THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL No. 107 OF 2019

(Original Criminal Case No. 73 of 2018, in the Court of Resident Magistrate of Mbeya, at Mbeya).

GODFREY S/O MWANDEMWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

20/05 & 14/08/2020.

UTAMWA, J.

In this first appeal, the appellant, GODFREY S/O MWANDEMWA challenges the judgement (impugned judgement) of the Court of Resident Magistrate of Mbeya, at Mbeya (the trial court) in Criminal Case No. 73 of 2018. Before the trial court the appellant stood charged with the offence of rape contrary to section 130 (1), (2) (e) and 131 (3) of the Penal Code, Cap. 16 R. E. 2002 (now R. E. 2019), henceforth the Penal Code. It was alleged that, on 12th day of April, 2018, at Swaya area within Mbeya City and Region, the appellant did unlawfully have carnal knowledge of one Z

d/o O (hereinafter called the victim for preserving her dignity), a girl aged 8 years.

The appellant pleaded not guilty to the charge, hence a full trial. Four prosecution witness testified and the appellant made a sworn defence. At the end of the trial, the trial court found the appellant guilty, convicted and sentenced him to serve life imprisonment and to suffer 12 strokes of the cane. It also ordered him to compensate the victim with Tanzanian Shillings (Tshs.) 1, 000, 000/= (One Million).

Aggrieved by the conviction, sentence and the compensation order, the appellant preferred this appeal for search of better justice. His petition of appeal is based on five grounds of appeal. However, the grounds can be smoothly condensed to only two as shown below:

1. That, the trial court erred in law and fact in convicting and sentencing the appellant, and in making the compensation order against him though the prosecution had not adduced sufficient evidence to prove the charge beyond reasonable doubts.
2. That, the trial court erred in law in not considering the appellant's defence in deciding the case.

Owing to the above grounds, the appellant urged this court to allow the appeal, quash the conviction, set aside the sentence and set him free.

Regarding the first improvised ground of appeal shown above, the appellant in his petition of appeal, essentially complained that, the trial court had erroneously based the conviction on insufficient evidence of the four prosecution witnesses. He further protested that, the victim's age was not proved to be eight years for want of production of her clinical card. The

PF. 3 in respect of the victim's medical examination was also erroneously received in evidence through PW. 4, the investigator of the case. The appellant however, did not elaborate his second improvised ground of appeal.

When the appeal was called upon for an oral hearing, the appellant was in court and the respondent (Republic) was represented by Mrs. Roda Ngole, learned State Attorney. The appellant had nothing to add to his grounds of appeal.

On her part, the learned State Attorney for the respondent argued in respect of the first ground of appeal thus; the age of the victim was duly proved to be eight years through the evidence of PW. 3 (Felister d/o Andondile) who is her mother. In law, age of a victim of sexual offence can be proved by her parent. She supported the contention by the decision of the Court of Appeal of Tanzania (the CAT) in **George Maili Kebonge v. Republic, Criminal Appeal No. 327 of 2013, CAT at Mwanza** (unreported). She further argued that, the evidence of PW. 2 (Raphael) showed that he found the appellant raping the victim and arrested him. But, the evidence of the victim alone that it was the appellant who raped her suffices to prove rape under section 127 (3) and (7) of the Evidence Act, Cap. 6 R. E 2019. Besides, in law, the best evidence on rape comes from the victim as guided by the decision of the CAT in the case of **Edward Nzabuge v. Republic, Criminal Appeal No. 136 of 2008, CAT at Mbey**a (unreported).

It was also the contention by the learned State Attorney for the respondent that, PW. 4 (D/C Werema), the police investigator of the case,

properly produced in evidence the PF.3 on the medical examination of the victim. This is because, the record of the trial court shows that, the appellant was informed of his right to call the doctor who had examined the victim for cross examination as per section 240 (3) of the Criminal Procedure Act, Cap. 20 (the CPA). However, he opted not to call the doctor and did not object the tendering of the PF. 3 in evidence. The prosecution evidence thus, proved the charge beyond reasonable doubts and the appellant cannot complain against the conviction, sentence and the compensation order.

Regarding the second improvised ground of appeal, the learned State Attorney for the respondent briefly submitted that, the trial court properly considered the appellant's defence as shown from page 7 of the impugned judgement. In his rejoinder submissions, the appellant reiterated his complaints in the petition of appeal.

I have considered the grounds of appeal, the arguments by the parties, the record and the law. I will firstly consider the second improvised ground of appeal for purposes of convenience. The issues here are these: firstly, *whether or not the trial court failed to consider the appellant's defence in making the impugned judgment*. Secondly is that, *if the answer in the first issue will be affirmative, then what is the effect of the omission*.

In my view, the impugned judgment of the trial court speaks for itself. As rightly argued by the learned State Attorney for the respondent, it is conspicuous that, the trial court firstly narrated the entire prosecution evidence and the defence evidence. In evaluating the evidence it against considered the evidence from both sides. The defence case was considered

from page 7 of the impugned judgment as correctly put by the learned State Attorney. I thus, answer the first issue under this heading negatively that, the trial court did not commit any failure to consider the appellant's defence. This finding makes it unnecessary to consider the second issue under this ground. I therefore overrule the second ground of appeal.

As to the first ground of appeal, the issue is whether or not the prosecution proved the charge against the appellant beyond reasonable doubts. According to the prosecution evidence, the victim testified that, she is eight years old. On the material date and time, she was on her way from school. The appellant grabbed her from behind and took her to an unfinished building. He fall her on ground and inserted his penis (calling it *dudu* in kiswahili) into her private parts. In fact, the literal meaning of the term "dudu" is an insect. However, the trial court, the prosecution and the appellant himself, understood it as meaning penis. This term did not thus, prejudice the appellant since he actual understood the term properly and made the defence that he did not rape the victim.

It was also the testimony by the victim that, she felt pains, PW. 2 arrived at the scene of crime, the appellant run away, but PW. 2 pursued and arrested him. This evidence is supported by PW. 2 who said, upon hearing an alarm for help, he went to the building and found the appellant on top of the victim raping her. He run away, he chased him and arrested him. People gathered at the place of his arrest. The appellant had not even properly dressed his trouser since his penis was still out. The victim was also dusted on her body.

The PW. 3 (victim's mother) confirmed that the appellant was eight years since she was born in 2010 where as the offence was committed in 2018. She was informed of the event and went to the place where the appellant had been arrested. He found the victim crying with dust on her body. She took her to hospital upon reporting the matter to police. She was medically examined and the doctor confirmed that she had been penetrated and had blood in her private parts. The PW. 4 investigated the case, he drew and produced the sketch map. He also tendered the PF. 3 in evidence.

In his defence, the appellant denied the commission of the offence. He said, when on his way, somebody pushed him and he fall down. Then PW. 2 arrested him when running and many other persons beat him for an allegation that he had rapped the victim. His request to be examined medically was not accepted.

In my view, the evidence of the victim cannot be relied upon since it was not taken according to the current law. This view is based on the following reasons: According to the submissions by the parties, it is not disputed that, the victim was a child of tender age. The phrase "child of tender age" is defined to mean a child whose apparent age is not more than 14 years; see section 127 (4) of the Evidence Act and the decision by the CAT in **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported). The current law, according to the totality of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016, and the decisions by the CAT in **Godfrey Wilson v.**

Republic, Criminal Appeal No. 168 of 2018, CAT, at Bukoba (unreported) and the **Issa Salum case** (supra), is to the following effect:

a) That, a child of tender age can give evidence with or without oath or affirmation.

b) The trial judge or magistrate has to ask the child witness such simplified and pertinent questions which need not be exhaustive depending on the circumstances of the case. This is for purposes of determining whether or not the child witness understands the nature of oath or affirmation. The questions may relate to his age, the religion he professes, whether he understands the nature of oath and whether or not he promises to tell truth and not lies to the court. If he replies in the affirmative, then he can proceed to give evidence on oath or affirmation depending on the religion he professes. However, if he does not understand the nature of oath, he should, before giving evidence, be required to make a promise to tell the truth and not lies to the court.

c) Before giving evidence without oath, such child is mandatorily required to promise to tell the truth, and not lies to the court, as a condition precedent before the evidence is received.

d) Upon the child making the promise, the same must be recorded before the evidence is taken.

In the case at hand however, the proceedings of the trial court indicate that, when the victim appeared before the trial court for her testimony, the learned trial Resident Magistrate recorded as follows:

> "State Attorney: The victim is aged 8 years. She be addressed in terms of ss. 127 (2) Cap. 6 and 26 of Written Laws Msic. Amendments Act,

> 2016...Court: the child witness has been addressed in terms of the two sections above and replies, "I will speak the truth to the court"...Court: She will testify on oath."

Upon the trial court making the entry into the record as quoted above, it caused the victim to swear and proceeded to take her evidence. The record however, does not show that, probing questions were asked by the trial court to the victim to determine whether she understood the nature of oath or affirmation. This was against the legal guidance marked **b)** herein above. In fact, I am of the view that, according to the above legal requirements, even the probing questions to the child witness need be recorded by a trial court. This is because, court record must represent all important events that transpired in court for indicating that the law has been followed and so that an appellate court can satisfy itself, in case of an appeal, that the law was in fact, complied with; see the holding by the CAT in the case of **Misango Shantiel v. Republic, Criminal Appeal No. 250 of 2007, CAT at Tabora** (unreported).

My further construction of the law cited above is that, it is a crucial requirement that, a child of tender age like the victim in the case at hand, has to give evidence on oath only when the trial court is satisfied, upon conducting a brief inquiry through putting some relevant questions to child witness, that he/she knows the meaning of oath or affirmation. Otherwise, where the trial court finds, upon making the brief inquiry, that he does not know the meaning of oath, the child witness shall give evidence without oath. Nevertheless, the witness shall make the promise to speak the truth and not lies to the court. The promise is made before he testifies. The two

steps are thus, in alternative and not cumulatively. In other words, a single child witness cannot make the promise and take oath at the same time.

I consider the legal requirement just underscored above as crucial because section 127 of the Evidence Act guides generally on who is a competent witness for testifying before a court of law. Section 127 (2) thus, guides specifically on how a child of tender age can testify in court as witness. The determination of an issue of competence of witness is thus, vital before the court receives his testimony if fair trial has to be promoted as required by the law.

In the case at hand however, and according to what transpired before the trial court (as per the passage quoted above), it is clear that, the trial court caused the victim to perform both steps, i. e. she made the promise to speak the truth and took the oath at the same time. The legal implication of this trend is that, the learned trial Resident Magistrate worked in a serious misconception of the law. It is not thus, clear if the victim in fact, knew the meaning of oath or not. It was thus, not certain as to which group did the trial magistrate place the victim; was it in the group of children/witnesses who had to testify without oath, but with a prior promise to speak the truth or to the group of those who had to testify upon taking oath and without any need for making the promise.

Owing to the omission committed by the trial court, it cannot be said that the evidence of the victim was properly received. I thus, find that, the blunder was fatal to the trial. I consequently expunge the evidence of the victim from the record.

However, there is the evidence of PW. 2 that he found the appellant *in flagrante delicto* on top of the victim. The appellant then run away, but PW. 2 apprehended him upon performing a continuous pursuit behind him. He found him with his penis out since he had not properly dressed after running away. The PF. 3 (exhibit P. 2) also shows that the victim's vagina was hyperaemic (i. e. an excess or congestion of blood in any part or organ of the body). It further shows that, there were blood stains in her vagina and that, an attempted vaginal penetration had been established. The PF. 3 was tendered in evidence by PW. 4 (investigator) without any objection from the appellant. Again, as correctly contended by the learned State Attorney, the appellant was, informed of his right to call the doctor who performed the medical examination on the victim for cross examination as per the command of section 240 (3) of the CPA. Nonetheless, the appellant did not chose to do so. The appellants complain against the tendering of the PF. 3, was thus, an afterthought that cannot help him at this stage.

There is also the evidence by the PW. 3 (mother of the victim) that the victim was only eight years old at the material date and time. The PF. 3 also confirms this age.

In my concerted view therefore, the prosecution evidence proved that the appellant was actually raped. Though a total penetration of the appellants penis into the private parts of the appellant was not prove, there is proof of slight penetration as shown into the PF. 3. This fact is cemented by the fact that her private parts were found with blood stains and was hyperaemic. In law any slight penetration of a male organ into a female's private parts amounts to rape. Again, the prosecution evidence narrated

above shows that, it was the appellant who raped her through a slight penetration of his penis. Indeed, the age of the victim was also proved to be eight years. The offence under which the appellant is charged is commonly known as statutory rape, hence proof that the victim is under eighteen years of age is an important element without even proving lack of her consent to the sexual intercourse at issue.

Indeed, though the law guides that the best evidence of rape comes from the victim as properly argued by the learned State Attorney above, and though the victim's evidence has been expunged in the case at hand, it does not follow that there was no other evidence to prove the offence. This is because, in law any sufficient evidence to prove the ingredients of the offence of rape, can base a conviction even in the absence of the victims evidence.

The defence by the appellant narrated earlier in my view, is a mere denial of the offence. It does not raise any doubts. Besides, he did not explain why PW. 2 could have lied against him as a stranger to him. In fact, as witness, PW. 2 was entitled to credence unless reasons are adduced for the court to hold otherwise; see **Goodluck Kyando v. Republic, CAT Criminal Appeal No. 118 of 2003, at Mbeya** (unreported).

Having observed as above, I answer the issue regarding the first ground of appeal affirmatively to the effect that, the prosecution actually, proved the offence of rape against the appellant beyond reasonable doubts. I thus, also overrule the first ground of appeal. The appellant was thus, properly convicted, sentenced and ordered to pay the compensation.

Owing to the findings I have made above against the appellant's grounds of appeal, I hereby dismiss the appeal for want of merits. It is so ordered.

JHK. UTAMWA.
JUDGE
14/08/2020.

14/08/2020.

CORAM; Hon. JHK. Utamwa, J.

Appellant: present (by virtual court, while in Ruanda prison-Mbeya).

Respondent; Ms. Xaveria Makombe, State Attorney (present physically).

BC; Mr. Kibona, RMA.

Court: Judgment delivered in the presence of the appellant (through virtual court link while is in Ruanda Prison-Mbeya), and Ms. Xaveria Makombe, learned State Attorney for the respondent (who is present in court physically), this 14th August, 2020.

JHK. UTAMWA.
JUDGE
14/08/2020.