IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 62 OF 2021

(Originating from Criminal Case No. 267 of 2018, in the District Court of Kilombero, At Ifakara)

ROJA NDAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

20.07.2021 & 02.08.2021

CHABA, J.

On 19/12/2018 the appellant, Roja Ndaga was arraigned before the District Court of Kilombero, at Ifakara on a charge of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Chapter 16 of the Revised Edition 2002; now [Revised Edition 2019]. The particulars of the offence are to the effect that on the 3rd day of November, 2018 at Mngeta village within Kilombero District in Morogoro Region the appellant did have sexual intercourse with a girl aged 12 years, who I shall identify her as the victim or PW1

The background facts of the case which lead to the arraignment of the appellant or accused can be briefly stated as follows: One day on Sunday in the morning, the appellant went to PW1's home and requested her to follow him up to his residential house. PW1 agreed and the two followed one another. Upon reached to the appellant's house, the appellant asked PW1 to wash his dishes and she did accordingly. As PW1 already had a plan to go to the church, she promised the appellant that she would come back on the following day and collect the gift or present as promised by the appellant. She then left to the church. On the following day PW1 went to the appellant's house so that he could take her gift. However, the appellant did not keep his promise decently. Instead, he told PW1 to enter inside his room and asked her to sleep on the bed. The appellant also slept on the bed. While on the bed he undressed PW1 and also took off his cloth and raped her. When he ended to know her carnally, he gave PW1 Tshs. 5000/= and warned her not to tell anyone. He asked her to come again on the following day at noon hours. That was Tuesday. On that particular day (on Tuesday) the victim arrived at the appellant's house and the two made sexual intercourses.

One day with gutsy the appellant went to the Primary School in which the victim was studying. Thereby he asked one pupil to call PW1, but unfortunately the teachers interfered. When OS was probed whether she knew the appellant, she confessed that she used to go to the appellant's house. The teachers through a mobile phone informed the victim's father herein PW2 one Michael Sikuluzwe. Afterwards PW1 was taken to the suburb Chairman in the locality and later on, to the nearest police station where her statement was recorded/taken. From there she was sent to hospital for

medical examinations where it was stated that nothing was noticed in connection with the offence of rape, of course according to PW1's testimony.

On 4th December, 2018 at 11:05hrs Lameck Maiba (PW3) while at Mngeta Health Centre conducted medical examination against PW1 and filled it. He said, in the course he found out that PW1 was a habitual to sexual intercourse. It was further noticed that no bruises or injury was found to her private part, vagina. On the other hand, PW2 Michael Sikuluzwe gave evidence of material particulars. He added that he was abreast to the statement offered by the victim at Mchombe Police Station where the PF3 (Exhibit PE1) was issued. The evidence of PW4 No. F. 410 D/CPL Eliwahad who was assigned to investigate this case, he explained how he conducted investigation and finally apprehended the suspect. He said, he was him who issued the PF3 so that PW1 could be medically examined.

As the appellant was found with a case to answer under section 231 of the Criminal Procedure Act [Cap.20 R.E. 2019] (the CPA), he told the trial court that could defend on oath, but had no one to summon as his witness. In his sworn defense, the appellant admitted that he was arrested in connection with instant case, but he denied to have involved to commit such an offence.

As alluded to above, having considered the evidence tendered by the prosecution and the appellant, the trial court was convinced that the evidence of PW1, PW2, PW3 and PW4 which was supported by the Exhibit PE1 were credible and their evidence could be safely relied upon to secure

conviction and sentence of the appellant. Hence, on the basis of circumstantial evidence, the trial court believed that the culprit was none other than the appellant. In purview of the aforementioned facts, the learned trial Magistrate was satisfied that the case was proved beyond reasonable doubt and thus convicted and sentenced the appellant accordingly.

Disgruntled with the trial court decision he preferred this appeal. In his petition of appeal filed on 20th April, 2021; the appellant raised eleven (11) grounds of appeal which may however be merged into the following seven (7) main grounds (herein the first to seventh grounds) as follows:

First; that the evidence by PW1 a child of tender age was un-procedurally procured as she promised to tell the truth but never promised not to tell lies contrary to section 127 (2) of the Tanzania Evidence Act [Cap.6 R.E. 2019] (the TEA). **Second;** that the victim failed to establish penetration pursuant to section 130 (4) (a) of the Penal Code [Cap.16 R.E. 2019] (the Penal Code). **Third;** the trial Magistrate erred in law and fact to hold that the evidence of PW1 was credible and reliable whereas her demeanor suggested that she was a liar. **Fourth;** the PF3 was improperly admitted and acted upon. **Fifth;** that the trial Magistrate believed the evidence of PW3, a Clinical officer who neither disclosed his qualification nor his experience in the field. **Sixth;** the age of the victim was not disclosed, and **Seventh;** the appellant's conviction was based on weak evidence by the prosecution witnesses, hence the case was not proved beyond reasonable doubt. He thus prayed his appeal be allowed.

At the hearing of this appeal the appellant appeared in person, unrepresented whereas the respondent Republic was ably represented by Mr. Ramadhani Kalinga, learned State Attorney who vehemently objected the appeal save for some few issues which he conceded. In particular, the learned brother conceded that the PF3 which was tendered and admitted in evidence as exhibit PE1 was tendered by the Public Prosecutor and it was not read aloud in court contrary to the requirement of the law. He then pleaded for it to be expunged from the record. With respect to the fourth and fifth grounds of appeal, he conceded the fact that PW3, a Clinical officer who medically examined the victim, when testifying before the trial court, he did not introduce himself as a Clinical officer or a Doctor and further never disclosed his qualification or even described his experience in the field.

In spite of the above asserted reservations, Mr. Kalinga supported both the conviction and sentence meted out against the appellant on the following arguments. On the first ground of appeal, the appellant argued that the evidence by PW1, a child of tender age was un-procedurally procured as she promised to tell the truth but never promised **not to tell any lies** contrary to section 127 (2) of the TEA. On this point, Mr. Kalinga contended that it is not true that the evidence adduced by PW1, who is a child of tender age was un-procedurally procured upon promised to tell the truth. He argued that the provision of the law under section 127 (2) of the TEA provides that the victim of such kind like PW1 has to give a promise that will speak the truth. As the records reveals at page 11 of the typed trial court proceedings, PW1 gave promise to the effect that she will speak the truth. He added that this complaint has no merit. When Mr. Kalinga was probed by this court

whether the guiding principle as voiced in the case of **Godfrey Wilson vs. Republic,** Criminal Appeal No. 168 of 2018 - Bukoba Registry (Unreported) was adhered to as far as the testimony of a child of tender age is concerned, he fairly agreed that the guiding principles was not complied with. He however, left the matter be addressed by the court.

Regarding the second ground, the appellant is complaining that the victim failed to establish penetration pursuant to section 130 (4) (a) of the Penal Code. Mr. Kalinga in response replied that penetration was proved as required by the law under section 130 (4) (a) of the Penal Code. It was his contention that PW1 when giving her testimony, she testified that the appellant and the victim had been making sexual intercourse in different times. Further the appellant warned the victim not to disclose to anyone and he gave her Tshs. 5000/= soon after making sexual intercourse. He further elucidated that the victim told her teachers that the appellant used to go to school and pick her because she had a tendency of visiting the appellant's home regularly. He cemented that this piece of evidence was corroborated by PW2 (her father) who gave testimony on how the victim disclosed the intimacy sexual relationship with the appellant something which led to appellant's arrest.

Mr. Kalinga explicated further that the evidence by the clinical officer (PW3) reveals that upon medical examination, the victim was found to have made sexual intercourse more than once. That is why she was found to have no bruises into her vagina. He contended that this ground has no merit to censure the findings of the trial court.

With regard to the third ground, the gist of the appellant's complaint is that the learned trial Magistrate erred in law and fact to hold that PW1 was credible and her evidence was reliable while her demeanor showed that she was a liar. On this point Mr. Kalinga firmly objected the contention and underscored that the evidence of PW1 as appeared in court record in particular at pages 11 and 12 of the typed trial court proceedings displays that she gave a true testimony and she perfectly answered the questions. He therefore clinched that the victim was credible and reliable, hence this grounds flop for want of merit.

In respect of the sixth ground of appeal, the appellant is complaining that the age of the victim was undisclosed. On this facet, Mr. Kalinga accentuated that the age of the victim was well established by herself. He submitted that OS mentioned her age at the time of giving testimony and that she was in standard four (IV) at Ngai Primary School. To bolster his proposition, he invited this court to make reference to the case of **Isaya Renatus vs. R,** Criminal Appeal No. 542 of 2015 (unreported) where their Lordships held that; *proof of the age of the victim may be given by either the victim, relatives, parent, medical practitioner or where available by a birth certificate.* To cement his argument, Mr. Kalinga cited section 122 of the TEA which articulates that the court may infer the existence of any fact which it thinks likely to have happened as to whether the victim is a minor or otherwise. He once again prayed this ground be dismissed.

As for the seventh ground, the appellant protested that conviction and sentence was based on weak evidence by the prosecution witnesses. To

counter this argument, Mr. Kalinga stressed that the case was proved beyond reasonable doubt. He said, the prosecution side is not duty bound to call every witness to appear before the court and testify. He buttressed his point by citing section 143 of the TEA which provides that:

> *"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact".*

In addition, Mr. Kalinga underlined that regarding the aspect of credibility of the victim or prosecution witnesses, the appellant was supposed to raise it at the trial court and not at this stage. The trial court would have decided in respect of the true demeanour of the victim on merits. Mr. Kalinga thus prayed this court to dismiss the appellant's appeal and sustain conviction and sentence meted out against the appellant.

In his brief rejoinder, the appellant did not have anything to add other than asking for this court to consider his grounds of appeal.

Having considered the grounds of appeal and submissions of both parties and further scrutinized the evidence adduced before the trial court, I am convinced to start with the Fourth and Fifth grounds of appeal. The gist of the complaint in these grounds is a manner in which the exhibit was tendered before the trial court and competency of a person who testified as a medical expert. The trial court record reveals that Exhibit PE1 (the PF3) a document describing the medical examination results against the victim was tendered in court by the public prosecutor and thereafter it was admitted in evidence without being read aloud in court. In the eyes of the law, that was

a grave mistake. In the case of **Thomas Ernest Msungu @ Nyoka Mkenya vs. Republic**, Criminal Appeal No. 78 of 2012 (Unreported), the Court of Appeal was confronted with alike situation and it made the following pertinent observation:

> *"A prosecutor cannot assume the role of a prosecutor and a witness at the same time. With respect that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in terms of section 198 (1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined."*

In subscription to above observation, the public prosecutor who tendered Exhibit PE1 (the PF3) truly was not a witness as envisaged under the provisions of section 198 (1) of the CPA which provides that:

> *"Section 198 (1) - Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act".*

On a legal point of view and upon considered the anomaly depicted from the trial court record, Mr. Kapinga pleaded that the Exhibit PE1 should be expunged from the record, of which I hereby do.

As regards to the testimony of Lameck Maiba (PW3), a Clinical officer who medically examined the victim, I concur with the contention advanced by Mr. Kapinga that before giving his evidence, PW3 was duty bound to introduce himself as a Clinical officer or a Doctor and mention his

qualification and describe a little bit about his experience in the field. At page 14 of the typed trial court proceedings, he started by mentioning his name as Lameck Maiba, Mngeta Heath Centre, 27 years, **peasant,** Christian sworn and then continued to states that; I quote for ease of reference:

> *"I work at heath centre Mngeta. I do attend different patients. I also fill in PF3 upon examining patients. On 4/12/2018 at 11:05 I was at heath centre Mngeta, there came a victim girl called OS, who was brought by her father who alleged that the girl had been rapped. I did examine her; she had no bruises. She said she had a relation with some one man.....". End of quoting.*

As it can be gleaned from the above paragraph, there is nowhere the expert witness, PW3 laid a proper foundation from the background of his insights like education, training, experience, skills and knowledge in the field as medical practitioner, or professional. In my view, it was necessary for the witness to satisfy the trial court that he met all the requisite qualifications of a medical practitioner and that he was a viable witness for that purpose. The law says if there some reasonable basis which demonstrates that the witness has knowledge of the subject beyond that of an ordinary knowledge, his or her evidence can be admitted as an expert testimony. In that view, PW3 being a medical practitioner and so an expert, he was obliged to gratify the trial court that he was a competent witness to testify. The Court of Appeal in the case of **Republic vs. Kerstin Cameron** (2003) T.L.R., 84 held among other things that:

> "It is now well established in our jurisprudence that it is not necessary that the expertise should have been acquired professionally. Special skill is not confined to knowledge acquired academically but includes also skill acquired by practical experience: see Gatheru s/o Njagwara v. Republic (11). For these reasons, it is settled law that it is the function of the Court only to determine whether or not a witness has undergone such a course of special studies or experience as to render him an expert in a particular subject".

Back to this case, PW3 upon invited by the trial court to give his testimony, he commenced by mentioning his name as Lameck Maiba, Mngeta Heath Centre, 27 years, peasant and a Christian by faith. He did not describe anything in respect of his professional, skills or experience in the field. Considering the nature of the opinion he gave after he conducted his medical examinations that PW1 was a habitual doer of the game, it was necessary for the trial magistrate to satisfy himself that the person whose opinion had to be relied on to secure conviction of the accused was a viable expert taking into account that it is the function of the Court to determine whether or not a witness has undergone such a course of special studies or experience as to render him an expert, of which in this case a medical practitioner. In absence of the aforementioned, the evidence of PW3 is good as an empty shell and its remedy is to be discarded and expunged from the court record.

As to the question whether the victim was a credible and reliable witness, it is now settled law that in sexual related offence the best evidence is that of the victim. See the case of **Abuu Kahaya Richael vs. The Republic,** Criminal Appeal No. 577 of 2017 (unreported) which cited with approval the case of **Selemani Makumba vs. Republic** [2006] T.L.R. 379.

In a recent case of **Majaliwa Ihemo vs. Republic,** Criminal Appeal No. 197 of 2020 (Unreported) the Court of Appeal went further and extended the principle of law developed in the case of **Selemani Makumba** (Supra) and made it clear that:

> *"...In **sexual related trials, the best evidence is that of the victim** as per our decision in **Selemani Makumba vs. R**, [2006] T.L.R. 379. **We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point...**"*[Emphasis added].

That being the case, credibility of the victim is paramount important. In this appeal, the trial court record shows that PW1 met the appellant more than twice and made sexual intercourse. As there is no direct evidence, nevertheless the surrounding circumstance portrays the truth that no other person(s) witnessed the incident except the contestants themselves and her credibility perhaps not be questioned. However, during the hearing of the impugned decision, the learned trial Magistrate noted at page 12 of the typed trial court proceedings that the victim was telling lies to the court in as much as her demeanour was concern.

Furthermore, upon a close scrutiny of the evidence adduced by the victim (PW1) in connection to her credibility and reliability of her evidence, I have noticed a crucial defect which is so vital to the extent of vitiating the worth of her testimony. The same is positioned on the manner on how her evidence was procured. Being a witness, her evidence was received by the

trial court under section 127 (2) of the TEA. In principle, this provision entails that a child of tender age before giving evidence, she or he must promise to tell the truth to the court and not to tell any lies. The law says:

> *"Section 127 :*
>
> *(1) - N/A..*
>
> *(2) 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".*

From the wording of the above provisions of the law, basically it provides for two conditions; **One**, it allows a child of a tender age to give evidence without taking oath or affirmation; and **Two**, before giving evidence such a child is mandatory required to **promise to tell the truth to the court and not to tell any lies.** As the record stands, no doubt that PW1 promised to tell the truth only and never promised **not** to tell any lies to the court. When our Apex Court was confronted with a similar situation in the case of **Godfrey Wilson vs. Republic (Supra),** the Court held *inter-alia* that:

> *"The trial court ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127 (2) as amended imperatively requires a child of tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is the 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 understands the nature of oath;

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

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

Back to the manner in which the victim's testimony was received, I find that failure by the trial court to comply with the mandatory provisions of the law under section 127 (2) of the TEA was fatal as the promise given by the victim was incomplete. In other words, failure to comply with the guiding principle expressed in the case of **Godfrey Wilson vs. Republic** (Supra) it impaired the evidence of PW1.

Having found that the crucial evidence of the victim and that of a Clinical officer (PW3) and the Exhibit PE1 were tainted with such discrepancies and shortcomings which are apparent on the face of the trial court record, I find that the case against the appellant was not proved beyond reasonable doubts.

In the event, the appeal is allowed. The conviction and sentence meted out against the appellant are quashed and set aside. the appellant should be released from prison forthwith unless he is detained for some other lawful cause. **It is so ordered.**

Dated at **Dar es Salaam** this **2nd August, 2021.**

M. J. CHABA

JUDGE

02/08/2021

Judgment delivered under my hand and Seal of the Court in Chambers this 2nd day of August, 2021 in the presence of the Appellant in person, unrepresented and Ms. Dhamiri Masinde, learned State Attorney for the Respondent Republic.

M. J. CHABA

JUDGE

02/08/2021

Right of Appeal fully explained.

M. J. CHABA

JUDGE

02/08/2021