IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 96 OF 2018

(Originating from Karatu District Court, Criminal Case No. 120/2017)

MANJO SARWAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

MAIGE, J

The appellant was charged at the District Court of Karatu ("the trial court") with the offence of rape contrary to section 130 (1) and (2) (e) of the Penal Code Cap. 16 R.E 2002. It was alleged in the charged sheet that; on 5th day of June, 2017 at about 18:00hrs and 8th day of June, 2017 at about 18:00hrs at Bashay Njiapanda village within Karatu District in Arusha Region, the appellant did have canal knowledge with one Rehema D/O Besieli a girl of 11 years of age. Upon full trial, the appellant was convicted as charged and sentenced to thirty (30) years imprisonment. In addition, he was to pay a fine at the tune of Tanzania Shillings two hundred thousand only (Tshs. 200, 000/=) together with compensation at the tune of Tanzania Shillings two hundred thousand only (Tshs. 200, 000/=) to the

victim. Aggrieved, The appellant has appealed before this court faulting the decision of the **trial court** on the following grounds;

1. *That, the **trial court** erred in law and in fact by not complying with the provisions of section 127 (2) of the Evidence Act, Cap. 6 R.E 2002.*

2. *That, the trial Court erred in law and in fact when it failed to take into account the glaring contradictions and inconsistencies that were apparent in the testimonies of the witnesses.*

3. *That, the trial Court erred in law and in fact in its judgment when it held that the prosecution had proved its case beyond reasonable doubt.*

Briefly the facts of the prosecution evidence that led to conviction of the appellant were that, on 5/6/2017,the victim (PW1) together with the appellant (who is her step father) went to Ngorongoro forest to collect firewood. While there, the appellant undressed **PW1** and inserted his penis into her vagina. In the course of committing the act, the appellant covered PW1's mouth with his arm to stop her from shouting. Further that, after finishing the illegal transection, the appellant threatened the victim that he would cut her with an axe if she disclosed the crime to her mother. Further in testimony was the fact that, on 8/6/2017 at 1800 hrs, she was again raped by the appellant while they were together at the farm. She testified further that; on 9/6/2017, she unveiled the secrecy to her grandfather. The latter reported the matter, on 10/6/2017, to the

headmaster of Njiapanda Primary School. As a result, she was, on 12/6/2017 PW1, interrogated by PW2 (matron) whereby she disclosed the fact to PW2. Thereafter, PW2 conveyed the information to the mother of the victim (PW3) who in turn reported the crime to police. She procured PF3 for medical examination of the victim. At the hospital, the victim was attended by **PW5.** On examination, it was established that there was laceration and discharge from the victim's vagina though there was no hymen. **PW5** opined that there was penetration of a blunt object on her vagina. The PF3 was admitted into evidence and marked "P1". Upon investigation conducted by **PW4,** the appellant was arraigned before the trial court with the offence of rape.

In defense, the appellant denied to have committed the offence. He said that, on 5/6/2017 at about 18 hrs, he was on duty at France Farm (kwa Askofu) as security guard. As a daytime security guard, he had to retire from work at around 2000 hrs, he testified further. In his testimony, that was the case also on 8/6/2017. He associated the allegation with family grudges.

In its judgment, the trial court placed heavy reliance on the evidence of **PW1** as supported by that of **PW2** and **PW3**. Equally relied upon was the documentary evidence in exhibit P1. By conclusion, the trial magistrate formed an opinion that the appellant committed the offence.

Before this court, the appellant appeared in person and unrepresented while the respondent acted through the service of Kagilwa, learned State Attorney.

During the hearing of the appeal, the appellant prayed to adopt his grounds of appeal to read as part of his submissions. He added that the evidence of **PW1** violated section 127 of the Evidence Act as the procedure was not followed. He therefore, prayed the evidence of **PW1** be expunged from the record and this appeal be allowed.

In his submissions in rebuttal, Mr. Kagilwa supported the conviction. On the issue of compliance of section 127(2) of the Evidence Act, it was his submission that in accordance with the amendment brought by Act No.2 of 2016, *voire dire* test is no longer a mandatory requirement provided that the witness promises to tell the truth.

On the issue of contradictions, he submitted that the contradiction if any were so trivial that they could be ignored. He clarified that the contradictions pertained only to the date when the victim was taken to hospital.

On the third ground of appeal, the counsel opined that, the charge against the appellant was proved beyond reasonable doubt. The testimony of PW1

on this aspect, the counsel submitted, was duly collaborated with the independent testimony of PW5 as well as the documentary evidence in exhibit P1. He henceforth prayed that the appeal be allowed.

With the above exposition of the feature of the instant matter, it is appropriate to consider the appeal. I propose to start with the first ground as to whether the testimony of PW1 did not comply with the requirement under section 127 (2) of the Evidence Act. On this issue, I find it necessary to state right from the beginning that; by virtue of the amendment brought by Act (No.2) of 2016, the requirement under section 127 (2) of the Evidence Act that the evidence of the child under tender age must be preceded by *voire dire* test has been abrogated. The law as it stand today, as correctly submitted for the Republic, imposes a minimum requirement that the child should at least give a promise that he shall tell the truth and not lies. The current position of the provision is as hereunder:-

> *"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."*

On carefully appraisal of the evidence, I have established without any doubt that the minimum requirement was duly complied with before the **trial court** received the evidence of PW1. It is manifestly apparent according to the evidence at page 11 of the typed proceedings of the **trial**

court, that before giving her testimony, PW1 who was twelve (12) years, *"promised to speak the truth and not lies"*. In my opinion therefore, the trial Magistrate complied with the law before recording the evidence of **PW**1. Therefore, the first ground of appeal is dismissed.

The appellant's complaint in the second ground of appeal is that that **trial court** failed to take into account the glaring contradictions and inconsistencies that were apparent in the testimonies of the prosecution witnesses. Layman as he was, the appellant could not afford to pinpoint any contradictions and inconsistencies in the prosecution evidence. Nevertheless, this Court having examined the proceedings of the **trial court,** has noticed contradiction between the testimony of **PW1** and **PW5** on the date when the former was taken to hospital for examination. While **PW1** claimed to have been taken to hospital on 12/6/2017, **PW5** (doctor) testified that it was on PW1 on 14/6/2017.The contradiction may sound trivial but not in the circumstances of this case. I will justify my contention as I consider the last ground of appeal.

It is a cardinal principle of our criminal law that, the burden is on the prosecution to prove its case beyond reasonable doubt and that; no duty is casted on the accused to prove his innocence. In this case, the appellant was charged before the **trial court** with the offence of rape. The appellant was alleged of having sexual intercourse with the child aged 11 years. It is

a settled law that, for there to be rape, there must be penetration and, in the case of an adult victim, lack of consent on her part. There are many judicial pronouncements in support of that proposition. See for instance, **Mbwana Hassani vs. The Republic**, Criminal Appeal No. 98 of 2009, Court of Appeal at Arusha (unreported). Since the victim was under 18 years, then consent was obviously immaterial. What the prosecution was required to prove, was penetration slightly as it might be. The evidence in exhibit P1 as amplified by the oral testimony of PW1 in my view would sufficient to establish the element of penetration. I would have but for the reasons to be adduced here below, agreed with the trial court that the case against the appellant was proved.

Let me state right away by saying that; it is one thing to establish that the victim was raped and another that it was the suspect who raped her. While the fact that the victim was raped could adequately be proved by the evidence of **PW5** and his medical report in exhibit **P1**, much more evidence was required to establish that it was the appellant who was responsible for the illegal transection. I am preparing myself to hold that; the evidence on that respect leaves much to be desired. The trial Magistrate seems to have placed reliance on the testimony **PW1** to prove the role of the appellant in commission of the offence. She was satisfied that, what **PW1** testified upon was nothing but the truth. It is certain in this case that, there is no person who witnessed the appellant having sexual intercourse with **PW1** apart from the victim (PW1) herself.

Undoubtedly, in sexual offences, independent evidence of the victim may prove penetration. See for instance, **Selemani Makumba vs. R**, Criminal Appeal No. 94 of 1999 (unreported) where it was held that;

> *"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent and in case of any other woman, where consent is irrelevant that there was penetration." (emphasis is mine)*

Yet, it is a principle of law that; for the court to rely on independent evidence of the victim to prove an offence, it must satisfies itself that the witness is telling nothing but the truth. This position of law is provided under section 127 (7) of the Penal Code (supra) which provides that;

> *"Notwithstanding the preceding provisions of this section,* ***where in criminal proceeding invoiving sexual offence the only independent evidence is that*** *of child of tender years or* ***of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence*** *of the child of tender years or* ***as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not collaborated, proceed to convict,*** *if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth." (emphasis is mine)*

The issue which I have to answer therefore is whether the evidence of **PW1** is adequately credible as to justify conviction of the appellant in the

absence of another independent testimony. I am mindful of the position of the law that, assessing credibility of a witness is the domain of the trial court which had an advantage observing the witness while testifying. In fit cases however, the first appellate court may depart from the rule and reappraise the evidence to determine the credibility of the witness. See for instance, **Omary Ahmed vs. R** (1983) TLR52.

The records show that, **PW1** testified that she was raped by the appellant on 5/6/2017 when they went with him to the forest to collect firewood. She could not report the incidence because the appellant had threated to harm her if she did so, it was in her testimony. It is also in her evidence that the incidence was replicated on 8/6/2017 when the victim and the appellant had went to the farm together. In accordance with her testimony, it was not until on 9/6/2017 when she reported the incidence to her grand father. For undisclosed the said reason, grand father who was the first person to receive the story was not called as a witness. He should have.

The fact that the victim did not report the incidence until when she was raped for the second time, appears to be uncommon. I hesitate to accept PW1's statement that she could not report because of the threat. The reason being that; upon getting home, **PW1** was no longer under immediate threat. Considering her age and the nastiness of the act done, it is unbelievable that she could have managed to bear the pains and distress for all three days without telling her mother while they were living

under the same house. That having happened, it was highly improbable, for the victim to accept going to the farm in a company of the appellant alone on 8/6/2017. He would have scared to face a similar inhuman treatment by the appellant.

More to the point, it was quite implausible for PW1 to bear the pains and agony for all three days without telling her mother who happened to have been living together in the same house. As well, her mother or teachers at school could have noticed strange manifestation in terms of movement or the like on **PW1** on the same day or the next day if at all **PW1** had been raped on that date, unless she was used to it. Strangely, **PW1** kept quiet for three days without telling her mother whom they lived together. As that was not enough, the victim would have not two days after, easily and without any force, accepted to go with the appellant only to the farm. She would have feared for the happening of previous unpleasant experience from the appellant. Again, she kept silent until on the next day when she told her grandfather. Ordinarily, it was much easier for the victim to unveil the fact to her mother than her grand father. This presupposition may however not apply in every circumstance. There is nevertheless, nothing in the testimony of **PW1** to explain why she reported to her grand father and not her mother. Perhaps, the evidence of the grandfather would have given some insights on this aspect. Unluckily, she was not called as a witness and no reason for the omission has been assigned.

Another thing that creates doubt is that, in accordance with the testimony of **PW2,** what was reported to the school by the grandfather of the appellant was that the victim and her sister Neema had been raped by the appellant. Further that, on the report being conveyed, and upon being requested by her headmaster, **PW-1** took both the two children for interrogation in the counseling room. While her evidence is silent on whether Neema admitted to have been raped too, it is suggestive that the victim admitted. That the initial report by the alleged grand father was on the rape of the victim and Neema, is supported by the testimony of PW5 who informed the trial court that it were two girls whom were produced to her for medical examination in relation to an allegation for rape on 14/6/ 2017 **PW2**. This being original source of the information, it was expected to form part of the facts of the case. It was expected in the evidence of PW5 to have any insight on what was the medical examination result of the said Neema. It is quite unusually that **PW1** avoided to make any remark in his testimony about that fact. In the absence of any evidence to the contrary and the said grand father having not been brought as a witness, it can reasonably be inferred that PW-1 intentionally concealed the said information. The intention of the concealment being not on the record, the trial court ought to have drawn a negative inference on the credibility of the testimony of **PW-1**. The improbability of the prosecution evidence would have been considered too in line with the defense testimony of the appellant that the case was fabricated on account of the family grudges. Obviously, the trial magistrate would have given benefit of doubt to the appellant. In my opinion, for such grievous offences like rape which as

attracts severe punishment, extra-ordinary care is required in testing the credibility of witnesses. That is more significantly important when the assessment pertains to the testimony of a witness whose independent evidence is solely relied upon in sustaining conviction.

In my opinion therefore, the case against the appellant at the trial court was not proved beyond reasonable doubt. The appeal is thus allowed on account of the second and third grounds of appeal. As a result, the conviction is quashed and the sentence thereof set aside. I further order for immediate release of the appellant from custody unless he is otherwise lawfully held.

It is so ordered.

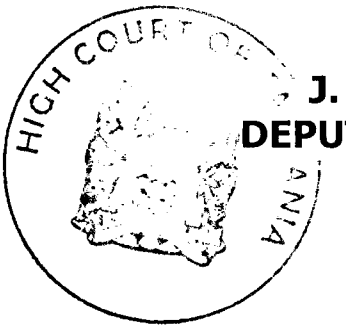
Right to appeal is duly explained.

SGD: I. MAIGE
JUDGE
23/01/2019

Judgment delivered this 23rd day of January 2019 in the presence of the appellant in person and Mr. Ahmed Khatibu, learned state attorney.

SGD: I. MAIGE
JUDGE
23/01/2019

I hereby certify this to be a true copy of the original



J. F. NKWABI
DEPUTY REGISTRAR
ARUSHA
29/01/2019