

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB REGISTRY)**

AT MWANZA

CRIMINAL APPEAL NO 5345 OF 2024

*(Originating from Criminal case No. 73 of 2023 from Misungwi District Court at Misungwi before
Hon. E.A. MARICK – SRM dated on 14th November, 2023)*

BETWEEN

ELISHA WILLIAM APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

15TH & 15TH May, 2024

A. MATUMA, J.

The appellant stood charged and convicted for rape in the District court of Misungwi at Misungwi contrary to section 130(1)(2)(e) and 131(1) both of the Penal Code, Cap. 16 R.E 2022. He was alleged to have on the 21st day of February, 2022 raped a girl aged fourteen years old at Nyanghomango village within Misungwi District in Mwanza Region.

Five witnesses were arraigned against the appellant during trial and he fended for himself with no any other witness or exhibit on his part.

At the end of the trial, the trial magistrate became satisfied that the prosecution case was proved beyond any reasonable doubts and thus

convicted the appellant of the offence and sentenced him to suffer a custodial sentence of thirty years.

Aggrieved with both conviction and sentence, the appellant is now before this court armed with a total of seven grounds of appeal which comprises complaints to the effect that; his defense evidence was not considered by the trial court in its judgment, there was unexplained delay to report the crime to the nearest authority or civilian, failure of the victim to identify the appellant in court during trial, contradictions and discrepancies in the prosecution evidence, failure to prove and or establish the age of the victim and failure to comply with the requirements of section 198 of the Criminal Procedure Act, Cap. 20 R.E 2022.

At the hearing of this case the appellant was present in person while the respondent was represented by Brenda Mayala learned State Attorney.

The appellant did not have much to argue but instigated the court to determine his grounds of appeal which he felt helpful in his favour and argued the court to allow his appeal, acquit him of that offence, set aside the sentence of thirty years which was meted against him and order his release from custody.

The learned State Attorney at first opposed the appeal and started to counter argue the grounds of appeal one after another. When she reached

to the sixth and seventh grounds of appeal which in its totality faulted the evidence of the victim to have been recorded contrary to section 198 of the CPA supra and thus standing valueless under the law making the prosecution case to stand unproved to the required standard, the learned State Attorney changed her stance and supported the appeal.

She submitted that the victim at the time of the commission of the offence she was fourteen years old. She however testified in court after one year and almost three months later from the crime date. That means at the time she gave her evidence she was fifteen plus (years old). Unfortunately she was treated as a child of tender age and therefore subjected to the requirements of taking evidence of a child of tender age which resulted into her giving evidence without oath or affirmation but under the promise of telling the truth.

The learned state attorney thus agreed that the evidence of the victim which ought to have been recorded under oath was wrongly recorded under section 127 (2) of the evidence Act because the victim at that time of giving evidence was not a child of tender age within the meaning of section 127 (4) of the Evidence Act supra.

The learned State Attorney further submitted that at first the appellant was convicted on the same offence but on appeal to this court it was

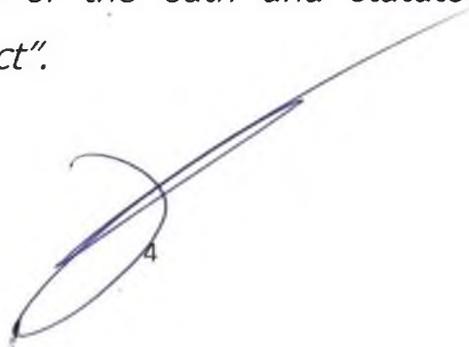
ordered a retrial. It is on the retrial when this anomaly occurred and as a matter of justice, she argued that there could not be justification to order another retrial. She thus argued the court to allow the appeal, quash the conviction, set aside the sentence and set the appellant free.

The appellant having noted that the learned state attorney has supported him, he ended joining her that this appeal be allowed and be ordered to be released and go free.

On my part, I entirely agree with the learned State Attorney M/S Brenda Mayala who despite of having been curious to have the appellant convicted and sentenced for the offence found herself necessitated to stand as an officer of the court and help it to reach to a just decision.

As a general rule every witness in a criminal trial must 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".



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) which is 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 not lies.

The child witness who is not of a tender age is however not covered under the exemption rule of evidence and must give his or her evidence under oath or affirmation failure of which the evidence given will carry no any legal weight and becomes valueless and cannot be acted upon to convict as it was held in the case of ***Godfrey Wilson versus Republic, Criminal Appeal No. 168 of 2018 (CAT)***.

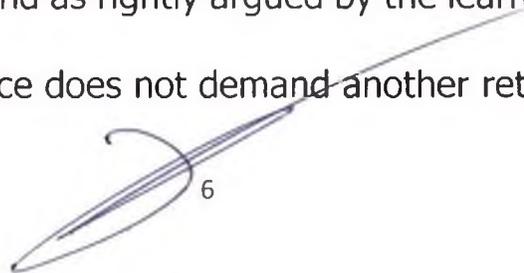
The Court of Appeal of Tanzania has in several occasions insisted that even when the child witness is of a tender age, trial Courts should not

jump and hurry 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 can give evidence on oath. See for instance the case of ***Issa Salum Nambaluka versus Republic, Criminal Appeal No. 272 of 2018.***

In the instant case, the victim although at the time of giving her evidence was still a child, she was not a child of tender age at the time she gave her evidence because her age at that time was more than fourteen years old. She was thus wrongly subjected to the procedure governing evidence of children of tender ages. She was thus caused to adduce the evidence which carried no value under the law. Such evidence is liable to be expunged as I hereby do.

Bearing in mind that the best evidence in rape cases is that of the victim herself and the fact that such evidence has been expunged from the record, I find that the remaining evidence is nothing but hearsays which cannot be the basis of conviction.

Since the appellant was initially tried of the same offence in Criminal Case no. 26 of 2022 which ended on a retrial through Criminal appeal no. 99 of 2022 in this court, I find as rightly argued by the learned state attorney that the interest of justice does not demand another retrial.



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I therefore allow this appeal, quash the conviction of the appellant, set aside the sentence of thirty years which was meted against him and order his immediate release from custody unless otherwise lawfully held. Right of further appeal is hereby explained.

It is so ordered.



A handwritten signature in blue ink, appearing to read "A. Matuma". The signature is written over the printed name and extends upwards and to the right.

A. Matuma

Judge

15/05/2024