

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA**

CRIMINAL APPEAL NO. 19 OF 2022

(Originating from the Court of Resident Magistrate of Mbeya at Mbeya
Criminal Case No. 175 of 2019)

ZUMBA WILFRED MWALUANDA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

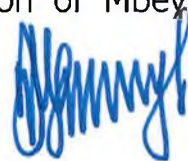
Date of last order: 27/06/2022

Date of Judgment: 25/07/2022

NGUNYALE, J.

The appellant was aggrieved with the decision of the District Court of Mbeya at Mbeya which found him guilty of the offence of Grave Sexual Abuse contrary to section 138 C (1) (a) and 2 (b) of the Penal Code, upon his conviction he was sentenced to serve twenty (20) years imprisonment and to pay compensation in the tune of 500,000/=

According to the particulars of the charge as filed before the trial Court the prosecution alleged that the appellant on 19th day of July, 2019 at Sinde area within the city and Region of Mbeya unlawful for sexual



gratification made grave sexual abuse by putting his penis to the vagina of a child girl aged five years old.

The historical background of the facts may simply be narrated that; - on the fateful date 19th July 2019 the victim was playing with her friend one Farida s/o M. The appellant went to the children who were playing and took the victim to his home while promising to give her money. The appellant upon reaching his home he put the victim on his bed and undressed her. He started to put his penis to the victim's vagina. Earlier the said Farida d/o M had informed the relatives of the child that she was taken by the appellant. The appellant after finishing the evil act he released the child and, on the way, home the victim met her relatives and narrated what the appellant did to her. The event was reported to local government leaders and later to police. The victim was issued with PF3 and upon examination it was revealed that the victim was not penetrated to her vagina.

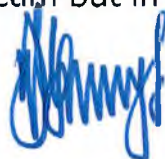
The appellant was arraigned before the trial Court where he was convicted and sentenced as already stated. Upon conviction, he was aggrieved with the verdict. As a matter of right he protested against his innocence, he preferred the present appeal predicated in nine grounds of appeal. The



appellant abandoned other grounds of appeal. He opted to argued only the 2nd and 9th grounds of appeal. The two grounds of appeal are; -

One, That the trial Court erred in law when convicted and sentenced the appellant without taking into consideration that the prosecution side failed to prove the charge against the appellant as per law. **Nine,** that the defence of the appellant was not considered by the trial court.

On the date of hearing the appellant appeared represented by Ms Tumaini Amenyee learned Advocate while the respondent was ably represented by Mr. Baraka Mgaya learned State Attorney. In support of the first ground of appeal it was the submission of Ms Amenyee that the prosecution failed to prove the offence because the evidence on record stated that the appellant inserted his penis to private parts the act which made her to fill pain but she could not cry. She said that it was abnormal for the adult man to penetrate to a child of five years old and she could not cry. PW2 said that he found the victim crying. She said that, the testimony of the victim tells that her credibility was shaking. The learned Counsel cited the case of **Majaliwa Ithemo vs R**, Criminal Appeal No. 197 of 2020 in which the case of **Suleman Makumba vs. R** (2006) TLR 397 which insist consideration of credibility of the witness. She stated further that the best evidence in sexual offences is of the victim but in this case the testimony



of the victim is not worth because the victim was not credible. She alleged that the case was fabricated against the appellant.

The complaint in the second ground of appeal that the defence case was not considered by the trial Court she submitted that the appellant said that she was not present on the date of the offence but he could not tender notice of alibi. She cited the case of Marwa **Wangiti Mwita vs R** (2002) TLR 39 that the accused does not assume the burden of proving. She said that the Court ought to consider the defence of alibi. She prayed the appeal to be allowed and the appellant be set at liberty.

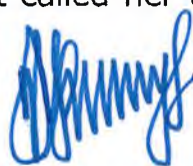
In the other limb of argument, she submitted that in recording evidence of a child of tender age the procedures were not followed. The trial Magistrate ought to guide the child to promise to tell the truth.

Mr. Mgaya for the respondent started his submission by declaring his stance that he does not support the appeal as filed by the appellant. Before submitting in respect of the grounds of appeal she said that there is a legal issue which need to be addressed for the attention of the Court. He submitted that PW5 a child of five years old in her evidence she used the word '*I am promising to tell the truth*' per section 127 (2) of the Evidence Act Cap 6 R. E 2019 each witness of tender age must promise to tell the truth. The provision does not give format on how the child will



give such promise. He referred to the case of **Wambura Kigingwa vs R**, Criminal Appeal No. 301 of 2018 Court of Appeal of Tanzania sitting at Mwanza the Court referred the case of **Godfrey Wilson vs R**, Criminal Appeal No. 168 of 2018 and the case of **Hamis Isa vs R**, Criminal Appeal No. 274 of 2018 also it referred to the case of **Suleman Mose Soteli @ White vs. R**, Criminal Appeal No. 385 of 2018 and the case of **Mwalimu Jumanne vs. R** (unreported) the judges insisted that the courts should ask simple questions to inquire if the child has sufficient intelligent and promise to tell the truth.

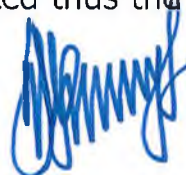
Mr. Mgaya went on to submit that in the present case the witness before the trial Court is not seed to be questioned prior to testifying. The legal procedure was not complied but he prayed the Court not to disregard his evidence. He cited the case of Wambura Kigingwa (supra) that the Court of Appeal discussed what to be done in case such legal requirement has not been done or adhered to. The Court of appeal said that the defect is rectified by section 127 (6) of the Evidence Act Cap 6 R. E 2019. The Court should assess the credibility of the very child. It was the view of the State Attorney that the evidence of the child was credible and reliable. Pw1 while testifying she said that she was praying with friends including PW2. In the course of playing the appellant called her to his home where he



undressed her and penetrated his penis to her vagina. The testimony of PW1 was corroborated by PW2 that they were playing together and the appellant called her inside his house. PW3 the mother of the victim testified that on the date of event the victim was called by the appellant. The victim narrated what happened to PW4.

Mr. Mgya went on to state that credibility is weighed by checking consistency of the evidence which in this case her evidence is consistency when cross checked with other evidence. The appellant did not cross examine these important aspects meaning he admitted the evidence. The case of **Martin Misara vs. R**, Criminal Appeal No. 428 of 2016 Court of Appeal at Mbeya (unreported) the Court has explained the effect of none cross examining. He prayed the Court to dismiss the argument that the witness could no promised to tell the truth.

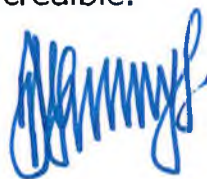
The witness was credible and her evidence was reliable as already stated, the argument of the respondents in the first ground of appeal are of no merit. The best evidence in sexual offences comes from the victim. In this case the victim proved the offence. The Court should confirm the decision of the trial Court. The legal requirement in sexual offences is penetration and not crying of the child. The child was taken to hospital where it was proved that no penetration was affected thus the appellant was charged



with the offence of grave sexual abuse. On the complaint that the court did not consider the defence evidence Mr. Mgaya submitted that the trial Magistrate at page 4 and 5 of the judgment analysed his evidence and found that the appellant ought to file notice of alibi. Still the court has power to re-evaluate the evidence as the first appellate Court. He prayed the Court to dismiss the appeal and confirm the decision of the trial Court.

Having heard both parties the main issue calling for determination is **whether the evidence of the child of tender age was legally taken by the trial Court?**

Ms. Amenye submitted that in recording evidence of the child of tender age procedures were not followed. The trial Magistrate ought to make sure that the child promise to tell the truth. The learned State Attorney Mr. Baraka was quickly to respond that it was true that the legal procedures were not complied but he prayed the Court not to disregard the evidence because the witness was credible and reliable. His credibility is measured by consistency and coherence of her testimony. He was of the firm view that the anomaly is curable by 127 (6) of the Evidence Act Cap 6 R. E 2019 because proper assessment of the evidence under scrutiny establishes that the child was credible.



In the proceedings dated 19th June 2020 when the victim testified her testimony could not go consistent because there was interruption where the victim was crying. After she stopped crying she testified at page 20 of the typed proceedings; -

"PW1 continues: He then give me dishes to wash. I wash these dishes. He then inserts his penis in my vagina.

Court: PW1 shows to the court the place where the accused inserted his penis to her

Sgd D. Luwungo – RM

19.06.2020

PW1 Continues: when he was inserting his penis to me, I fell so pain but I did not cry. Then I returned back home and go to sleep. This Zumba is here, there he is.

Court: PW1 pointed a finger to the accused with a view of identifying him

Sgd D. Luwungo – RM

19.06.2020"

The above script talks about penetration but there is evidence that no penetration was done to the victim. Lack of penetration made the prosecution to avoid to charge the appellant with the offence of rape. There is no other evidence other than of the victim which prove that there was no penetration. The contradictions that there was penetration or not makes the court to hesitate to hold that PW1 was a credible witness as submitted by the learned State Attorney because it will be difficult to



establish whether he proves a charged offence of other offence of rape. Therefore, her credibility cannot be established in this prevailing circumstance. The fact that Section 127 (2) of the Evidence Act was not complied means the trial was not fair to both parties.

In **MOHAMED SAINYENYE V.REPUBLIC** CRIMINAL APPEAL NO.57 OF 2010 CAT (Unreported) insisted where the prosecution relies on the evidence of child of tender years who does not understand the nature of the oath, the court must comply with section 127 (2) of the Evidence Act Cap 6 [R.E.2019]. In a similar point and observation, the court in **Omary Kurwa v R** Criminal Appeal No. 89 of 2007 cited in **Leonard S/O DEMU vs The Republic**, criminal Appeal No 81 of 2008 stated that: -

"The Court has set standards which must be followed before the evidence of a child of tender years is considered. First, the Court must form an opinion on whether or not the child understands the nature of oath. Second, the Court must form an opinion, and record this opinion in the proceedings, whether the child is possessed of sufficient intelligence to justify the taking of the child's evidence at all, and if the court finds the child is intelligent to testify, whether or not the child understands the duty of speaking the truth".

In the case at hand the promise to tell the truth was merely recorded by the Magistrate without clear guidance. From my findings, I am of the settled mind that failure to comply with the dictates of section 127 (2) of the Evidence Act, Cap 6 [R.E.2019] means that the evidence of PW1 (the

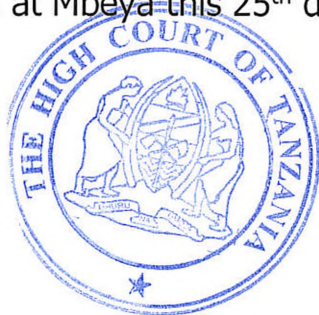


victim) had no value in the case in hand because there is no promise to tell the truth, it ought to be expunged from the records and I accordingly do so. Having observed those irregularities, I don't see the need of embarking on the other grounds of appeal filed by the appellant since the non-compliance with the law suffices to expunge the evidence of PW1.

In the end result, the testimony of a child as conceded by the parties was recorded without compliance to procedure of recording evidence of a child of tender age. The argument of the state Attorney that the witness was credible do not cure the anomaly occasioned. Consequently, conviction is hereby quashed and sentence set aside. I hereby order immediately released of the appellant unless lawful held with another lawful cause.

Order accordingly.

Dated at Mbeya this 25th day of July 2022.



D. P. Ngunyale
Judge