**IN THE COURT OF APPEAL OF TANZANIA**

**AT MUSOMA**

**(CORAM: KWARIKO, J.A., GALEBA, J.A. And KIHWELO, J.A.)**

**CRIMINAL APPEAL NO. 302 OF 2020**

**JAFETH MANYASI @ MANYONYI ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Decision of the Court of a Resident Magistrate of Musoma at Musoma)**

**(Mushi, SRM Ext. Jur.)**

**dated the 18th day of May, 2020**

**in**

**(DC) Criminal Appeal No. 1 of 2020**

.....

## JUDGMENT OF THE COURT

30th October & 9th November 2023

**GALEBA, J.A.:**

The appellant in this appeal, Japheth Manyasi @ Manyonyi was arraigned before the District Court of Musoma at Musoma (the trial court), in Criminal Case No. 45 of 2019, where he was charged for rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code. He was consequently convicted and sentenced to thirty years imprisonment. He was aggrieved and appealed to the High Court. *Vide* the powers conferred upon it by section 45 (2) of the

Magistrates' Courts Act, the High Court directed that the appeal be transferred and heard at the Court of a Resident Magistrate at Musoma, where the matter was assigned to Mushi SRM with Extended Jurisdiction (the first appellate court). The latter court heard the appeal but it dismissed it for want of merit. This appeal is challenging that dismissal of the appellant's appeal by the first appellate court.

The brief facts giving rise to this appeal are that; on 27th January, 2018, at around 22:00 hours, a person knocked at the door of one of the rooms in Winfrida Robert's (PW2) house and entered in it. Sleeping in the room, were a girl aged eleven years, whose name we will conceal and refer to her, as PW1 or the victim, and other two of her siblings who were even younger than the victim. On that night, PW1 had slept wearing a skirt and an underwear. After achieving entry in the room, the stranger threatened to kill PW1 in case she raised an alarm to alert people of his presence in the room. In the meantime, the stranger tore the victim's skirt and underwear and raped her.

According to the prosecution, the person who raped PW1 was the appellant. The appellant denied the charge, but upon a full trial,

the trial court was convinced that indeed, he committed the offence. He was thus convicted and sentenced as indicated above. His appeal to the first appellate court as observed above did not succeed, both his conviction and sentence were upheld and confirmed.

In this appeal, the appellant had initially, lodged four grounds of appeal. However, at the hearing he prayed for an order to add four supplementary grounds which he raised orally. As the respondent's side did not object to the prayer, we permitted him to add the said supplementary grounds. Although the total grounds of appeal became eight, we think this appeal may fully be disposed of by addressing the following complaints of the appellant: -

> *"1. That, the evidence tendered at the trial was at variance with the charge such that it could not, and did not prove it.*
>
> *2. That, the evidence of PW1 ought to be expunged because she did not promise to tell the truth and not lies, as required by the law.*
>
> *3. That, the case for the prosecution was not proved against the appellant beyond reasonable doubt."*

At the hearing of this appeal, the appellant appeared in person, and the respondent Republic had the services of Mr. Abel

Mwandalama, the learned Principal State Attorney, Ms. Monica Hokororo, the learned Senior State Attorney and Ms. Janeth Kisibo, the learned State Attorney. The appellant adopted his grounds of appeal and prayed that we determine it on that basis. He also requested that we permit the respondent's side to respond to his appeal first, so that he could rejoin thereafter, should it be necessary.

Initially, the respondent's team had intimated to us that it was supporting conviction and the sentence meted on the appellant. However, after giving the whole matter a thoughtful consideration, Mr. Mwandalama who led the team, informed us that the respondent was supporting the appeal. The learned Principal State Attorney submitted that he was supporting the appeal in the context of the above formulated complaints.

On the first and second points, Mr. Mwandalama argued that according to the charge, the offence was committed on 27th January, 2018, but according to the evidence of No. E. 5123 CPL Michael, (PW3) a Police Officer, and Happiness Nashon, (PW4) the medical expert, the offence, if any, was committed a year later on 27th January, 2019.

He submitted further that, not only that the evidence of the above two witnesses would not be able to support the charge as to the date of the commission of the offence, but also the remaining evidence that would have rescued the case, as to the date of commission of the offence, was so problematic such that it would not salvage the case. In support of that contention, the learned Principal State Attorney argued; **first**, that the evidence of PW1 ought to be expunged from the record, because it was received at the time when she was 11 years of age, in which case the modality of taking of her evidence was supposed to comply with the provisions of section 127 (2) of the Evidence Act, Cap 6 of the Laws (the Evidence Act), which was not the case. In amplifying this point, Mr. Mwandalama referred us to page 10 of the record of appeal where, it was the trial court which stated that the witness promised to tell the truth but there is no promise of the witness to tell the truth and not lies as required by law. To support his argument, the learned counsel referred us to this Court's decision in the case of **Herman Muhe v. R**, Criminal Appeal No. 113 of 2020 (unreported).

**Second**, he submitted that there was no credible identification of the appellant at the scene of crime, and; **third** he contended that exhibit P2 and P4, the victim's clinic attendance card and the PF3

respectively, were not read after they were tendered in court, so the same ought to be expunged.

As for the third point of failure to prove the case beyond reasonable doubt, the learned Principal State Attorney, argued that if the evidence highlighted above will be discredited, as he beseeched us to do, the charge would be rendered unproved against the appellant. It was in view of the above submissions on the respondent's side, that Mr. Mwandalama prayed that the appeal be allowed.

When the appellant was consulted as for any point in rejoinder, he just supported the stance taken by the respondent's side.

On our part, we have scrutinized the record of appeal, particularly the charge upon which the appellant was tried, the evidence on record, the grounds of appeal, the submissions of the learned Principal State Attorney before us. We have also reviewed the judgment of the trial court and that of the first appellate court. Having done so, we think the issue for our determination is whether the evidence tendered proved the charge that was levelled against the appellant.

Our starting point will be to deal with the evidence that Mr. Mwandalama implored us to discard in order for us to assess whether the evidence which will have remained, if any, will be able to prove the charge. This is so because discarding a portion of the evidence in a case does not, on all occasions, render the remaining evidence too insufficient to found a conviction - see **Anania Clavery Batera v. R** [2020] 2 T.L.R. 112.

The first piece of evidence was that of PW3, a police officer. The substance of that evidence was that, the appellant was taken to Kibara Police Station on 29th January, 2019 and that the appellant told him that the offence was committed on 27th January, 2019, which is one year after the charged offence was committed. That means the evidence of PW3 cannot support the charge containing the offence which had been committed on 27th January, 2018. So, we agree with the learned Principal State Attorney that the evidence of PW3 did not, at all come anywhere closer to proving the charge against the appellant.

Next was the evidence of PW4, a clinical officer at Kasahunga Health Center. Her evidence at page 19 of the record of appeal, was that on 28th January, 2019, PW1 was taken to her, and upon

examining her clinically, she found that the victim had bruises in her private parts, a sore and had lost her virginity. This evidence when considered in view of the evidence of PW2 who took the victim to the health centre, one notes that things are not adding up. PW2, the mother of the victim at pages 13 and 14, testified that PW1 was raped on 27th January, 2018 and that on the following day, which naturally must be 28th January, 2018, she took the victim to PW4 at Kasahunga Health Center. That is very contrary to PW4's account above, who said that the victim was taken to her by PW2 on 28th January, 2019. This mix up of significant details of the case leads to one unavoidable question that is; how could have a medical examination of 28th January, 2019 revealed fresh bruises of an act of rape which had been committed on 27th January, 2018? With this confusion on the dates, we agree with Mr. Mwandalama that the date on which the offence was committed was not proved to the required standard. Thus, the first appellant's complaint is upheld.

Notably, this Court has held time and again that where a date is mentioned in the charge as being the date on which an offence was committed, evidence must be led by the prosecution to prove that the offence charged, was indeed committed on that date - see this Court's decision in **Abel Masikiti v. R** [2015] T.L.R. 21. Other

cases on the same point include; **Anania Turian v. R**, Criminal Appeal No. 195 of 2009 and **Japhet Anael Temba v. R**, Criminal Appeal No. 78 of 2017, (both unreported). For instance, in **Abel Masikiti** (supra), we stated that a charge containing a wrong date of the commission of the offence, if it is not amended under section 234 (1) of the Criminal Procedure Act, (the CPA), in order to match the date in terms of the evidence, the charge remains unproved. We will come to a deserving conclusion, but for now let us first cross over to the remaining evidence, which is of PW1, the victim.

In respect of this evidence, the learned Principal State Attorney, submitted that the same needs to be expunged because, the witness who was 11 years at the time of testifying, did not promise to tell only the truth and not lies as required by the law. As for this point, we will let the record of appeal at page 10 speak for itself, where it is recorded thus: -

> ***"CASE FOR PROSECUTION OPEN***
>
> ***PW1: (victim) STD IV*** *student at Nansimo Primary School age 11 years, Christian.*
>
> ***Court:*** *Witness do here (sic) to tell nothing but the only truth.*
>
> *S. 127 (2) TEA*

*Sgd*

*K. A. Majinge RM*

*17/6/2019."*

It appears that in the above quotation, despite the clear difficulty in struggling to communicate something, the trial court's desire was to record that the child promised to tell the truth. The position of this Court however, is that the judicial officer recording the evidence of a child of tender age, has to record the actual child's promise to tell the truth and not lies, and not to report what he heard the child promising to tell - see this Court's decisions in **John Mkorongo James v. R,** Criminal Appeal No. 498 of 2020; and **Amos Zacharia v. R,** Criminal Appeal No. 74 of 2021 (both unreported). For instance, in **John Mkorongo James** (supra), the appellant was charged with committing unnatural offence against a boy aged 10 years. In taking the evidence of the victim; **first** the trial magistrate did not ask any questions to the child seeking to establish whether he possessed sufficient understanding of the nature of oath. **Second**, the trial magistrate did not record the words of the witness, but reported what he understood to be the promise of the witness. This Court in that case discarded the evidence so

recorded on account of offending the provisions of section 127 (2) of the Evidence Act.

In the circumstances, like we did in the two cases above, and in many others, we have not cited in this judgment, we are satisfied that the evidence of PW1 was wrongly recorded. The evidence is therefore worthless and, we discard it. Hence the second appellant's complaint succeeds.

We have also thoroughly studied the record of this appeal and we are in agreement with the learned Principal State Attorney that the Clinic Card of PW1, exhibit P2 and the PF3 exhibit P4, were not read after they were admitted at pages 14 and 19 of the record of appeal, respectively.

In this jurisdiction, the general principle is that once a document is admitted, the same must be read over to the accused person in a language he understands. This requirement, in this case, was not complied with. The position taken by this Court, is that where we spot this kind of anomaly in the proceedings of the trial court, the remedy we impose is to disregard or expunge the offending document. Among other decisions of this Court on this point - see **Robinson Mwanjisi and Three Others v. R**, [2003]

T.L.R. 218 and **Huang Qin and Xu Fujie v. R**, Criminal Appeal No. 173 of 2018 (unreported). Thus, without any further ado, exhibits P2 and P4 are hereby discarded.

The brief issue we will then seek to resolve as we conclude, is whether there is any remaining witness who gave credible evidence we can confidently hold that it proved the charge. To briefly recapitulate; the evidence of PW1 was entirely discarded, the evidence of PW2 and PW4 was not credible, it clashed on the date that the victim was taken to the Health Centre, was it January 2018 or January 2019, each of the two witness mentioned hers, while referring to the same victim. The evidence of PW3 was to the effect that the victim was raped on 27th January, 2019, which is not the date mentioned in the charge. Those are the only prosecution witnesses who were called. In the circumstances, we can confidently confirm that, there is no any other credible evidence that may be considered for purposes of salvaging the charge.

Thus, based on the above discussion, we have no doubt in our mind that the charge against the appellant, was not proved. There was no clear and positive evidence affirming without doubt, that the appellant raped the victim on 27th January, 2018, the date mentioned

in the charge sheet. In the circumstances, the third complaint of the appellant is hereby allowed.

Consequently, we allow the appeal. We further make orders that the appellant be released from prison and set to liberty, unless he is held there for any other lawful cause.

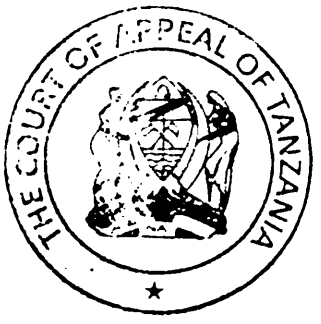
**DATED** at **MUSOMA** this 9th day of November, 2023.

M. A. KWARIKO
**JUSTICE OF APPEAL**

Z. N. GALEBA
**JUSTICE OF APPEAL**

P. F. KIHWELO
**JUSTICE OF APPEAL**

Judgment delivered this 9th day of November, 2023 in the presence of the Appellant in person and Mr. Tawabu Yahya Issa, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




R. W. CHAUNGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**