THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 112 OF 2020

(From the District Court of Mbarali, at Rujewa, in Criminal Case No. 46 of 2020).

MUSA NELSON MWANKEFU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14. 12. 2020 & 23. 02. 2021.

Utamwa, J:

In this first appeal, MUSA NELSON MWANKEFU the appellant, challenges the judgment (impugned judgment) of the District Court of Mbarali, at Rujewa, (the trial court) in Criminal Case No. 46 of 2020. Before the trial court, the appellant stood charged with Unnatural Offence contrary to section 154 (1) (a) of the Penal Code, Cap. 16 R.E 2002 (Now R.E 2019). It was alleged that, on diverse dates of February, 2020, at Manjenje Village within Mbarali District in Mbeya region, wilfully and unlawfully did have carnal knowledge to one DS (for reserving his

dignity) a pupil of standard three at Manjenje Primary School aged 10 years old against the order of nature.

The appellant pleaded not guilty to the charge, hence a full trial. Two prosecution witness testified and the appellant made a sworn defence. At the end of the trial, the trial court found the appellant guilty, convicted and sentenced him to serve thirty years imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred this appeal for search of better justice. His petition of appeal is based on four grounds of appeal as follows:

1. That, the trial court erred in law and in fact by convicting the appellant basing on the evidence of the child of a tender age which was improperly admitted and contrary to the law.
2. That, the trial court erred in law and in fact by convicting the appellant by conducting unfair trail which prejudiced the appellant.
3. That, the trial court erred in law and fact as there were no matters for determination for the trial magistrate failed to raise issues for determination so as to provide boundary to which matter were to be determined.
4. That, the trial court erred in law and fact by convicting the appellant to the offence charged while the respondent failed to

prove the case beyond reasonable doubts to enable the court to convict the appellant due to the contradictions and inconsistence of the prosecution evidence.

Owing to the above grounds, the appellant urged this court to allow the appeal, quash the conviction, set aside the sentence, and set him free. He also prayed for this court to grant any other relief(s) it may deem fit and just.

When the appeal was called upon for hearing, the appellant was represented by Ms. Tunsume Angumbwike, learned Advocate whereas Ms. Rosemary Mgenyi, learned State Attorney represent the respondent/ Republic. Parties agreed to dispose of the appeal by way of written submissions. The court granted the prayer and the submissions were filed according to the scheduled order.

In determining this appeal, I will start resolving the first ground of appeal. This is because, the respondent does not object it, but again, if it will be uphold, the same can terminate the entire appeal without testing other grounds of appeal. The issues to be resolved by this court regarding the first ground of appeal are therefore as follows:

(i) Whether or not the victim's evidence was properly admitted in evidence.

(ii) If the first issue is negatively answered then what is the legal effect of the omissions.

(iii) Lastly is what order(s) should this court make.

Submitting in support of the first ground of appeal, Ms. Tunsume argued that, the trial court erred in admitting the evidence of the child of tender age against the provisions of section 127 (2) of the Evidence Act, Cap. 6 R.E 2019. She stated that, the said provision of law requires the child of tender age who is unable to give evidence on oath to give them on the promise to tell the truth and not lies to court. Ms. Tunsume also submitted that, the law requires the trial magistrate to ask some simplified questions to the child before he reaches the stage of promising to tell the truth. To fortify her contention, she cited the decision by the Court of Appeal of Tanzania (CAT) in the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** (unreported). She contended further that, since in the matter at hand, the record of the trial court does not show if the trial magistrate followed the law, the evidence adduced thereat had no evidential value to be acted upon in convicting the appellant. She thus concluded that, the remaining evidence on record are those of PW 2 and PW 3 which are not sufficient to sustain the conviction.

On the other part, the learned State Attorney for the respondent replied regarding the first ground of appeal only. She just conceded to the irregularities committed by the trial court in admitting the evidence of the child of tender age as argued by the counsel for the appellant. She however, prayed for the court to order retrial. This is because, according to her, the prosecution had strong evidence which proved the case at the required standard. It is her contention that, PW1 narrated clearly how he knew the appellant since he was his teacher and he narrated how he used to insert his penis to his buttocks. She contended that, the case of **Seleman Makumba v. republic [2006] TLR 384,** supports the circumstance of the case. She further argued that, the conditions for ordering retrial in the matter at hand are available. It was her contention that, the conditions for ordering retrial were stated in the case of **Athanas Julias v. Republic, Criminal Appeal No. 498 of 2015, CAT at Mbeya** (unreported) which cited the case of **Fetehali Manji v. Republic (1966) EA 341.** It is therefore for the end of justice to rehear the case so as to rectify the irregularities committed during admission of evidence by the victim (PW 1).

In her rejoinder submissions, Ms. Tunsume vehemently objected the prayer for ordering retrial made by the learned State Attorney for

the respondent. She objected it on the ground that, there prosecution evidence did not prove the case against the appellant. She stated that, the evidence of PW1 and PW2 contradicted relating the dates when the victim was discovered to have been affected. She further argued that, also the evidence of PW3 contradicted that of PW1 and PW2. This is because; the later testified that the victim was unable to walk properly, whereas the former testified that the victim was walking properly. She stated therefore, that, contradictions of prosecution witnesses should be resolved in favour of the appellant. To buttress her contention she cited the case of **Mohamed Said Matola v. Republic [1995] TRL 3.**

Now, I have considered the submissions by the parties, the record and the law. I agree with them on the irregularities discussed above. This is due to the following reasons: According to the submissions by the parties, it is not disputed that, the victim was a child of tender age. The phrase "child of tender age" is defined to mean a child whose apparent age is not more that 14 years; see section 127 (4) of the Evidence Act and the decision by the CAT in **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported). The current law, according to the totality of section 127 (2) of the Evidence Act R.E 2019, and the decisions by the CAT in

Godfrey Case (supra) and in **Issa Salum case** (supra), is to the following effect:

a) That, the child of tender age can give evidence with or without oath or affirmation.

b) The trial judge or magistrate has to ask the child witness such simplified and pertinent questions which need not be exhaustive depending on the circumstance of the case. This is for purposes of determining whether or not the child witness understands the nature of oath or affirmation. The questions may relate to his age, the religion he professes, whether he understands the nature of oath and whether or not he promises to tell the truth and not lies to the court. If he replies in the affirmative, then he can proceed to give evidence on oath or affirmation depending on the religion he professes. However, if he does not understand the nature of oath, he should, before giving evidence, be required to make a promise to tell the truth and not lies to the court.

c) Before giving evidence without oath, such child is mandatorily required to promise to tell the truth, and not lies to the court, as a condition precedent before the evidence is received.

d) Upon the child making the promise, the same must be recorded before the evidence is taken.

In the case at hand however, the proceedings of the trial court indicate that, when the victim appeared before the trial court for her testimony, the learned trial Resident Magistrate recorded as follows:

> "**Details of DW 1** (sic)
> D.S.K, 10 years old, I am a student of standard 3, I am a Christian.
> The child promises to tell the truth only and not lies."

Upon the trial court making the entry into the record as quoted above, it proceeded to take his evidence. The record however, does not show that, probing questions were asked by the trial court to the victim to determine whether he understood the nature of oath or affirmation. This was against the legal guidance marked **b)** hereinabove. In fact, I am of the view that, according to the above legal requirements, even the probing questions to the child witness need be recorded by a trial court. This is because, court record must represent all important events that transpired in court for indicating that the law has been followed and so that an appellate court can satisfy itself, in case of an appeal, that the law was in fact, complied with; see the holding by the CAT in the case of **Misango Shantel v. Republict, Criminal appeal No. 250 of 2007, CAT at Tabora** (unreported).

My further construction of the law cited above is that, it is a crucial requirement that, a child of tender age like the victim in the case at hand, has to give evidence on oath only when the trial court is satisfied, upon conducting a brief inquiry through putting some relevant questions to child witness, that he/she knows the meaning of oath or affirmation, otherwise, where the trial court finds, upon making the brief inquiry, that he does not know the meaning of oath, the child witness shall give evidence without oath. Nevertheless, the witness shall make the promise to speak the truth and not lies to the court. The promise is made before he testifies. The two steps are thus, in alternative and not cumulatively. Again, the promise to speak the truth allegedly made by the victim was not recorded by the trial court. The learned presiding magistrate just indicated the existence of the said promise by his mere reported speech that the witness had made the promise. In my view, therefore, the trial court did not comply with the mandatory legal requirements numbered **b)** and **d)** herein above.

Owing to the omissions committed by the trial court, it cannot be said that the evidence of the victim was properly received. I thus, answer the first issue posed above negatively that, the victim's evidence was not properly admitted in evidence.

It follows thus, that, due to the stance of the current law highlighted above, following also the submissions by Ms. Tunsume, I find the blunder committed by the trial court fatal to the prosecution case. The legal effect of the evidence admitted contrary to law therefore, is nullify them and expunging them from the record; see also my stance in **Zawadi Ezekiel Jabil v. Republic, Criminal appeal No. 97 of 2019, HCT at Mbeya** (unreported). I consequently expunge the evidence of the victim from the record.

Having said so, the last issue is what order(s) this court should make. I have considered the argument by the learned State Attorney for the respondent that, this court should order retrial for the interest of justice between the parties. And that the prosecution proved the case through the PW1. I have also considered the arguments by Ms. Tumsume that, this court should not order for retrial, instead it should quash conviction, set aside sentence and acquit the appellant. Now, the sub-issue to be resolved by this court is *whether or not there are favourable conditions warranting this court to an order for retrial*. The circumstance of this matter attracts answering positively the sub-issue above. This is because, In **Athanas Julias case** (supra) following the **Fatehali case** (supra) cited by the learned counsels for both sides, it

was guided inter alia that, an order for retrial should only be made where the interests of justice require it. It was also guided that, retrial should not be ordered where it is likely to cause injustice to the accused person.

In the matter under consideration, it was rightly argued by the learned State Attorney for the respondent that, the law guides that, the best evidence or true evidence for sexual offences comes from the victim of the crime; see **Seleman Makumba case** (supra). In fact, as a general rule, the evidence of the victim in sexual offences can alone, base a conviction without any corroborative by another evidence; see section 127 (7) of the Evidence Act. In the circumstance of the matter at hand, it is my opinion that, there is a tangible prosecution evidence from the victim save for the improper style adopted by the trial court in receiving his evidence. The retrial therefore, is necessary so that justice can take its course. Such retrial will not cause injustice to either side of the case. Nevertheless, the end of justice also will save the fact that, it was the trial court which committed blunder discussed above. Basing on that view, I answer the sub-issue posed above positively that, there are favourable conditions warranting this court to order for retrial. The findings thus, are capable enough of disposing of the entire appeal

without testing the rest of grounds of appeal and the arguments by the appellant's counsel against other pieces of the prosecution evidence. I will not thus, consider such other arguments.

Owing to the reasons discussed above, the following orders will meet the circumstance of the case; I nullify the proceedings of the trial court and the conviction and I quash them. I also set aside the entire impugned judgment and resulting sentence. The case be remitted to trial court for retrial.

I further order that, the retrial shall take place within a period of two months from the date of this judgment. It shall be conducted before another magistrate of competent jurisdiction. The appellant shall remain in prison custody while awaiting the retrial. In case he will be convicted at the end of the trial, the period he has stayed in prison by virtual of the improper conviction discarded above shall be deducted from his term of imprisonment without affecting the law. It is so ordered.

J.H.K. UTAMWA,
JUDGE
23/02/2021

Date: 23/2/2021:
Coram: JHK. Utamwa, J.
Appellant: Present (By v/court while in Songwe Prison) and Ms. Prosista Paul (Hold brief of Ms. Tunsume, advocate.
For the Appellant:
For the Republic: Prosista Paul, State Attorney.
B/C: Gaudensia.

Court: Judgment delivered in the presence of the appellant (By virtual court while in Songwe Prison) and Ms. Prosista Paul, learned State Attorney for the respondent/Republic who is also holding briefs for Ms. Tunsume Angumbwike, learned counsel for the appellant in court, this 23rd February, 2021.

J.H.K. UTAMWA,
JUDGE
23/02/2021