IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., MUGASHA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 168 OF 2018

GODFREY WILSON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bongole, J.)

dated the 8th day of July, 2018
in
Criminal Appeal No. 24 of 2017

JUDGMENT OF THE COURT

30th April & 7th May, 2019

MKUYE, J.A.:

The appellant, Godfrey Wilson was charged and convicted by the District Court of Bukoba at Bukoba of the offence of rape contrary to sections 130(1)(2)(e) and 131(3)(a) of the Penal Code, Cap. 16 R.E. 2002. He was alleged to have raped V.D who was aged ten (10) years old. He was sentenced to thirty (30) years imprisonment. Aggrieved by the decision of the District Court, he appealed to the High Court where

his appeal was dismissed. Still aggrieved, the appellant has brought this second appeal to this Court.

Before embarking on the merits of appeal we deem appropriate to give albeit a brief background of the case which led to the appellant's conviction.

The incident took place at Mafumbo, Kashai area within Bukoba Municipality in Kagera Region. On the fateful date, on 16/7/2016 the appellant went to the house of the parents of the victim V.D (PW1). He found PW1 seated on the chair. He asked her the whereabouts of her mother and PW1 told him that she had gone to the market. It would appear that the appellant took that advantage and started undressing PW1's underwear and after undressing his clothes as well, he took his male organ and inserted it into her vagina. When PW1 tried to shout, the appellant covered her mouth while claiming that she would awaken the children who were sleeping.

Thereafter, when her mother called and required her to give her a small bag, she noticed that PW1's dress was wet. On asking her why the dress was wet, she told her that it was soaked in water.

Incidentally, her mother smelt something unusual. On further prompting, PW1 revealed to her mother that Godfrey (appellant) had carnal knowledge of her.

PW1's mother immediately went to call her neighbours who, upon examining the victim's private parts, discovered that something wrong had happened to her. Those neighbours informed her mother who also related it to PW1's father. The matter was reported to the Street Chairman and then to the Police. Later PW1 was taken to the hospital for medical examination. The appellant was, subsequently, charged with the offence of rape.

At the hearing of the appeal, the appellant appeared in person and unrepresented; whereas the respondent Republic was represented by Ms. Chema Maswi, learned State Attorney.

The appellant fronted eight (8) grounds of appeal to the effect that, **one,** the criminal case was neither reported to the police nor investigated; **two,** no sufficient evidence was adduced by material witness to the investigator to support the provision of sections cited in the charge. **Three,** the victim failed to mention the appellant in the

earliest possible moment to the person (police) whom she first reported the rape incident. **Four,** the *voire dire* examination was not properly conducted to establish the truth of the witness of a tender age as per law. **Five,** the age of the victim (PW1) was not proved by her parents in the absence of a birth certificate or any birth's documents. **Six,** the first appellate judge did not consider the appellant's defence. **Seven,** the investigation was not properly conducted; and **eight,** the PF3 was defective as the police who issued it did not testify to prove the same.

When the appellant was required to amplify his grounds of appeal he sought leave of the Court to let the learned State Attorney submit first and reserved his right to respond later, if need would arise.

In response, Ms. Maswi prefaced by supporting both the conviction and sentence meted out against the appellant. The learned counsel essentially argued all eight grounds of appeal in opposition with a caveat that all the grounds **except ground No. 4** were new grounds not dealt with by the High Court. While relying on the case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015

(unreported) she argued that, this Court has no jurisdiction to entertain them.

Having considered Ms. Maswi's argument, we agree with her that grounds Nos. 1, 2, 3, 5, 6, 7 and 8 are new grounds which were not raised and considered by the High Court. This Court, in the case of **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 (unreported), was confronted with an issue on whether it can decide on a matter not raised in and decided by the High Court on first appeal. It stated as follows:

> *"On comparing the grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, grounds one to five are new grounds. As the Court said in the case of* ***Nurdin Musa Wailu v. Republic*** *supra, the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal. This however, does not mean that the Court will not satisfy itself on the*

fairness of the appellant's trial and his conviction."

Yet, in another case of **Hassan Bundala @ Swaga** (supra) cited by Ms. Maswi, when the Court was confronted with a similar situation, stated as follows:

"Mr. Ngole, for obvious reasons resisted the appeal very strongly. First of all, he pointed out that the first and third grounds were not raised in the first appellate court and have been raised for the first time before us. We agree with him that the grounds must have been an afterthought. Indeed, as argued by the learned Principal State Attorney, if the High Court did not deal with those grounds for reason of failure by the appellant to raise them there, how will this Court determine where the High Court went wrong? It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

(See also **Athumani Rashidi v. Republic**, Criminal Appeal No. 26 of 2016 (unreported)).

On our part, we subscribe to the above decisions. After having looked at the record critically we find that, as the learned State Attorney submitted, grounds Nos 1, 2, 3, 5, 6, 7 and 8 are new. With an exception of the 6th ground of appeal which raises a point of law, as was stated in **Galus Kitaya** and **Hassan Bundala's cases** (supra), we think that those grounds being new grounds for having not been raised and decided by the first appellate Court, we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate Court went wrong or right. Hence, we refrain ourselves from considering them.

With regard to the 4th ground of appeal where the appellant is challenging that the *voire dire* test was not properly conducted by the trial court, Ms. Maswi argued that such requirement was removed through the Written Laws (Miscellaneous Amendments) (No 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8/7/2016. In

elaboration, Ms. Maswi pointed out that, it is no longer a requirement of law to conduct *voire dire* test to establish whether the child of tender age knows the nature of oath or he/she possesses sufficient intelligence for reception of his/her evidence. She was of a view that, since the witness (PW1) said she knew the difference between the truth and lies and her evidence was taken not on oath, it did not vitiate her evidence. She added that, despite the fact that the trial magistrate did not make a finding on the witness' understanding of oath, her evidence was reduced to unsworn evidence. On being probed by the Court on whether the witness (PW1) promised to tell the truth as per the law, she said there was no such promise. Besides that, she said, PW1's evidence taken without oath was corroborated by other witnesses. In the end, she prayed to the Court to dismiss the appeal for lack of merit.

On his part, the appellant insisted that the *voire dire* test was not properly conducted and he urged the Court to allow the appeal and release him.

From the outset, we wish to take off by pointing out that, section 127 (2) of the Evidence Act, Cap. 6, R.E. 2002 (Evidence Act) prior to the amendment, required the trial magistrate who conducts *voire dire* test to indicate whether or not the child of a tender age understands the nature of oath and the duty of telling the truth; and if he is possessed of sufficient intelligence to justify the reception of his/her evidence. The said provision provided as follows:

> *"(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."*

This position of the law was reiterated in the case of **Mohamed Sainyeye v. Republic,** Criminal Appeal No. 57 of 2010 (unreported) where it adopted with approval the case of **Hassan Hatibu v.**

Republic, Criminal Appeal No. 71 of 2002 (unreported) and stated as follows:-

> *"From these provisions, it is important for the trial judge or magistrate when the witness involved is a child of tender age to conduct a voire dire examination. This is done in order for the trial judge or magistrate to satisfy himself that the child understands the nature of oath. If in the opinion of the trial judge or magistrate, to be recorded in the proceedings, the child does not understand the nature of oath but is possessed of sufficient intelligence and the witness understands the duty of speaking the truth, such evidence may be received though not upon oath or affirmation."*

However, in the wake of the 2016 amendment through Act No. 4 of 2016, subsections (2) and (3) of section 127 of the Evidence Act were deleted and substituted with subsection (2) in the following manner:-

> *"Amendment of Section 127* *26. Section 127 the Principal Act is amended by -*

(a) deleting subsections (2) and (3) and substituting for them the following:

(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]

To our understanding, the above cited provision as amended, provides for two conditions. **One,** it allows the child of a tender age to give evidence without oath or affirmation. **Two,** before giving evidence, such child is mandatorily required to **promise to tell the truth to the court and not to tell lies.** In emphasizing this position the Court in the case of **Msiba Leonard Mchere Kumwaga v. Republic,** Criminal Appeal No. 550 of 2015 (unreported) observed as follows:

"... Before dealing with the matter before us, we have deemed it crucial to point out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No. 4 of 2016 (Amendment Act). Currently, a ***child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies.****"*

[Emphasis added]

In this case, before PW1 who was a child of tender age gave her evidence, this is what transpired as shown at page 12 of the record of appeal:

"PW1. [V.D] 10 years standard four student I know the difference between truth and lies.

Sgd E. A. Katemana, RM

19/12/2016."

Then the witness proceeded to testify as follows:

"PW1 XN IN CHIEF

I am ten years old, I study at Mafumbo Primary School, in standard IV. On 16/7/2016. ..."

What we gather from the above passage is that PW1 was answering questions regarding her profile/particulars such as her name, age and that she is a school child. On top of that she answered the question on whether she knew the difference between truth and lies without more. We think, the aspect of knowledge of difference between truth and lies was more of testing intelligence of the child, though no finding was made by the trial magistrate to that effect. This, however, as we have alluded to earlier on, is currently no longer a requirement of the law. The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127(2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/ she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. The question, however, would be on how to reach at that stage. 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.

Thereafter, upon making the promise, such promise must be recorded before the evidence is taken.

In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016. Hence, the same has no evidential value. Since the crucial evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of sustaining the conviction. In the circumstances, we find the 4th ground of appeal to be meritorious and hence we sustain it.

As regards the complaint in the 6th ground of appeal that his defence was not considered by the first appellate judge we do not agree with him. This is so because the same was considered as shown at page 55 of the record of appeal and the appellate judge found that it did not cast doubt to the prosecution evidence.

That said done, we allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. We further order for an immediate release of the appellant unless held for other lawful reasons.

It is so ordered.

DATED at **BUKOBA** this 6th day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL