

TANZANIA / JUDGMENT

Ridhiwan Juma vs R

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DODOMA DISTRICT
REGISTRY) AT DODOMA CRIMINAL APPEAL NO. 56 OF 2023 (Originating from the conviction
and sentence of the District Court of Kondoa in Criminal Case No. 28 of 2022 Hon. F. A. Kahamba-
SRM) RIDHIWAN JUMA..... APPELLANT VERSUS
REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 2/5/2024 Date of the Judgment: 29/7/2024 KHALFAN, J. The above-named appellant was arraigned before District Court of Kondoa (hereinafter referred as the trial court), charged with one count of rape contrary to sections 130(1), (2)(e) and 131 (3) of the Penal Code [CAP 16 R.E 2022]. It was alleged that on 10/6/2022 at Chemchem street within Kondoa district, the appellant did have carnal knowledge with a girl aged 8 years. i For the purpose of hiding her identity, the girl shall be referred to as PW1 or simply the victim. The appellant pleaded not guilty, hence full trial ensued. In attempt to prove the case, the prosecution called four witnesses and tendered one documentary exhibit. The appellant was the sole witness for the defence. A brief background underlying the instant appeal is that, on 10/6/2022, the victim had gone to collect her skipping rope. On the way, she claimed to have met the appellant who grabbed her and told her that he was going to give her some money to take the same to her mother. But the appellant took the victim to unfinished house and undressed her underwear and the appellant too undressed his trouser and had sexual intercourse with her. When she arrived home, the victim informed her aunt (PW2) that she was raped by one guy who used to eat food at her mother's place. The matter was reported to the police station where the victim was issued with a PF3 and went for checkup and treatment at Kondoa District Hospital where she was attended by PW3. According to PW3, the victim's vagina was swollen with reddish colour and she had no hymen. He added that there was no semen. He testified that the physical examination and laboratory test results revealed that the victim was raped. PW4, a police officer was assigned to 2 investigate the matter at hand. She narrated that she interrogated the victim and she disclosed that it was the appellant who raped her. In his defence, the appellant denied to have committed the offence, he claimed that on 22/9/2022, two police officers went at his working place and informed him that he was needed at Kondoa police station. He stated that upon arriving at the police station, he was informed that he raped the victim. After full trial, the trial court was of the view that the case against the appellant was proved beyond reasonable doubt; hence it convicted

and sentenced the appellant to thirty years imprisonment. It further ordered the appellant to compensate the victim a sum of TZS 1,000,000/=. The appellant was aggrieved with both conviction and sentence meted out against him hence he preferred the instant appeal with 8 grounds of appeal which can be conveniently summarised and reduced into 4 grounds of appeal as follows:

1. That, the trial magistrate erred in law and fact to convict the appellant while the prosecution failed to prove their case beyond reasonable doubt. 3
2. That, the learned trial magistrate erred in law and fact by convicting the appellant while the testimony by PW1 was improperly received contrary to section 26(a) (b) of the Written Laws (Miscellaneous) Amendment Act No. 2 of 2016.
3. That the evidence of visual identification was weak.
4. That the evidence by PW3 was unreliable and contradictory. When the appeal was called on for hearing, the appellant appeared in person and unrepresented. The respondent was represented by Mr. Geoffrey Mlagala, learned state attorney. The appeal was disposed of orally. Having gone through the trial court's record and the grounds of appeal, I am of the settled view that the 2nd ground of appeal is sufficient to dispose of the appeal before me. When called to argue the appeal, the appellant adopted his grounds of appeal to form part of his submission. He had nothing of substance to add. On his part regarding the 2nd ground of appeal, the learned state attorney urged the court to find the 2nd ground of appeal lacking in substance since voire dire test was no longer a mandatory requirement and in lieu thereof section 127 (2) of the Evidence Act [CAP 6 R.E 2022], (hereinafter referred to as the Act) was introduced. Having considered the parties' arguments on the 2nd ground of appeal and the record of the trial court, the appellant's complaint in the 2nd ground of appeal is that the evidence of the victim was improperly received. The Act governing reception of evidence of a child of tender age at the time the victim testified, was amended in 2016 vide the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act no. 4 of 2016) referred to by the appellant and came into force on 8/7/2016. The legal requirement to conduct voire dire test in terms of the former section 127(2) of the Act, before a child of the apparent age of 14 years and below could testify so as to determine whether or not he understands the nature of an oath or not and the duty to tell the truth and if he is possessed of sufficient intelligence to justify the reception of his evidence, was done away and replaced with the requirement to promise to the court that he will tell the truth and not lies. At the time the victim testified, section 127 (2) of the Act provided in permissive terms the procedure for the giving of evidence by a child of tender age as follows: "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. "[Emphasis] It is on record that at the time the victim testified she was 9 years old. This means that in terms of section 127(4) of the Act, the victim was a child of tender age. Hence, as the law by then required, the trial court was required to comply with section 127(2) of the Act by requiring the victim to promise that she will tell the truth and not lies. The learned trial magistrate indicated that he interrogated

the victim and she promised to tell the truth and not lies. But the record does not indicate such interrogation, the questions posed to the victim and the answers given by the victim. Equally, the record does not indicate if the promise to tell the truth came from the victim. In the case of Yusufu Molo v. Republic, Criminal Appeal No. 343 of 2017 (unreported), the Court of Appeal observed that: "(2) A child of tender age may give evidence without taking oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies." Under the above amendment, the requirement to conduct a *voire dire* test has been removed. What is paramount in the new amendment is for the child before giving evidence to promise to tell the truth to the court and not to tell lies. That is all what is required. It is mandatory that such a promise must be reflected in the record of the trial court. "[Emphasis added]. As to what are the obtaining consequences of failure to comply with the law, the Court of Appeal went on to state: "If such a promise is not reflected in the record, then it is a big blow in the prosecution case. In the instant case, since the record does not show that such a promise was made by the victim child, the necessary inference we draw is that there was no such undertaking made. If there was no such undertaking; obviously the provisions of section 127(2) of the Evidence Act (as amended) were faulted. This procedural irregularity, in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value. It is as if she never testified to the rape allegation against her. It was wrong for the evidence of PW1 to form the basis of conviction as stated in the second ground of appeal." [Emphasis added] In the case of Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018 (unreported), the Court of Appeal observed thus; "...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. 8 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. Guided by the above decisions, in the instant matter the trial court's record does not indicate the type of questions asked by the trial court and the answers if any also the record does not indicate if the victim promised to tell the truth and not lies. This means that the victim's evidence is of no evidential value. It is accordingly expunged from the record. Having expunged the victim's evidence, the issue is whether there is any evidence on the record to sustain the appellant's conviction. The testimonies by PW2 and PW4 are just hearsay since they testified on what they were told by the victim. They never witnessed the appellant raping the victim. Equally, the evidence by the medical doctor (PW3) was just to determine whether the victim was raped and it did not establish the culprit. Henceforth, from the above brief discussion, having expunged the victim's evidence, there is no evidence which can sustain the appellant's conviction. Therefore, I allow the appeal. The conviction, sentence and order for compensation meted out against the appellant are quashed and 9 set aside. I further order the appellant's immediate release from the custody unless lawfully held for another lawful cause. It is so ordered. Dated at Dodoma this 29th day of July 2024. F. R. KHALFAN, JUDGE 29/7/2024 io

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