THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 23 OF 2022

(Originating from the Court of the Resident Magistrates of Mbeya at Mbeya in Criminal Case No. 4 of 2021)

Between

MATHIAS ALSONI MUNILE@ RAS .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 6th June, 2022
Date of judgment: 27th June, 2022

NGUNYALE, J.

The appellant Mathias Alison Munile was charged and convicted of the two offences of rape contrary to sections 130 (1) (2) (e) and section 131(1) of the Penal Code, [Cap 16 R. E. 2019]. It was alleged by the prosecution that, the appellant on unknown dates between 1st and 13th December, 2020 at Iwindi Usongwe Division within District and Mbeya Region did have carnal knowledge of the two victims, girls aged nine (9) and seven (7) years old respectively. The victims shall be referred to as G.S and V.T or the victims or PW1 and PW2 respectively for the purposes

of concealing their true identity. Upon full trial the appellant was convicted of both counts and sentenced to life imprisonment. Aggrieved, he has preferred the present appeal with ten (10) grounds which are fairly paraphrased as follows: -

1. *That the prosecution failed to prove the charge against the appellant as required by the law;*
2. *That clothes which contained blood of PW1 and PW2 was not tendered in Court to corroborate evidence of PW1, PW2, PW3 and PW4;*
3. *That his conviction was based on liar evidence of PW3 which contradicted with PW1, PW3, PW3 and PW4 on time they went to PW5;*
4. *That evidence of PW1 and PW2 was not corroborated;*
5. *That conviction was based on evidence of PW7 a doctor who did not observe bruises or sperm on private parts of the victims;*
6. *That no voire dire test was conducted to PW1 and PW2 before taking their evidence;*
7. *That the trial Court did not properly evaluate evidence of PW6 who was a neighbour to where the appellant resided;*
8. *That the appellant was wrongly convicted based on evidence of PW1 and PW2;*
9. *The charge against him was fabricated by PW1, PW3, PW3 and PW4 and their evidence was not corroborated by non-family members witnesses; and*
10. *That the defence evidence was not considered.*

When the appeal came for hearing the appellant appeared in person while Ms. Hannarose Kasambala learned State Attorney appeared for the respondent Republic. When the appellant was called to elaborate on his grounds of appeal, he opted the State Attorney to start first while reserving a right to reply later.

Ms. Hannarose submitted ground 1, 3, 4, 7 and 8 jointly, that it revolves on proof of the offence by the prosecution to the standard required by the law. In elaborating she submitted that the appellant was charged with rape under section 130 (1) (2) (e) of the Penal Code which requires the victim to be underage. It was further submission that PW1 and PW2 clearly adduced evidence on how the appellant undressed and raped one after another in his room while the other victim waiting at the sitting room. Counsel for the respondent added that penetration was proved by PW1 and PW2 and in rape cases true evidence has to come from the victim. She cited the case of **Mawazo Anyandwile Mwaikwaja v R**, Criminal Appeal No. 455 of 2017.

Expounding more Ms. Hannarose added that evidence of the victims was corroborated by PW3, PW4 and PW7 a doctor who examined them. It was further submission that the trial Court assessed credibility of the victims and the appellate Court is not enjoined to rule otherwise. The case of

Dickson Elia Nsamba Shapwata & Another v R, Criminal Appeal No. 92 of 2007 was referred to support the argument.

On second ground on absence of bruises she submitted that rape is proved by penetration and not bruises or blood on clothes of the victim.

Submitting on sixth ground that *voire dire* test was not conducted, she submitted that section 127(7) of the Evidence Act requires a child to promise to tell the truth and there is no requirement of *voire dire* test and in this case, victims promised to tell truth.

Regarding complaint in nineth ground on calling only relatives as witnessed, it was submitted that no law prevents relatives from being a witness what matter is credibility of a witness. She cited the case of **Goodluck Kyando v R** [2006] TLR 374.

On whether defence evidence was considered in tenth ground it was argued that the trial court considered it and found not reliable.

On rejoinder the appellant prayed the Court to consider his grounds of appeal and allow the appeal.

Upon close scrutiny of the grounds of appeal and the learned State Attorney's submission thereof, I am of the settled view that before dealing

with ground one of appeal that the charge was not proved beyond reasonable doubt, it is logical to deal with other grounds of appeal first.

I wish to start with the second ground which the appellant complain about failure to tender clothes of the victims which was stated to contain blood. The appellant was charged with rape and the key element of rape in whatever category under section 130(2) of the Penal Code [Cap 16 R: E 2019] is penetration however slight it may be. It is not the requirement of the law that whenever rape is committed the clothes which contain blood stains has to be tendered. The prosecution has only to prove that there was penetration. Therefore, this ground fails.

Complaint in third ground is that there was contradiction of evidence of PW3 on where PW1 was found in relation to other evidence. Indeed, I agree with the appellant that there are some variations on evidence PW1 that he went to report directly to ten-cell leader even before informing her parents. It is in record that PW5 who introduced as ten-cell leader testified that he got information at 23:00hrs but PW5 did not say PW1 reported the incident to him. Unfortunately, this piece of evidence was not considered by the trial Magistrate. As to whether contradiction was a major or minor the question will be decided in the course of deliberating other issues.

Fourth ground is that evidence of the victims was not corroborated. This ground has no merits. It is now settled law that under section 127(7) of the Evidence Act [Cap 6 R: E 2019] the appellant may be convicted solely based on evidence of a child of tender age without corroboration as long as the Court is satisfied that the witness is telling the truth. See the case of **Anselimo Kapeta v Republic,** Criminal Appeal No. 365 of 2015, CAT at Mbeya (Unreported). Therefore, the complaint that evidence of the victims' needed corroboration is dismissed.

Complaint in fifth ground is that no bruises and sperms were seen by PW7 the doctor who examined the victims. This been addressed in the second ground of appeal above. Ingredients of rape is penetration and not presence of bruises or sperms and lack of consent to victim above the age of eighteen. Similar complaint was raised in the case of **Manyinyi Gabriel @ Gerisa v The Republic,** Criminal Appeal No. 594 of 2017, CAT at Mwanza (Unreported) and the Court held that;

> *'We entirely share the same view for if bruises are to be the natural and probable consequences of sexual intercourse women would better opt to completely abstain from it. Crucial in cases of this nature is penetration however slight it may be and the person better placed to tell is the one on whom it is practiced which is in line with the Swahili saying "maumivu ya kukanyagwa anayajua aliyekanyagwa".*

In this appeal PW7 through exhibit P1 collectively indicated that there was delay in sending specimen for about four days. In that circumstance considering the age of the victims being below ten years probably bruises could be observed had examination been done immediately. But that is not the requirement of the law that bruises should be observed because even slight penetration which may not cause bruises suffice to prove rape.

Failure to conduct *voire dire* test is the appellant complaint if sixth ground. The learned State Attorney submitted that the law under section 127(2) of the Evidence Act requires a witness to promise to tell the truth and not do *voire dire* test. I entirely agree that the law before 2016 was that for a person of tender years to be allowed to testify, he or she had to satisfy the Court during a *voire dire* test that, he or she was competent to do so with or without oath, depending on the finding of the trial Court. After 2016, vide section 127(2) of the Evidence Act brought about by Act No. 4 of 2016 a person of tender age may testify without oath, but all what such a witness needs to do is to promise to tell the truth and not to tell lies.

In this appeal the Magistrate before recording PW1 and PW2 engaged them in asking some questions to ascertain if they knew meaning of speaking truth and oath. Having recorded the reply thereto he was satisfied that they did not know meaning of oath and they promised to

speak the truth. The record of the trial Court is plain that PW1 and PW2 made their promise to tell the truth and not lies before evidence was received in compliance with section 127 (2) of the Evidence Act. The case of **Godfrey Wilson v R,** Criminal Appel No. 168 of 2018 relied by the appellant do not support the appellant complaint rather the stance taken by the Magistrate. Therefore, the appellant's appeal is patently misconceived and we hereby dismiss it.

Regarding evaluation of evidence of PW6 I don't find any merits in this ground because her evidence was to the effect that she saw a child playing outside the appellant's compound which in fact is not supported by testimonies of PW1 and PW2 who never testified that they were playing outside while the appellant preparing food.

The charge being a planted case forms complaint number nine, I have gone through evidence of the prosecution and defence and found nothing which suggest that there were grudges. Even the appellant did not suggest even one. The complaint that prosecution evidence came from family members has no merits because apart from PW1 and PW3 being child and mother and that of PW2 and PW4. There is no any suggestion that PW5, PW6 and PW7 came from the same family. As rightly submitted by the learned State Attorney there is no law which prohibits person from

the same family being called to testify, what matter is credibility of a witness when his or her testimony is weighed against other witnesses. This ground is likewise is marked dismissed.

Last complaint in tenth ground is that the defence evidence was not considered. I have gone through the judgment of the trial Magistrate and found that at page 8 of the judgment he considered the appellant's defence and when he weighed it against that of the prosecution he found it to have not shaken the prosecution evidence. Therefore, it is dismissed too.

Having deliberated other grounds, I turn to the first ground whether the prosecution proved the case against the appellant beyond reasonable doubt. In a criminal case, the burden of proof is on the prosecution to prove the case against the appellant and it never shifts to the accused person as per section 3(2) of the Evidence Act [CAP. 6 R.E. 2019]. Having considered the prosecution evidence and discovered some of shortcomings which impacted on evidence of the prosecution necessary relief will be pronounced shortly.

In the present appeal, it is evident that the credibility of the victims is crucial, knowing they are the ones advancing the prosecution case. PW1 and PW2 being key witness, and girls of nine (8) and seven (7) years old

respectively, examining the authenticity of their evidence becomes crucial. It is also settled law that, although assessing the credibility of a witness basing on demeanour is the exclusive domain of the trial Court, it can still be determined by the appellate Court when assessing the coherence and consistency of the witness and when such witness is considered in relation to the testimony of other witnesses including that of an accused person. See **Daniel Malogo and 2 Others v Republic,** Consolidated Criminal Appeals No. 346, 475 and 476 of 2021 (Unreported).

Having gone through evidence of PW1 and PW2 in relation to evidence of other witnesses their credibility was not free from doubts. First contradictions in prosecution witnesses' evidence. PW1 stated after the incident she went directly to ten-cell leader without going home but PW5 said it was 23:00hrs when three persons went to him and informed him about rape incident. There is nowhere PW3, mother of PW1 testified that he was looking for PW1 who had not returned home since afternoon. PW3 is recorded to have got information through phone but never disclosed who passed the information to her. Again, PW1 did not say he did not find ten-cell leader. The other contradiction is that of PW6 who testified that she saw PW1 playing outside the appellant house but PW1 and PW2 never testified to that effect. Their evidence was that after reaching the

appellant's house they set at the sitting room. In the case of **Mohamed Said Matula v Republic** [1995] TLR 3 the Court laid a principle on how to deal with contradictions and inconsistencies in the testimonies of witnesses. It held that;

> *'Where the testimonies by witnesses contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible; else the Court has to decide whether the inconsistencies and contradictions are* ***only minor, or whether they go to the root of the matter.'*** **(Emphasize mine)**.

After considering the above contradiction I find them major which affected the prosecution case.

It is settled law that the best evidence of sexual offence comes from the victim and conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim. However, such evidence of victims has to be subjected to security in order for Courts to be satisfied that what they state contain nothing but the truth. In the case of **Mohamed Said v Republic,** Criminal Appeal No. 145 of 2017 (Unreported) the Court stated;

> *'We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with the rules of evidence in*

general, and s. 127 (7) of Cap 6 in particular, and that such compliance will lead to punish offenders only in deserving cases.'

From what I have demonstrated above PW1 and PW2 credibility is questionable.

Second, failure to call material witnesses the wife of the ten-cell leader who examined PW1 is fatal. It was the prosecution evidence through PW1 and PW3 that PW5's wife examined PW1 and found she had been raped. No any other witness testified on that aspect though were present to wit PW2, PW4 and PW5. It is upon the prosecution to decide who should be called as witnesses and that number of the witnesses does not matter under section 143 of the Evidence Act [Cap 6 R: E 2019]. But if a person who is unreasonably not called as a witness is a material witness, the prosecution is bound to produce him and if not, the Court may draw an adverse inference for the omission. See the case of **Aziz Abdallah vs. Republic** [1991] TLR 71.

Third, delay to go to hospital for examination, although medical report is an expert opinion which is not binding the Court, but in this case it ought to be done promptly. There is enough evidence that the appellant was arrested on the night of 13/12/2020 and sent to Utengule police station and the victims were issued with PF3 on the same date as shown in exhibit P1. But there is no explanation why it took four days to send the victims

to hospital for examination. Worse enough the victims came from two different families. Under normal circumstances caring parents if really rape had occurred to their children, were supposed to send them for examination immediately. This unwarranted delay casts some doubts on the prosecution case.

Although the evidence of the appellant was general denial on commission of the offence, he owed no duty to prove his innocence. On that account I find the prosecution case was not proved beyond reasonable doubts.

In view of what we have deliberated above, I find the appeal merited and proceed to allow it. I order the immediate release of the appellant **MATHIAS ALISON MUNILE** unless he is held with another lawful cause.

DATED at MBEYA this 27th day of June, 2022.

D.P. NGUNYALE
JUDGE
27/06 /2022