**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 202 OF 2020**

**(Appeal from the decision of the District Court of Kilosa, at Kilosa)**

**in**

**Criminal Case No. 296 of 2018.**

**JOSIA JOSEPH MNYANYIKA .....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

# JUDGMENT

**10th May & 1st June, 2022**

**CHABA, J.**

The appellant, **Josia Joseph Mnyanyika** was charged and convicted by the District Court of Kilosa, at Kilosa with the offence of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap. 16 R. E. 2002] now [R. E. 2019]. It was alleged by the prosecution that the appellant (accused person) raped AB (whose identity is withheld) a girl aged five (5) years old. He was sentenced to serve thirty (30) years imprisonment. Aggrieved by the decision of the District Court of Kilosa, at Kilosa herein "the trial court", the appellant filed his petition of appeal armed with seven (7) grounds of appeal as hereunder:

1. *That, the learned trial magistrate erred both in law and fact by convicting the appellant based on evidence of PW3 (victim) who's age was not proved.*

2. *That, the learned trial magistrate erred both in law and fact by convicting the appellant based on incredible, tenuous, contradictory and uncorroborated evidence of the prosecution witnesses.*
3. *That, the learned trial magistrate erred both in law and fact by failing to comply with the mandatory sections 210 (1) (a) and (3) of the Criminal Procedure Act [Cap. 20 R.E. 2019] so as to clear doubt in the evidence of PW3 (alleged victim).*
4. *That, the learned trial magistrate erred both in law and fact by convicting the appellant based on the evidence of PW3 (victim) who did not promise the court she will talk the truth.*
5. *That, the learned trial magistrate erred both in law and fact by convicting the appellant with a case that was not proved to the hilt.*
6. *That, the learned trial magistrate erred both in law and fact by concluding that PW3 (the alleged victim) had sufficient knowledge of speaking the truth, yet there is nowhere is seen PW3 promised to tell the truth and not lies hence it was contrary to section 127 (2) of Tanzania Evidence Act [Cap. 6 R.E. 2019].*
7. *That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant based on incredible evidence of PW2 while he didn't establish his credentials qualification to ascertain that he was professional doctor. He only said he attended at Muhimbili University without properly establishing if he is a holder of degree, Advanced Diploma or Certificate in Medicine.*

The background of the case albeit is briefly as follows: On the material day on 25.04.2018 PW3 (the victim) was coming from her school. While on the way, she met the appellant along the road. The appellant took the victim up to his house, where he undressed her underwear and raped her on his bed. From there, PW3 went to her mother's house (but she was late) and told her mother (PW4) that she was coming from the appellant's house who used to call him "uncle". Afterward, she slept on the chair. It appears that PW4, the victim's mother was astounded to see her daughter sleeping during the day time. She therefore asked her why she was sleeping at the material time? In reply, the victim did not hesitate

to explain the cause. She told her mother that she was injured on her vagina by her uncle. Though the victim tried as much as she could to explain and describe the said uncle, but she (PW4) was unable to detect the alleged uncle. However, on physical inspection or examination of her private part, she noted that her daughter's vagina was red in colour a sign which indicated that she had been raped by the said uncle, herein the appellant. She therefore asked her to show the place where the said uncle could be found. The victim did not hesitate to led or direct her mother up to the crime scene, the house in which the appellant used to stay. When PW4 knocked the door, the appellant opened the door and PW3 shouted upon him. From there, PW4 went to report the matter to the street chairperson. Thereafter, she went to report the matter at the nearest police station and issued with the PF3. She then sent her daughter to the hospital for medical examination at St. Kizito Hospital. The medical results revealed that the victim was raped.

As gleaned from the prosecution evidence, PW1 a Police Officer with Force No. 1221 D/CPL Seleman was assigned to investigates the crime. In the course, he went together with the victim (PW3) up to the house in which she was raped. While at the crime scene, the victim did not hesitate to show the room in which she was raped. The evidence of PW2, a medical doctor shows that on 25/04/2018 he conducted medical examination of the victim and found that had no bruises, but her pant or underwear was wet and her vagina was full of waste containing a mixture of semen (sperm), liquid and pus. He identified the PF3 as it had his own signature. But according to the court record, it was tendered by the public prosecutor and admitted as Exhibit P.1.

As the victim is (was) a witness of tender age, it was mandatory for the trial resident magistrate to conduct an interview to ascertain whether she knew the nature and meaning of oath and whether had sufficient knowledge to speak the truth. According to him, his inquiry proved negative. He therefore, upon warned himself he proceeded to record her evidence without affirmation. The victim advanced evidence of material particulars as testified by PW1 and PW4 respectively, taking into account that PW1 and PW4 also gave their testimonies relying on the story narrated by the victim.

At the hearing of the appeal, the appellant prayed to argue his appeal by way of written submissions. The Republic had no objection and the court granted the appellant's prayer. Both parties filed their respective submissions in support and opposition, respectively. Whereas the appellant appeared in person, unrepresented the Respondent Republic was represented by Mr. William Danstan, learned State Attorney.

Arguing in support of his appeal, the appellant commenced with grounds number 4 and 6. He submitted that the reception of the evidence of PW3, a child of the tender age contravened the provision of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2002] as amended by Act No. 2 of 2016. He underlined that before the victim adduced her evidence before the trial court, did not promise to tell the court the truth and not lies as required by the law. In his view, since the law was violated, then her evidence was improperly procured. He referred this court at page 11 of the trial court proceedings where the trial magistrate failed to conduct properly the *voire dire test* as required by the law. To back up his argument, the appellant relied on the decision of our Apex Court in **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018

(unreported). Basing on the above anomaly, the appellant prayed the court to expunge the evidence of the victim from the court record.

As regards to the 1st ground, the appellant submitted that since the age of the victim was not proved by birth certificate or through her parents or a guardian, that was fatal to the trial. He said, the evidence of the victim's mother (PW4) is silence on this facet. He added, it was very important on the side of prosecution to prove the age of the victim taking into account that he was charged with a statutory offence whilst the age of the victim was a key determinant factor in establishing the offence of rape. He highlighted that in the circumstance, the evidence of PW3 had no evidential value meanwhile the offence of rape was not proved beyond the reasonable doubt. To buttress his argument, he referred this court to the case of **Andrea Francis v. Republic,** Criminal Appeal No. 173 of 2014 (unreported).

In respect of the ground of appeal filed as an additional or supplementary ground, the appellant contended that the trial magistrate erred in law and fact when he convicted and sentenced him basing on incredible evidence of PW2. He accentuated that since PW2, a medical officer did not specify his credentials or qualifications, but only told the trial court that he attended at Muhimbili University without properly stating and specified whether he holds a Bachelor Degree, Advanced Diploma or Certificate in Medicine. He submitted, failure of which that was contrary to section 2 of Medical Dental and Allied Health Professionals Act No. 11 of 2017. He cited the case of **Faraji Said v. Republic,** Criminal Appeal No. 172 of 2018 (unreported) to back up his stance and insisted that the evidence of PW2 is doubtful.

On the 3rd ground, the appellant contended that the trial magistrate did not comply with the provision of section 210 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) which requires the trial magistrate to read over and record any comment(s) advanced by every witness. The appellant further submitted that the learned trial magistrate erred in law and fact when he failed to append his signature at the end of each evidence adduced by the witness and he did so after he had recorded the portion of re-examination. He contended that the trial magistrate also did not adhere to the provision of the law under section 210 (3) of the CPA. In this respect, he cited the case of **Mussa Abdallah Mwiba & Two Others v. Republic,** Criminal Appeal No. 200 of 2016 (unreported) to support his contention. He prayed the court to consider this anomaly as it makes the whole proceedings null and void.

As regards to the 2nd and 5th grounds, the appellant submitted that the evidence adduced by the prosecution witnesses are contradictory because, whereas PW2 testified that his medical examination revealed that the victim had no bruises into her vagina, but it was full of wastes, semen and pus, PW4 recounted that when she physically examined her daughter's private part, her vagina looked red in colour. In his opinion, the evidence of PW2 and PW4 did not corroborate the evidence of the victim. On the strength of discrepancies exhibited in the testimonials of the PW2 and PW4, he prayed the court to quash the conviction and set aside the sentence meted upon him and set him free.

On his part, Mr. William Dunstan, learned State Attorney for the respondent arguing that in respect of the 4th and 6th grounds of appeal, the trial magistrate was right to rely on the evidence of the victim and other testimonies advanced at trial. He contended that before recording

the evidence of PW3 he warned himself to the effect that upon conducted an interview with the victim he found out that she didn't know the nature of oath but possessed sufficient knowledge to speak the truth and proceeded to record her testimony without taking an affirmation. Mr. Danstan submitted that the trial magistrate complied with the provision of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2002] as amended by Act No. 2 of 2016; now [R. E. 2019].

On the first ground, Mr. Dunstan contended that the victim herself ascertained her age as 5 years old as indicated at page 2 of the typed judgement. In addition, the trial magistrate also conducted *voire dire test or* examination as required by the law.

As to the 3rd ground, Mr. Dunstan accentuated that the trial magistrate signed the records as required by section 210 (1) (a) of the CPA (supra). The magistrate further adheres to the requirement of section 210 (3) of the CPA. He said, the provisions of the law ought to be executed if the witnesses would have asked for their statements to be read over to them and not by the desire of the trial magistrate.

Regarding to the contradictory evidence as complained by the appellant in the 2nd ground, Mr. Dunstan highlighted that the evidence of the victim (PW3) shows that she correctly and confidently identified the appellant and she mentioned the appellant to be a culprit who raped her. She also led her mother (PW4) up to the house of the appellant, and did the same to PW1. To bolster his argument, he referred this court to the case of **Seleman Makumba v. Republic,** [2006] TLR 379. The learned State Attorney maintained that both PW2 and PW4 recounted that after they examined the victim, they found her underwear or pant was wet and her vagina was full of wastes, mixture of semen and pus.

In connection to the 5th ground, Mr. Danstan cemented that since the best evidence comes from the victim as it was underscored in the case **Selemen Makumba** (supra), the victim did clearly identify the appellant as she used to call him "uncle". To back up his contention, the learned State Attorney relied on the decision of the Court of Appeal of Tanzania in the case of **Nkanga Daudi Nkanga v. Republic**, Criminal Appeal No. 316 Of 2013 (unreported). He highlighted that this case was proved to the hilt and in accordance with the required standards.

Regarding the additional or supplementary ground of appeal, Mr. Danstan submitted that the medical doctor (PW2) explained well before the presiding trial magistrate that he is the medical doctor working at St. Kizito Hospital and he possessed a Bachelor Degree from Muhimbili University and therefore he was a rightful person to medically examine the victim. He prayed before this court to confirm the trial court conviction and sentence meted on the appellant.

From the above rival submissions advanced by both parties and upon carefully considered the court records, I think in my opinion that the burning issue is whether or not this appeal has merits.

In determining this appeal, I will deal with the grounds of appeal seriatim as submitted by the parties. On the fourth and sixth grounds of appeal, the appellant is challenging the evidence of PW3, a child of tender age to the effect that her evidence was received by the trial court without complying with the provision of section 127 (2) of the Evidence Act (supra) as amended by Act No. 4 of 2016 which came into force on 8/7/2016. He further challenged the trial magistrate that he failed to conduct the *voire dire test* against the victim. He prayed this piece of evidence be expunged from the court record.

I had time to revisit and peruse the trial court record particularly the evidence adduced by the victim (PW3), who is a witness of tender age. The following is part of the evidence of PW3 recorded by the trial magistrate at page 11 of the trial court proceedings. The record transpires that, I reproduce:

*"VOIRE DIRE*

*Through the interview I have conducted it is apparent that a witness is a minor, he do not know the nature and nearing of other but passes sufficient knowledge to speak the truth. I therefore warn myself that this in the evidence of the child who testing not under oath.*

*PW3, Swaumu Mohamed Jumbe 54 years, student (kindergattern), Muslim reside at kikwaraza – Mikumi, not affirmed and state as hereunder".*

From the above passage, there is no dispute that though there is typo errors but the trial magistrate conducted the *voire dire test* and he was satisfied that the child did not know the nature and meaning of oath but she possessed sufficient knowledge to speak the truth and he warned himself as well. It is further clear that the trial magistrate did not bother even to ask for some questions from the victim to test her intelligence as it was underscored in the case of **Godfrey Wilson v. Republic** (supra). What I have gathered from such piece of evidence which is part and parcel of trial court proceedings, there is nowhere the victim made her promise to tell the truth to the court and not to tell lies as envisaged by the law under section 127 (2) of Evidence Act (supra). The law provides that:

*"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 lies."***

Interpretation of the above provision of the law was well articulated by our Apex Court **in Godfrey Wilson v. Republic** (supra) where the Court held *inter-alia* that:

*"Section 127 (2) as amended imperatively requires a child of a tender age to give a 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 a tender age."*

As to the consequence of failure to comply with the above provision, the Court of Appeal (T) had this to say:

*"In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016. Hence, the same has no evidential value. Since the crucial evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of sustaining the conviction."*

See also the cases of **Ally Ngozi v. R,** Criminal Appeal No. 216 of 2018; **Marko Bernard v. R,** Criminal Appeal No. 329 of 2018 and **Masanja Masunga v. R,** Criminal Appeal No. 318 of 2018 (All unreported).

As garnered from the trial court record, it quite clear that the requirement under section 127 (2) of Evidence Act (supra) was not complied with. As hinted above, the trial magistrate did not bother even to ask simplified questions to the victim at least to check her intelligence. Instead, the trial magistrate gave a general statement on this facet. The Court of Appeal in **Godfrey Wilson v. R,** underscored that since section 127 (2) of the Evidence Act laid conditions precedent before reception of the evidence of a child of a tender age, the question as how to observe and or a-line with the principle of law, this will largely depend on circumstance of each case. However, the Court of Appeal thought prudent to lay a foundation on how 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.*

As it is clear that the reception of the evidence of PW3 did not meet the legal standards, its remedy is to be expunged from the court record, as I hereby do. Upon expungement of the evidence of the victim, the remaining crucial question is, in absence PW3's evidence there is any other evidence upon which the court may rely on to sustain the appellant's conviction? In my considered view, the answer is obvious that it is hard to sustain the appellant's conviction based on the evidence of PW1, PW2 and PW4 respectively. I say so because the testimony of PW1 is full of hearsay evidence as he didn't witness the incident. His evidence shows that the victim led him up to the crime scene and

was informed by the victim that the accused is the one who raped her. PW2, the medical doctor explained what he detected from the victim's vagina upon conducting medical examination. His evidence shows that he found full of wastes into the victim's vagina and it had a mixture of some liquid, semen and pus which signified that she was raped. However, he was so clear that no bruises were detected or noted. Even though it was proved that the victim was raped and that upon a physical examination or inspection of her private part (vagina), PW4 who is the victim's mother observed that victim's vagina was red in colour, still these pieces of evidence cannot hold water to ground the appellant's conviction for obvious reason that, usually the best evidence comes from the victim. See the case of **Seleman Makumba v. Republic** (supra). In my opinion, the evidence of PW4 also fallen on this trap.

All the same, in the present appeal there is no other evidence to prove that the appellant committed the offence of rape. Even the PF3 (Exhibit P.1) cannot be safely relied on because the public prosecutor is the one who prayed and actually tendered in evidence as an exhibit contrary to the legal requirement. It should be noted that, the prosecution side or the public prosecutor is always not a witness in as much as criminal trials is concerned. It is a cardinal principle of law that in criminal trials, it is the prosecution which is required to prove her case against the accused person beyond reasonable doubt. In **George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016 (unreported), the Court held:

> *'We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise."*

Placing reliance in the above precedent, I am of the considered view that the prosecution failed to prove their case in the standards required by the law. It is sufficed to hold that these two grounds are sufficient to get rid of the instant appeal. In the case of **Issa Reji Mafita v. R**, Criminal Appeal No. 337 'B' of 2020 (unreported), the Court was faced with a similar situation and the following was her observation:

> *'..... As shown above, I find no need to determine the remaining grounds of appeal. In the event, I have no doubt that the prosecution case against the appellant was not proved beyond reasonable doubt to ground conviction. We thus allow the appellant's appeal, quash the conviction and set aside the sentence. We consequently order the appellant's release from prison unless his continued incarceration is related to other lawful cause. Thus, there was to be corroborated by the testimonies of PW1, PW3 and PW4 more so because the testimonies of these witnesses were largely hearsay, that there was no evidence to warrant the conviction.*

From the above observations, I also find no need to deal with the remaining grounds of appeal as alluded to above. This appeal has merit. I thus, allow the appeal and quash the appellant's convictions. I also set aside the sentence meted on the appellant. The appellant is to be forthwith released from custody, unless held by a lawful cause.

**It is so ordered.**

**DATED** at **MOROGORO** this 1st day of June, 2022.

**M. J. Chaba**

**Judge**

**1/6/2022**