IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 272 OF 2018

ISSA SALUM NAMBALUKA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 30th day of July, 2018
in
DC Criminal Appeal Case No. 21 of 2017

JUDGMENT OF THE COURT

14th & 21st February, 2020

MWARIJA, J.A.:

In the District Court of Lindi, the appellant, Issa Salum Nambaluka was charged with and convicted of the offence of incest by male contrary to section 158(1) (a) of the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). It was alleged that on divers dates between the months of November and December 2016, he had a carnal knowledge of "R.N." a girl aged 14 years (hereinafter "the child") while having knowledge that she is his daughter.

Initially, the charge sheet contained two counts of incest by male as the 1st count and rape contrary to s.130(2) (e) of the Penal Code as

the 2nd count. However, on 31/1/2017, before the appellant was arraigned, the 2nd count was dropped and the appellant was thus called upon to plead only to the 1st count. He denied the charge and as a result, the case proceeded to a full trial. At the conclusion of the trial, the trial court found the appellant guilty. He was convicted and sentenced to thirty years imprisonment. He was also ordered to pay a compensation of TZS 500,000.00 to the child.

The facts leading to the arraignment and the ultimate imprisonment of the appellant are not complicated. The appellant is a biological father of the child who was, at the material time, a standard VI pupil at Wailes Primary School in Lindi Municipality. She was living with the appellant and her step mother. This was because her biological mother, Fatuma Hamisi (PW3) and the appellant had divorced. Sometime in January 2017, the child showed reluctance in continuing to stay with her father. She approached her uncle, one Mussa Hassan Nampeleche (PW7) and asked him to provide her with her mother's telephone number. Having got the telephone number, the child called and asked PW3 to arrange for the latter's transfer to another school in Mtwara. The child's intention was to leave her father's residence and shift to Mtwara to stay with her mother.

Incidentally, the appellant learnt about the arrangement which was being made by the child's mother through the assistance of PW7 and in turn, reacted by halting the process on account that the child's school administration informed him that the transfer of standard VI and VII pupils was prohibited. Meanwhile, the child became sick and failed to attend school. In the midst of these incidences, information reached the police that the child might have been subjected to sexual assaults by her father thus the cause for her intention to leave her father's residence and join her mother at Mtwara. On that information, the police conducted investigations which resulted into the levelling of the charge against the appellant as shown above.

At the trial, apart from the evidence of PW3 and PW7, the prosecution relied on the evidence of five other witnesses, including the child who testified as PW1. In her evidence which she gave on affirmation, she narrated how the appellant had carnal knowledge of her on three different occasions. She told the trial court that the appellant used to molest her when her step mother was away from home. Another witness, ASP Vicent (PW4), who was at the material time the OC-CID, Lindi Municipality, testified that after the police had received information on the alleged conduct of the appellant, he caused his arrest

and directed that PW1 be taken to hospital for medical examination. On 25/1/2017, WP 9203 D/C Kibibi (PW5) and WP 8222 D/C Sakina (PW6) took PW1 to Sokoine Hospital, Lindi for that purpose. At the hospital, she was medically examined by Mashaka Alinis (PW2), a Clinical Officer. He found that her hymen had been perforated. As to the object used to perforate her hymen, PW2 remarked on the PF.3 (Exhibit P.1) that she was penetrated by a blunt object.

In his defence, the appellant did not deny that PW1 is his biological daughter. He however denied the allegation that, he had a carnal knowledge of her. According to his evidence, on 25/1/2017 he was arrested at his residence and taken to the police station where he was informed of the offence with which he was later charged.

In convicting the appellant, the trial court relied solely on the testimony of PW1 whose evidence the trial Magistrate found to be credible and reliable. The learned trial Resident Magistrate stated as follows in the judgment at page 48 of the record of appeal:

> " *As far as the evidence in record as already summarized above, seems to me only PW1 (the victim) has adduced evidence of proving sexual intercourse inflicted to her by her own father the*

accused. Other witnesses only gave hearsay evidence as to what had been told by PW1...."

The trial magistrate was of the view that, although the medical examination report (Exhibit P.1) tendered by PW2 was the only evidence which could corroborate the evidence of PW1, that evidence is doubtful, given the lapse of time between the date on which the offence was allegedly committed and the date of conducting medical examination on PW1. That notwithstanding, the trial magistrate relied on *inter-alia*, the case of **Selemani Makumba v. R**, [2006] TLR 379 and after having warned himself in terms of s.127(6) of the Evidence Act [Cap. 6 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016 (hereinafter the Evidence Act), he was satisfied that the evidence of PW1 had proved the case against the appellant beyond reasonable doubt.

The appellant was aggrieved by the decision of the trial court and thus appealed to the High Court. His appeal was unsuccessful. The learned first appellate Judge dismissed the appeal rating the trial court's decision as "one of the best judgments from that court." He agreed with the learned trial Resident Magistrate that, although the prosecution case depended wholly on the evidence of PW1, her evidence was

watertight. His re-evaluation of that evidence led him to conclude that it was "a strong evidence against the appellant." He thus dismissed the appeal.

Aggrieved further by the decision of the High Court, the appellant preferred this second appeal which is predicated on the following three grounds:

1. *That both courts erred in law by admitting exhibit P.1 as evidence un-procedurally in contravention of section 210(3) of Criminal Procedure Act (CAP 20 R.E 2002). The trial magistrate failed to address the appellant on his rights under section 210 (3) before its admission (P1).*
    - *The alleged exhibit was not read in court prior to its admission which led the appellant not to object it because the appellant never knew the contents of the document.*
    - *Further the alleged document (Exhibit P1) was not cleared before tendering. The document was never identified by PW2 (before being tendered).*
2. *That the trial court as well as the High Court Judge erred in law by failing to comply with mandatory provisions of the Tanzania Evidence Act section*

127(2)(5) and (7) as amended by Written Laws (Miscellaneous Amendments) No.2 Act of 2016.
Since the alleged victim was child of tender age (as per sub-section 5 of section 127 of the Act) both courts were supposed to ensure that the trial court was supposed to comply with sub-section 2 of section 127 before receiving evidence of PW1, the alleged victim. Therefore the evidence of PW1 was to be expunged.

3. *That the trial magistrate as well as the High Court Jude erred in law by failing to disclose that the appellant was unfairly tried.*

The appellant failed to enter the correct defence due to the fact he didn't grasp the charge which he was to enter defence against. During trial, the prosecution side dropped 2nd count the trial magistrate dropped the 1st count of rape, to this juncture the defence (the appellant) could not have known the count that the trial magistrate had amended in order to enter the correct defence."

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent Republic was represented by Mr. Joseph Mauggo, learned Senior State Attorney.

When the appellant was called upon to argue his grounds of appeal, he decided to hear first, the respondent's reply to the grounds of appeal with the option of making a rejoinder if the need to do so would arise. In his submission, Mr. Mauggo began by expressing the respondent's stance that it was supporting the appeal. In his brief submission, the learned Senior State Attorney agreed with the findings of the two courts below, that the appellant's conviction was solely based on the evidence of PW1. However, he conceded to the appellant's contention in the 2nd ground of appeal that the evidence of PW1 was taken in contravention of s.127 (2) of the Evidence Act. For that reason, he argued, the principle stated in the case of **Seleman Makumba** (supra) is not applicable given the circumstances of the present case. In that case which was relied upon by the trial court, the Court laid down the following principle on the evidence which is required to prove a sexual offence:

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

The learned Senior State Attorney submitted that, in the particular circumstances of this case where the recording of the only evidence which was relied upon to found the appellant's conviction, did not comply with the requirements of the law, that evidence should not have been acted upon to convict the appellant. He therefore, submitted that the appeal may be allowed because the appellant's conviction was founded on invalid evidence.

The appellant welcomed the stance taken by the learned Senior State Attorney to support the appeal. He urged us to allow his appeal and order his release from prison.

Having heard the learned Senior State Attorney and the appellant, it is plain that the determination of this appeal lies on the validity or otherwise of the evidence of PW1. It is an undisputable fact that at the time of giving her evidence, PW1 was a child of tender age. Section 127(4) of the Evidence Act defines who a child of tender age is. It states as follows:

> *"For the purpose of sub-section (2) and (3), the expression 'child of tender age' means a child whose apparent age is not more than fourteen years."*

According to the record, at the time of giving her evidence, PW1 was aged 14 years thus fitting the definition of a child of tender age. Her age was not more than 14 years. The procedure for taking the evidence of a child of tender age is provided for under s. 127(2) of the Evidence Act which states 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 lies."*

From the plain meaning of the provisions of sub-section (2) of s.127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies. Section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not.

It is for this reason that in the case of **Geoffrey Wilson v. Republic**, 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 replies 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 such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies. In the above cited case, we observed as follows:

> *" 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."*

In another case, **Hamisi Issa v. The Republic**, Criminal Appeal No. 274 of 2018 (unreported), the Court approved the procedure which the trial court followed before the witness of tender age gave her

evidence in accordance with s. 127(2) of the Evidence Act. The trial magistrate started by asking the child witness whether or not she understood the nature of oath. Having replied to the question in the negative, the child's evidence was taken upon her promise that she would tell the truth and upon her undertaking that she would not tell lies.

In the case at hand, PW1 gave her evidence on affirmation. The record does not reflect that she understood the nature of oath. As stated above, under the current position of the law, if the child witness does not understand the nature of oath, she or he can still give evidence without taking oath or making an affirmation but must promise to tell the truth and not to tell lies. In the circumstances therefore, we agree with both the appellant and the learned Senior State Attorney that in this case, the procedure used to take PW1's evidence contravened the provisions of s. 127 (2) of the Evidence Act. For these reasons, we allow the 2nd ground of appeal. As a result, the evidence of PW1 which was received contrary to the provisions of s. 127(2) of the Evidence Act is hereby expunged from the record.

Since the appellant's conviction was solely based on the evidence of PW1, there is no gainsaying that the effect of expunging that evidence is

to render the prosecution case lack a leg to stand on. Obviously, this finding suffices to dispose of the appeal. In the event, the appeal is hereby allowed. The appellant's conviction is quashed and the sentence is set aside. We consequently order his immediate release from prison unless he is otherwise lawfully held.

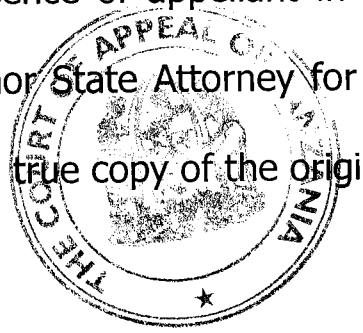
DATED at **MTWARA** this 20th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 21st day of February, 2020 in the presence of appellant in person and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL