IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CRIMINAL APPEAL NO. 07 OF 2022

GABRIEL MTULI CHILONGANI.....APPEALANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Arising from judgment of the District Court of KongwaK.J.Mwanemile,SRM)

Dated 25th October, 2021

In

Criminal Case No.47 of 2021

.....

JUDGMENT

11th May, & 03rd June,2022

MDEMU, J:.

In the District Court of Kongwa, the Appellant one Gabriel Mtuli Chilongani was arraigned for two counts; grave sexual abuse contrary to section 138C(1)(a) (2) (b) and attempted rape contrary to section 132(1)(2)(b) both of the Penal Code, Cap. 16. The allegation was that, on 27th day of April, 2021 at about 1700hours at Tubugwe Village within Kongwa District in Dodoma Region for sexual gratification, the Appellant did commit grave sexual abuse to one "SN" (disguised for identity purposes), a child of five (5) years old.

On the second count it was alleged that, on the same date, time and place, the Appellant did attempt to rape one "SN". According to the evidence, the Appellant called PW1 while on her way to her uncle's premises, undressed her and also undressed himself thus attempted to insert his penis into PW1's private parts. Pedestrians saw the Appellant holding PW1 in the lap (amempakata) while both of them naked. With this evidence, the trial Court was satisfied that, the charge of grave sexual abuse was proved beyond reasonable doubt. However, the Appellant was acquitted on the charge of attempted rape for want of evidence. Aggrieved by both conviction and sentence of twenty (20) years prison term, this appeal on the following grounds was filed by the Appellant: -

1. *That, the trial court erred in law and fact when convicted and sentenced the Appellant without considering that the prosecution side has failed to prove the case beyond any reasonable doubt.*
2. *That, the trial court erred in law and fact when failed to evaluate whether or not the evidence adduced by the prosecution witnesses PW1, PW2, PW3 and PW4 cast any doubt in the circumstances of the case.*

3. *That, the trial court erred in law and fact when convicted the Appellant without taking into consideration that the PF3 of a victim were not tendered by the prosecution side, not only that but also, the prosecution side has failed to call the Doctor who attended the victim to give her evidence as an expert.*

At the hearing of the appeal, the Appellant appeared in person and unrepresented. The Respondent Republic was represented by Ms. Chibanenda Luwongo, Senior State Attorney. When given the floor to submit on the grounds of the appeal, the Appellant adopted his grounds of appeal to be part of his submissions and added to have not committed the offence as there is no evidence to connect him. He prayed to be released.

In reply, Ms. Chibanenda supported conviction and sentence. She submitted among other things that, there are procedural irregularities committed by trial court when recording the evidence of PW1(the victim) who was five years of age. She said that, according to section 127(2) of the Evidence Act, Cap. 6, a witness of tender age has to promise to tell the truth and not to tell lies. At Page 13 of the proceedings, the record is silent on

compliance of this requirement in the evidence of PW1. She said that, since the procedure was not observed, the said evidence be expunged from the record. She bolstered this assertion by citing the case of **Makenji Kamura vs. R. Criminal Appeal No. 30 of 2018** (unreported).

It was her submissions further that, besides the evidence of PW1; there is evidence of PW2 and PW4 who identified the Appellant being familiar to them and there was also dock identification. The two also saw the Appellant naked while holding the victim (PW1) in the lap (amempakata). She added that, the Appellant didn't discredit the evidence of the prosecution witnesses as he had a general denial. It was her argument also that, this cements the prosecution case.

Ms. Chibanenda submitted further that, in the case of **Makenji Kamura v. Republic** (supra), even when the victim's evidence is expunged, the available evidence is watertight, thus the accused was rightly convicted. She therefore asked this Court to hold that, the Appellant committed grave sexual abuse as was observed by the trial Court. In rejoinder, the Appellant stated that, the evidence of PW2 and PW4 contradicts each other. Whereas one witness testified that the Appellant was seated, the other said he was

with the victim. He thus said to leave the matter to God as with his age of eighty (80) years there is no way he can commit such an offence.

With the above submissions from the parties, the issue to be determined is whether there is evidence on record to sustain conviction and sentence for the offence of grave sexual abuse. Before determining the grounds of appeal, I will first address procedural irregularity pointed by Ms. Chibanenda regarding the evidence of PW1 which was received in contravention of section 127(2) of the Evidence Act, Cap. 6. Under the section, the child of tender age may give evidence without oath or affirmation provided she/he promises to tell the truth and not to tell lies. The section reads:

> *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 any lies.*

The above provision as first tested in the case of **Godfrey Wilson v. R, Criminal Appeal No. 168 of 2016** (unreported) prescribes two conditions. **One,** it allows a child of a tender age to give evidence without oath or affirmation. **Two,** before giving evidence, such a child is mandatorily

required to promise to tell the truth to Court and not to tell lies. In emphasizing this position, the Court of Appeal in the case of **Msiba Leonard Mchere Kumwaga v. R, Criminal Appeal No. 550 of 2015** (unreported) observed as follows: -

> *".....before dealing with the matter before us we have deemed it crucial to point out that, in 2016 section 127 (2) was amended vide written Laws (Miscellaneous Amendment) Act No. 4 of 2016 (Amendment Act). Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies."*

In the case at hand, before PW1 who was a child of tender age gave her evidence, the following is what transpired in Court as at page 13 of the trial court proceedings: -

> ***PROSECUTION CASE OPEN***
>
> *PW1: Stela Noel, 5 years, Tubugwe, Student,gogo*
>
> *-I am using to go to the church*
>
> *-Ninasoma Chekechea*

-I am a second born and we are only three to my mother

-People who speak untruth goes to Satan

Court: *This Court satisfied that the child knows the importance of speaking the truth hence she qualifies to give evidence.*

What I gather from the above passage is that, PW1 was answering questions regarding her profile/particulars. The court was then satisfied that the child knows the importance of speaking the truth hence qualified to give evidence. This, as said earlier, is currently no longer a legal requirement. The trial Magistrate ought to have required PW1 to promise to tell the truth and not to tell lies. This is a condition precedent before the reception of evidence of a child of a tender age. Regarding this, in the case of **Godfrey Wilson vs R** (supra), the Court of Appeal prescribed the following guidance on how to reach at that stage for the witness of tender age to make the promise:

"....the trial court or Judge can ask a 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. Thereafter upon making the promise, such promise must be recorded before the evidence is taken.*

In this instant case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied before taking the evidence of the victim. There is nowhere the witness promised to tell the truth and not to tell lies. In absence of promise by PW1, her evidence was not properly admitted in terms of section 127(2) of the Evidence Act. As submitted by the learned Senior State Attorney, this evidence has no evidential value and is accordingly expunged from the record.

Since the crucial evidence of PW1 has been expunged, the issue now is whether the remaining evidence may sustain conviction against the Appellant. Ms. Chibanenda was of the view that, the remaining evidence,

particularly that of PW2 and PW4 is watertight to sustain conviction. With due respect to the learned Senior State Attorney, the said evidence is a suspect one. PW4 who heard a child complaining and saw her and an old man naked didn't take any action. This is unusual and raises a lot of doubt to any reasonable person. Furthermore, it doesn't make sense that the Appellant, even after being seen by PW4, remained there naked continuing to commit the offence waiting for PW2 to come.

Furthermore, PW2 testified to have raised an alarm whereby many people responded and found the victim and the Appellant at the crime scene. However, to conclusion of trial, those people neither testified nor their names mentioned to that effect by PW2. Under the premises, it is safe to draw adverse inference against the prosecution case that such witnesses would testify adverse to the prosecution case.

Again, no one from Mlali police station or Tubugwe dispensary testified to corroborate the evidence of PW3 on diagnosis of the victim; if at all the victim was issued with a PF3 by that police station. As complained by the Appellant in his grounds of appeal, particularly in ground 3, absence of such evidence raises doubt to the prosecution case. That doubt should benefit the Appellant. I am aware of the principle stated in the case of **Makenji**

Kamura v. R (supra) that, even when the victim's evidence is expunged, the available evidence can be used to convict the accused. However, in the instant case as expounded in the foregoing analysis, the remaining evidence is shaking. It thus remains suspect to ground conviction.

Having said all this, I allow the appeal, quash the conviction and set aside the sentence of twenty (20) years prison term imposed against the Appellant. The appellant should be released forthwith from prison unless held for some other lawful reasons.

It is so ordered.

Gerson J. Mdemu
JUDGE
03/6/2022

DATED at **DODOMA** this 3rd day of June, 2022

Gerson J. Mdemu
JUDGE
03/6/2022