IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 379 OF 2018

BASHIRU SALUM SUDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Twaib, J)

dated the 17th day of September 2018

in

(DC) Criminal Appeal No. 23 of 2017

JUDGMENT OF THE COURT

19th February & 1st April, 2020

MWANDAMBO, J.A.:

The District Court of Tandahimba tried and convicted Bashiru Salum Sudi, (the appellant) of the offence of rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code, [CAP 16 R.E. 2002] (the Penal Code). Upon such conviction, the appellant was sentenced to serve thirty years jail term. The High Court, sitting at Mtwara before which he challenged the trial court's decision found no merit in his appeal. He has now appealed to this Court on a second appeal.

The arraignment and the trial that ensued and the resultant conviction of the appellant was prompted by facts which are less intricate. The prosecution alleged that on 3rd January, 2017 at Namahonga Village within Tandahimba District, the appellant had unlawful sexual intercourse with a 14 years old girl. For the purposes of concealing the victim's identify, we shall henceforth be referring to her as **AA** or PW1 as the case may be. The prosecution alleged that on the material date and time, **AA** and her three friends had gone to collect cashew nuts at a certain farm. As they were doing that, the appellant emerged and apprehended **AA** by getting hold of her hand. The appellant claimed that the youngsters were stealing cashew nuts in a farm of Kamenya said to be his grandfather. That prompted **AA**'s friends to flee to a neighbouring farm in search for help. In the meantime, the prosecution alleged that the appellant dragged **AA** to a bush, laid her down, undressed her clothes including underpants and undressed himself also and withdrew his manhood and inserted it in **AA**'s private parts.

A moment later, **AA**'s friends, Muntaz Idd Matila(PW2) included, resurfaced at the scene in the company of Rehema Salum and other people but before they came to the place where the appellant and **AA** were, the appellant saw them and released **AA** in an attempt to flee.

However, before he could do so, **AA** got hold of him tightly which prevented him from running away and this facilitated his arrest by Rehema Salum (PW3) and other persons. Immediately thereafter, **AA** was taken to a hospital by Mohamed Issa Bandula, her uncle who testified as PW4. This was after obtaining a PF3 from the police station where Rukia Asali (PW6), the mother of **AA** in the company of PW4 had been referred by a Ward Executive Officer.

At the hospital, **AA** was attended by Magreth Msafiri (PW7) a Clinical Officer who examined her private parts. PW7 posted her findings in the PF3 revealing presence of slight bruises and blood clots on **AA**'s vagina but no spermatozoa was seen.

In his defence, the appellant denied the accusations branding the case as having been framed up against him by **AA**'s **parents** to cover up embarrassment of their daughter's theft at his grandfather's farm which he apprehended **AA** and her friends on the material date. At the end of it all, the trial court found the prosecution case sufficiently proved through seven witnesses including **AA** (PW1) and her friend, Muntaz Idd Matila (PW2) who was in her company, Rehema Salum (PW3), Mohamed Isa Bandula (PW4), WP 7326 Regina (PW5) and Margreth Msafiri (PW7) who also tendered a PF3 (Exhibit P2). Proof of **AA**'s age

was furnished by PW6 who tendered a clinic card admitted in evidence as Exhibit P1.

The trial court arrived at that conclusion upon being satisfied that the witnesses were truthful and that the evidence proved all ingredients of the offence of rape predicated under section 130(2) (e) of the Penal Code.

As for the defence, the trial court found it to be too weak to raise any reasonable doubt given the fact that the appellant admitted having been at the scene of crime and got hold of PW1 in the presence of PW2 and later on seen by PW3. In the end, the trial court convicted the appellant as charged followed by the mandatory 30 years custodial sentence.

On appeal, to the High Court, Twaib, J concurred with the trial court's findings and sustained its decision. The learned first appellate Judge took into account evidence which showed that the appellant admitted to have appeared at the scene and held **AA**. He also concurred with the trial court's findings that PW'1s testimony was partly supported by other prosecution witnesses including PW2 and PW3. It (the High Court) dismissed the appeal and hence this second one.

The memorandum of appeal is admittedly mouthful, but after paraphrasing it, the appellant's appeal is premised on the following grievances namely:-

1. *His conviction was improper because the trial court accepted the evidence of PW1 and PW2 without complying with section 127(7) of the Evidence Act [CAP. 6 R. E. 2002].*
2. *The evidence of PW1 and PW2 lacked corroboration.*
3. *The case against him was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, unrepresented. Mr. Kauli George Makasi, learned Senior State Attorney represented the respondent Republic opposing the appeal. At the outset, the appellant adopted his grounds of appeal and let the learned Senior State Attorney address the Court first before he could make his reply if such need arose.

Mr. Makasi addressed the Court on four areas which he considered to be the appellant's complaints in the appeal namely; non-compliance with section 127(7) of the Evidence Act [CAP. R.E 2002] (the Evidence Act), credibility of PW2, PW3 and PW4, discrepancies in the testimonies

of PW1 and PW2, reliance on the uncorroborated evidence of PW1 and PW2 and conviction being grounded against the weight of evidence.

It is clear to us that the above areas of complaint revolve around the general issue whether there was sufficient evidence to prove the charge against the appellant on the charged offence on the required standard. Addressing the Court, the learned Senior State Attorney submitted that the High Court concurred with the findings of the trial court that the prosecution witnesses were truthful and credible. Specifically, Mr. Makasi argued that the evidence by PW1 who was the victim of the offence was not only sufficient on its own, but it was corroborated by PW2, PW3 and PW7 as well as the PF3 (exhibit P2).

On the other hand, Mr. Makasi argued that PW6, the mother of **AA** proved her age by tendering a clinic card (exhibit P1) showing that **AA** was born in 2002. On the whole, Mr. Makasi contended that the appeal lacked merit and prayed that it should be dismissed.

After the above submissions, the Court drew the attention of Mr. Makasi to pages 9-13 of the record containing the evidence of PW1 and PW2, witnesses of tender age in the light of the provisions of section 127(2) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016. Mr. Makasi readily

conceded that the trial court received the evidence of PW1 on affirmation after conducting a *voir dire* test which was no longer a requirement after the amendment to section 127 of the Evidence Act. It was his submission that in so far as the evidence by PW1 and PW2 was received irregularly, it was liable to be discarded. That notwithstanding, the learned Senior State Attorney argued that the circumstances of the case attracts applying the overriding objective principle brought about by ss. 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 [CAP 141 R. E. 2002] as amended by The Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 because the receipt of that evidence did not prejudice the appellant. But Mr. Makasi was quick to concede that the evidence of PW2 lacked evidential value because it was received without oath in the absence of any evidence on record showing that PW2 made a promise to tell the truth and not lies as required by section 127(2) of the Evidence Act. On this, he was agreeable that it should be discarded although such course of action will not have any effect on the remaining evidence.

Finally, Mr. Makasi conceded too that exhibits P1 and P2 were admitted without their contents being read out and so the Court should expunge them from the record. However, counsel argued that the expungement of exhibits P1 and P2 will have no adverse effect on the

prosecution case because the oral evidence of PW6 on the age of **AA** is intact so was evidence of the clinical officer (PW7) who examined **AA** on the material date.

When it was his turn to re-join, the appellant contended that the submissions made by the learned Senior State Attorney were incorrect having been made on non-existing grounds. Otherwise, the appellant implored the Court to do justice to him on the basis of his grounds of appeal.

After hearing the arguments in support and against the appeal, we find it necessary to state at this stage that we are sitting on a third appeal and so issues of credibility of witnesses who testified during the trial are outside our inquiry as rightly submitted by Mr. Makasi relying on our previous decision in **Saada Abdallah & Others v. Republic** [1994] TLR 132. We also need to state at this juncture that in cases involving sexual offences like the instant appeal, the best evidence must come from the victim of the sexual offence. See: **Selemani Mkumba v. R**, [2006] TLR TLR 339, **Hamis Mkumbo v Republic**, and Criminal Appeal No. 124 of 2007 (unreported) and **Rashidi Abdallah Mtungwa v Republic,** Criminal Appeal No. 91 of 2011 (unreported) amongst others. Having so stated, the next question for our determination is

whether PW1, the victim of the sexual offence adduced best evidence to sustain conviction and if not, whether there was any other corroborative evidence from other witnesses. The determination of the two issues will be dependent upon our answer to another crucial issue namely; whether the reception of PW1's evidence was in accordance with the law. The law in question is none other than section 127(2) of the Evidence Act (as amended) which stipulates:

> *"(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 lies."*

Mr. Makasi conceded that the reception of PW1's evidence was done in accordance with the repealed law that is, s. 127(2) of the Evidence Act before the amendments thereto. Under the repealed section 127(2) of that statute, evidence of a witness of tender age could be received without oath or affirmation if in the opinion of the trial court, the tender age witness could not understand the nature of oath. The reception of such evidence was, under the repealed sub-section, subject to the trial court's opinion that such tender age witness possessed of sufficient intelligence justifying the reception of his

evidence and understands the duty of speaking the truth. The section made it mandatory that the court's opinion must be recorded in the proceedings.

As seen above, the current section 127(2) of the Evidence Act permits a tender age witness to give evidence with or without oath or affirmation. However, where the evidence is received without oath or affirmation, the witness must make a promise to tell the truth and not lies. What is gathered from the new provision is that conducting a *voir dire* test is no longer a requirement for determining whether such a child witness is capable of giving his evidence with or without oath. It is equally not a requirement to record the court's opinion (if any) in the proceedings. The nagging question is whether the evidence of tender age witnesses received on oath or affirmation after conducting a *voir dire* test which is no longer a legal requirement becomes worthless.

The Court has already pronounced itself that the evidence of a tender age witness received not on oath or affirmation without such witness making a promise to tell the truth and not lies to be without evidential value. Such evidence is as good as no evidence had been taken. See: **Godfrey Wilson v. R.**, Criminal Appeal No. 168 of 2018(unreported) where the tender age witness is recorded to have

known the difference between truth and lies and proceeded to give evidence without oath or affirmation but without the mandatory promise to tell the truth and not lies. The Court took cognisance of the uncertainty in the manner of reaching the stage of asking a tender age witness to give evidence on oath or affirmation or vice versa and soliciting a promise from the witness. It is for this reason, the Court attempted a list of simple questions to be asked to the witness before receiving his evidence (see page 14). **Godfrey Wilson v. R** (supra) has been applied in subsequent cases including, **Selemani Bakari Makota @ Mpale v. R**, Criminal Appeal No. 269 of 2018 and **Issa Salum Nambaluka v. R**, Criminal Appeal No. 272 of 2018 (both unreported). In both cases, evidence of tender age witnesses received without oath or affirmation was discarded because there was nothing on record showing that the witnesses made promises to tell the truth and not lies as required by section 127(4) of the Evidence Act.

The position in the instant appeal is similar with regard to PW2. Upon the trial court forming an opinion that the witness did not understand the meaning of oath, it received his evidence without affirmation which was contrary to the dictates of section 127(2) of the Evidence Act. On the authority of the above cited cases, PW2's evidence had no evidential value. It was worthless and incapable of supporting

PW1's evidence. However, the position is not the same with regard to PW1.

It is plain that her evidence was received on affirmation after the trial court had conducted a *voir dire* test despite the fact that it is no longer a requirement. However, we are settled in our mind that the fact that the trial court determined PW1's ability to give evidence on oath or affirmation on the basis of the practice obtaining under the repealed law, did not invalidate that evidence. This is because, as observed in **Godfrey Wilson v. R** (supra) and later in **Issa Salum Nambaluka v. R** (supra), the law is silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not.

In the absence of such a method, we do not think the method adopted by the trial court for the purposes of ascertaining PW1's ability to give evidence on oath or affirmation was fatal to her evidence and thus prejudicial to the appellant. What we gather from the record is that the trial court indulged itself in matters which were unnecessary but in the end, it formed an opinion that PW1 was capable of giving her evidence on affirmation. Apparently, it did alike to PW2 but with a different opinion and received his evidence without oath or affirmation, omitting to solicit a promise from that witness to tell the truth and not

lies. We have already held that in the absence of the promise to tell the truth, PW2's evidence was received in contravention of section 127(2) of the Evidence Act.

With respect, we decline to take a similar approach in relation to PW1's evidence whose evidence was received on affirmation. We say so having regard to our previous decision in **Asha Haruna v. Republic,** Criminal Appeal No. 74 of 2005 (unreported) in which we held that the purpose of oath or affirmation is to solemnly promise to tell the truth and the truth only. This is what PW1 did before her evidence was received. Consequently, we are firm that the evidence of PW1 was properly received and relied upon by the trial court regardless of the method used to determine her ability which resulted into receiving her evidence on affirmation. Having so determined, we now turn our attention to the appellant's ground of appeal.

Ground one faults the trial court for convicting the appellant by relying on the evidence of PW1 without complying with section 127(7) which is now section 127(6) of the Evidence Act. Mr. Makasi had two responses. **One,** the trial court concluded that the prosecution witness were all truthful to which the first appellate court concurred. **Two,** the two courts below made concurrent finding on the evidence adduced by

PW1 to be credible. At any rate, the learned Senior State Attorney argued, PW1's evidence was sufficiently corroborated by PW2, PW3 and PW7.

We are mindful of the settled principle that the second appellate court should not normally interfere with the concurrent findings of the two courts below except for compelling reasons – See: **Salum Mhando v.R** [1993] TLR 170. Section 127(6) of The Evidence Act, on the basis of which the appellant faults the trial court's decision applies to cases involving sexual offences where the only evidence is that of a child of tender age. The trial court is empowered to convict an accused person charged with a sexual offence solely on uncorroborated evidence of a after assessing his/her credibility if for reasons to be recorded, the witness or the victim of sexual offence is telling nothing but the truth. That being the case, did PW1's evidence require corroboration? we do not think so guided by our previous decision in **Seleman Makumba v. R** (supra) which reinforces the spirit behind section 127(6) of The Evidence Act and hence the rule that the best evidence must come from the victim of the sexual offence. The two courts below concurred that PW1's evidence was truthful and reliable to convict the appellant for the charged offence. We have not seen any justification to interfere with the concurrent findings and so we sustain them in this appeal.

Assuming there was any requirement for corroboration, we are settled in our minds that apart from the discarded evidence of PW2, there was sufficient evidence from PW3 who responded to the call for help from PW1's friends. PW3 who was in the company of other people, apprehended the appellant who was already held under control by PW1. Other corroborative evidence came from PW7 who examined PW1 at the Hospital. Leaving aside the contents of the irregularly admitted PF3, PW7's oral evidence established presence of slight bruises on PW1's vagina which was consistent with PW1's testimony that the appellant forced his manhood into her vagina. Other evidence came from PW6, the mother of PW1 who proved her age and thus, the trial court correctly made a finding that all ingredients of the offence of rape under section 130(1)(2)(e) and 131(1) of the Penal Code were sufficiently established and proved on the required standard. Like the first appellate court, we have found nothing to justify interfering with the concurrent findings of the two courts below. The upshot of all of what we have endeavoured to demonstrate is that the appellant's complaint in ground one is devoid of merit and we accordingly reject it.

The appellant's complaint in ground 2 is that the evidence by PW1 and PW2 lacked corroboration. However, in view of our determination in ground 1, we find no merit in this ground and reject it. We likewise

find no merit in the complaint that the evidence by PW1 and PW2 was contradictory considering that we have discarded PW2's evidence for lack of evidential value. In the absence of PW2's evidence, there will be no evidence to contradict PW1's evidence.

From what we have discussed above, we are satisfied like the two courts below that the case against the appellant was proved to the hilt and so, the complaint in ground three falls away.

Lastly, we need to dispose of one issue which featured in the course of hearing in relation to the admission of the clinic card (exhibit P1) by PW6 and the PF3 (exhibit P2) by PW7. Mr. Makasi conceded that the admission of the two exhibits was irregular because it offended the rule in **Robinson Mwanjisi & Others v. R** [2003] T.L.R. 218. Contrary to that rule, the contents of the two documents were not read out after they were cleared for admission. The omission was fatal and the two exhibits are expunged from the record. However, the fact that we have expunged the two documents has no bearing on the outcome of the appeal. In the first, place, it is trite that age of a child can be proved by amongst others, a parent or guardian. Since PW6, the mother of PW1 testified to the same affect, her evidence on the age of PW1 remains intact. Likewise, on the authority of **The Director of Public**

Prosecutions vs. Erasto Kibwana and 2 Others, Criminal Appeal No. 576 of 2016 relied upon subsequently in **Thomas Robert Shayo vs. The Republic**, Criminal Appeal No. 409 of 2016 (both unreported) oral evidence of a medical personnel survives the obliteration of any medical document, in this case the PF3. PW7's oral evidence sufficiently corroborated PW1's evidence and indeed, PW7 was not controverted during cross examination.

In conclusion, the appeal is devoid of merit and we hereby dismiss it.

DATED at **MTWARA** this 10th day of March, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 1st day of April, 2020 in the presence of the appellant in person and Mr. Wibroad Ndunguru, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

A. K. RUMISHA
DEPUTY REGISTRAR
COURT OF APPEAL