IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

(CORAM: KOROSSO, J.A., KIHWELO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 335 OF 2019

OMARY AWAMI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Mkapa, J.)

Dated the 5th day of August, 2019
in
DC. Criminal Appeal No. 14 of 2018

.....

JUDGMENT OF THE COURT

4th & 11th July, 2023

KOROSSO, J.A.:

This is an appeal from the judgment of the High Court at Moshi in Criminal Appeal No. 14 of 2019 dated 5/8/2019. Omary Awami, the appellant was arraigned in the District Court of Same at Same, charged with Rape contrary to section 130(1)(2) and 131(2)(a) of the Penal Code, Cap 16 (the Penal Code). It was alleged that on 23/5/2017 at about 16.00 hours in Hedaru area, within Same District, Kilimanjaro Region, the appellant did

unlawfully have carnal knowledge of the victim/PW1 (her name withheld) a girl aged six years old.

The appellant denied the charge, and was tried, and found guilty as charged, he was convicted and sentenced to thirty years imprisonment. Aggrieved by the conviction and sentence, his appeal to the High Court was unsuccessful and the sentence was enhanced to life imprisonment. Still dissatisfied he has preferred this appeal.

The background, albeit in brief, as discerned from the adduced evidence in the trial court, is necessary to appreciate what gave rise to the appellant's arraignment in the District Court of Moshi at Moshi to face the offence charged. The victim, who testified as PW1 lived in the same house with her grandmother, Asha Omary (PW2), her aunt, and her uncle (the appellant). According to PW2, on 23/5/2017, at night, when she went to wake up PW1 to go for a short call, PW1 lamented about being in pain but nothing was done at that time and they slept it off. The following day, PW1 went to school as usual and upon her return, one of PW1's friends informed PW2 that PW1 had urinated blood. PW2 examined PW1 and saw some bruises in her vagina. PW1 testified that she told PW2 that the appellant had raped her and warned her not to tell anyone about the incident. PW2

reported the matter to the Police where they were given a PF3 which they took to the dispensary. The dispensary referred them to Same Hospital, where they went the next day. At Same Hospital, PW1 was examined and diagnosed as having been raped. Alfred Seth Nyome (PW4), the doctor who examined PW1 on 24/5/2017, stated that his examination of PW1, a six-year-old girl, found she had puss cells in her vagina as well as bruises. He also filled the PF3 which was later tendered and admitted as exhibit P1, at the trial. The appellant was later arrested and arraigned in the District Court of Moshi, and charged as earlier stated.

The appellant's defence was of a general denial of being the perpetrator of the alleged offence against PW1 and provided an *alibi* that on the day the alleged incident is said to have taken place he was in Bwiko area and not in the vicinity where the charged incident took place.

The instant appeal was lodged by way of a memorandum of appeal founded on six grounds of appeal that fault the first appellate court for his conviction and sentence, compressed, generate the following five grievances: **One**, failure of the prosecution to prove the charge against him to the standard required. **Two**, enhancing the sentence despite a fatally and incurably defective charge. **Three,** reliance on the evidence of PW1 which

was taken in contravention of section 127 (2) of the Evidence Act, Cap. 6 (the Evidence Act). **Four**, impropriety in the admissibility of the PF3 (exhibit P3) as it was never read aloud in court after being admitted; and **five**, reliance on weak, tenuous, contradictory, incredible, and unreliable prosecution evidence.

In this appeal, the appellant appeared in person, unrepresented, whereas Mr. Paul Kimweri and Mr. Geofrey Mlagala, learned Senior State Attorneys entered appearance for the respondent Republic.

When the appellant was given an opportunity to amplify his grounds of appeal, he had nothing substantive to add but prayed that his grounds of appeal and prayers be considered and the State Attorney be allowed to respond to his grounds first, and he retains the right to rejoin thereafter.

Mr. Kimweri took the lead in submitting for the respondent Republic, and at the outset, informed us that the appeal was not resisted. He started by urging us to find the appellant's grievance on the charge being defective to be misconceived saying the charge was proper. He further argued that for the sake of argument, even if the provisions cited in the statement of offence are not proper, such anomaly is curable by virtue of the fact that the particulars of the charge are very clear and plainly inform the appellant of

the substance of what he was charged against. He thus implored us to dismiss that ground for being devoid of merit.

He then moved to elaborate on the reasons why he believed the appeal was merited contending that his stance fell squarely on the trial court's failure to comply with section 127 (2) of the Evidence Act as complained by the appellant in his appeal. The learned Senior State Attorney argued that the law as it is in recording the evidence of children of tender years after the amendments to section 127 of the Evidence Act ushered in by the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 is that where such evidence is received without an oath, the witness who is a child of tender age has to promise to tell the truth and not to tell lies. He argued that the trial court in the present case failed to comply with such legal directives because, on page 8 of the record of appeal, it does not show that at the start of recording PW1, whose evidence was unsworn, she promised to tell the truth and not tell lies. That the trial court conducted a session, which can be assumed to be a *voire dire test* and thus failed to comply with the law rendering PW1's evidence improperly recorded. Mr. Kimweri contended further that the consequences of the said infraction is to render the evidence of PW1 valueless and subject to being expunged. He cited the case of **John**

Mkorongo James v. Republic, Criminal Appeal No. 498 of 2020 (unreported) to reinforce his argument.

The learned Senior State Attorney further argued that if the Court expunges the evidence of PW1 as prayed, the prosecution case against the appellant would be weakened to a great extent to render the case against him unproven to the standard required. He contended that the evidence of the grandmother, PW2's evidence is essentially hearsay as regards the incident in question and only expounds on the bad character of the appellant. Such evidence even if it is the truth, cannot be considered as the basis of conviction of the appellant in terms of section 56 of the Evidence Act, he argued. The learned Senior State Attorney averred that the evidence of WP 6843 D/C Oliver (PW3), a Police officer, is primarily on the investigations conducted on the incident which included what she was informed by PW1, PW2, and the appellant, evidence which cannot prove the offence charged against the appellant.

As regards the evidence of PW4, Mr. Kimweri argued that his evidence only establishes that PW1 was sexually assaulted but not who is the culprit and thus cannot prove that it is the appellant who committed the offence charged.

The learned Senior State Attorney also faulted the first appellate court for only discussing the evidence of PW1 and making reference to other decisions on the significance of section 127(2) of the Evidence Act, but failing to analyze and apply the holdings in the said decisions to the instant case. The learned Senior State Attorney thus urged us to find that the case against the appellant was not proved to the standard required and allow the appeal.

After the submission by the learned Senior State Attorney, the appellant had nothing to state in rejoinder except to reiterate his prayer for his appeal to be allowed and to be set free.

In the determination of this appeal, having gone through the record of appeal, and heard the oral submissions by the appellant and the learned Senior State Attorney, we are of the firm view that we should commence by delving into consideration and determination of the appellant's grievances that address pertinent points of law and thereafter proceed with the remaining grounds. Thus, we shall address the second and third grievances first and then proceed with those remaining if we shall deem necessary.

The second grievance faults the first appellate court for sustaining his conviction and enhancing his sentence while disregarding the fact that the charge is fatally and incurably defective. The appellant is charged and

convicted of rape contrary to sections 130(1), (2) and 131 (2) (a) of the Penal Code. The framing of charges is governed by the provisions of sections 132 and 135 of the Criminal Procedure Act, Cap 20 (the CPA). Section 132 provides the manner in which the charge is to be framed, that it should contain a statement of specific offence(s) with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Section 135 (a)(iii) provides for modality for framing the statement of offence, that it shall describe the offence shortly in an ordinary language without stating all the essential elements of the offence charged and reference to the section of the enactment creating the offence. The import of the said provisions has been elucidated in various decisions of this Court including **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387, **Mohamed Koningo v. Republic** [1980] T.L.R. 279 and **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007 (unreported).

In the present case, the provisions cited in the statement of offence of the charge against the appellant were sections 130(1), (2) and 131 (2) (a). The said provisions state:

"130.-(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) ..N/A

(b) ..N/A;

(c).. N/A;

(d) ...N/A;

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of

the age of eighteen years or less, he shall- (a) if a first offender, be sentenced to corporal punishment only.

(b) ... N/A

(c) ....N/A

(3) Subject to the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."

Certainly, when considering the cited provisions in the statement of offence in the charge, they do not reflect the particulars of the rape charged since the offence charged is raping a six-year-old girl. Thus, under the circumstances, the proper provisions should have been sections 130 (1), (2)(e) and 131 (1), (3) of the Penal Code. We are of the firm view that taking into consideration the contents found in the particulars of the offence, and the evidence adduced in the trial court, there was clarity that the appellant was charged with rape of a girl under the age of ten years. Undoubtedly, this informed the appellant and enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices against his rights. We find that in the circumstances, the irregularity found in the charge is curable under section 388 (1) of the CPA. Our finding here follows what

we held in **Jamal Ally v. Republic**, Criminal Appeal No. 52 of 2017 (unreported). We thus find the grievance unmerited.

As regards the appellant's third complaint on the impropriety of PW1's evidence for being recorded in contravention of section 127(2) of the Evidence Act, we find it opportune to reproduce the said provision after the amendments ushered in by the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 which came into operation on 7/7/2016 and provides:

> *"Section 127(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."*

The import of the above provision is not an unchartered area and has been discussed in various decisions of this Court. In the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) it was held:

> *"... 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..."

In **Emmanuel Massanja v. Republic**, Criminal Appeal No. 394 of 2020 (unreported), the Court held that giving the promise, to tell the truth and not lies is a condition precedent for admissibility of the evidence of a child of tender age which is given without oath or affirmation. The case of **John Mkorongo James** (supra) further explicated the significance of the amendments to section 127(2) of the Evidence Act, stating 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 and not to tell lies."

What is crystal clear from the above holdings on the significance of section 127(2) of the Evidence Act, is guidance to the courts when recording the evidence of a child of tender age, to conduct a simple process to test the child's understanding of the nature and meaning of an oath to enable the

judge or magistrate to make a finding on whether the evidence of a child of tender age can be taken upon a promise to the court to tell the truth, and not lies.

In the instant case, for ease of reference, we reproduce what transpired in the trial court before recording the evidence of PW1, a child of tender age was recorded, which is found on page 8 of the record of appeal.

> *"Date: 03/08/2017*
>
> *Coram: HON. F. J. KIGINGI- RM*
>
> *P.P. D/C Beatrice*
>
> *Accused: Present*
>
> *C/C: Dativa*
>
> ***COURT IN CAMERA***
>
> ***P.P**: - The case is coming for hearing. I have two witnesses.*
>
> ***Court: HEARING START***
>
> ***PW1 (NAME WITHHELD) 6 YRS OLD***
>
> ***(VICTIM)***
>
> ***XD by Court:***
>
> - *(Victim)*
> - *I am in class of chekechea at Hedaru village*
> - *I am of Islamic faith*
> - *If you tell untruth is against God.*

Court: - After conducting "voire dire test" the court is satisfied witness can testify but without an oath."

F.J. KIGINGI- RM

3/8/2017"

The above passage palpably shows that the evidence of PW1 was taken after the conduct of what the trial magistrate considered to be "*voire dire test".* The issue is whether what transpired in the trial court complied with the provisions of section 127(2) of the Evidence Act. The appellant's complaint is that the trial court was in contravention of the said provision. The learned Senior State Attorney joined hands with the appellant to fault the trial court for failing to comply with section 127(2) of the Evidence Act, and the first appellate court for not faulting the irregularity in the recording of the evidence of PW1 and proceeding to sustain conviction of the appellant without scrutinizing the said evidence afresh. The appellant and the learned Senior State Attorney have both urged us to find the irregularity fatal and incurable.

As observed above, section 127 (2) of the Evidence Act, requires a child of tender age to promise to tell the truth and not to tell lies. In the instant case, the record of appeal shows that PW1's evidence was not taken under oath and she did not promise to tell the truth, contrary to the

requirements of section 127(2) of the Evidence Act. The omission is fatal and as held in the case of **John Mkorongo James** (supra), it renders such evidence valueless, and the consequence for such evidence is to expunge it from the record. Consequently, in the instant appeal, the evidence of PW1 is expunged from the record. The grievance is meritorious.

After expunging the evidence of PW1 from the record, the underlying issue to determine is whether the remaining evidence is sufficient to prove the case against the appellant and thus support his conviction and sentence. Mr. Kimweri argued that there is no such evidence and we agree with him for the following reasons; **one**, the evidence of PW2, the grandmother, is mainly on the bad character of the appellant being a drunkard and a bhang smoker, always being in trouble and having been previously imprisoned. There was nothing concrete regarding the incident against PW1 for which the appellant was charged and convicted. With respect to the incident, apart from having examined PW1 and observing bruises in PW1's vagina when on the day she came back from school and someone told her that PW1 had urinated blood, PW2 did not clearly state what PW1 had told her about the incident. Our scrutiny of her testimony on page 12 of the record of appeal, PW2 stated:

"I reached at Same hospital and PW1 was examined. PW1 said she was threatened not to tell anybody about her elder father what he did."

Plainly, PW2's testimony does not add anything to the prosecution case against the appellant. The relevance of her evidence is invariably to prove that PW1's genital organ was penetrated, but not on who or what perpetrated it. **Two**, the evidence of PW3, the investigating officer relates to questioning PW1 and PW2 what she was told, therefore, on its own it cannot be said to prove the charges against the appellant. **Three**, the evidence of PW4, on having examined PW1 and found bruises and puss cells in her vagina, merely shows, PW1's vagina was penetrated but not who was the perpetrator. Even the PF3 which was tendered by PW4 and admitted as exhibit P1, did not strengthen the prosecution case against the appellant, because it only revealed the fact that there was penetration in PW1's genital area and not the perpetrator.

Important to note that, the record of appeal on page 20 shows that the content of the PF3 (exhibit P1) was read in court after being admitted, which refutes one of the appellant's grievances that it was not read aloud in court. This fact though does not change the fact that there was no evidence to prove that it was the appellant who devoured PW1's innocence.

For the foregoing, we are of the view that the conviction against the appellant cannot stand since the prosecution failed to prove the offence charged.

In the end, the appeal is allowed, the conviction against the appellant is quashed and the sentence imposed upon him is set aside. We order the appellant's immediate release from prison unless he is otherwise lawfully held.

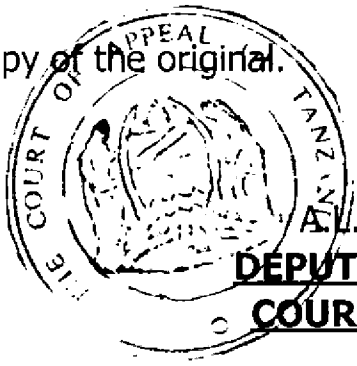
DATED at **MOSHI** this 10th day of July, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2023 in the presence of the Appellant in person, Mr. Paul Kimweri assisted by Mr. Geofrey Mlagala both learned Senior State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL