IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA.

CRIMINAL APPEAL NO. 37 OF 2020

(Arising from Criminal Case No. 04 of 2020 of Songea District Court at Songea)

ANANIA PATRICK ZAGAMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last order: 15/03/2021

Date of Judgment: 19/04/2021

JUDGMENT

I. ARUFANI, J.

The appellant, Anania Patrick Zagamba was charged before the District court of Songea (henceforth the trial court) with the offence of rape contrary to sections 130 (1), (2) (e) and 131 (3) of the Penal Code, Cap 16 R.E 2002. It was alleged in the particulars of the offence that, on 1st day of January, 2020 at Mkuzo area within Municipality of Songea in Ruvuma Region the appellant did have sexual intercourse with one AM (not her real name) a girl of 6 years old. After full hearing of the matter the appellant was convicted and sentenced to serve life imprisonment.

The historical background of the matter as can be traced from the record of the trial court is to the effect that, the appellant was living with his parents in a house which is adjacent to the house where the victim and her parents were living at Mkuzo area. The houses where the appellant and the victim were living are build two in one houses and are the properties of Immigration Department were the parent of the appellant and the parent of the victim were working. On the date alleged the event occurred, the parents of the appellant were not at home as they had gone to Dar es Salaam where the father of the appellant had gone for treatment and escorted by the mother of the appellant.

It was stated by the mother of the victim who testified before the trial court as PW1 and victim who testified as PW1 that, on the date of event the victim was playing a game of hide and seek in the house of the parents of the appellant with her young brother namely Shakunzi together with one Mesia. The players of the game agreed that, Shakunzi and Mesia would have hide in the room of the mother of the appellant but when the victim went to seek for them she didn't find them in the room of the mother of the appellant. The victim said to have gone to the room of the

appellant where she found the appellant who bent her over the door and ravished her after pulling out her skintight and underwear.

PW1 said to have heard a child crying but she failed to recognize which child was crying from the room occupied by the appellant which was adjacent to her room. PW1 said that, after going to the house of the parents of the appellant and called the victim it was only Shakunzi and Mesia who came out. When she asked them where was about the victim they told her they were playing a game of hide and seek and they don't know where was about the victim. When she called the victim again the victim came out and when she asked her why she was not responding to her call she told her she was playing a hide and seek game with the appellant.

PW1 said to have told the children to go to play at her sitting room but the victim was reluctant to go. When she asked the victim why she was not ready to go to play at her sitting room the victim told her she feared she was going to whip her. PW1 said that, after assuring the victim she would have not whipped her, the victim agreed to go to her sitting room. PW1 said to have left the other two children at the sitting room and took

the victim to her bedroom where she interrogated her about which game she was playing with the appellant.

PW1 said that, instead of the victim telling her which game she was playing with the appellant, she insisted she feared she would have been whipped by her. PW1 said that, after asking the victim whether she would have put in writing the game she was playing with the appellant and agreed she was ready to do so she gave her a piece of paper and pen and the victim wrote on that paper that, *"Zagamba amenifanya matusi"* (literally means Zagamba has ravished her).

PW1 said that, after getting that information from the victim she reported that event to the father of Mesia who advised her to report the matter to the police station. PW1 said that, after reporting the matter to the Songea Central Police Station a PF3 was issued to them and the victim was taken to Songea Regional Hospital. She said the victim was examined by Dr. Steven Gregory Mapunda (PW3) who found the victim had been raped and the PF3 was returned to the Police Station.

Thereafter the appellant was arrested and when he was interrogated about that event he denied to have done the alleged event. He said in the

night of 31st December, 2019 heading to 1st January, 2020 he was at Godwin Hall located at Mwengo Mshindo area and he returned to their home in the morning of 1st January, 2020. He said after returning home he was requested by the wife of his brother to stay with her child so that she can go to the market.

The appellant said that, after the wife of his brother returned she went to Kijiweni area to do his business of selling petrol and repairing shoes and he returned to their home at about 20:00 hours. He said while asleep he was followed by PW1 and other neighbors and PW1 accused him for raping the victim and phoned to the police station. Thereafter a team of policemen went to arrest him and took him to the police station. Later on the appellant was taken to the trial court where he was charged with the offence of raping the victim. He said after his case being heard he was convicted and sentenced to serve life imprisonment.

Upon being aggrieved by the proceedings, conviction and sentence imposed to him by the trial court the appellant through the service of Mr. Vicent P. Kassale, learned advocate he filed in this court a petition of appeal carrying five grounds quoted hereunder:-

1. *That the trial court erred in law and facts when it relied on the evidence of PW2 a child of tender age whose evidence was received and relied contrary to the law and did not qualify in law to be relied as the said witness did not promise (by her words of the mouth) to tell the truth as per section 127 (2) of the Evidence Act, Cap 6 R.E 2019 and instead it is the court itself which illegally and unlawfully found and hold in its proceedings that the witness was intelligent and do promise to tell nothing but the truth without reflecting in its proceedings as to how it reached that stage and how the said witness promised to tell the truth.*
2. *That, the trial court erred in law and fact to convict the appellant while the prosecution had not proved their case beyond reasonable doubts taking into consideration that there are serious contradiction on the prosecution testimony which go direct to the root of the case.*
3. *That, the trial court erred in law and facts when it failed to draw an adverse inference after the prosecution side had failed to call some key witnesses especially the children who were with the victim and the police who went with PW1 to the hospital for*

checkup of the victim who could have cleared doubts casted by the prosecution witnesses who were called.

4. *That, the trial court erred in law and facts when it relied on exhibit P2 (PF3) which has a lot to be desired on the face of it and whose chain of custody is wanting and which as per the prosecution testimony, the possibility that there might have been some tempering with the exhibit, could not be overruled.*
5. *That, the trial court erred in law and facts when it convicted and sentenced the appellant contrary to the law.*

When the appeal came for hearing the counsel for the appellant prayed the appeal to be argued by way of written submission and as there was no objection from the respondent side the court granted the said prayer. I commend both sides for filing their written submissions in the court within the time frame given to them by the court. The counsel for the appellant stated in relation to the first ground of appeal that, the proceedings of the trial court shows at its page 20 that, when the victim was about to adduce her testimony she was not lead by the trial magistrate to promise to tell the truth as required by section 127 (2) of the Evidence Act, Cap 6 R.E 2019 (hereinafter referred as the Evidence Act).

He stated that, what was done by the trial magistrate is to record his finding that a witness who appears to him to have sufficient intelligence do promise to tell nothing but only the truth while that procedure is contrary to the law and very unsafe to the administration of justice. He submitted that, the law requires a trial magistrate or a trial judge to require a child of tender age to promise to the court by her own words of mouth to tell the truth and not to tell lies. To support his submission he cited the cases of **Godfrey Wilson V. R,** Criminal Appeal No. 168 of 2018 CAT at Bukoba, **Shaibu Naliga V. R,** Criminal Case No. 34 of 2019, CAT at Mtwara and **Ahazi Mwakisisye @ Sugu V. R,** Criminal Appeal No. 66 of 2019, HC at Mbeya (all unreported).

He argued in relation to the second ground of appeal that, there are clear contradictions and inconsistencies in the evidence of prosecution witnesses which goes direct to the root of the case. He stated that, while PW1 said to have been told by the victim that the appellant bent her over the wall and kneel her down and thereafter the appellant undressed her skintight and underwear and after the appellant unzipped his trouser and took out his "mdudu" he ravished her from behind but the victim stated in

her testimony that, the appellant bent her over the door and ravished her after undressing her skintight and underwear.

He said there is another question which was not answered as while PW1 said she heard a child crying but when she met the victim while coming from the house of the parents of the appellant she was normal while it was alleged the victim whose age was 6 years had been raped by the appellant whose age was 24 years. He added that it was not stated why PW2 did not report the pain of her vagina to PW1 and instead of that she stated the same to PW3.

The counsel for the appellant stated that, PW1 said in her testimony that there was another incident of the appellant to rape the victim at their sitting room on 31st December, 2019 but that was not said to the trial court by the victim. He argued that, if it is true that the incident took place at the alleged time, place and by the alleged person, why PW2 kept on changing her story from that which was said to PW1 and that she told the trial court on her testimony. He submitted that, the trial court did not consider the stated basic contradictions and inconsistencies on the prosecution evidence which go direct to the root of the matter.

He argued in relation to the third ground of appeal that, as PW1 said at page 16 of the proceedings of the trial court that Shikunzi and Mesia where in the house of the parents of the appellant when is alleged the event occurred were material witnesses but were intentionally left to be called by the prosecution side. He said if were called they might have testified contrary to what was alleged by the prosecution. He added that, it was not stated why the piece of paper said by PW1 was written by PW2 was not tendered in the matter before the trial court and prayed the court to draw an adverse inference under section 122 of the Evidence Act.

As for the fourth ground of appeal, the counsel for the appellant argued that, PW1 stated at page 19 of the proceedings of the trial court that after reporting the matter to the police station, a PF3 was issued to them and after examination of the victim they returned the PF3 to the police station. On the other hand PW3 told the trial court at page 34 of its proceedings that, after examination of the victim he told the police officer who was accompanying the victim to take the PF3 to him in the next day for filling and PW3 filled the PF3 on 2nd January, 2020. The appellant's counsel stated further that, PW4 who was an investigator of the case

stated at page 38 of the trial court's proceedings that he collected the PF3 from PW1.

He said the stated inconsistencies is creating doubt as to who was in custody of the PF3 and when exactly it passed from the police officer who had escorted the victim and her mother to the hospital. Sequel to that, the counsel for the appellant stated that, part II of the PF3 shows the date of examining the victim was corrected by correction fluid. He said if you check the PF3 properly you will find the victim was medically examined on 2nd January, 2020 at 13:14:47 and not on 1st January, 2020. He submitted that is a serious and fatal irregularity on the part of the prosecution evidence which shows the appellant's case was not proved beyond reasonable doubt.

He argued in relation to the fifth ground of appeal that, the appellant was convicted and sentenced contrary to the law as the trial court wrongly relied on the evidence of the victim which was received contrary to section 127 (2) of the Evidence Act. He went on arguing that, even if the evidence of the victim was properly received but the trial court failed to address the inconsistencies appearing on the evidence of PW1 and PW2 and stated whether were minor or went to the root of the case.

He argued that, although the trial court's magistrate stated at page 9 of the judgment that the evidence of PW2 was corroborated by the evidence of PW1, PW3 and exhibit P2 which is a PF3 form but as stated hereinabove the possibility that the exhibit P2 was tampered could have not been overruled. He based on the above stated reason to pray the court to allow the appeal, quash the conviction entered against the appellant and set aside the sentence imposed to him and set him free.

In rebuttal it is stated in the respondent's written submission drawn and filed in this court by Ms. Shose Naimani, learned Senior State Attorney that, the respondent is opposing the appeal and is supporting the conviction and sentence passed against the appellant by the trial court. In response to the arguments made by the counsel for the appellant to support the first ground of appeal the State Attorney invited the court to look into what is provided under section 127 (2) of the Evidence Act. She argued that, the cited provision of the law shows it is mandatory for a child of tender age before giving evidence to promise the court that he or she will tell the truth and not any lies.

She argued that, the proceedings of the trial court shows at its page 20 that, PW2 who is a child of tender age was examined by the trial court

about her particulars and before giving her evidence she promised to the court to tell nothing but the truth and her promise was recorded by the trial court. She submitted that, she has read the three cases cited by the counsel for the appellant and found those cases are distinguishable from the case at hand.

She said the children who gave evidence in the cited cases gave their evidence without promising to tell the truth and not lies as required by the law while the record of the case at hand shows the victim promised the trial court to tell nothing but the truth. She submitted that, the trial court adhered to the requirement of the law as the cited cases do not show there is hard and fast rule on how a promise of child giving evidence is required to be recorded.

She argued in relation to the second ground of appeal that, the prosecution case was proved beyond reasonable doubt and there is no contradiction or inconsistency on the evidence of the prosecution witnesses as submitted by the counsel for the appellant. She stated in her submission what was said by PW2 and said her evidence was never challenged by the appellant as he opted not to cross examine her. She said as stated in the case of **George Maili Kemboge V. R**, Criminal Appeal No. 327 of 2017

quoted with approval in the case of **Damian Ruhele V. R,** Criminal Appeal No. 501 of 2007 (both unreported) that implies he accepted the truth of the evidence of PW2.

As for the contradictions and inconsistencies raised by the counsel for the appellant, the State Attorney stated they are minor and does not go to the root of the case. She stated that, as it is well known the best evidence in sexual offences comes from the victim and said the victim in the case at hand explained clearly where she was living, where she was raped and who raped her. She stated further that, even if there could have been contradictions or inconsistencies as stated by the counsel for the appellant but the same does not vitiate the evidence of PW2 that she was raped on 1st January, 2020. She referred the court to the case of **Alex Kapinga & Others V. R**, Criminal Appeal No. 252 of 2005 (unreported) where it was stated that, the fact that there are discrepancies in a testimony of a witness does not straight away make him or her unreliable witness and make the whole of his or her evidence unacceptable.

With regards to the third ground of appeal the State Attorney argued the same is fruitless. She argued that, although there is no dispute that the victim was playing with Shikunzi and Mesia but those children were not key

witnesses as they did not witness the act of the appellant raping the victim. She said the law as provided under section 143 of the Evidence Act is very clear that no particular number of witnesses is required in any case for the proof of any fact.

She went on arguing that, as held in the case of **Selemani Makumba V. R**, [2006] TLR 379 the true evidence of rape is required to come from the victim of the offence herself. She stated that, other witnesses like the mentioned children and police officer who accompanied the victim and her mother to the hospital cannot prove to the court the victim was raped by the appellant. She submitted that, the mentioned children were not material witnesses to prove rape done against the victim as they didn't witness the appellant raping the victim.

As for the issue of chain of custody of the PF3 stated in the fourth ground of appeal the State Attorney argued it is true that, according to the proceeding of the trial court the PF3 passed through the hands of three people. She went on saying that, the witness who examined the victim on 1st January, 2020 filled the PF3 on 2nd January, 2020 and testified before the trial court as PW3. She stated that, the mentioned witness was the one

and only person to prove before the trial court what he saw and he tendered to the court the document he filled on 2nd January, 2020.

She argued that, the correction of the date on the PF3 does not mean the same was tempered with. She said the PF3 shows it was issued at the Police station on 1st January, 2020 and the victim was attended by PW3 on the same date but the PF3 was filled by PW3 on 2nd January, 2020. She added that, the said PF3 was tendered and received by the trial court without any objection from the appellant concerning its admissibility or genuineness.

It was her submission that, the principle of chain of custody is not applicable in the case at hand as is applicable in exhibits which can change hands easily. She submitted further that, the correction of the date does not help the appellant at all as whether the PF3 was filled on 1st January, 2020 or 2nd January, 2020 is immaterial as what matter is the contents on it which corroborated the testimony of PW2 that there was penetration.

She submitted in relation to the fifth ground of appeal that the evidence adduced before the trial court by the prosecution was strong enough to prove the offence of rape laid against the appellant beyond

reasonable doubt thus the trial court was right in convicting the appellant and sentencing him to serve life imprisonment. At the end she prayed the court to dismiss the appeal and upheld the conviction and sentence passed against the appellant.

In his rejoinder the counsel for the appellant reiterated what he submitted in his submission in chief in relation to all grounds of appeal. He stated in relation to the first ground of appeal that, failure to question or require the witness to give promise to tell the truth by her own words of mouth before the trial court reached its finding was fatal irregularity which discredited the evidence of PW2. He argued that, as the offence laid against the appellant was a sexual offence the trial court was required to comply strictly with the rules of evidence. To bolster his argument he cited the case of **Mohamed Said V. R**, Criminal Appeal No. 145 of 2017 (unreported).

He stated in relation to the second ground of appeal that, the principle that in sexual offences the best evidence comes from the victim should not be taken as sword to innocent accused person. He stated the evidence must pass the tests of truthfulness, credibility and beyond reasonable doubt. He supported his argument by referring the court to the

case of **Mohamed Said V. R**, (supra) where it was stated that, it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness.

As for the third grounds of appeal the counsel for the appellant submitted that, Shikunzi and Mesia were key witnesses as were playing with the victim when the event occurred. He stated that, the said witnesses would have cleared doubt featuring in the evidence of PW1 and PW2 as to where they were hiding. He stated it is our cardinal principle in our jurisdiction that, failure to call key witness in a case is fatal and the court should draw an adverse inference.

He argued in relation to the fourth ground of appeal that although it is true that the principle of chain of custody is not applicable in all exhibits tendered before the court but the discrepancies and corrections made on PF3 cast doubt on it and stated it changed hands as stated in his submission in chief. He submitted in relation to the fifth ground of appeal that, the prosecution failed to prove their case beyond reasonable doubt. In fine he prayed the court to allow the appeal, quash the proceedings, judgment and order of the trial court and set the appellant free.

Having carefully considered the rival submissions from both sides and after going through the record of the trial court the court has found proper to determine the appeal at hand by dealing with the grounds of appeal filed in this court by the appellant seriatim as argued by the counsel for the parties. Starting with the first ground of appeal where is stated the trial court erred in relying on the evidence of PW2, a child of tender age without making promise by her words of mouth to tell the truth as required by section 127 (2) of the Evidence Act, the court has found proper to have a look on what is provided in the said provision of the law. It states as follows:-

> *"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.*** *"*[Emphasis added].

To the view of this court the wording of the above quoted provision of the law and specifically the bolded part is very clear and do not need any interpretation. The court has found that, as rightly argued by the counsel for the appellant it requires a child of tender age to promise to the court to tell the truth and not any lies before giving his or her evidence.

Compliance with the stated requirement of the law is mandatory as the word used in the cited provision of the law is the word "shall". As provided under section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2019 when such word is used to confer a function, is interpreted to mean the function so conferred must be performed.

That being the position of the law the issue to determine in the first ground of appeal is whether the above quoted provision of the law was complied with before taking the evidence of PW2 and if not what is its effect. The record of the trial court shows at page 20 of its proceedings that, the trial magistrate examined PW2 about her personal profile or particulars and after recording her personal particulars he made a finding that, the witness appeared to him she had sufficient intelligence and promised to tell nothing but only the truth. For the purpose of appreciating properly what was recorded by the trial magistrate the proceedings of the trial court read at its page 20 as quoted hereunder:-

"PW2: AM.

Court:- XD by Court states:-

- *I am schooling at Taifa Foundation School, located at Mshangano Area. I am a standard ii pupil at this school. My*

class teacher is one Lubida. I am six (6) years old now. I am a Christian professing K.K.K.T. church.

Court:- A witness who appears to me to have sufficient intelligence do promise to tell nothing but only the truth."

From the above quoted excerpt is crystal clear that, as rightly argued by the counsel for the appellant there is nowhere indicated PW2 was asked to promise to tell the court the truth and promised to do so as required by section 127 (2) of the Evidence Act. The proceedings of the trial court shows is the trial magistrate recorded in his finding that the witness had sufficient intelligence and had promised to tell nothing but only the truth.

The court has considered the argument made by the State Attorney that, before PW2 gave her evidence she promised to tell the trial court the truth as required by the law as the trial magistrate recorder he found she promised to tell nothing but only the truth. The court has found that, although it might be true as argued by the State Attorney that there is no fast and hard rule in recording the promise of a child to tell the court the truth, but what was recorded by the trial magistrate that PW2 promised to tell nothing but the truth was not sufficient enough to establish PW2

promised the trial court to tell the truth as required by section 127 (2) of the Evidence Act.

The court has arrived to the above finding after seeing that, when the Court of Appeal of Tanzania was dealing with the issue of how a promise of a child of tender age provided under section 127 (2) of the Evidence Act can be obtained it stated at pages 13 and 14 of the case of **Godfrey Wilson** (supra) that:-

> *"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 27 (2) as amended imperatively requires a child of tender age to give promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of tender age. The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:*
>
> 1. *The age of the child.*
> 2. *The religion which the child professes and whether he/she understand the nature of oath.*

3. *Whether or not the child promises to tell the truth and not lies.*

Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

The above excerpt shows the trial court was required to ask the child to promise whether or not she would tell the truth and not lies and upon the child making the promise to record such promise in the proceedings of the case before taking her evidence. The court has found that, as appearing at page 20 of the proceedings of the trial court the trial magistrate asked PW2 the first and second questions indicated in the above quoted excerpt and recorded the answers given by the PW2.

The proceedings of the trial court shows, it is not recorded anywhere whether the trial magistrate asked the child the third question of requiring her to promise to tell the truth and not to tell any lies as laid in the above cited case. If that question was asked to the child it is not recorded what the answer was given by PW2. Instead of that, it is indicated it is the trial magistrate who stated in his finding that the child had sufficient intelligence and promised to tell nothing but the truth.

To the view of this court and as stressed in the excerpt quoted from the case of **Godfrey Wilson** (supra) and as also rightly argued by the counsel for the appellant the trial magistrate was required to record in the proceedings of the case the answer given by PW2 on her own words of mouth in relation to the third question as he did for the first and second questions. It was not proper and enough for the trial magistrate to record only his own finding that the child had sufficient intelligence and she promised to tell nothing but the truth while what was said by the child in relation to her promise to tell the truth is not reflected in the record of the case.

The above view of this court is getting support from the case of **Ahazi Mwakisisye @ Sugu V. R**, cited in the submission of the counsel for the appellant where it was stated that, the promise of the child to tell the truth ought to have been recorded in her own words. The similar position was stated in the cases of **Hassan Samson V. R**, Criminal Appeal No. 145 of 2019 and **Adam Christopher @ Kibuta V. R**, Criminal Appeal No. 107 of 2020, HC at Mbeya District Registry, (both unreported) which although are the decision of the High Court but I have no reason to differ with the position of the law stated in those cases.

Therefore the argument by the State Attorney that the three cases cited in the submission by the counsel for the appellant are distinguishable from the appellant's case as they do not lay a fast and hard rule as to how a promise of a child of tender age is required to be obtained is meritless. The court has found those cases laid down a principle that a trial judge or magistrate is required to record the promise made by a witness who is a child of tender age before taking her evidence.

In the premises the court has found the first ground of appeal and the arguments made to this court by the counsel for the appellant that the evidence of PW2 was received contrary to section 127 (2) of the Evidence Act has merit as demonstrated hereinabove. The effect of evidence of a child of tender age received without taking her or his promise to tell the court the truth and not lies as required by the above cited provision of the law was stated in the case of **Godfrey Wilson** (supra) to be that, the same has no evidential value. Therefore the evidence of PW2 which was taken without recording her promise as stated in the above cited cases has no evidential value.

Coming to the second ground of appeal the court has found that, while the counsel for the appellant argued there are clear contradictions

and inconsistencies in the evidence of the prosecution which go to the root of the case the State Attorney argued that, there are no contradictions or inconsistencies in the evidence of the prosecution and if there is any the same are minor and do not go to root of the matter. The position of the law where is alleged there are contradictions or inconsistencies in the evidence adduced before the trial court is that, the court is required to address and decided whether they are minor or they go to the root of the matter. The above position of the law was stated in the case of **Mohamed Said Matula V. R,** (1995) TLR 3 where it was held that:-

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter".*

That being the position of the law the issue to determine in the second ground of appeal is whether the contradictions and inconsistencies alleged by the appellant and his counsel are in the prosecution evidence are existing in the evidence of the prosecution and if they exist whether they go to the root of the matter or not. After going through the evidence

adduced before the trial court, the court has found that, as rightly argued by the counsel for the appellant it is true that there is a contradiction in the evidence of PW1 and PW2 in relation to the way it was alleged PW2 was raped by the appellant.

The court has found that, while PW1 said she was told by PW2 that the appellant bent her over the wall and raped her from behind but PW2 told the trial court the appellant bent her over the door and raped her from behind. The said contradiction was not cleared by the prosecution and it was not addressed and resolved by the trial court to find who among the PW1 and PW2 was telling the truth as to whether the victim was bent over the door or over the wall before relying on it to convict the appellant.

The court has found that, as argued by the counsel for the appellant there is also an inconsistency in the evidence of PW1 and PW2 in relation to the evidence of PW1 who stated the victim was also raped by the appellant on 31st December, 2019. The court has found that, although PW1 said she was told by PW2 that on 31st December, 2019 when PW1 had gone to town to record music in a flash disc the appellant raped PW1 at their sitting room but that fact was neither disclosed in the charge sheet laid against the appellant nor stated by PW2 when she was testifying

before the trial court. To the view of this court the stated inconsistency is raising doubt to the credibility of the evidence of PW1 and PW2.

Another aspect stated by the counsel for the appellant is raising doubt in the prosecution evidence is that, while PW1 said she heard a child crying before following PW2 in the house of the parents of the appellant but when she called PW2 and came out of the house of the appellant she was in a normal condition. The court has found that, as stated by the counsel for the appellant and under normal circumstance it would have not been expected PW2 who was a child of six years and had just been raped at that moment by the appellant who was 24 years old and sustained bruises and bleed in her vagina as said by PW3 would have walked properly and appeared to PW1 to be in a normal condition.

The court has also found that, although PW1 said when she interrogated the victim about which type of game she was playing with the appellant she failed to tell her as she was fearing she would have been whipped by her and she gave her a piece of paper where she wrote she was ravished by the appellant but that piece of paper was not tendered to the court to support what was said by PW1 and PW2 and it was not stated why it was not tendered to the court. It is the view of this court that,

failure to tender the stated piece of paper to the court raises a doubt in the credibility of the evidence of PW1 and PW2 as to whether there was a paper written by PW2 that she was ravished by the appellant on the alleged date of event.

The court has considered the argument by the State Attorney that, as PW2 was not cross examined by the appellant then there is no contradiction or inconsistency in the evidence of the prosecution. The court has found that, although it is true that it was held in the case **George Maili Kemboge** (supra) that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence but to the view of this court that does not mean what was said by a witness who was cross examined by the adverse party must be taken as a gospel truth even where there are contradictions and inconsistencies as appearing in the appellant's case. To the view of this court and as stated in the case of **Mohamed Said V. R**, (supra) it must pass the test of truthfulness.

The court has considered the further argument by the State Attorney that the contradictions and inconsistencies found in the prosecution evidence is minor and do not go to the root of the matter but failed to

agree with her. The court has been of the view that, although it is true that it was stated in the case of **Alex Kapinga & Others** (supra) that presence of discrepancies in a witness testimony does not straight away make him or her unreliable witness and make the whole of his or her evidence unacceptable but the contradictions and inconsistencies appearing in the evidence of PW1 and PW2 as demonstrated hereinabove are not minor but great and they go to the root of the matter as they are raising great doubt to the credibility of their evidence.

The court has arrived to the above finding after seeing it has been stated in number of cases that handling cases of sexual offences need to be exercised with care. One of the cases where the stated observation was made is **Mohamed Said V. R**, (supra) where the Court of Appeal of Tanzania quoted the cautionary statement made by Lord Chief Mathew Hale in the case of **People V. Benson**, 6 Cal 221 (1856) where he stated that:-

> *"Rape is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent."*

The Court of Appeal of Tanzania went further and quoted in the case of **Mohamed Said V. R** (supra) a view made by the Supreme Court of Philippines in the case of **People of the Philippines V. Benjamin A. Elmancil, G. R.** No. 234951 where it was held that:-

> *"In reviewing rape cases, this court has constantly been guided by three principles, to wit: (1) an accusation of rape can be made with facility; difficult to prove but more difficult for the person accused though innocent, to disprove; (2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall in its own merits and cannot draw strength from the weakness of the evidence of the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted solely on the basis thereof."*

In the light of the cautionary statement given in the above quoted case which is highly persuasive to this court and was adopted by the Court of Appeal of Tanzania in our jurisdiction, it has make the court to find the contradictions and inconsistencies appearing in the evidence of PW1 and

PW2 as demonstrated hereinabove raised great doubt to the credibility of their evidence to the extent of making the court to find they go to the root of the case and it was unsafe to rely on the same to convict the appellant. Since that contradiction was not addressed and resolved by the trial court before convicting the appellant the court has been of the view that, it cannot be said the conviction entered against the appellant and the sentence imposed to him by relying on the evidence of the said witnesses was proper.

As for the third ground of appeal which states the trial court erred in failing to call material witnesses who were children who were playing with the victim at the time alleged the victim was raped and the policeman who escorted PW1 to the hospital for checkup of PW2 the court has found it is true that the mentioned witnesses were not called to testify before the trial court. The court has found it is also true and as rightly argued by the State Attorney that, section 143 of the Evidence Act is very clear that no particular number of witnesses is required for the prove of any fact in any case.

The cited provision of the law has been considered in number of cases and one of them is the case of **Abdallah Kondo V. R**, Criminal

Appeal No. 322 of 2015, CAT at DSM (unreported). When the Court of Appeal was looking under what circumstances an adverse inference can be drawn for failure of the prosecution to call a witness who is able to testify on material fact it followed the principle articulated in the case of **Aziz Abdallah V. R**, [1991] T.L.R. 71 where it was stated that;

> *"the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

The Court of Appeal stated in the case of **Abdallah Kondo** (supra) that, the import of the above decision is that the prosecution has the right to choose which witnesses to call so as to give evidence in support of the charge. It stated further that, the witnesses to be called must be material witnesses who are able to establish the responsibility of the appellant in the commission of the offence. If the prosecution thinks a witness though material will not be able to perform the stated task they can opt not to call such witness even if is readily available.

Back to the case at hand the court has found that, although it is true as argued by the State Attorney that Shikunzi and Mesia who were alleged were playing with the victim might have not seen the appellant raping the victim but they would have told the trial court if were really playing with the victim in the house where is alleged the victim was raped by the appellant. They would have also told the trial court whether while playing in the said house they heard the victim crying or screaming as said by PW1 so as to establish the victim was raped by the appellant in their house on the alleged date and time of event.

Although it might be said the mentioned children were not called because of their age as it was said by PW1 that Shikunzi was four years old but the age of Mesia was not stated. Therefore failure to call those children to testify before the court while were material witnesses who would have established on the date and time of event were playing with the victim in the house of the parents of the appellant and whether they heard the victim crying or screaming in the room of the appellant caused the court to find an adverse inference could have been drawn against the failure of the prosecution to call those witnesses to testify before the trial court as they

had a great role to play in the case of establishing responsibility of the appellant to the commission of the alleged offence or not.

As for the failure of the prosecution to call the policeman who escorted PW1 to the hospital for checkup of the victim the court has found that, although it is true as stated by the State Attorney that his evidence would have not proved the appellant raped the victim but as argued by the counsel for the appellant he would have cleared out the contradiction relating to when the PF3 was filled, when it was returned to the police station and who return it to the police station.

The court has arrived to the above view after seeing that, while PW1 said after taking the victim to the hospital and being examined they were given the PF3 and returned the same to the police station but PW3 said after examining the victim he told the policeman who was with the child to take the PF3 to him on the following and he filled it on 2nd January, 2020. At the same time PW4 who was an investigator of the case said she received the PF3 from PW1 which shows the PF3 was taken to the investigator on the date when the child was taken to the hospital and examined which was 1st January, 2020. To the view of this court the policeman involved in handling of the PF3 was a material witness to clear

out the above stated contradiction and failure to call him left the stated contradiction to remain unresolved.

The above finding takes the court to the fourth ground of appeal which states there is a possibility that there might have been some tempering with the PF3. The court has found that, although PW3 said he filled the PF3 on 2nd January, 2020 and handed the same to the policeman who escorted PW1 to the hospital for checkup of the victim after filling it but as rightly argued by the appellant's counsel the date of the child being attended by PW3 is corrected by correction fluid and it was not stated who corrected the same. To the view of this court the said policeman was material witness to clear out the doubt raised that there is a possibility that the PF3 was tempered.

The court has also considered the argument made by the State Attorney in relation to the third ground of appeal that, the evidence of the children who were playing with the victim and the policeman escorted PW1 to the hospital would have not proved to the trial court that PW2 was raped by the appellant because as held in the case of **Selemani Makumba** (supra) the evidence of the victim being raped by the appellant was supposed to come from the victim herself. Although it is true that the

evidence of the victim being raped by the appellant was supposed to come from the victim herself but as demonstrated hereinabove the evidence of the said witnesses would have cleared out the doubts appearing in the evidence of the victim and other witnesses testified before the trial court to support the evidence of PW2.

The above finding caused the court to come to the view that, even if it would have been taken the evidence of the victim was received properly after making a promise to tell the trial court the truth and not any lies as required by section 127 (2) of the Evidence Act but the contradictions, inconsistencies and doubts featuring in her evidence when taken together with the evidence of PW1 and PW3 caused the court to find it cannot be said it was proved beyond reasonable doubt that the victim was raped by the appellant as alleged by the prosecution.

In the premises the court has found that, as stated in the fifth ground of appeal the appellant was convicted and sentenced contrary to the law as he was convicted on evidence which was received contrary to the law and the evidence which contain contradictions, inconsistencies and doubts which were not addressed by the trial court. Consequently, the appeal of the appellant is found has merit and is hereby allowed. The

conviction entered by the trial court against the appellant is quashed and the sentence of life imprisonment passed against him is set aside. The court is ordering the appellant to be set at liberty if there is no other lawful cause of detaining him in prison. It is so ordered.

Dated at Songea this 19th day of April, 2012

I. ARUFANI

JUDGE

19/04/2021

COURT:

Judgment delivered today 19th day of April, 2021 in the presence of the appellant who is also represented by Mr. Vicent P. Kassale, learned advocate and in the presence of Mr. Frank Chonja, learned State Attorney for the Republic. Right of appeal to the Court of Appeal is fully explained to the parties.

I. ARUFANI

JUDGE

19/04/2021