**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**(CORAM: WAMBALI, J.A. LEVIRA, J.A. And MAIGE, J.A.)**

**CRIMINAL APPEAL NO. 271 OF 2020**

**HAWADI MSILWA .....APPELLANT**

**VERSUS**

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

**[Appeal from the Decision of the High Court of Tanzania at Iringa]**
**(Matogolo, J.)**

**dated the 10th day of March, 2020**
**in**
**Criminal Appeal No. 59 of 2019**
.....

## JUDGMENT OF THE COURT

*31st October & 4th November 2022*

**LEVIRA, J.A.:**

In the District Court of Mufindi at Mufindi the appellant, Hawadi Msilwa was charged with rape contrary to sections 130 (1) and (2) (e)and 131 (1) of the Penal Code [Cap 16 R.E. 2002 now R. E. 2022] (the Penal Code). After a full trial, he was convicted as charged and sentenced to life imprisonment. Aggrieved, he unsuccessfully appealed to the High Court, hence the current appeal.

Briefly, according to the record of appeal, the prosecution alleged that on the 24th May, 2018 (the material day) at Kibengu Village within Mufindi District, the appellant had canal knowledge of a girl aged 7 years old (the

name withheld to protect her identity) whom we shall refer as the victim or PW1. In her evidence, PW1 testified that on the material day, in the morning, as she was returning home from school, she met the appellant who held her hand, took her to the forest, removed her clothes and his. Thereafter, the appellant inserted his penis into PW1's vagina causing her pains. She went on to testify that the appellant ordered her not to tell anyone about what had happened otherwise he would cut her by using a hoe. He also promised to buy her an exercise book. Being threatened, PW1 did not tell anyone about the incident when she arrived home. The following day, PW1's mother, one Agness Ubanba (PW2), saw her walking improperly and upon asking her why was she walking that way, PW1 never responded as she was fearing to be beaten by the appellant. Thus, PW2 decided to inspect PW1's private parts and saw wounds, and upon further inquiry, PW1 revealed the truth that Hawadi (the appellant) was responsible for those wounds. Thereafter, PW2 took her to the office (which was not mentioned by name) and PW1 narrated to them what had befallen her.

In her evidence, PW2 testified that on 24th May, 2018 while at home at around 14: 00 hours, she saw PW1 returning home from school but she was not walking properly. Upon asking her what was wrong, she replied

that she had some wounds in her private parts. Therefore, PW2 inspected her and discovered wounds *"vidonda vikiwa na usaha."* According to her, later, PW1 told her that the appellant had put his penis in her vagina. Thereafter, PW2 took PW1 to the dispensary and she was given a first aid and they went back home. PW2 reported the incident to the Village Executive Officer (the VEO) of Kibengu, Musa Msungu (PW4). The evidence of PW2 though with slight differences was confirmed by Kawaida Kigodi (PW3), the victim's father to the extent that, on the material day (24th May, 2018) when PW1 was asked by her mother what had befallen her, she remained silent and that is when her mother decided to take her to the room to inspect her private parts only to discover that she had some wounds and bruises in her vagina. They took her to the dispensary where she was given some medication and later reported the incident to the VEO and the appellant was arrested on the same day by militia.

On the following day, PW2 and PW3 reported the incident to Mafinga Police Station where they were given the PF3 and sent PW1 to Mafinga District Hospital where she was attended by Dr. Lilian Sanga (PW5). To the contrary, PW4 testified that on 30th May, 2018 while at his work place, PW3 went to complain to him that the appellant raped PW1 and thus he ordered the militia to arrest the appellant and they complied. In her evidence, PW5

testified that, on 31st May, 2018 is when she received PW1 at the hospital. She examined her and discovered that she had no hymen, fluid was flowing from her vagina and she had bruises in labia minora, a finding which showed that she was raped. She filled the PF3 which was tendered and admitted as exhibit P1 at the trial. The last prosecution witness was D/C. Elihuruma Kimaro who recorded the appellant's cautioned statement which was admitted as exhibit P2.

In his defence, the appellant distanced himself from the commission of the alleged offence claiming that the case against him was fabricated following a land dispute he had with PW3. As intimated above, having heard both sides, the trial court convicted the appellant and sentenced him to life imprisonment. As intimated above, he unsuccessfully appealed against the decision of the trial court to the High Court and hence the current appeal, the memorandum of which, comprises of the following paraphrased grounds:

1. *That the age of the victim (PW1) was not proved during trial.*
2. *That the appellant's cautioned statement was recorded out of time prescribed by the law.*

3. *That the PF3 could not be relied upon by the first appellate court to sustain the appellant's conviction because the examination of the victim was done after lapse of 8 days from the date of the incident.*
4. *That the evidence of PW1 was recorded after voire dire test contrary to the law.*
5. *That the case against the appellant was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, the respondent Republic was represented by Mr. Yahaya Misango, learned State Attorney. Understandably, being an unrepresented layman, the appellant having adopted his grounds of appeal as part of his submission before us, he preferred to hear first the submission by the learned State Attorney in response to the grounds of appeal and reserved his right to rejoinder.

Mr. Misango opposed the appeal right away when he took the flow to respond to the grounds of appeal. He submitted that the first ground of appeal is baseless because the age of the victim was proved by the victim, which he said, was sufficient proof. He supported his stance by the decision of the Court in **Shani Chamwela v. Republic,** Criminal Appeal No. 481 of 2019 (unreported).

As regards the appellant's complaint in the second ground of appeal that his statement was recorded out of time, without ado, Mr. Misango conceded to this ground of appeal. He indicated that, the appellant was arrested on 29th May, 2018 and his statement was recorded on 31st May, 2018 beyond the prescribed time by the law without any explanation. He urged us to expunge the said statement (exhibit P2) from the record of appeal.

Mr. Misango conceded to the third ground of appeal as well though with a different reason that, the PF3 does not disclose who sent PW1 to the hospital as per the requirements of that exhibit while there is evidence on record that she was sent there by PW2 and PW3 on 24th May, 2018. However, PW5 testified to have examined PW1 on 31st May, 2018 as indicated in the said exhibit. The variance of evidence and the fact that exhibit P1 does not disclose who sent PW1 to the hospital as the relevant part of the PF3 was not filled by PW5, he said, should benefit the appellant.

The fourth ground of appeal was attacked by Mr. Misango for being baseless as he said, PW1 promised to tell the truth in compliance with section 127 (2) of the Law of Evidence Act, [Cap 6 R. E 2002 now R.E. 2019] (the Evidence Act) as reflected in the record of appeal. According to him, the questions put on PW1 by the trial Magistrate prior to giving her

promise referred to as *voire dire* test by the trial magistrate can be cured under section 388 of the Criminal Procedure Act [Cap 20 R.E. 2002 now R.E. 2022] (the CPA).

Apart from that, Mr. Misango acknowledged some discrepancies in the prosecution case including the variance of evidence of PW1, PW2 and PW3 as to when the incident took place. While PW1 testified to have been raped on 24th May, 2018 and disclosed the incident to her parents on the following day, that is 25th May, 2018, PW2 and PW3 (the parent) testified to have seen PW1 walking improperly on 24th May, 2018 and on the same day wounds were discovered in her private parts by PW2. Besides, while PW3 maintained that on the material date, having discovered what had befallen PW1, they reported the incident to the VEO and Mafinga Police Station where they were issued with a PF3 and took the victim to Mafinga District Hospital, the VEO testified to have received PW3's complaint on 30th May, 2018 and ordered the appellant to be arrested. To the contrary, PW5 stated that she examined PW1 and filled the PF3 on 31st May, 2018, the date which is also indicated in exhibit P1. However, it was PW2's evidence that the victim was sent to Mafinga Police Station on 25th May, 2018.

Mr. Misango also noted that the facts of the case on record indicated that the appellant was arrested on 29th May, 2018. Notwithstanding the

discrepancies in the prosecution case above mentioned, the learned State Attorney urged us to hold, basing on the sole evidence of PW1 that the case against the appellant was proved beyond reasonable doubt as in terms of section 127 (6) of the Evidence Act, conviction can solely base on the victim's evidence.

The appellant made a very brief rejoinder advancing a defence that he did not commit the alleged offence and the case against him was fabricated by the victim's parents following land conflict they had. He thus urged us to set him free.

This appeal raises a very crucial legal question as to whether the charge against the appellant was proved beyond reasonable doubt. However, we intend to consider and determine all grounds of appeal raised by the appellant. For convenience purposes, we shall determine them by starting with the fourth ground, followed by the first, then the second and conclude with the third and fifth grounds together.

The appellant's complaint in the fourth ground of appeal is that PW1 did not promise to tell the truth before adducing evidence. Instead, the trial court conducted *voire dire* test before recording her evidence. Section 127 (2) of the Evidence Act provides that, a child of tender age (as in the case at hand) may give evidence without taking an oath or making affirmation

but shall, before giving evidence, promise to tell the truth to the court and not to tell lies. In **John Mkorongo James v. Republic,** Criminal Appeal No. 498 of 2020 (unreported), the Court held that:

> *"The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court to tell the truth not to tell lies."*

In the current appeal, the promise of PW1 to tell the truth to the court was preceded by a simple test of her intelligence and understanding of truth as reflected in the record of appeal; which we must admit that the trial magistrate recorded it as *voire dire.* Though the process was labelled by the trial magistrate as *voire dire*, in our settled view, it meets the requirement of the law because ultimately, PW1 sufficiently promised to tell the truth in compliance with section 127 (2) of the Evidence Act and her evidence was recorded without oath. We therefore, agree with Mr. Misango's submission in respect of this ground and find the complaint baseless.

We equally find the first ground of appeal baseless due to the fact that, the age of PW1 was not at issue during trial. Besides, it should be noted that age of a child can be proved by various ways, including documentary and / or oral evidence (as the case herein). It is noted that the victim confirmed in her testimony that she was 7 years old. Therefore, the appellant's complaint in this ground of appeal, as stated earlier, is unfounded because the evidence of PW1 proved the age.

In the second ground of appeal, the main complaint is that the appellant's cautioned statement was recorded out of time prescribed by the law. Section 50 (1) of the CPA provides the time to interview a person under restraint in respect of the offence to be four hours unless it is extended in terms of section 51 (2) of the same Act due to investigation reasons or other arrangements. In the case at hand, the record is clear that the appellant was arrested on 29th May, 2018 but without any explanation, his statement was recorded on 31st May, 2018 out of prescribed time. In the circumstances, we agree with Mr. Misango that, since the appellant's statement was recorded out of the prescribed time, it cannot stand to corroborate PW1's evidence and therefore exhibit P2 ought to have been excluded from the record in terms of section 169 (1) of the CPA because we are satisfied that the exclusion was necessary for the fairness of the

proceedings as prescribed under subsection (4) of section 169 of the same Act. This ground of appeal is therefore merited.

We now move to consider the third and fifth grounds of appeal to determine whether the case against the appellant was proved beyond reasonable doubt. The appellant's complaint in the third ground of appeal is that the PF3 could not be relied upon by the court because the examination of the victim was done after lapse of 8 days from the date of the incident. We wish to note that this ground was conceded by Mr. Misango having revealed that the prosecution witnesses gave varied account as to when and who took PW1 to the hospital for medical examination. While it was the evidence of PW2 and PW3 that they sent PW1 to the hospital on 24th May, 2018, PW5 who examined her stated that, she performed that duty on 31st May, 2018 and filled the PF3 on the same date. However, the PF3 does not indicate who sent PW1 to the hospital. The difference of dates, in our view, raises doubt as to whether and on which date exactly was PW1 sent to the hospital for examination.

It can as well be noted that PW2, PW3 and PW4 gave different account on when the incident was reported to the VEO and Mafinga Police Station. According to PW2 and PW3, they reported the incident on 24th May, 2018 while the VEO testified that it was reported on 30th May, 2018 instead

of the date mentioned by PW3. Mr. Misango urged us to resolve the identified contradictions in prosecution evidence in favour of the appellant.

Nevertheless, he further urged us to consider the evidence of PW1 in isolation of that of other prosecution witnesses and hold that, she managed to prove the prosecution case beyond reasonable doubt. We are aware of the cherished position that in sexual offences, the best evidence is that of the victim. But, with respect, we are unable to agree with the invitation by Mr. Misango to solely rely on the evidence of PW1 and turn blind eye on other evidence on record and conclude that the said evidence sufficiently proved the case against the appellant as required by the law. We shall give reason. In terms of section 127 (6) of the Evidence Act, the evidence of a child of tender age can only be relied upon after assessing the credibility of that witness and the court becomes satisfied that the witness told the truth. This means that reliance on the evidence of such witness is not automatic.

In the current case, credibility of PW1 cannot be examined in isolation of other evidence on record as suggested by Mr. Misango. In **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 in which its decision was quoted in **Charles Nanati v. Republic**, Criminal Appeal No. 286 of 2017 (both unreported) the Court held as follows:

*"In evaluating discrepancies, contradictions and or omissions, it is undesirable for the court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

Likewise, in the present case, we are not prepared to pick the sentences from PW1's evidence and conclude that the prosecution proved its case against the appellant to the required standard. We think, had it been that the prosecution intended PW1 to be the sole witness, it could not have called those other witnesses to testify and tender some exhibits. We observe that the contradictions in this case ought to have been weighed against the defence evidence that the case against him was fabricated due to the land dispute he had with PW3. In our view, had the trial and first appellate courts scrutinized the prosecution evidence against defence case and resolved the contradictions, it could have arrived at a different conclusion – see **Mohamed Said Matula v. Republic** [1995] T.L.R. 3.

In its decision, the first appellate court relied on exhibits P1 and P2 as corroborative evidence to what was testified by PW1. As we have indicated above, on one hand, those exhibits could not be relied upon because they were obtained in contravention of the law – see: **Sia Mgusi**

**@ Wambura and Two Others v. Republic**, Criminal Appeal No. 125 of 2015 (unreported). On the other hand, the evidence of PW1 could not solely be relied upon because it differed from that of PW2, PW3 and PW4 to whom she disclosed what had happened to her immediately after the incident and the doctor (PW5) who allegedly examined her on the material date, rendering it incredible. Particularly, while PW1 told the court that she did not inform PW2 and PW3 concerning the incident on 24th May, 2018 until 25th May, 2018 when they questioned her inability to walk properly, the later firmly testified that they knew about the incident on 24th May, 2018.

Since the prosecution case is not built upon a weak defence, we do not buy the idea by the first appellate court that failure by the appellant to cross examine PW2 and PW3 about the land conflict at the time they were testifying rendered his defence useless. This we say because the learned first appellate judge ought to have resolved all the contradictions in the prosecution evidence against the raised defence, but he did not. Therefore, we are compelled to interfere with the concurrent findings of the trial and first appellate courts and make a finding that, in the circumstances of the present case, the identified contradictions in prosecution evidence went to

the root of the case and thus, it cannot be said with certainty that the prosecution proved its case beyond reasonable doubt.

For the reasons stated above, we allow the appeal, quash conviction and set aside the life imprisonment sentence imposed on the appellant. We order immediate release of the appellant from custody, unless otherwise he is lawfully held therein.

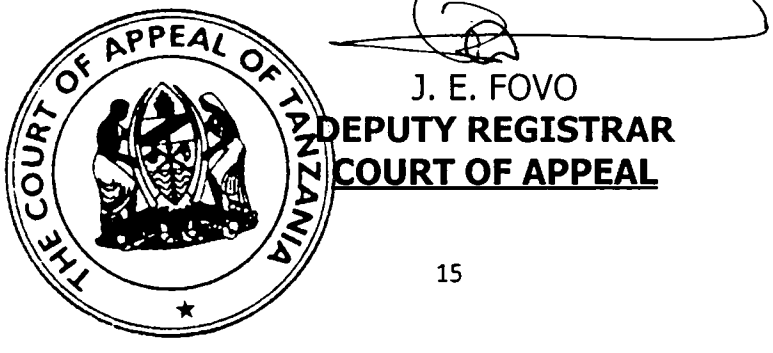
**DATED** at **IRINGA** this 3rd day of November, 2022.

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

M. C. LEVIRA
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

This Judgment delivered this 4th day of November, 2022 in the presence of the Appellant in person and Mr. Alex Mwita, Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**