IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO.209 OF 2019

(Arising from Judgment of the District Court of Geita at Geita in Criminal Case No. 31 of 2018)

GODIANUS GODION ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 25.03.2020

Judgment Date: 02.04.2020

A.Z.MGEYEKWA, J

In the District Court of Geita at Geita, the appellant was arraigned and stand charged with an offence of rape contrary to Section 130 (1) and (2) (e) and 131 (1) (2) (a) of the Penal Code Cap.16 [R.E 2019].

A brief account of the evidence which led to the conviction of the appellant is as follows: it was alleged by the prosecution that on 3rd August, 2017 at about 20:00 hrs at Mgusu Geita District and Region of Geita did have carnal knowledge of one Teddy D/O Lucas a girl aged 12 years.

Having, accepted the prosecution's version to be true the trial court convicted and sentenced the appellant to 30 years imprisonment. Undaunted, the appellant has preferred this appeal. In the petition of appeal, he has raised five grounds of appeal as follows:-

1. *That, no sufficient evidence i.e documentary proof was led to prove whether the victim was a child and /or a school girl of 12 years old; thus ingredients of rape on part of lack of consent was not sufficiently established rather a penetration if any was a voluntary action.*

2. *No independent witness nor other tenants and landlord testified in court to back up the prosecution case rather the conviction was wrongly based on incredible evidence by the witnesses with an interest to serve.*

3. *That, the relied admission presumably to be appellants confession under Exh. P1 was wrongly made out of the min trial test as the same was retracted for wanting voluntariness in its improper extraction under coercion from the arresting police officer.*

4. *That, the appellant's case was not enjoyed experts investigation rather what happened was harsh practice as it was a trivial case though it amounts to capital punishment if one found guilty, the trial court overlooked this fact.*

5. *That, the conviction was wrongly relied on the weakness of the appellant's defence as a contrast to the prosecution case through (the entire trial) was not proved to the hilt.*

When the matter was called for hearing, the appellant entered appearance in person, unrepresented whereas, the respondent had a service of Ms. Fyeregete, learned State Attorney.

When I asked the appellant to address me on his grounds of appeal, the appellant prays this court to adopt his grounds of appeal and submitted that he was charged for rape but the case was not proved to the hilt. He went on saying that the Doctor and Teacher were not called to testify. He lamented that the case was adjourned for one year and when it was called for continuation with hearing it comprises a different set of witnesses. The appellant ended by insisting that he did not commit the crime.

On her part, the learned Senior State Attorney supported the conviction and sentence, submitting for the 1st ground of appeal which relates to the age of the victim, Ms. Fyeregete stated that the victim's age was established since PW1 who was the victim's father testified in court that his daughter was 13 years old. She went on to

state that a father is in a better position to establish the age of his child. She referred this court to page 9 of court proceedings.

Ms. Fyeregete rebutted that penetration was not proved, she referred this court to page 17 of the court proceedings where the victim proved that she was raped and her words confirm that penetration took place. She went on that the Victim's evidence was corroborated by PW1 evidence when he found the appellant and her daughter making love in the appellant's bedroom. Ms. Fyeregete added that the father is in a better position to establish the age of his child therefore she urged to disregard this ground.

Submitting for the 2nd ground of appeal, Ms. Fyeregete argued that this ground is baseless since the best evidence comes from the victim herself therefore there was no need to call independent witnesses. She submitted that PW1 narrated how they caught the appellant and the victim in flagrante delicto then PW1 locked the door and reported the matter to the Village Executive Officer. Ms. Fyeregete further argued that PW1 and other people headed to the scene of a crime and found the appellant and the victim inside the appellant's room. She urged this court to disregard this ground of appeal.

As to the 3rd ground of appeal, Ms. Fyeregete refuted that Exh P1 was retracted she went on submitting that the records are clear that

who witnessed the act and PW2 evidence which confirms that the appellant raped PW3.

The appellant had no nothing to rejoin.

Having considered the grounds of appeal and the submissions made by the learned State Attorney and the appellant, I will determine the issue of ***whether or not the present appeal is meritorious***.

Addressing the 1st ground of appeal, it is on record that the victim's father proved the age of PW3 when he testified that PW3 was 13 years old. I understand that a parent of the victim is in a better position to establish the age of his child as it was observed in the case of **Salu Sosoma v R Criminal** Appeal No.31 of 2006 whereas the Court of Appeal observed that:-

"... a parent is better positioned to know the age of his child."

In the instant appeal, the victim's father established the age of the victim. Therefore this ground is a demerit.

On the same ground of appeal, the appellant faulted the trial court for failure to establish penetration; it is in the record that, PW3 explained how penetration took place. PW3 narrated how the appellant undressed her and inserted his penis in her vaginal. In my view, PW3 was able to establish penetration. As it was held in the

case of **Kayoka Charles v R** Criminal Appeal No. 325 of 2007 the Court of Appeal held that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ.

Similarly, in the case of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal considered whether or not the complainant had been raped by the appellant and observed: -

> " *True evidence of rape has to come from the victim, of an adult, that there was penetration and no consent, and* ***in the case of any other woman where consent is irrelevant, that there was penetration****..." [Emphasis added].*

Based on the above authorities, I have found that the victim proved there was a penetration.

Addressing the 3rd ground of appeal which relates to the cautioned statement of the accused, it is in the lower court proceedings that the cautioned statement was tendered in court and the court proceeded to admitted and marked it as Exh. P1. In my view, the cautioned statement was wrongly admitted because it was not read over. The procedure for admission of caution statements is regulated by the Evidence Act. Like any other documentary evidence, whenever it is intended to be introduced in evidence, it must be initially cleared for admission and then actually admitted before it can

be read out. This was stated in the case of **Walii Abdallah Kibutwa & 2 Others v R,** Criminal Appeal No. 181 of 2006 and also in the case of **Omari Iddi Mbezi v Republic**, Criminal Appeal No. 227 of 2009 (both unreported). In the trial under scrutiny, on page 24 of the trial court proceedings, it is evidently shown that the caution statement of the appellant upon admission as exhibits P1 was not read over to the appellant as required by the law thus the same is a fatal irregularity. Therefore, I proceed to expunge Exh.P1 from the court records. This ground is answered in affirmative.

Now addressing the issue raised by the learned Senior State Attorney, she admitted that the trial court faulted itself by not guiding the victim to take oath as required by the law. She went on urging this court to find that the omission does not vitiate the evidence on record. I wish to observe that the victim was 13 years old as stated by the victim's father thus the court was required to lead the victim to take oath as per the requirement of the law. In the instant appeal, PW3 took oath instead of promising to tell the truth and not lies. In my view and guided by the Evidence Act, Cap.6 [R.E 20O2] as amended by Act No. 4 of 2016 subsections (2) and (3) of section 127 of the Evidence Act, Cap. 6 [R.E 2019], PW3 oath was made contrary to the law. Evidence Act, Cap.6 [R.E 2002]. The amended section 127 (2) of the Evidence Act reads as follows:-

> " *Section 127 (2) 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 lies.*** [Emphasis added].

Guided by the above provision a child of tender age is allowed to give evidence without oath or affirmation and before giving evidence such child is mandatorily required to promise to tell the truth to the court and not to tell lies.

In the instant case, PW3 was administered to the oath which is contrary to the law. This makes the reception of PW3 evidence improper and in view of such irregularities, PW3 was not a competent witness and her evidence was improperly received by the trial court. The same was held in the case of **Godfrey Wilson v The Republic** Criminal Appeal No. 168 of 2018 which was delivered on 7th May, 2019.

Now, I had to go through the court record and find if PW3 evidence was corroborated by any other evidence which can sustain the conviction of the appellant. The records reveal that PW2 testified that they found the appellant and the victim inside the room, he could not prove if they were making love/ penetration took place. PW1 (father) testified that he saw the victim and the accused having sex but the same was not proved since the person to prove the act. Therefore, I expected the Doctor could have been called to testify in court taking to account that PW1 testified that a PF3 was in place but it was no tendered in court. PW1 testified that he took PW3 to the hospital but the Doctor was not called to testify if he examined PW3

and found her with sperm or bruises. Additionally, PW4 testified that he prepared a cautioned statement of the accused, in the record the cautioned statement was wrongly admitted and the same is expunged from the court record as I have elaborated in length when addressing the 3rd ground of appeal. Therefore, I find that the remaining evidence on record was not reliable to ground conviction upon the appellant.

With the foregoing observation, it only suffices to hold that the trial court's conviction against the appellant was not proved beyond a reasonable doubt.

For the aforesaid reasons, the principle of law and authorities, I allow the appeal, quash the conviction, and set aside the sentence imposed against the appellant. I order for an immediate release of the appellant unless held for other lawful reasons.

Order accordingly.

Dated at Mwanza this 2nd day April, 2020.

A.Z.MGEYEKWA

JUDGE

02.04.2020

the appellant did not object the tendering of Exh. P1 thus the same was tendered and admitted in court. The learned Senior State Attorney added that the appellant was in a position to say that she was tortured which means the statement was freely made.

In relation to the 4th and 5th grounds of appeal, the learned Senior State Attorney argued that investigation took place and the same led to the appellants to be brought before the court. Ms. Fyeregete rebutted that the trial court wrongly relied on the weakness of the appellant.

The learned Senior State Attorney requested and I accepted that she address the court on the issue of the victim's age that the court did not lead her to plea in accordance to the law as amended by the Written Laws Miscellaneous Amendment No.2 of 2016 section 127 (1) and (2). She submitted further that before this amendment a voire dire test was conducted to test the credibility of a child and the child was required to make a promise but in the instant case the victim did not promise to tell the truth. It was Ms. Fyeregete's further submission that the omission does not vitiate the evidence on record, this court to rely on unsworn evidence. She fortified her submission by referring this court to the case of **Seleman Moris Soteli @ White v R** Criminal Appeal No. 385 if 2018 the Court of Appeal (Mtwara) that the evidence of a child who did not swear as per the said amendment her evidence can be considered. She went on to submit that this court to direct itself to the evidence adduced by PW1

Ruling delivered on 2nd day April, 2020 in the presence of the Appellant and Ms. Fyeregete, learned Senior State Attorney for the Republic.

A.Z.MGEYEKWA

JUDGE

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