IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 250 OF 2019

NYANCHOBE RYOKI @ GUNZA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Galeba, J.)

dated the 27th day of May, 2019

in

Criminal Appeal No. 311 of 2018

.....

JUDGMENT OF THE COURT

2nd & 4th May, 2023

KIHWELO, J.A.:

Nyanchobe Ryoki @ Gunza, the appellant before this Court, was arraigned in the District Court of Serengeti at Mugumu in Mara Region for the offence of rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002] (the Code). It was alleged that on 19.05.2017 at Kenyamonta village within Serengeti District in Mara Region the appellant did have sexual intercourse with a girl aged 6 years, who we

shall henceforth identify her as "the complainant", for purposes of concealing her identity.

On the whole of the evidence, the trial court was impressed by the version told by the prosecution witnesses. Speaking of the defence case, the trial magistrate found the defence case unworthy of belief and, accordingly, held that the defence case did not cast any doubt on the prosecution case. In his own words:-

> *"In his defence the accused explained that he was not at home on the date when the victim was raped and on the whole day from the morning to the evening the accused was at the paddy farm. The assertion by the accused person as above said does not at all create doubt to the court on the charge facing the accused. The mere saying that he was at the farm does not mean that he did not commit an offence. Looking on the evidence at hand PW2 told the court that after the accused raped her, he went back to the paddy farm*
>
> *In the circumstances this court does not hesitate at all to hold that the accused person did rape PW2 as*

charged before the court. Hence he has breached the provision of the law herein above cited."

The trial court then found the appellant guilty as charged and accordingly, convicted and sentenced him to serve 30 years' imprisonment.

In protesting his innocence, the appellant filed his first appeal in the High Court Criminal Appeal No. 311 of 2018 whose hearing on merit was conducted on 17.04.2019. His appeal was not successful as the first appellate court upheld both conviction and sentence. Still aggrieved, he has come to this Court on a second appeal.

At the outset, in order to set matters into their right perspective, it is imperative to give the context in which this matter arose as can be ascertained from the record. On 19/05/2017, around afternoon, PW1, the mother of the complainant, upon getting back home from her rice farm observed something strange about the complainant who was walking awkwardly, and when asked what was wrong with her, the complainant did not respond and PW1 never bothered to press her further on that day as she took it for granted that all was fine. However, on 20/05/2017 while PW1 was bathing the complainant, she started crying and complained that

she was feeling pains into her private parts and when asked as to what befell her, the complainant explained the ordeal she went through when the appellant held her hand and pulled her inside his house and raped her under the pretext of offering her candy in return. According to the complainant who testified as PW2 she felt severe pain when the appellant was inserting his male organ into her female private parts.

Following that revelation, PW1 inspected PW2's private parts and observed some bruises and bleeding on the vaginal part. The following day, on 21/05/2027, PW1 reported the matter to the neighbours and local leaders who put the wheels of justice into motion and the matter was reported at Majimoto Police Station and the PF3 was issued and an arrest order for the appellant was issued by the police whereupon the appellant was apprehended at a later date. PW1 took the victim to Iramba Health Center for medical examination and PW3 a clinical officer conducted a clinical examination which indicated that the inner part of her vagina was swollen and had bruises. The results of the medical examination further revealed that the complainant was discharging blood stains from her vagina and to this PW3 concluded that the complainant was raped.

Upon conducting further laboratory tests, it was revealed that the complainant was infected with gonorrhea. PW3 filled the PF3 and hospital records which were both admitted in evidence and marked as exhibits P1 and P2 respectively. He further prescribed some medication to the complainant for both the venereal disease, prevention of HIV infection and painkillers to relieve her from pains. On 25/05/2017, PW4 a police officer was assigned to record the cautioned statement of the appellant who denied any involvement with the alleged rape incident of the complainant.

On the adversary side, the appellant gallantly denied the allegations leveled against him and stoutly defended his innocence. He testified to the effect that, on the material date he was not at the alleged crime scene and that the whole day he was not around. In his view, the entire case against him was fabricated simply because PW1 had grudges with him since they were ex-lovers and therefore, the charge was framed just to implicate him. He further testified that he did not confess to have committed the offence charged with.

As hinted earlier on, at the height of the trial, it was found that, on the whole of the evidence, the prosecution case was proven to the hilt and therefore, the appellant was convicted and sentenced as stated above.

The appellant lodged a four (4) point memorandum of appeal before this Court. We shall only give the gist of the grounds so as to avoid reproducing them. They go thus:

1. *That, the first appellate court erred in upholding the appellant's conviction despite the fact that PW2, the victim did not promise to tell the truth and not lies.*
2. *That, the first appellate court erred in upholding the appellant's conviction despite the fact that PW2's evidence was not corroborated.*
3. *That, the first appellate court erred in upholding the appellant's conviction despite the fact that the prosecution failed to medically examine the appellant to ascertain whether or not he had venereal disease.*
4. *That, the first appellate court erred in upholding the appellant's conviction while the prosecution did not prove the case beyond reasonable doubt.*

At the hearing, before us, the appellant was fending for himself, unrepresented, whereas Ms. Ghati Mathayo teamed up with Ms. Jaines Kihwelo both learned State Attorneys who stood for the respondent Republic. The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage after the submissions of the learned State Attorney, if need would arise.

In response, Ms. Mathayo, prefaced her submission by hastily informing us that the respondent Republic was supporting the appeal. Arguing in relation to ground 1, on the failure by the complainant (PW2) to promise to tell the truth and not lies before giving her evidence, the learned State Attorney admittedly contended that, PW2, a child of tender age did not promise to tell the truth to the court and not to tell any lies as required by section 127(2) of the Evidence Act, [Cap 6 R.E. 2019] (the Evidence Act). In her view, this was a serious anomaly which renders the evidence of PW2 invalid and of no evidential value for having been received in contravention of section 127 (2) of the Evidence Act. She faulted the first appellate court for upholding the appellant's conviction relying on the evidence of PW2. The learned State Attorney, in order to

facilitate the appreciation of her proposition, she paid homage to the case of **Jackson Anthony v. Republic**, Criminal Appeal No. 242 of 2019 (unreported) in which we discussed at considerable length similar issue.

As to the consequences that may befall following the evidence of PW2 being found to be invalid and of no evidential value, the learned State Attorney profoundly argued that, what remains on record, is the evidence of PW1, PW3 and PW4 which is insufficient to convict the appellant. Elaborating at considerable length, she narrated in minute details how the evidence of PW1, PW3 and PW4 did not at all mention the appellant as the one who raped the victim. The learned State Attorney, therefore argued that, this ground has merit.

With regards to ground 3, that the appellant was required to undergo medical examination in order to establish whether it was him who raped the complainant and whether he had venereal disease, the learned State Attorney was fairly brief and argued that, the first appellate court considered this complaint and resolved it, referring to page 64 of the record of appeal where the first appellate court found out that the complaint by the appellant was baseless because PF3, exhibit P1 was

meant for the complainant and not the appellant and in any case it is upon the prosecution to choose the evidence it seeks to rely upon in proving the case.

Arguing in response to grounds 2 and 4 the learned State Attorney without burning much energy, admittedly submitted that the prosecution did not prove its case to the required standard in criminal law which is beyond reasonable doubt.

In all, the learned State Attorney zealously urged the Court to allow the appeal in its entirety.

The appellant had nothing useful in rejoinder. He is blameless for nothing was forthcoming from him on the legal issues submitted by the learned State Attorney. The most he did was to welcome the stance taken by the learned State Attorney to support the appeal.

At the outset, we wish to state that we are settled in our mind that this appeal can be conveniently disposed of by deliberating on the first ground of appeal only.

We think that, it is appropriate here to recapitulate briefly the provision of section 127 (2) of the Evidence Act which 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 any lies.****"* [Emphasis added]

Quite clearly, the provision above is very categorical that a child of tender age will, before giving evidence under circumstances permitted in that provision promise to tell the truth to the court which means that it is upon the trial court to ensure that the child promises to tell the truth and not lies. We have emboldened the above provision purposely to emphasize the most relevant part as we are about to deliberate on this ground.

In the instant case as rightly submitted by the learned State Attorney, the trial court did not follow the letter and spirit of section 127 (2) of the Evidence Act. For the sake of clarity, we wish to let the record of appeal at page 9 speak for itself:

> *"**PW2:** [Complainant]*

A nursery School

Student

Six years old

Christian

Is telling the court

The accused did rape me. He did put his penis into my vaginal. The victim has touched the accused's penis showing the court and she pointed and touched her viginal.

I did feel pain when the accused raped me...."

The excerpt above from the record of proceedings is conspicuously clear that (PW2) did not promise to tell the truth and not to tell any lies before giving her evidence in court, contrary to the dictates of section 127 (2) of the Evidence Act. Unfortunately, with due respect, the learned trial Resident Magistrate did not exercise care and close scrutiny when taking the evidence of PW2 a child of tender age. We are inclined to agree with the learned State Attorney that, the above anomaly renders the evidence of PW2 invalid and of no evidential value for having been received in contravention of section 127 (2) of the Evidence Act. In the light of the

foregoing, the evidence of PW2 is hereby discarded from the record and there will be no further reliance upon it.

To resume to the matter under our consideration, having found out that the evidence of PW2 is invalid and of no evidential value and therefore discarding it from the record we are, admittedly, left with a skeleton of the prosecution case and, worse still, the material account of PW1, PW3 and PW4 as rightly argued by the learned State Attorney automatically depreciates to hearsay testimony. If anything, it is a mere suspicion and not a very strong one, since none of them identified the perpetrator. It is trite law that a mere suspicion alone, however strong cannot ground a conviction. It is, indeed, obvious that this disquieting aspect of the proceedings was occasioned by the laxity of the trial Resident Magistrate and quite unfortunately it escaped the attention of the first appellate court.

We wish to reaffirm the elementary principle of law that in criminal cases the duty of the prosecution is twofold. One, to prove that the offence was committed, and two, that the accused is the one who committed it. See, for instance, the case of **Maliki George Ngendakumana v. Republic**, Criminal Appeal No. 353 of 2014 in which while deliberating on

the evidence of the victim of rape we emphasized that it is not enough to establish rape but rather the prosecution has to be able to prove beyond reasonable doubt that it is the accused who committed the offence and no one else.

In this appeal there is no doubt that according to the evidence of PW1, PW3 and PW4, the complainant was raped. However, as alluded to above, none amongst PW1, PW3 and PW4 can certainly say that the appellant is the one who raped the complainant as their evidence did not in any way irresistibly point to the guilt of the appellant. We think, with respect, that, the learned State Attorney was undeniably right that the prosecution did not prove the case beyond reasonable doubt.

We are aware that this Court has pronounced itself in numerous occasions that conviction can be sustained independent of the evidence of the victim and there is a litany of authorities where the testimonies of child victims of tender years have been expunged for non-compliance with the Evidence Act and yet the courts arrived at a conviction independent of that evidence. See, for example, **Khamis Samwel v. Republic**, Criminal

Appeal No.320 of 2010 and **Harrison Mwakibinga v. Republic**, Criminal Appeal No. 196 of 2009 (both unreported). In our considered opinion, the appeal before us presents a different situation as conviction cannot stand in the absence of any other witness who identified the appellant other than the complainant whose evidence has been discarded.

We think it is momentous that we should remark in passing before we take leave of the matter that, the fact that the anomaly was occasioned by the trial court has exercised our mind quite considerably. In particular, we have anxiously considered whether a retrial in the circumstances of this case would be appropriate, in view of the principle laid down in the celebrated case of **Fatehali Manji v. Republic** [1966] EA 343. However, given the circumstances of this appeal, in our view, we find that a retrial will not be appropriate.

There can be no better words to express our view and conclude as we hereby do, that, the prosecution's evidence was weak to discharge the burden of proof as required by law. Accordingly, the appeal is allowed, the

conviction is quashed and the sentence is set aside. The appellant should be released from prison unless held for any other lawful reason.

It is so ordered.

DATED at **MWANZA** this 3rd day of May, 2023.

G.A.M. NDIKA
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of May, 2023 in the presence of Appellant in person and Ms. Jaines Kihwelo, State Attorney for the Respondent, is hereby certified as a true copy of the original.

A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL