature of oath, she was thus subjected to give her evidence without oath merely because she was of the tender age. That is absolutely wrong on the strength of the authorities I have cited supra.

What should then be the proper cause to take under the circumstances? The learned State Attorney pressed for a retrial arguing that the facts of the case and the evidence on record dictate as such.

This court and even the Court of Appeal has taken different stances depending on the facts of each case. There are instances the evidence recorded under such anomaly were expunged for being held to be valueless like in Godfrey Wilson's case supra. In some other instances it has been ruled out that a retrial would serve the better end of justice for an innocent victim should not be condemned by mistakes committed by the court itself nor the criminal should benefit from irregularities committed by the court. Thus, for instance in the case of **Gilbert Ntambala & Another versus The Republic, Criminal Appeal N o. 3 of 2020,** this court held;

> *"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 recorded, 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 the retrial is not there to accord the prosecution opportunity to fill in the gaps"

In the instant case I find the proposal argued by the learned state attorney is not sound as the prosecution evidence not intact to suggest conviction against the appellant. For instance, looking at exhibit P1 which is PF3 does not suggest as to whether the victim was raped. That only suffices to hold a different view as no conviction could be founded against the appellant.

With all these observations, I find this appeal to have been brought, with sufficient cause, I allow it and order the appellant's immediate release from custody unless otherwise lawfully held.

DATED at Shinyanga this 17th day of April, 2024.

F.H. Mahimbali

Judge