IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: WAMBALI J.A., KEREFU, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 386 OF 2021

AHAMAD SALUM HASSAN @ CHINGA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Morogoro with Extended Jurisdiction)

(Fovo, PRM-EXT JUR.)

dated the 20th day of March 2020

in

Ex. Jurisdiction Criminal Appeal No. 24 of 2019

.....

JUDGMENT OF THE COURT

13th & 22th February, 2023

MAIGE, J.A.:

At the Resident Magistrate Court of Morogoro (the trial court), the appellant was charged with and convicted of the offence of rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code. He was sentenced to thirty (30) years imprisonment. On appeal, the Resident Magistrate's Court of Morogoro with Extended Jurisdiction confirmed both the conviction and sentence and henceforth the instant appeal.

The allegations in the Charge was that, at Komotonga area, Turiani within Mvomero District in Morogoro Region (the village), the appellant, on diverse dates between September and November 2017 (the material time), had carnal knowledge of a girl of 14 years old who shall herein be referred to as "the victim" or "PW1"

The evidence on which the appellant was convicted is easy to narrate. The victim was on the material time, a child of 14 years old. She was living with her grandmother, Zaina Zuberi (PW4) at the village. There is no dispute that, the appellant was well known to both the victim and PW4 as they were living in the same village. PW1 claimed to have been raped by the appellant twice. The first incident happened in September, 2017 at around 12 hours on the date that she could not remember. She was, on the said day, at home alone. Suddenly, the appellant came and inquired if PW4 was there. When he established that she was absent, the appellant pulled her into a room. He thereafter undressed her and proceeded to penetrate his male organ into her vagina. She felt pains and cried but there was no one to assist her.

The second incident, PW1 testified, happened sometime in November, 2017. Again, she was at home alone cooking some food when the appellant came and drugged her into unfinished house where

he committed the crime. This time around, PW1 revealed the incident to his father who in turn conveyed the information to the Village Executive Officer, Teddy Saimon Turian (PW3). PW4 suggested in her evidence that, she was present when the victim was informing her father about the incident. Besides, PW3 confirmed to have been so informed by the victim's father and reported the incident to the police where they procured a PF3 and rushed the victim to Turian Hospital. Dr. Liberatus Denis Njau (PW2) examined the victim and established as per exhibit P1 that she had been raped.

In his defense, the appellant completely denied the allegation. He refuted the possibility of the incident to happen without the victim reporting to the neighbors because her residential home was surrounded by many houses. He added that, the victim could have not been threatened to be killed as she claimed because her residence was near to the road where many people pass. He claimed, therefore, that the case had been fabricated.

The trial magistrate, relying on the evidence of the victim, was satisfied that, the charge was proved beyond reasonable doubt. As we said above, the appellant was convicted and sentenced accordingly. The first appellate court upheld both the conviction and sentence. The

appellant is not happy with the concurrent findings of the two lower courts and thus the current appeal. He has enumerated six grounds in his memorandum of appeal which in essence raise the following complaints. **One**, the appellant was convicted based on the evidence of PW1 which was received in violation of section 127(2) of the Tanzania Evidence Act; **Two**, exhibit P1 was improperly received into evidence; **Three**, the case against the appellant was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person without representation, whereas the Respondent Republic enjoyed the service of Ms. Dorothy Massawe, learned Principal State Attorney.

When requested to address the Court on the merit of the appeal, the appellant adopted the written submissions he earlier on filed in support of his grounds of appeal and urged us to allow the appeal.

In brief, the submissions of the appellant in connection to the first complaint was that, as there was no findings by the trial court of the competence of the victim to testify on oath, she being a child of tender age, it was wrong to testify on affirmation. He contended that, under section 127(2) of the Evidence Act, she should have promised to tell the truth and not lies. The defect in question, he submitted, has the effect

of having the entire evidence of PW1 expunged from the record. He invited us to expunge the evidence from the record.

In second complaint, the appellant contended that for the reason of not being read out after being cleared for admission, exhibit P1 was wrongly admitted and ought to be expunged from the record. Reference was made to the case of **Robinson Mwanjisi and Others v. R** [2003] T.L.R. 218.

On the third complaint, it was his submission that, with the exclusion of the oral evidence of PW1, the remaining evidence is insufficient to prove the case beyond reasonable doubt in that; it is hearsay, contradictory, incredible and lacks some evidential links for want of production of material witnesses. He thus prayed that the appeal be allowed.

In reply, Ms. Massawe for the Respondent Republic fully supported the appeal. On the first complaint, it was her submission that, because she was a child of tender age, PW1 could not have, as she did, testify on affirmation or at all before the conditions in section 127 (2) of the Evidence Act were duly complied with. She submitted that, the trial court was, before taking her evidence, required to satisfy itself as to the competence of the child witness to testify on oath. Otherwise, she

submitted, the child witness would have been caused to promise to tell the truth and not lies before proceeding to testify without oaths or affirmation. In her contention, therefore, as the victim testified without complying with the said conditions, her testimony could have not been given any weight at all. Relying on the authority in **John Mkorongo James v. R,** Criminal Appeal No. 498 of 2020 (unreported), she urged us to expunge the said evidence from the record.

On the second complaint, the learned counsel submitted that; in so far as it was admitted into evidence without its contents being read out and explained to the appellant as the law requires, exhibit P1 was admitted improperly and should be expunged from the record.

In line with the third complaint, it was the humble submission of the learned Principal State Attorney that, if the evidence of PW1 was to be removed from the record as she requested, the remaining evidence would obviously be incapable of proving the case beyond reasonable doubt. She pointed out three weaknesses in the remaining prosecution evidence. **First,** in the absence of the evidence of PW1, the remaining evidence is mere hearsay. **Two,** the said evidence is at variance with the charge sheet on the date of the commission of the offence. **Three,** the unreasonable delay in arresting and prosecuting the appellant

coupled with failure of the prosecution to produce material witnesses such as the police and the father of the victim renders the probative value of the prosecution case highly questionable. In her conclusion, therefore, the appeal should be allowed and the appellant set free.

Having heard the submissions, we shall henceforth consider the merit or otherwise of the appeal starting with the second complaint as to the propriety of the admission of the documentary evidence in exhibit P1 (PF3). Without consuming much of the precious time of the Court, we entirely agree with the learned Principal State Attorney that because the PF3 was not read out and explained to the appellant when it was cleared for admission, exhibit P1 was improperly admitted and as such the appellant was denied an opportunity to know the contents of the document. As we held in **Robinson Mwanjisi and Others v. R** (*supra*) this is a fatal irregularity which renders the document unreliable. We accordingly discount the evidence contained therein.

We now turn to the first ground of appeal which question the propriety of the trial's court admission of the evidence of PW1, the victim of the crime. As we said above, PW1 was a child of tender age as she was testifying. Thus, admission of her evidence was to comply

with the provisions of section 127(2) of the Evidence Act as amended by Act No. 4 of 2016 which provides as follows: -

> *"(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 lies".*

Under the above provision, it is apparent, a child of tender age can testify without oath or affirmation if she promises to tell the truth and not lies. In criminal proceedings, the provision, it would appear to us, is an exception to the general rule under section 198 of the Criminal Procedure Act that, every witness in a criminal cause should testify on oath or affirmation. Therefore, in **Mwami Ngura v. R**, Criminal Appeal No. 63 of 2014 (unreported) it was stated:

> *"...as a general rule, every witness who is competent to testify, must do so under oath or affirmation unless she falls under exceptions provided in a written law. As demonstrated above one such exceptions is section 127 (2) of the Evidence Act. But once a trial court, upon inquiry under section 127(2) of the Evidence Act, finds that the witness understands the nature of an oath, the witness must take an oath or affirmation."*

In this case, PW1 testified on affirmation. The record is however silent if the trial court was satisfied before receiving her evidence of the competence of PW1 to testify on affirmation as she did. More to the point, there is nothing on the record to suggest that, the child witness was caused to promise that she would tell the truth and not lies so as to fall within the purview of section 127(2) of the Evidence. Act. Dealing with more or less similar issue, this Court stated in **Hassan Yusuph Ally v. R**, Criminal Appeal No. 462 of 2019 (unreported) as follows:

> *" In the present appeal, it is on record that PW1 was a child of tender age. The age was proved by PW1 herself when she was giving her personal particulars to the trial court before reception of her evidence. She told the trial court that she was 14 years. There is also the evidence of her mother, PW3 who told the trial court that PW1 was aged 13 years. After PW1 had given her personal particulars and the trial court became aware that PW1 was a child of tender age, instead of putting questions to the child witness to satisfy itself as to whether or not the child understood the nature of oath, it proceeded to affirm the witness and thereafter, received her evidence. As was in* ***Issa Salum Nambaluka*** *(supra), the record in this appeal is silent as to how the trial court reached to a conclusion that PW1 possessed sufficient intelligence to justify the*

reception of her evidence upon affirmation. Since the record is silent, we find that the recording of PW1's evidence was in contravention of the provisions of section 127(2) of the Evidence Act. In that regard, we entirely agree with the submissions of the learned State Attorney that the affirmed evidence of PW1 was invalid with no evidential value."

See also **Jafari Majani v. R**, Criminal Appeal No. 402 of 2019, **John Mkorongo James v. R**, (supra), **Hamis Issa v. R**, Criminal Appeal No. 274 of 2018 and **Nestory Simchimba v. R**, Criminal Appeal No. 454 of 2017 (all unreported).

Guided by the above authorities, therefore, it is our firm opinion that, because PW1 testified on affirmation without the trial court satisfying itself of her competence to testify as such, and there being nothing on the record to the effect that she promised to tell the truth and not lies, her evidence cannot fall within the exemption under section 127(2) of the Evidence Act. It thus did not have any evidential value and it is hereby discarded.

Having discarded the evidence of PW1, the issue which we have to address is whether in the absence of such evidence, can it be said that, the case was proved beyond reasonable doubt as to justify the

conviction and sentence imposed on the appellant. We think, the answeris obviously no for a number of reasons.

First, with the exception of PW1, the evidence of the four prosecution witnesses was based on mere hearsay. We shall explain. PW3 testified based on what he was told by the father of the appellant who was even not called as a witness. Similarly so for PW4, the grandmother of the appellant, whose evidence was solely based on what she heard from PW1. The evidence of PW2, the doctor, was only relevant in establishing that the victim was raped. The main issue at the trial was however whether it was the appellant who raped her, the issue which could not be addressed by the oral evidence of PW2.

Two, the evidence of PW4 on the date of commission of the offence is not in conformity with the charge. While in accordance with the charge, the offence was committed on diverse dates between September and November 2017, the evidence of PW4 is such that the offence was committed in December, 2017.

Three, while the incident according to the charge happened in between September and November, 2017, it was not until on 3rd day of February, 2017 that it was reported to PW3 by the victim's father and then to the police. This is in accordance with the evidence of PW3. There

is an interval of hardly three months in between. It is highly improbable for the parents to take such a long time to report an incident like this to the relevant authorities.

Four, notwithstanding the unreasonable delay to report the incident to the relevant authority, for undisclosed reasons, the prosecution did not produce any witness from police to explain the reason behind such a delay. Neither did they produce the father of the victim who is said to have reported the matter to the Village Executive officer. The position of law is that, failure to call a witness who is in a better position to explain some missing links in the prosecution case justify an adverse inference against the prosecution. There are many decisions in support of this proposition. See for instance, **Boniface Kundakira Tarimo vs. R.**, Criminal Appeal No. 350 of 2008, **Issa Reji Mafuta v. R**, Criminal Appeal No. 337 of 2020 and **Yohana Chibwingu v. R**, Criminal Appeal No. 177 of 2015 (all unreported). In **Tarimo's case** in particular, it was observed:

> *"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be*

drawn against that party, even if such inference is only permissible."

The weaknesses pointed out herein above raise reasonable doubts of the prosecution case which should be applied in favour of the appellant as the law requires.

In view of the foregoing discussions, therefore, we find the appeal with merit. Consequently, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released forthwith from custody unless he is held therein for another lawful purpose.

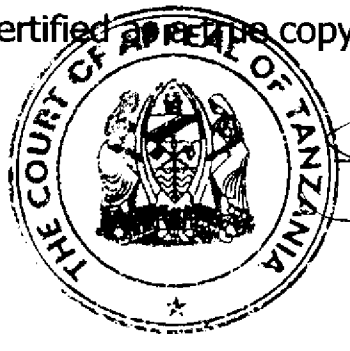
DATED at **DAR ES SALAAM** this 20th day of February, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 22th day of February, 2023 in the presence of Appellant present in person and Mr. Nassoro Katuga, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL