**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 396 OF 2021**

**MOHAMED RAMADHANI @KOLAHILI .....APPELLANT**

**VERSUS**

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

**(Appeal from the judgment of the High Court of Tanzania, at Dar es Salaam)**

**(D.Mello, J.)**

**Dated 30th Day of August,2021**

**in**

**HC. Criminal Appeal No. 31 Of 2021**

**.....**

## JUDGMENT OF THE COURT

*15th February, & 2nd March, 2023*

**MAIGE, J.A.:**

At the District Court of Ulanga (the trial court), the appellant, Mohamed Ramadhani @ Kolahili, was charged with and convicted of the offence rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [CAP 16 RE.2002]. He was sentenced to life imprisonment accordingly.

It was alleged by the prosecution that, on 10th May, 2019 at or about 19.00 hours at Togo village within Ulanga District in Morogoro

Region, the appellant did have carnal knowledge of a girl aged seven (7) years old, hereinafter referred to as "the victim" or "PW1".

The factual background of this case is as follow. On the material date, PW1 was with her friend one Paulina Soko (PW2) on the way back home. Suddenly, the appellant, a person who was well known to both of them, attacked them on their back. He eventually covered PW1's face with a piece of cloth and drugged her into a wild where he had canal knowledge of her. On seing this, PW2 quickly rushed into the home residence of the victim and reported the incident to the victim's aunt one Salome Peter Kugonga (PW3).

PW3 testified that; on the material date, PW1 went to school in the morning and came back a short while crying. On asking her what was up, she disclosed to PW3 that her teacher had advised that she be taken to hospital for check-up. PW3 took the victim to the hospital where she was diagnosed and found with malaria. However, despite the treatment she underwent, she did not recover. It happened that, as PW3 was washing the victim, she found her female organ swollen. When she asked her what was wrong, she revealed that, it was the appellant who raped her. Sooner than longer, PW3 reported the crime to the police and as a result, the appellant was arrested. Once again, the victim was taken to the hospital and on examination by Dr. Edgar Felisian Itemba (PW4), it

was discovered that she had been raped. In his testimony, PW4 produced the relevant PF3 which was admitted as P1.

In his defence, the appellant vehemently denied to have committed the crime. He denied presence at the scene of the crime on the material date as well. He said, while he was arrested on 14th May, 2019 in connection with an offence of murder, the accusation changed into rape when he was produced to the police station.

Persuaded by the oral account of the victim as substantiated by that of PW2 and PW3 together with the expert evidence of PW4, the trial court convicted the appellant with the offence and sentenced him accordingly as alluded to above. Notwithstanding the appeal to the first appellate court, neither the conviction nor the sentence was disturbed. The appellant still believes that he is innocent this is why he has preferred this appeal. In his initial memorandum of appeal filed on 25th March, 2022, the appellant listed eight grounds whereas in his supplementary memorandum of appeal filed on 27th September, 2022 he has raised only one ground which indeed is a repetition of his first ground in the initial appeal. In our careful reading, both the initial and supplementary memoranda of appeal raise the following five grounds:-

1) *The evidence of PW1 and PW2 upon which the appellant was convicted were wrongly received and relied upon without complying with the requirements under section 127(2) of the Evidence Act.*
2) *The appellant was convicted based on the evidence in exhibit P1 which contrary to the law was read out before being cleared for admission.*
3) *The evidence of the appellant was recorded in violation of section 210 (1) of the Criminal Procedure Act.*
4) *The appellant was not correctly identified.*
5) *The case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, unrepresented while Ms. Mwansiti Athumani Ally, learned Principal State Attorney and Ms. Florida Wenceslaus, learned State Attorney represented the respondent Republic. While the appellant fully relied on the written submissions he earlier on filed having abandoned the third ground of appeal, the Respondent Republic through Ms. Wenceslaus strongly submitted in opposition to the appeal. We shall hereinafter consider the rival submissions as we address the grounds of appeal.

We start our deliberation with the second ground as to the admissibility of the PF3. In his submissions which was fully supported by Ms. Wenceslaus for the respondent Republic, the appellant has

questioned the admissibility of Exh. P1 on two accounts. First, it was, contrary to the law, produced into evidence by the public prosecutor. Two, contrary to the law, it was read out before being cleared for admission. In the contention of the appellant, it ought to have been produced by a witness. In line with the principle in **Frank Massawe v. R**, Criminal Appeal No. 302 of 2012 (unreported), the appellant like the learned State Attorney, has urged us to hold that the respective exhibit has no evidential value at all.

On our part, we are in agreement with the appellant and the learned State Attorney that, the public prosecutor being not a witness, could not in law produce a document into evidence as that would obviously deny the accused a right to cross examine on the document. This position was put clear in the case of **Frank Mssawe v. R,** (supra) where it was observed:

> *"So, since the prosecutor was not a witness, he could not be examined or cross examined on a shotgun he tendered. It is also curious on how the trial court admitted a shotgun from a person who was not a witness and who could not be validly examined or cross examined by the appellant. In the light of the circumstances in which Exh. P1 was tendered by a prosecutor, it is doubtful as to whether or not it was the same shotgun recovered by PW3 and PW9 from the appellant".*

Therefore, guided by the above authority, we hold that Exh. P1 was improperly admitted into evidence. It is according discounted. As the document was not produced by a witness, we find it useless to consider the second element of the ground. Thus, we allow the second ground of appeal.

We now proceed with the first ground as to the admissibility of the evidence of PW1 and PW2. In accordance with the record, both were children of seven years when they were testifying. In his submissions, the appellant has contended that, in so far as the evidence of the said witnesses was received without oath or affirmation, under section 127(2) of the Evidence Act, the two were obliged to promise to tell the truth and not lies before giving their testimony. Though he noted of their being observations by the trial magistrate that, the said witnesses had promised to tell the truth, it was his submission that the same did not meet the requirement of the respective section as their promises were supposed to be reflected on record. Reference was made to the case of **Godfrey Wilson v. R**, Criminal Appeal No. 168 of 2018 and **Faraji Said v. R**, Criminal Appeal No. 172 of 2018 ( both unreported).

In rebuttal, Ms Wenceslaus while in agreement that section 127 (2) of the Evidence Act was not complied, she was of the contention that, the non-compliance would not, provided that the evidence was true and

credible, render the evidence inadmissible and unreliable. In her view, which was founded on the authority in **Wambura Kiginga v. R,** Criminal Appeal No.301 of 2018 (unreported), the evidence was admissible under the exception in section 127(6) of the Evidence Act.

Having followed the rival submissions on this ground, the issue which we have to consider is whether, in the circumstance, the evidence of PW1 and PW2 was correctly received in evidence and properly relied upon by the trial court in convicting the appellant.

It is common ground that, both the victim (PW1) and PW2 were, when they were giving their testimony, children of 7 years. It is also common ground that, their evidence was given without oath or affirmation. More to the point, aside from the trial magistrate's remark before their evidence that, they promised to tell the truth, the actual statements of the witnesses constituting the promise is not on the record.

Under section 127(2) of the Evidence Act, we agree with the appellant, a child of tender years cannot give evidence without oath or affirmation unless she or he promises to tell the truth and not lies. The provision 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 any lies."*

We equally agree with the appellant and the learned State Attorney that, to comply with the requirement of the above provision, the promise by the child witness must be actual and it has to be clearly recorded in the proceedings. There are many authorities in support of this position. For instance, in **Yusuph Molo v. R,** Criminal Appeal No. 343 of 2017 (unreported), it was stated that:

> *"What is paramount in the new amendment is for the chiid before giving evidence to promise to tell the truth to the court and not lies. That is what is required. It is mandatory that such a promise must be reflected in the record of the trial. If such a promise is not reflected in the record it is a big blow in the prosecution case."*

See also **Godfrey Wilson v. R** (supra), **John Mkorongo v. R**, Criminal Appeal No. 498 of 2020 and **Nestory Simchimba v. R**, Criminal Appeal No. 454 of 2017 ( both unreported).

In our opinion, therefore, the evidence of both PW1 and PW2 was received un-procedurally without compliance of the mandatory conditions of section 127 (2) of the Evidence Act.

The question which follows, therefore, is whether the said evidence can be relied upon under section 127 (6) of the Evidence Act notwithstanding the non-compliance in question. The learned State

Attorney has urged us to answer the question in the affirmative. She has placed heavy reliance on our authority in **Wambura Kiginga v. R,** (supra).

We wish to state right away that; the provision of sub-section (2) of section 127 as it appears today which allows a child of tender years to testify without oath or affirmation conditional upon promising to tell the truth and not lies, was brought by Act No. 4 of 2016. Before that, a child of tender years could only testify without oath or affirmation if upon inquiry, three conditions were established. First, he or she did not know the nature of oath. Two, he or she possessed sufficient intelligence to understand the questions put to him. Three, he or she knew the meaning of speaking the truth. Prior to 1998, it is necessary to observe, there was a proviso to the respective provision to the effect that unless corroborated by some other material evidence, the evidence of a child of tender age could not be used to sustain conviction.

Conversely, the provision of section 127(7) which is now subsection (6), was introduced in the Evidence Act by Act No. 4 of 1998. It thus was in existence several years before the current provision of subsection (2) of the same section had come into being. Therefore, if the respective provision intended to introduce an alternative or additional procedure for admissibility of evidence of a child of tender years as suggested by the

learned State Attorney in her submissions, why was subsection (2) amended in 2016 to remove the competence test in unsworn evidence of a child of tender years and substitute it with the requirement of promising to tell the truth and not lies ? In our view, the rationale behind the introduction of the provision of section 127 (7) which is currently subsection (6) was, as we held in **Nguza Vikings @ Babu Seya & 4 Others v. R,** Criminal Appeal No. 56 of 2005 (unreported), to create an avenue wherein credible evidence of a child of tender years or victim of rape, could, subject to the conditions therein, be used to sustain conviction in sexual offences without corroboration. In particular, we stated as follows:

> *"But at this juncture, we entirely agree with Mr. Marando that the provisions of section 127(7) do not override the provisions of section 127(2). All that the section does is to allow the court, in sexual offences, to assess the credibility of a child witness who is the only independent witness or a victim of a crime, and convict without corroboration, if the court is satisfied that the child witness told nothing but the truth.*

We recapped the same position in the case of **Omary Kijuu v. R**, Criminal Appeal No. 39 of 2005 (unreported) where we stated:

> *"It is true, in the past, courts used to hold that, whilst it was not a rule of law that an accused person charged with rape could not be convicted on uncorroborated evidence of prosecutrix especially if of tender years, yet as a matter of practice courts used to look for and required corroboration in sexual offence as stated by the appellant relying on the case of Andrea Maginga cited above. But those days when the position used to be so are long gone. They were swept away by the enactment of the Sexual Offences Special Provisions Act 1998 which amended section 127 by adding subsection (7). That amendment allowed conviction of rape even on uncorroborated evidence of a child of tender years as a single witness where the court is satisfied that she is telling nothing but truth, as in this case."*

In view of the foregoing, therefore, we hold, as we did in **Nguza** case (supra) and in our recent decision in **Emmanuel Masanja v. R**, Criminal Appeal No. 394 of 2020 (unreported) that; the conditions for admissibility of the evidence of a child of tender years in subsection (2) of section 127 of the Evidence Act have not been overridden by the provision of subsection (6) of the same Act.

It follows, therefore that, since PW1 and PW2 did not promise to tell the truth and not lies before giving their testimony, their evidence, in so far as it was given without due compliance with the preconditions under section 127(2) of the Evidence Act, has no evidential value at all. We

henceforth allow the first ground of appeal and discount the respective evidence.

With the determination of the first ground in favour of the appellant, we do not deem it necessary to consider the fourth ground of appeal as its determination depended on the evidence of PW1 and PW2 which we have discounted.

Having discounted the said evidence, we think, the evidence of PW3 and PW4 cannot stand in its own in establishing the case beyond reasonable doubt. The reason being that neither of the two witnessed the commission of the offence. The evidence of PW4, the doctor is limited into establishing that, PW1 was raped. It could perhaps be relevant to corroborate the evidence of the victim if it was still intact. On the other hand, the evidence of PW3 much as it is based on what she was told by the victim, is nothing but hearsay. It is not probable anyway. The reason being that, gathering from the record of appeal, it is not clear whether she became aware of the incident on the material date upon being informed by PW1 and PW2 as the facts of the case suggested or three days after as she was washing the victim according to her own narration. We would have thus looked at her evidence suspiciously.

From the foregoing discussions, therefore, we have no hesitation to conclude that the prosecution case was not proved beyond reasonable

doubt as per the complaint of the appellant in the fifth ground of appeal which we allow.

In the final result and for the foregoing reasons, therefore, we allow the appeal. We accordingly quash the conviction and set aside the sentence meted out against the appellant. We order his immediate release from prison unless his continued incarceration is related to other lawful cause.

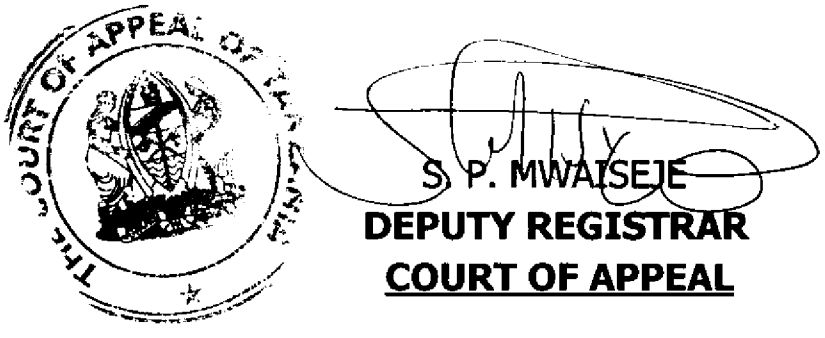
**DATED** at **DAR ES SALAAM** this 28th day of February, 2023.

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

The Judgment delivered this 2nd day of March, 2023 in the presence of Appellant present in person and Mr. Genes Tesha, 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**