IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO.04 OF 2021

HAMISI NYANDA @MASUNGA ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the decision of the District Court of Bariadi-Nyangusi-RM)

Dated the 2nd of December, 2020

In

Criminal Case No.62 of 2020

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JUDGMENT

26thMay & 9thJuly, 2021

MDEMU, J.:

The Appellant in this appeal was charged in the District Court of Bariadi for the offence of rape contrary to the provisions of section 130(1)(2) (e) and section 131(1) of the Penal Code, Cap.16. As per the particulars of offence, it was on the 3rd day of May, 2020 where the accused raped a twelve (12) years old girl one "KM"(for purposes of hiding identity), testified as PW2 at Gitoya area within Baridi District. On the fateful day, "KM" was asked by her mother one Maria Sylivester (PW1) to look for cooking oil to the shop. On her way, she was called by the Appellant and took her to the bush where he had sexual intercourse with

her. Thereafter, the Appellant informed one Christina Daudi(PW4) that he raped " KM". The Appellant was thus arrested, though denied, he was found guilty, convicted and sentenced as charged. This was on 2nd day of December, 2020. Aggrieved, the Appellant filed the following appeal on the following ground:

1. *That the trial magistrate erred in law and fact when admitted the PF3 as evidence contrary to the law.*
2. *That the trial magistrate erred in law and fact when agreed the evidence of PWs which did not establish ingredients of rape.*
3. *That the age of the victim was not proved as required by the law.*
4. *That, the prosecution case was not proved beyond reasonable doubt.*

On 3rd of June, 2021, parties appeared before me arguing the appeal. the two Appellant appeared in person whereas the Respondent Republic had the service of Ms. Salome Mbughuni, learned Senior State Attorney. In support of the appeal, the Appellant submitted to have his four grounds of appeal be adopted to form part of his submission. He then added that

generally, the age of the victim was not proved and that there is no indication from the doctor in his testimony that the victim was raped. He added that the PF3 was illegally procured in evidence and that the Said Mama Jerry whom the prosecution alleged to have been told by him that he raped the victim did not come to testify and in fact, he does not know that Mama Jerry. He thus asked the court to analyse properly the evidence and acquit him.

In reply, Ms. Salome Mbughuni resisted the appeal. Replying in ground one of the appeal, the learned Senior State Attorney submitted that at page 15 of the proceedings, the said PF3 was tendered by a doctor who examined the victim and that the said PF3 was read in court. Ms. Mbughuni did not submit in the 2nd ground of appeal for the witness whose evidence was accepted by the trial magistrate was not disclosed in the said ground of appeal.

Turning to ground three on the age of the victim, she was of the view that at page 7 of the proceedings, the evidence of PW2 was taken in compliance with section 127 (2) of the Evidence Act, Cap.6 and that as per the evidence of Maria Sylivesta (PW1 and that, of Magembe Nhandi (PW3)who are the parents of the victim stated clearly that, the victim was

born on 10th of April, 2007. She added that the victim also testified to be born on that date. Under the premises she was of the firm view that the age of the victim was proved to be twelve (12) years. She cited the case of **Isaya Renatus vs R, Criminal Appeal No.542 of 2015** (unreported) in support of her position.

Regarding proof of the prosecution case complained in ground four of the Appeal, the learned Senior State Attorney submitted that, as the evidence of the victim PW2 complied with the provisions of section 127(2) of Evidence Act, then in view of what was stated in **Seleman Makumba vs Republic, (2006) TLR 379**, it was proved that it is the Appellant who raped the victim.

She observed that PW2 testified to have been dragged by the Appellant into the bush where she was raped while on her way to a shop. and that shortly thereafter, PW1 was informed by PW4 that the Appellant had sexual intercourse with the victim as the latter had grown up. Mr. Mbughuni trusted this statement as it was supplied by the Appellant to Mama J, who is PW4. She stated further that the victim was attended by medical practitioner Mwanaidi Chunu (PW5) the same day and not on 13th of May 2020 as appears in the PF3 which to her is a mere typing error.

Last in her submission regarding proof of the prosecution case was the testimony of PW4 that the Appellant told PW4 to have had sexual intercourse with the victim as the victim has now grownup. She treated this as oral confession and cited the case of **Posolo Wilson @ Mwaliengo VS. Republic, Criminal Appeal No. 613 of 2015**; **Gozibert Heneriko vs. Republic, Criminal Appeal No.114 of 2015** (both unreported) and the provisions of section 3(1)(a) of the Evidence Act to support her view.

She thus trusted the prosecution witnesses to be credible by citing the case of **Edison Simon Mwombeki vs.Republic, Criminal Appeal No. 94 of 2016**(unreported). In all the learned Senior State Attorney did not observe any substance to this appeal thus urged me to dismiss it. In rejoinder, the Appellant simply reiterated what he submitted in chief thus had nothing useful to add.

In essence, the matter hinges on one aspect, that is whether the prosecution evidence was watertight to justify conviction met to the accused person for the offence of rape. In this, the trial Resident Magistrate convicted the Appellant basing on the evidence of penetration and that, the prosecution evidence proved that PW2 was raped by non-other than the Appellant herein. Going by what the leaned State Senior

State Attorney submitted, I agree with her that there is no substance in ground one of the appeal. PF3 was tendered by Mwanaidi Chunu, PW5, as exhibit P1, a medical doctor and also is the one who examined the victim. The said PF3 which was tendered without objection from the Appellant, was read in court after it was admitted in evidence. Particularly at page 15 of the proceedings, the said PF3 was tendered in evidence after being cleared for admission. In it therefore, I do not see which procedure was not complied in receiving the said PF3 in evidence. Accordingly, the first ground of appeal has no merit and is accordingly dismissed.

Regarding complaint of the Appellant in ground three of the appeal, I again share the position of the leaned Senior State Attorney that PW1 and PW3 who are parents of the victim testified that the victim was born on 10th of April, 2007. The victim also testified to be born on the same day. It is trite law that the evidence as to proof of age may be given by the victim, relative, parent, medical practitioner or where available, by production of a birth certificate. (see**Isaya Renatus vs R**(supra) at page 8 through 9). This ground is again baseless and is accordingly dismissed.

Now as to whether the prosecution case was not proved as complained by the Appellant in ground four and certainly ground two

though the learned Senior State Attorney did not submit for want of specification of which witness the Appellant was referring to. In this I will begin with the evidence of PW2, the victim. Ms. Mbughuni trusted this evidence on what she stated as compliance with the provisions of section 127 (2) of the Evidence Act. The said section requires the witness of tender age, PW2in this case, to promise to tell the truth and not lies. It is stated in that section that:

> *127(2) A child of tender age may give evidence without taking an oath or making affirmation* ***but shall, before giving evidence, promise to tell the truth to the court and not to tell lies****.(emphasis added)*

Did PW2 made the said promise? At page 7 of the proceedings, the learned trial Magistrate recorded the following before receiving the evidence of PW2:

> *The girl is a minor of 12 years. I asked her some few questions and she responded well in the sense that she understand the nature of telling the truth. She promised the court that she will tell the truth.*

With what was stated above, Ms. Mbughuni was comfortable that the procedure was followed. I am aware that the learned trial Magistrate recorded that PW2 promised to tell the truth. In my opinion, the import of section 127 (2) of Cap.6 as first interpreted in the case of **Godfray Wilson vs Republic, Criminal Appeal No.168 of 2018**(unreported) the question should not be that the witness of tender age merely promisedto tell the truth and not lies, but rather the prudent court should put to inquiry on the methodology deployed in arriving at the conclusion that there was a promise to tell the truth and not lies before receiving the evidence of that witness. I think this is the reason in **Godfray Wilson** (supra), the court suggested questions to put to the witness and in fact, it is through such questions the trial court will be of assistance and assurance of the promise to tell the truth and not lies. At page 13 through 14 in **Godfray Wilson** (supra), it was observed regarding this duty to the trial court that:

> *We say so because section 127(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 questions, which may not be exhaustive depending on the circumstances of the case as, 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 to tell lies.*

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

In the instant appeal, the trial magistrate never recorded anything assisted her to record the promise. That was left to her mind and put whoever reads the proceedings on assumptions. On that account, going by what the learned trial magistrate recorded, the same has not established on how PW2 came to promise to tell the truth and not lies. That is **one**.

Two, as per her evidence (PW2), there is contradiction. She has two versions as to where she met the Appellant before she got raped. In one version she said to have met the Appellant at neighboring houses and in the second version she said to have been pulled to the bush. The unresolved question is whether there are bushes in the neighboring houses or did the Appellant took her from the neighboring houses direct to the bushes for sexual intercourse.

Of course, this also goes to the testimony of PW4 who reported in evidence that the two had sexual intercourse in the mountain. Is the mountain the same as a bush? Another peculiar thing in this case in the testimony of PW4, is her evidence that the Appellant told her to have had sexual intercourse with PW2 as the latter has grown up. I think this have to be approached with great caution. One it is because, it is not known if PW4 is Mama J. Because, according to PW2, the victim, the first person to be told by the Appellant is Mama J. It is not stated in the evidence of PW4 that PW4 is Mama J. **Two**, we are not told the genesis of the story as to require the Appellant to reveal this evil act to PW4. It is not usual for someone to simply disclose his love relationship to any person he meets on the street. Three, perhaps is the version of the victim (PW2) that PW4 was

the first to be informed. Part of her testimony at page 8 of the proceedings reads:

> *After he raped me he went to the neighbor called Mama J. Then I went home, and I was afraid to tell my mother then she was told by Mama J what happened. Hamis was the one who told Mama J and Mama J told my mother.*

From the above testimony several questions might be asked. Was PW2 told by the Appellant that he is going to Mama J? Was the rape committed in neighboring houses? Where was PW2 was when the Appellant was going to Mama J? Who told her that the Appellant informed Mama J? Is mama J PW4? etc.

Taking all this into account, and as the testimony of PW2 contravened the provisions of section 127(2) of Cap. 6, in terms of the case of **Godfray Wilson** (supra), the said evidence is expunged from the record. That said, it is not the best evidence in terms of the principles stated in **Seleman Makumba vs Republic** (supra)

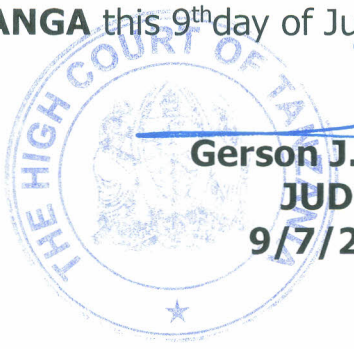
As I also stated above, the evidence of PW4 have not met the test of oral confessions suggested by Ms. Salome Mbughuni because, in the first

place it is not known if Mama J is the same as PW4. Secondly, the evidence of PW4 may not be trusted as it is not that much usual for a person to tell anybody he meets in the street that he had sexual intercourse with a woman and third, it is not known how PW2 is the only person who knew that the Appellant told first PW4 before telling any other person.

It is on those premises, I find the appeal to have merit and is accordingly allowed. I thus quash conviction and set aside sentence of thirty years' prison term and order the Appellant to be released in prison, unless lawful held for some other lawful causes. It is so ordered.

Gerson J.Mdemu
JUDGE
9/7/2021

DATED at **SHINYANGA** this 9th day of July, 2021



Gerson J.Mdemu
JUDGE
9/7/2021