**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: LILA, J.A., WAMBALI, J.A. And KOROSSO, J.A.)**

**CRIMINAL APPEAL NO. 182 OF 2018**

**ABDALLAH NGUCHIKA .....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es salaam)**

**(Mlyambina, J.)**

**Dated the 28th day of June, 2018.**
**In**
**HC. Criminal Appeal No. 205 of 2017**
.....

**JUDGMENT OF THE COURT**

18th November & 1st December 2020

**LILA, JA:**

In this appeal the appellant, **Abdallah Nguchika,** seeks to challenge the decision of the High Court which upheld his conviction for the offence of rape and the sentence of thirty (30) years imprisonment imposed by the District Court of Kilosa District at Kilosa. The accusation laid against the appellant by the prosecution, while hiding the identity of the victim by referring to her as WS or simply the victim, was a subject of the charge which was couched thus: -

*"STATEMENT OF OFFENCE*

*RAPE C/S 130(1), (2)(e) AND 131(1), (b) of the Penal code [Cap 16 RE 2002]*

*PARTICULARS OF OFFENCE*

*That ABDALLAH s/o NGUCHIKA is charged on 27th day of November, 2016 at about 1900hrs at Mamoyo Village within Kilosa District in Morogoro Region did have sexual intercourse with WS a girl of 10 years old and a student of standard two at Mamoyo Primary School."*

The appellant's conviction and sentence was founded on five prosecution witnesses' evidence including the victim and two documentary exhibits. Going by the manner the witnesses were referred to, the prosecution evidence came from the evidence of Victor Sawaya (PW1) who was an assistant medical doctor who examined the victim, the victim (DW1), Malua Ali (PW2) who was the victim's brother, Angelina Hosea (PW3) who was the victim's grandmother and WP 4457 D/Cpl Theresia (PW4) who happened to be the police officer who recorded the appellant's cautioned statement (exhibit 'P2"). The appellant (DW1) and his wife Zainabu Mohamed (DW2) testified in defence.

The victim testified that on the material day and time, her grandmother had gone to the shop. She went to the toilet to attend a call of nature. As she came out from the toilet the appellant emerged, grabbed and fell her down. Determined to ravish her, the appellant, who was their neighbour, proceeded to undress her and then undressed himself. Explaining what happened thereafter, the victim said the appellant inserted "mdudu wake sehemu zangu za siri" while covering her mouth by his hand to avert her from screaming for help. She said she felt pain in her private part when being penetrated. She, further, said the appellant who was carrying a knife with him, warned her not to disclose the incident to PW3 lest he would kill her. Having accomplished his evil act, the appellant left the place. The wind that the victim was raped reached PW2 who, the next day, asked the victim as to what had befallen her. The later unfolded the truth that she was raped by the appellant. PW2 revealed the news to PW3. The matter was then reported to the Village Chairman and later to police. The police issued them a PF3 (exhibit 'P1") and they went to hospital where PW1 medically examined the victim and came out with the findings that the victim had bruises in her private parts and the hymen was perforated.

The appellant was later that day (28/11/2016) arrested and taken to police station. PW4 recorded the appellant's cautioned statement (exhibit "P2") on 30/11/2016 in which he allegedly confessed committing the offence.

In his defence, the appellant flatly denied the prosecution's allegation contending that he was innocently arrested by auxiliary police on 21/11/2016 and linked with the commission of the offence. DW2, on her part, told the trial court that on 21/11/2016 while going home from her farm at 1:00 O'clock, PW2 was sent to inform her that he was required at the Village Chairman's Office. She heeded to the call and thereat she was told that her husband was being suspected to have raped the victim.

After a full trial, the trial court was satisfied that the charge was proved against the appellant. Relying on the contents of exhibit "P2' where the appellant stated that "kuhusu kumbaka sikufanikiwa kuingiza uume wangu kwa sababu ni mtoto", the findings of PW1 in exhibit "P1" that he found the *labia minora* and *labia majora* lacerated and the hymen perforated as well as the victim's evidence, she was fully convinced that it was clearly established that the victim was raped and

the appellant was the perpetrator of the offence. The appellant was accordingly found guilty, convicted and subsequently sentenced to serve thirty (30) years imprisonment.

Aggrieved, the appellant appealed to the High Court to challenge the trial court's decision fronting five (5) grounds of appeal. The appeal was unsuccessful save for the cautioned statement (exhibit "P2") which was expunged from the record for having been recorded beyond the prescribed period of time. Addressing itself to the appellant's complaint that the charge was defective for citing non-existent provisions of the law in the sentencing provisions, the High Court, relying on the case of **Jafari Mohamed v. Republic**, Criminal Appeal No. 495 of 2016 (unreported), had it that although section 131(1)(b) of the Penal Code Cap 16 R. E. 2002 does not exist the anomaly is not fatal and is curable under section 388 of the Criminal Procedure Act Cap. 20 R. E. 2002 (the CPA). The learned judge reasoned that it was a mere sentencing provision that was missing and that the appellant had not established to the court how the infraction had worked injustice to him. On the commission of the offence and the appellant's involvement, the learned presiding judge was satisfied that the narration of the victim supported

by PW1's evidence and his findings as reflected in exhibit "P1" left no any doubt on the appellant's involvement. The learned judge also dismissed the appellant's contention that the prosecution relied on close family members' evidence which was not corroborated by any independent witness. He relied on the decision in the case of **Paulo Tarayl v. Republic**, Criminal Appeal No. 216 of 1994 (unreported), which is to the effect that relatives are not barred from testifying and that it is the veracity of the witness's testimony which should be gauged judiciously. In the end, the learned judge was satisfied that the charge was proved to the hilt. The conviction and sentence entered by the trial court against the appellant, therefore, remained undisturbed.

The aforesaid decision of the High Court aggrieved the appellant. He has now accessed the Court protesting his innocence and is seeking to assail the High Court decision upon a memorandum of appeal lodged on 7th day of June, 2019 and a supplementary memorandum of appeal lodged on 1st July, 2020 each containing five grounds which substantially boil down to the following grounds;

1. *That, the learned first appellate judge grossly erred in upholding the appellant's conviction which was based on a defective charge.*

2. *That, the learned first appellate judge erred in acting on PW.1's evidence who did not promise to tell the truth and not lies.*
3. *That, the learned first appellate judge erred in relying on un - credible and unreliable visual identification by PW.1 against the appellant at the "locus in quo".*
4. *That the age of the victim was not sufficiently proved.*
5. *That the trial court judgment was defective for not containing the points for consideration and failure to consider the defence evidence.*
6. *That the prosecution failed to prove that Abdallah Nguchika and Mtumbwi was one and the same person.*
7. *That PW1 did not establish his credentials, qualification and experience.*
8. *That the prosecution did not prove that PW1 is the same person as one Kilonzo who filled the PF3.*
9. *That the PF3 was not read out aloud in court after being cleared for admission.*
10. *That the appellant did not close his defence case.*

11. *That, the learned first appellate judge erred in upholding the appellant's conviction while none of the village leaders or police officer(s) to whom the offence was first reported ever testified.*
12. *That, the learned first appellate judge erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt as charged.*

The appellant appeared in person through video link from the Ukonga prison and had no legal representation. He fended for himself. On the other hand, Ms. Lilian Rwetabura and Ms. Imelda Mushi, both learned State Attorneys, appeared representing the respondent Republic. Neither of the parties lodged written submissions. Only the respondent lodged a list of authorities.

When he was accorded the opportunity to address the Court on the appeal, the appellant adopted his grounds of appeal without more and urged the Court to consider them and determine the appeal.

On her part, Ms. Rwetabura commenced by expressing her position that she was fully supporting the appellant's appeal. In elaboration, she opted to argue ground 12 of appeal which, in her view, encompasses and, actually, is the effect of the infractions in the conduct

of the prosecution case complained by the appellant in the remaining grounds of appeal.

The first infraction to be addressed by the learned State Attorney was in respect of the reception of the victim's evidence. Elaborating, Ms. Rwetabura pointed out that according to the record of appeal, none of PW2, PW3 and PW4 witnessed the incident of the victim being raped. They all told the trial court what the victim told them, she insisted. But, further elaborating, she pointed out that the victim's evidence was received in total violation of the provisions of section 127(2) of the Evidence Act, Cap. 6 R. E. 2002 (the EA) which imperatively require the trial magistrate to satisfy himself that a child witness promises that she would tell the truth and not lies before her evidence is taken. Assailing the procedure adopted by the learned trial magistrate, the learned State Attorney argued that the learned trial magistrate strayed into error when she conducted a *voire dire* test instead of putting up questions to the victim which would solicit from her whether she was ready to tell the truth and not lies. On that account, Ms Rwetabura stressed, the evidence of the victim was irregularly taken and ought to be disregarded. To augment her contention she made reference to the

Court's decision in the case of **Masoud Mgosi v. Republic**, Criminal Appeal No. 195 of 2018 (unreported) in which the case of **Ibrahim Haule v. Republic**, Criminal Appeal No. 398 of 2018 (unreported) was referred. Since the evidence by PW2, PW3 and PW4 mainly relied on what they were told by the victim, disregard of the victim's evidence inflicts a fatal blow to the prosecution case as their (PW2, PW3 and PW4) evidence miss legs on which to stand, Ms. Rwetabura charged.

Submitting in respect of the remaining evidence by PW1, the learned State Attorney argued that such evidence suffered from two serious ailments. **One**, she said, the PF3 (exhibit "P1") was not read out after being cleared for admission hence it should be expunged from the record of appeal. **Two**, such evidence, standing alone, only shows the injuries sustained by the victim in the aftermath of the rape incident but does not tell who the ravisher was.

Before resting her submission, we asked the learned State Attorney to address us on the appellant's complaint in ground 1 that the charge put at his door was defective for citing a non-existent law and its legal implication. Ms. Rwetabura did not mince words for she readily conceded that there is no sub-section (b) in section 131(1) of the Penal

Code. She was, however, quick to add that the irregularity is not fatal and did not occasion an injustice to the appellant because section 131(1) of the Penal Code is a proper sentencing provision given the fact that the particulars of the offence indicated that the victim was ten (10) years old and the appellant was sentenced to serve thirty (30) years jail term which is a prescribed sentence under section 131(1) of the Penal Code. She added that the situation would be different had the appellant been sentenced to life imprisonment in terms of section 131(3) of the Penal where the offence of rape is committed to a child under the age of ten (10) years. That being the case and relying on the decision in the case of **Jafari Salum @ Kikoti v. Republic**, Criminal Appeal No. 370 of 2017 (unreported), the learned State Attorney argued, no injustice was occasioned by the defect in the charge hence the infraction is curable under section 388 of the CPA.

In conclusion, and in view of the above unfolded shortcomings in the prosecution case, the learned State Attorney firmly argued that the appellant's guilt was not established to the required standard. She consequently implored upon us to allow the appeal and set the appellant at liberty.

Having heard the learned state Attorney's submission which was in his favour, the appellant had nothing to rejoin. He just reiterated his earlier stance that his grounds of appeal as presented be given due regard in the determination of his appeal.

Having carefully gone through the paraphrased grounds of appeal and the submission of the learned State Attorney, we propose to deal with the merits of appeal starting our discussion with the issue whether the charge is defective. We find this to be a crucial matter to be determined first for an obvious reason that the charge is the foundation of any criminal trial. On that account, the charge should be properly framed. From the charge the accused is made aware of the case he is facing so that he would be able to marshal his proper defence (See **Simon Abonyo v. Republic,** Criminal Appeal No. 144 of 2005 (unreported). To ensure that purpose is achieved, section 132 of the CPA was enacted. That section provides: -

> *132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving*

*reasonable information as to the nature of the offence charged.*

With the necessary lucidity, the import of the above quoted provision was explained in the case of **Mussa Mwaikunda v. Republic** [2006] TLR 387 where the Court stated, inter alia, that: -

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence."*

In another case of **Isidori Patrice v. Republic,** Criminal Appeal No. 224 of 2007 (unreported), the Court stated: -

> *"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the* ***actus reus*** *of the offence with the*

*necessary* ***mens rea****. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

Since, in the present case, the charge did not comply with the above mandatory requirements of the law for citing sub-section (b) of section 131(1) of the Penal Code which is non-existent, we are at one with the learned State Attorney that the charge was defective. However, the issue that promptly knocks at the door calling for our resolve is whether that infraction prejudiced the appellant? As rightly submitted by the learned State Attorney, the particulars of the offence, above quoted, indicated clearly that the victim was of the age of ten (10) years. That suggested that in the event the appellant was to be convicted of the offence, the appropriate sentence that would be imposed was thirty years in terms of section 131(1) of the Penal Code. And, indeed, upon being convicted the appellant was accordingly sentenced. Insertion of sub-section (b) of section 131(1) in the penalty provision cannot therefore be said to have prejudiced the appellant. In the circumstances, indication of the victim's age in the particulars of the

offence removed the confusion that might arise on the sentence that would be imposed to the appellant. Like the learned State Attorney, we are inclined to find that there was no prejudice and the infraction was curable under section 388 of the CPA.

Our above finding paves way for us to consider and determine the merits or otherwise of the appeal.

After carefully and seriously considering the evidence on record, we wish, in the first place, to point out that we have no plausible reason why we should not go along with Ms. Rwetabura's submission that the prosecution evidence failed to prove the charge at the required standard. The record bears out clearly, as rightly argued by Ms. Rwetabura, that PW2, PW3 and PW4 were not witnesses of the rape incident. Instead, they told the trial court what they were told by the victim. Unfortunately, though, the trial court recorded PW1's evidence without having undertaken the duty to tell the court the truth and not lies pursuant to section 127(2) of the EA. It is, instead, apparent that the trial Magistrate conducted a *voire dire* test. It seems clear to us that the learned trial magistrate was not aware of the amendment effected under section 127(2) of the EA hence failed to comply with it. It is

discernible from the record of appeal that, the offence was allegedly committed on 27/11/2016 and the victim gave her testimony on 18/ 01/2017. By then the law had already changed. The changes were brought by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8th July, 2016, to the effect that section 127 (2) of the EA provides:

> *"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".*

In the case of **Faraji Said v. Republic**, Criminal Appeal No. 172 of 2018, (unreported) the court stated inter alia that;

> *"...the questions asked by the trial magistrate did not satisfy the requirement of section 127 (2) of the Evidence Act. This was violation of the settled principle under section 127 (2) of the Evidence Act which justify for our interference of the concurrent findings of the two courts below. We therefore fully concur with the submission made by Mr. Kalinga that the evidence of PW1 does not have evidential value, it ought, and we hereby do, expunge that evidence from the record ".*

In **Geoffrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported), the Court stated that;

> *"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."*

[See also **Masoud Mgosi v. Republic** (supra)].

In the instant case, there is no indication that the victim promised to tell the truth and not to tell lies before her evidence was taken. Her evidence was therefore improperly taken and acted on by the trial Court to found the appellant's guilt. Her evidence was, on the authority above, worthless and ought to have been disregarded.

Having disregarded the evidence of the victim which is considered to be the best evidence in sexual offences (see **Selemani Makumba v. Republic**, [2006] TLR 384, the central issue now is whether there is other evidence proving the appellant's guilty.

To the above posed question, the learned State Attorney provided us with, in our view, the right answer. PW2, PW3 and PW4 told the trial court what they were told by the victim. They did not witness the rape incident. In the absence of the victim's evidence their evidence remain unsupported hence prone to collapse. More so, the PF3 (exhibit "P1") was not read out after being cleared for admission as exhibit, hence improperly acted on. That irregularity is fatal and incurable with the effect that exhibit "P1" should be disregarded from the record (See **Robison Mwanjisi v. Republic**, [2003] TLR 218). And, PW1's remaining oral evidence concentrated on his observation of the victim's female organ. Taken alone, as rightly argued by the learned State attorney, it falls short of telling the perpetrator of the rape incident. At the end of the day, there remains no evidence implicating the appellant with the commission of the offence. On that account, we are inclined to entirely agree with the learned State Attorney that the charge against the appellant was not proved.

The above finding fully determines the appeal. We shall, therefore not dwell to consider each of the remaining grounds of appeal.

It is for the above reasons that we allow the appeal, quash the conviction and set aside the sentence. We order the appellant be released from prison forthwith unless he is otherwise lawfully held.

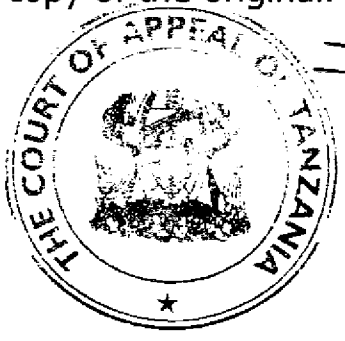
**DATED** at **DAR ES SALAAM** this 27th day of November, 2020

S. A. LILA
**JUSTICE OF APPEAL**

F.L.K. WAMBALI
**JUSTICE OF APPEAL**

W. B. KOROSSO
**JUSTICE OF APPEAL**

The Judgment delivered this 1st day of December, 2020, in the Presence of the Appellant linked through video conference from Ukonga Prison and Ms. Chesensi Gavole, State Attorney for the Respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**