IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KWARIKO, J.A., LEVIRA, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 322 OF 2021

AMOUR HAMIS MADULU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mansoor, J.)

dated the 5th day of May, 2021

in

(DC) Criminal Appeal No. 11 of 2021

.....

JUDGMENT OF THE COURT

25th April & 5th May, 2023.

KENTE, J.A.:

The appellant Amoor Hamis Madulu was convicted by the Singida Resident Magistrate's Court of the offence of rape contrary to sections 130(1), (2) (e) and 131 (1) of the Penal Code, Chapter 16 of the Revised Laws and was sentenced to the mandatory thirty years imprisonment. His appeal to the High Court (sitting at Dodoma), was unsuccessful hence the present appeal.

The prosecution evidence which was anchored on the testimony of five witnesses was briefly to the effect that, at the time which is material to the commission of the charged offence, both the appellant and the complainant whose name we shall hereinafter in this judgment conceal and simply refer to her as either the complainant, or PW2 and who was a young girl then aged 13 years, were residents of Ipongo Msugua Village in Ikungi District, Singida Region. On 12th September, 2019 at about 10:00am, the appellant went to the complainant's home and asked her the whereabouts of her mother one Mariam Rajab Mtei (PW1). On being told by the complainant that her mother had gone to the funeral of a relative, the appellant is said to have left and gone to PW1's brother to repair his television set.

According to PW2, sometimes later the appellant came back, once again asking for PW1. After he was told that she was yet to come back, the appellant allegedly, looking over his shoulder, and upon assurance that there was nobody in the vicinity, he took hold of the complainant and pulled her into the bedroom where he proceeded to have sexual intercourse with her. Asked why she could not scream or otherwise raise an alarm to alert neighbours, PW2 is on record as having told the trial

court that the appellant had gagged her with a bedsheet. After he was finally able to quench his irrepressible sexual appetite, the appellant allegedly threw Tsh. 2000/= at PW2 and left while pretending that he was going to wait for PW2's mother who until then, had not come back.

On her part, PW1 recounted that upon arrival at home, she met the complainant who was slightly limping. Right away PW2 told her that the appellant had raped her. In response, PW1 took her daughter to the nearby police station where they were issued with a police medical examination form popularly known as the PF3 (Exhibit P2) before proceeding to hospital for medical examination. Following confirmation by one Mageni Selestine Paulo (PW5) a medical expert who examined PW2 and found that indeed she had been raped, the police at Singida launched a manhunt for the appellant who was said to have escaped immediately after commission of the alleged offence. Four days there-after, the appellant was arrested and subsequently charged with rape, the offence which he has consistently denied.

In sum, the appellant's defence was that, on the material day at 10.00am, he had arranged with PW1 to take him to one man whose name

he did not know to repair his television set. That, accordingly, he went to PW1's home who took him to the home of the said man. After inspecting the TV set, he left to look for some spares. It was his further evidence that, he went back home and worked on the TV set up to 2:00pm when the owner called him. He said that, at about 8.45pm, he went to the home of PW1 but he could not find her as there was only one boy who was washing clothes and a young girl, in school uniform who told him that her mother had gone to the shop. He stated that, as the mother of the said girl had called him using her phone and connected him to the man who was in need of his services, before leaving PW1's home, he gave Tsh. 2000/= to the said girl, apparently in appreciation. From there, the appellant stated that, he went to the nearby primary school to set a teacher's satellite dish where he worked up to 8:00pm.

After two days, he travelled to a certain village in Meatu District where on the following Monday, he received a telephone call from someone informing him of the accusations that he had raped someone's child. The appellant went on to say that, upon return to the village on 15th September, 2020 he told PW1 that, he was going to submit himself to the police but only to be arrested a few hours later.

Refuting the claim that he had gone missing after commission of the alleged offence, the appellant challenged the prosecution witnesses as to why he was not arrested immediately. All in all, he denied being involved in the commission of the offence he is facing.

After hearing witnesses from both sides, the learned trial Resident Magistrate was satisfied and she accordingly found that indeed PW2 was raped and that the perpetrator of the offence was none other than the appellant. Relying on our decision in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 384, she accepted PW2's evidence that the appellant grabbed her and took her into the bedroom where he went on to have sexual intercourse with her. The learned trial magistrate dismissed the appellant's defence version that he was not at the scene of the crime at the time which was contemporaneous with its commission. She found that having admitted to know PW2 and her mother, coupled with the fact that, the appellant went to their home on the material day and gave Tsh. 2000/= to PW2, the appellant's account that he was at the nearby school setting a satellite dish could not undo all the above undisputed facts together with the claim by PW2 that it was at that time when the appellant took the advantage of her mother's absence to gratify his sexual urge. The

learned trial magistrate found in conclusion that, there was overwhelming evidence against the appellant that indeed he committed the offence with which he stood charged. She accordingly found him guilty as charged and sentenced him to thirty years imprisonment.

As stated earlier, the appellant's appeal to the High Court was unsuccessful. Like the trial court, the first appellate court found that PW2 was a reliable and trustworthy witness whose evidence was corroborated by the testimony of the medical officer who examined her. The learned Judge of the first appellate Court was as well satisfied that, PW2 knew the appellant very well prior to the commission of the charged offence as to be able to identify him and that, there was no reason for PW2 to settle her blame upon him to the exclusion of anyone else.

Regarding the appellant's complaint that there was a delay in reporting the rape incident to the police and subsequently another delay to arrest him, the learned Judge of the first appellate court was of the quite different view. She found as a fact that, the incident was reported to PW1, by PW2 immediately after PW1 returned home from the funeral and that straight away, PW1 went on to report the incident to the police.

With regard to the appellant's defence of alibi that he was not at the home of PW1, the first appellate Judge could not go by that version. She was convinced like the trial court that, the evidence of PW2 placed the appellant at the scene of the crime. All things considered and the learned High Court Judge having assessed the evidence placed before her, she was on firm ground that, the offence was proved beyond reasonable doubt. She accordingly dismissed the appeal in its entirety for want of merit.

In support of the appeal, the appellant has advanced a nine-point memorandum of appeal which can conveniently be paraphrased as hereunder: -

1. *That the evidence of the complainant (PW2) who was a child of tender age was wrongly received contrary to section 127(2) of the Evidence Act Chapter 6 of the Revised Laws;*
2. *That the appellant was convicted and subsequently sentenced to thirty years imprisonment on a charge which was not proven beyond reasonable doubt;*
3. *That the evidence of PW2 was too weak to ground a conviction;*

4. *That there was a contradiction between the evidence of PW1 and PW2 regarding the time of occurrence of the charged offence;*
5. *That the evidence of a doctor (PW5) who examined the victim did not indicate that there was perpetration of the appellant's manhood into the victim's private parts;*
6. *That there was no evidence from the arresting officer which would lend credence to the prosecution case;*
7. *That the first appellate court strayed into error by not taking into account that there was no evidence to show that the appellant had escaped after the rape incident;*
8. *That the offence with which the appellant stood charged and of which he was subsequently convicted was a frame up; and*
9. *That the trial and the first appellant courts had wrongly shifted the burden of proof onto the appellant.*

We have considered the nine grounds of appeal and the arguments and submissions exchanged by the parties. We start with the first ground of appeal which challenges both the trial and the first appellate court for

basing the appellant's conviction on the evidence of PW2 which was allegedly received in total disregard of the provisions of section 127(2) of the Evidence Act.

Quite clearly, the most telling evidence against the appellant was from PW2 the victim of the alleged offence who was a child then aged fourteen years and therefore a child of tender age in terms of section 127(5) of the Evidence Act. In this connection, it must be common cause that this was a case of a single identifying eyewitness hence the two lower courts' reliance on our decision in the case of **Selemani Makumba** (supra) in which we emphasized, that true evidence of rape has to come from the victim.

Bearing in mind the particular facts and circumstances of this case, it is needless to say that, concerning the evidence of PW2 who was plainly a child of tender age, the provisions of section 127(2) of the Evidence Act would necessarily come into play. The above – cited provision of the law provides in no uncertain terms that:

> *"(2) A child of tender age 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".

[Emphasis added]

Apart from being permissive in terms by allowing a child of tender age to give evidence with or without taking oath or affirmation, the above-quoted provision imposes one condition that, before giving evidence, a child of tender age who has not taken oath or made an affirmation is required to promise to tell the truth to the court and not to tell lies. (See **Godfrey Wilson v. Republic**, Criminal Appeal No 168 of 2018 and **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (both unreported)). It should be emphasized here that the undertaking to tell the truth and not lies is a mandatory requirement.

Coming to the instant case, the appellant has criticized the reception and acceptance of the evidence of PW2 in that, the provisions of section 127(2) of the Evidence Act were not complied with. The appellant could not clarify but if we understood him well as we reckon we did, by extension, he meant that, given the above omission, the evidence of PW2 was wrongly received and we should discount it.

Submitting in reply and evidently wavering in her position, Ms. Patricia Mkina, learned State Attorney who appeared along with Ms. Pamela Shinyambala, learned Senior State Attorney to represent the respondent Republic was at first of the view that, PW2 had promised to tell the truth and therefore her evidence could not be said to have been wrongly received. However, upon reflection, the learned State Attorney was convinced and she accordingly conceded and submitted in consequence that, indeed the mandatory requirements of section 127(2) of the Evidence Act were not observed. In such a away therefore, the learned State Attorney supported the first ground of appeal much as she was not opposed to the remaining grounds of appeal. Even though, regarding the way forward, she implored us to allow the appeal and pursuant to section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws, to order for retrial as she believed that what happened were a few procedural mishaps, for otherwise, there was sufficient evidence to ground a conviction.

Given the complaint raised by the appellant in the first ground of appeal and the concession by Ms. Mkina, we feel compelled to immediately comment on the procedure adopted by the trial magistrate in receiving the

evidence of PW2, a child of tender age. But before we embark on this task, we think it is appropriate and indeed imperative for us to revisit the law as evolved through our various decisions regarding the applicability of section 127 (2) of the Evidence Act. This time around, we have in mind a situation where, as in the instant case, a child of tender age gives evidence after taking oath or making an affirmation.

Regarding the procedure to be followed by the court before a witness of tender age can give evidence upon oath or affirmation, we held in **Issa Salum Nambaluka and Geofrey Wilson** (supra) that:

> "Where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies".

Having gone through the record before the trial court, it occurs to us that the learned trial magistrate was completely unaware of the existence of the mandatory requirements of section 127(2) of the Evidence Act. For, it is a fact that, every witness who appeared before the court to testify was either sworn or affirmed and it has not been demonstrated to us that, PW2 who fall within the expression "a child of tender age" was either asked a few pertinent questions to determine if she understood the nature of oath or was led to promise to tell the truth and not to tell lies if she did not understand the nature of oath, as required by law. This is a procedural requirement which was unfortunately not followed.

In these circumstances, it is clear that indeed the evidence of PW2 was received in total violation of the law and, on that account, had the first appellate Judge, addressed her mind to this procedural irregularity, she would have inevitably sustained the appellant's seventh ground in the petition of appeal which challenged the trial court for non-compliance with section 127(2) of the Evidence Act.

Having accordingly addressed our mind to the glaring omission by the trial court, we are convinced that the omission had the effect of

vitiating the validity of the evidence of PW2. We find the first ground of appeal to have merit and we accordingly sustain it. As it has always been the case, the evidence of PW2 is expunged from the record for having been received contrary to the dictates of the law. Henceforth, there will be no further reference to the said evidence.

Bearing in mind that, the only evidence directly connecting the appellant with the commission of this offence according to the record, was that of PW2 which we have just expunged from the record, and in view of the position we have taken above, it becomes rather otiose for us to consider other grounds. Moreover, we do not agree with the spirited argument put forward by Ms. Mkina that an order for retrial would be appropriate in the circumstance of this case. For, it is a settled principle of law that, an order for retrial will not be made by a higher court, if as it seems to be in the present case, the order is likely to give a helping hand to the prosecution side to fill the gaps in their case. (See **Fatehali Manji v. Republic** [1966] 1 EA 343 and **Jackson Davis @ Linus V. Republic**, Criminal Appeal No. 248 of 2019 (unreported)).

The above considered, we allow the appeal, quash the conviction and set aside the sentence of thirty years imprisonment meted out on the appellant. We make an order that the appellant be set free forthwith if he is not otherwise lawfully detained.

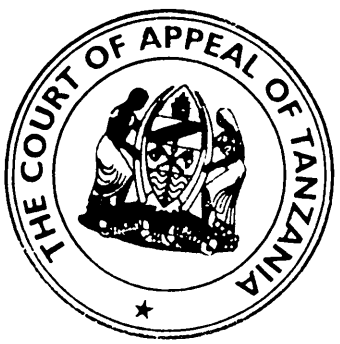
DATED at **DODOMA** this 5th day of May, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 5th day of May, 2023 in the presence of the Appellant in person and Mr. Henry Chaula, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL