IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO.01 OF 2021

MAGANGA IKELENGE ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the decision of the District Court of Kahama-Msalilwa-RM)

Dated the 24th of November, 2020

In

Criminal Case No.270 of 2020

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JUDGMENT

9thJune&16thJuly, 2021

MDEMU, J.:

The Appellant in this appeal was charged in the District Court of Kahama 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 RE:2019. As per the particulars of offence, it was on the 28thday of September, 2020 at Kagongwa area within Kahama District where the Appellant raped a twelve (12) years old girl one "EG"(for purposes of disguising her identity)who testified as PW1. The said "EG" was a standard five pupil of Kishia "A" Primary School.

On the fateful day, the Appellant and PW1 were at home while other tenants were away. The Appellant then pulled PW1 to his room and had sexual intercourse with her. By then, the young sisters of PW1 were outside playing. After the Appellant has completed his desire, PW1 then left crying leaving the Appellant in his room. The following day,PW1 told her grandmother (PW2)and her mother who then reported the matter to police for a PF3(P1) and then to Isaghehe Dispensary at Kagongwa where she was medically examined by PW3 one Daniel Nyango.

The Appellant was thus arrested, though denied, he was found guilty, convicted as charged and sentenced to thirty (30) years prison term. This was on 24th day of November, 2020. Aggrieved, the Appellant filed an appeal on the following 6 grounds of appeal:

1. *That, the trial magistrate erred in law and fact by convicting the Appellant while he pleaded not guilty to the offence charged.*
2. *That, the trial magistrate erred in law and fact by convicting the Appellant excessive sentence on hearsay evidence given by PW2, PW3 and PW4 thus no any witness who saw the Appellant committing the offence*

charged. They simply narrated false story given by PW.1("EG")

3. *That, the trial magistrate erred in law and fact by convicting the Accused without sufficient evidence which incriminate the Appellant with the offence charged.*
4. *That, it was a serious misdirection on a part of the trial magistrate to deal with the prosecution evidence on its own and arrive at the conclusion that, the accused is guilty without considering reasonable doubt which remain unresolved. For example, the victim "EG" was a student of Kishima "A" Primary School. Also, there are no witnesses from the area of incident and leadership who were brought in court to give explanation about the offence.*
5. *That, the trial magistrate erred in law and factsto convict the Appellant by using pour investigation by PW.4. Thus she failed to explain in the trial court what she investigated.*

6. That, the trial magistrate erred in law and factsto convict the Appellant without giving the right to be heard to the Appellant. The court didn't consider the Appellant statement.

On 9th of June, 2021, parties appeared before me arguing the appeal. the 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 grounds of appeal adopted to form part of his submissions. He thus urged me to acquit him.

In reply, Ms. Salome Mbughuni, Senior State Attorney resisted the appeal. Replying in ground one of the appeal, the learned Senior State Attorney noted on the said grounds by adding that, the prosecution called four witnesses who proved that the Appellant committed rape.

She merged grounds2, 3,4 and 5 as one that, the prosecution case was not proved. It was her submissions in this that, the evidence of PW1, the victim was taken in compliance with the provisions of section 127 (2) of the Evidence Act, Cap.6 as the witness promised to speak the truth and not

to tell lies. After this promise, it was her submissions that, the victim stated to have been raped in the room of the Appellant during day time hence, the question of visual identification may not arise.

She added that, during rape, other children were outside and that, the victim told PW2 when the latter inquired on her unusual movement. She thus submitted that, according to PW3 who examined medically the victim, there is ample evidence that, the victim was raped. In her view therefore, the evidence of the victim is the best evidence proving to have been raped. She cited the case of **SelemanMakumba vs Republic, (2006) TLR 379** supporting her assertion.

As to the question of age of the victim, her view was that, PW3 testified that, the victim was twelve (12) years of age and conceded that, there was neither birth certificate nor evidence of parents to prove that, but as PW3 was a medical practitioner, in the case of**Isaya Renatus vs R, Criminal Appeal No.542 of 2015** (unreported),such evidence is also relevant in proving age. She added further on this point that, PW1 was a pupil in Primary School thus for sure, she is below 18 years old. She faulted the evidence regarding proof if PW1 was a pupil as to her that is not relevant in rape cases.

Lastly on the right to be heard, the learned Senior State Attorney submitted that, the Appellant was heard and specific from page 17 of the proceedings, the Appellant was addressed of his rights under the provisions of section 231 of the Criminal Procedure Act, Cap.20 before he entered his defence. She added also that, the Appellant also cross examined prosecution witnesses. She thought therefore the complaint is an afterthought.

In rejoinder, the Appellant submitted that, the evidence of a medical practitioner did not establish the age of PW1 and the rape as no sperms were observed and instead, he opined that, there was mucus. He also faulted the evidence on penetration because a blunt object can be a pen or a pencil and not necessarily be a penis.

In essence, the complaint in this appeal hinges on one aspect, that is whether the prosecution evidence was watertight to justify conviction met to the Appellant for the offence of rape. In this, the trial Resident Magistrate convicted the Appellant basing on the evidence of PW1, the victim and that the said evidence was corroborated by the evidence of PW2 and PW3. At page 8 through 9 of his judgment, after making reference to the case of**SelemanMakumba vs Republic**(supra), he observed that:

With the proposition from the case of Seleman Makumba(supra) and consistent with PW1'saccount, this court finds credence in the testimony of PW1 which has so far been corroborated by that of PW2 and PW3 on examining her and holds that, the prosecution case has been proved beyond reasonable doubt. In that light, this court finds the accused guilt and convicts him.

Since, as submitted by the learned Senior State Attorney that PW3 proved the age of PW1 to be twelve (12) years of age, then her evidence has to comply with the provisions of section 127 (2) of the Evidence Act, Cap. 6 which provides:

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 PW1 made the said promise? At page 7 of the proceedings, the learned trial Magistrate recorded the following before receiving the evidence of PW1:

Court: *the court inquiries as to whether PW1 promises to speak the truth*

Sgd: D. D. Msalilwa-RM
9/11/2020

PW1- I promise to speak the truth

Sgd: D.D.Msalilwa-RM
9/11/2020

With what is stated above, Ms. Mbughuni was satisfied that the procedure in procuring the testimony of PW1got complied. 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 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 to tell lies before receiving the evidence of that witness.

In essence, 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 to tell lies. At page 13 through 14 in **Godfray Wilson** (supra), it was observed regarding this duty of 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 learned trial Resident Magistrate did not record what assisted him to record the promise of PW1. That in fact was left to hismind and put whoever reads his recorded proceedings on assumptions. On that account, it has not been established on how PW1 came to promise to tell the truth and not to tell lies.

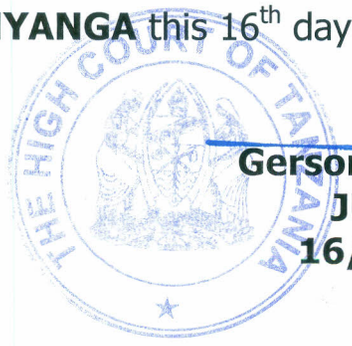
Taking this into account, and as the testimony of PW1 contravened the provisions of section 127(2) of Cap. 6, in terms of the principles as stated in the case of **Godfray Wilson** (supra), the said evidence is expunged from the record. That said, it is not the best evidence in terms of the principles stated in **Seleman Makumba vs. Republic** (supra). Having expunged the evidence of PW1, I agree with the Appellant that the evidence of PW2 becomes hearsay thus remain of no evidential value and there is nothing therefore to corroborate. I think, this ground alone has disposes of the whole appeal and therefore the remaining grounds of appeal as raised by the Appellant will not be considered.

It is upon those premises, I find the appeal to have merits and is accordingly allowed. I thus quash conviction and sentence of thirty (30)years' prison term and order the Appellant be released from prison unless, lawful held for some other lawful causes.

It is so ordered.

Gerson J.Mdemu
JUDGE
16/7/2021

DATED at **SHINYANGA** this 16th day of July, 2021



Gerson J.Mdemu
JUDGE
16/7/2021