IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
CRIMINAL APPEAL No. 130 OF 2019

(Original Criminal Case No. 98/2018 of the District Court of Magu at Magu)

MASHAKA ZAKAYO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

26th & 28th, February, 2020.

TIGANGA, J.

Before the District Court of Magu at Magu the Appellant Mashaka Zakayo was charged with and convicted of the offence of rape contrary to section 130 (2)(e) and 131(1) of the Penal Code (Cap 16 RE 2002).

He was sentenced to serve a mandatory minimum sentence of 30 years in prison. The conviction and sentence aggrieved him, he appealed to this count to challenge both the conviction and sentence. In such endeavour, he lodged a five grounded petition of appeal which for easy reference are hereunder reproduced:-

1. That the alleged victim's evidence was wrongly relied on by the trial court as the alleged victim was rather a suspect witness whose

evidence was unworthy of belief (incredible witness) so unsafe to base the conviction.

2. The victim's evidence was improperly taken into court as she was of 13 years old tender age.
3. That the trial court erred by regarding PF3 as corroboration to Pw3 so far as admissibility of the PF3 was in flagrant contravention of law and more so it negated rape offence. (sic)
4. That lack of evidence from the alleged guest house and PW4 - investigator evidenced not about the alleged guest house render the prosecution case to be shaky.
5. That the prosecution's in toto was fall far short in proving the capital offence of rape to the standard i.e beyond reasonable doubt.

In the end, he prayed the Appeal to be allowed and the appellant be set free.

At the hearing of appeal before me, the appellant was unrepresented, therefore appeared in person, while the respondent appeared in the representation of Miss Rehema Mbuya learned Senior State Attorney.

Fending for himself the appellant had nothing new to add, he just asked the court to adopt and use his grounds of appeal as his submissions. He prayed the appeal to be allowed, conviction be quashed, sentence be set aside and an order for his release from custody be issued.

For the respondent Republic Miss Rehema Mbuya learned Senior State Attorney supported the appeal on the ground that, the evidence of

the victim did not comply with the provision of section 127 (2) of the Evidence Act as amended by Act No. 4/2016. This law requires the witness of tender age before giving evidence to give a promise to speak the truth. It was her submission that in this case before the trial court, the victim Pw3 being a child of tender age, did not give promise to speak the truth before her evidence was recorded.

The other ground for her support of the appeal was an irregularity in the tendering and admission of the PF3 which was tendered by the police officer instead of the medical doctor who examined the victim. The said PF3 was admitted and marked as exhibit PE1. These shortcomings in her considered view, render the judgement incompetent and the appeal to be meritorious. With a foregoing response from the learned Senior State Attorney, the appellant had nothing to rejoinder, he just insisted that his appeal be allowed.

For easy flow of ideas, I will determine this appeal in the manner and series adopted by the learned Senior State Attorney by starting with the second and third grounds of appeal for the reasons to be revealed in the due cause.

As rightly submitted by the appellant in the second ground of appeal, and supported by the learned Senior State Attorney in her submission, it is the law that for evidence of a child of tender age to be received and acted upon, the court must comply with the provision of section 127 (2) of the Evidence Act (Cap 6 RE 2002) as amended by Written Laws Misc. Amendment (No.2) Act No. 4 of 2016. That law requires such witness who

is of tender age to give promise that he will tell the truth to the court and not to tell lies.

For easy reference, this provision is hereby reproduced as hereunder:-

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 any lie"*

In this case, the age of the victim has been described differently in charge sheet and in the proceedings. In the charge sheet on the particulars of the offence, it is described to be 15 years, while in the proceedings it is described to be 13 years. The age of 13 years in the proceedings, are in the testimony of the victim when she turned up to testify in court as reflected at page 11 of the proceedings, she said she was 13 years. That age was also mentioned by Pw2 one Mariam Buswelu who is a guardian/parent of the victim when she testified. This facts was also acknowledged and appreciated by the appellant as that age of 13 years was mentioned in the second ground of appeal.

It means, by the evidence of Pw2 the parent of the victim and Pw3 the victim herself, are in my considered view better placed to accurately describe the age of the victim. That said and found, I find the correct age of the victim Pw3 when she testified to be 13 years old. Therefore she was

a child of tender age subject to the provision of section 127 (2) as amended by Act No. 4/2016. Further to that, even Pw1 a boy of 11 years old, when his evidence was being recorded, he did not make any promise in terms of section 127 (2) as quoted above.

Now, looking at the phraseology of the said provision of section 127(2), of the Evidence Act (supra), it goes without say that the provision is mandatory. Its compliance is a must once the witness is found to be a child of tender age. Failure to comply makes the recording and admission of the said evidence to be illegal. The evidence is regarded to have been illegally obtained. In law, any evidence illegally obtained deserves to be expunged. The evidence of Pw1 and Pw3 for that matter were illegally admitted for failure to comply with the mandatory provision of the law, they are hereby expunge from the record for the reasons given.

Now, going to ground number three as argued by the learned Senior State Attorney that the PF3 was tendered by the police officer i.e Pw4 instead of the medical doctor who examined the victim. According to the proceedings of the trial court at page 24 and 25, it is true that the PF3 i.e exhibit PE1 was tendered by Pw4 instead of the medical doctor who examined the victim. It is on record that when the said exhibit was being tendered on 25/04/2019 the accused person objected its admission on the ground that the PF3 was not correct especially on the aspect of the date when it was prepared and filled in. That objection was overruled for want of merit and the trial court proceeded to admit and mark it as exhibit PE1.

After its admission, Pw4 went on to elaborate the said PF3 as if he was the one who examined the victim. In my considered view to trial court slipped into an error, as section 240 (3) of the Criminal Procedure Act [Cap 20 R.E 2002] requires the medical doctor who examined the victim and whose report is to be tendered to be called to tender it and for cross examination by the Accused, if the accused against whom such report is to be tendered or his advocate so demand. The objection of admission of the said exhibit by the accused, on the ground of the correctness of the said PF3 was indicating the need for calling the medical doctor for cross examination by the accused person. It was therefore not proper for the trial court to disregard the right of the accused to cross examine the medical doctor over the correctness and authenticity of the report. That said, I find that the PF3 was also illegally admitted in evidence, in contravention of section 240 (3) of the Criminal Procedure Act (Cap 20 RE 2002), this also deserves to be expunged, as I hereby do.

Having expunged the evidence of Pw1 and Pw3 as well as the PF3, i.e Exhibit PE1, I find the remaining evidence to be very weak to found the conviction. In upshots the appeal is therefore allowed basing on the two grounds i.e number 2 and 3 of the appeal. Since these two grounds of appeal have disposed of the appeal, it will be just an academic exercise to go on with the rest of the grounds of appeal. That said, the findings of the trial court are reversed, the conviction of the appellant is quashed and the sentence meted out to the appellant is set aside.

The Appellant Mashaka Zakayo be immediately released from custody unless held for other lawful purpose.

It is accordingly ordered.

DATED at MWANZA, this 28th day of February 2020

J. C. TIGANGA

JUDGE

28/02/2020

Right of Appeal explained and guaranteed

J. C. TIGANGA

JUDGE

28/02/2020