IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 15 OF 2022

(Originating from Criminal Case No. 148 of 2018 of Mwanga District Court)

HAMADI SALUMU SAIDI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

16/8/2022 & 15/9/2022

SIMFUKWE, J

The appellant was charged before the District Court of Mwanga with two counts of rape contrary to **section 130 (1)(2)(e) and 131(1) of the Penal Code, Cap 16 R.E 2019** and **unnatural offence** contrary to **section 154(1)(a) of the Penal Code Cap 16 R.E 2002** as amended by **section 185 of the Law of the Child Act, No 21 of 2009**.

On the first count it was alleged that on diverse dates, October, 2018 at Makokoro area within the District of Mwanga in Kilimanjaro Region, the appellant did have carnal knowledge of one Jackline Emmanuel a girl of 11 years.

On the second count it was alleged that on the unknown date of October, 2018 at Makokoro area within the District of Mwanga in Kilimanjaro Region, the appellant did have carnal knowledge of one Jackline Emmanuel against the order of nature without her consent.

Briefly, the facts of the case as captured from the record are set out as follows:- The whole saga started at the school where the victim studies. That, one of the parents complained to the teachers that she found her child one Rafia with money. So, the said parent asked the teachers to inquire where the said student got that money. When the child was asked by the teachers, she told the teachers that she got the money from one Babu Mwarabu and that even the victim of this case (PW2) was given money by the said Babu Mwarabu. The victim of this case alleged that, the suspect had been raping and sexually assaulting her. Upon hearing such story, the teachers decided to call the victim's parents to school. The victim also described how the suspect was raping and sexually assaulting her. Consequently, the victim's mother reported the incidence to the police. PW2 was taken to hospital and then a case was filed in court.
The trial court was satisfied with the evidence presented against the accused and convicted the accused on both counts. He was sentenced to serve life imprisonment and to pay compensation of two million.

Dissatisfied the accused preferred this appeal under the following grounds;

1. *That the trial court grossly erred in law and fact in basing its conviction on PW2's (prosecution's) unreliable, incoherent and contradictory evidence.*

2. *That the trial court grossly erred in law and fact in construing reasonable doubts raised by the appellant (accused person) and opted to rely on them in favour of the prosecution side.*
3. *That the trial court grossly erred in law and fact in failing to consider the Appellant's defence adduced at the trial, and erroneously held that the Respondent proved their case against the Appellant beyond reasonable doubt(s).*
4. *That the trial court grossly erred in law and fact in failing to draw adverse inference against the Respondent (Republic) upon their failure to call material witnesses.*
5. *That the trial court grossly erred in law and fact in failing to draw adverse inference against the said PW2, upon his (sic) failure to report the incidences at the possible earliest moment.*
6. *That the trial court grossly erred in law and fact in failing to properly evaluate the evidence adduced at the trial instead it glossed over it to justify the conclusion reached.*

The hearing of the appeal was conducted orally. The Appellant was represented by Mr. Martin Kilasara, learned advocate whereas the Respondent (Republic) had the legal services of Mr. Rweyemamu, learned State Attorney.

Submitting jointly on the 1st, 2nd and 3rd grounds of appeal which concerns evaluation of evidence, the learned advocate for the appellant argued that since at page 13 of the typed proceedings of the trial court it has been said that PW2 (the victim) was a child of tender age, then her evidence

was supposed to be tendered under **section 127(2) of the Evidence Act, Cap 6 R.E 2002**. The learned counsel continued to state that in the proceedings of the trial court no preliminary questions were asked to PW2 by the trial magistrate in order to test whether she knew the duty of speaking the truth. That, in the proceedings, there is conclusion of the court only. Thus, the trial court didn't comply to the requirements of **section 127(2) of the Evidence Act** (supra). Mr. Kilasara cited the Court of Appeal case of **John Mkorongo James vs Republic, Criminal Appeal No. 498 of 2020** in which at page 10 to 15 it was emphasized that*; the child of tender age should be asked preliminary questions in order to ascertain whether she understands the meaning of oath and the duty of speaking the truth.* In the circumstances, the learned advocate for the appellant implored the court to find evidence of PW2 to have been recorded contrary to **section 127(2) of the Evidence Act** (supra) and that the same should be expunged from the record for want of evidential value.

It was the opinion of Mr. Kilasara that if evidence of PW2 will be expunged from the record, the rest of the evidence is hearsay evidence which is inadmissible. That, even the PF3 tendered before the trial court does not state anything in respect of the culprit.

The learned advocate also contended that even if it is assumed that evidence of PW2 should not be expunged, still the said evidence is unreliable and contradictory. Elaborating the said contradictions, Mr. Kilasara submitted that at page 13 and 14 of the proceedings, PW2 alleged that she was raped in the morning while on her way to school. However, when PW2 was interrogated by the doctor (PW3) who examined her, she

said that she was raped while on her way back home. Also, PW3 alleged that the said offence was committed in the toilet which is near the house and the road where people use to pass while PW1 the mother of the victim said that the said place is an open place.

The learned counsel also argued that pursuant to the evidence of PW2 there was no attempt to raise an alarm as evidence that there was something bad going on which could have triggered people who were around that place to assist the victim. Apart from that, PW2 said that she was raped two weeks prior to her medical examination by PW3. PW3 testified that PW2 had bruises which had been sustained two or three days prior to examination. That, even evidence of PW1 Tumaini Mzava the mother of the victim was to the effect that she sleeps on the same bed with PW2. However, for the period of two weeks PW1 had not noted anything from her child.

Evidence of PW4 Mary Mollel was that when they interrogated PW2 and 9 other children, only one child Rafia Mussa was mentioned to have been raped. PW2 was not mentioned.

PW5 CPL Fatuma at page 22 and 23 of the proceedings alleged that PW2 told her that she used to be raped several times on different occasions while PW2 alleged that she was raped once. The question is why PW2 gave different stories if she was raped? Mr. Kilasara, was of the opinion that the same raises doubts and the trial court should have noted it. He referred to the case of **Fredwind Martin Minja vs Republic, Criminal Appeal No. 237 of 2008** CAT at Arusha at page 6 the Court held that:

"This is the witness who says this at one time, but completely the opposite at the other time. For all purposes this witness turned hostile, although not declared so. But even in her police statement (PW1) mentions MUSSA S/O MINJA as the one who raped her. There is no evidence, whether MUSSA S/O MINJA and FREDWIN MARTINE MINJA the appellant, were one and the same person."

Also, the learned counsel referred to the case of **Jeremiah Shemweta vs Republic [1985] TLR 228** in which it was held that:

"Discrepancies in various accounts of stories of prosecution witnesses give raise to some reasonable doubts about the guilt of the appellant."

On the strength of the above authorities, Mr. Kilasara submitted that the trial court did not do extensive evaluation of evidence. As a result, it caused miscarriage of justice against the appellant having in mind the prescribed sentence of the offence of which the appellant was convicted. Thus, the trial court was obliged to have acted extra carefully.

The learned advocate referred to the case of **Deemay Daat and 2 Others vs Republic [2005] TLR 132** in which the Court of Appeal held that:

"Where the trial court misdirected herself on the evidence available and misapprehend the substance the nature and the quality of evidence, the first appellate court is entitled to look at the evidence and make its own findings of the fact."

He prayed the doubts which were raised by the appellant before the trial court to be resolved in favour of the appellant and find that the offence charged was not proved beyond reasonable doubts.

Mr. Kilasara noted another irregularity in respect of the PF3, that, at page 19 and 20 of the trial court proceedings when the PF3 was admitted into evidence it was not read out in court. He thus implored the court to find the same to be wrong as it was held in the case of **Jofrey Isidory Nyasio vs Republic, Criminal Appeal No. 270 of 2017** at page 16 that:

> *"..... Failure to read a document after it is admitted as exhibit is fatal. A well-established practice is that after any document is cleared for admission and is actually admitted as an exhibit, it should be read out to the accused person to enable him understand the nature and substance of the facts contained in it. The interest of justice and fair trial demands that be done."*

He prayed the said PF3 to be expunged from the records.

On the 3rd ground of appeal which concerns failure by the trial court to consider the defence of the appellant, Mr. Kilasara submitted to the effect that in his defence, the appellant from the outset denied to have committed the offence. Also, he explained the circumstances of the place where the offence was alleged to have been committed. His evidence was supported by DW2 Hadija Salum. That, the appellant was staying with his children and grandchildren. That, from the place where the incidence is alleged to have taken place to the house it is a distance of about five steps. PW1 when cross examined stated that when they went to that place, they found three people staying with the appellant. DW1 and DW2

stated that it was impossible that the incidence could not be heard by those who were in the house of the appellant or people who were passing at that place. On balance of probabilities, the appellant adduced sufficient evidence to prove that it was impossible that the alleged incidence could not be noted by other people. Mr. Kilasara condemned the trial court for failure to evaluate the defence of the appellant which vitiates the conviction against the appellant as it was held in the case of **Ahmed Said vs Republic, Criminal Appeal No. 291 of 2015** at page 15 to 16.

Regarding the 4th ground of appeal, the learned advocate blamed the prosecution for failure to call material witnesses which draw an adverse inference against the prosecution. That, evidence of PW4 Mwl. Mary Mollel was that there was a child called Rafia who was being mentioned often as one of the victims. The said child was not called to testify and no reason was advanced why the said child was not called to testify. He referred to the case of **Hemed Said vs Mohamed Mbilu [1984] TLR 113** which held that:

> *"Where for undisclosed reasons a party fails to call material witnesses on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interest."*

The learned advocate argued that the same position was stated in the case of **Aziz Abdallah vs Republic [1991] TLR 71**. Mr. Kilasara prayed the court to draw an adverse inference against the prosecution for failure to call a witness one Rafia Mussa.

In respect of the 5th ground of appeal on failure to report the incidence and mention the suspect at the possible earliest moment, Mr. Kilasara submitted that PW2 at page 13-15 of the typed proceedings stated that, after being raped she felt bad and sustained sharp pains. At the same time, she said that she never told anyone about the said incidence. When she was interrogated by PW4 after two weeks she did not say anything. However, PW1 said that she was informed through a phone call of teachers that her child was raped. For all that period despite sleeping together, PW1 had not discovered that her child was raped and the culprit was not mentioned. Also, PW2 alleged that after being raped she went to school. Thus, PW2 could have told any person on her way to school, or a teacher or fellow pupil at school. PW2 could have told even a nanny at home or her mother after coming back from work. No evidence was adduced by the prosecution showing that PW2 was threatened anyhow. Thus, for two weeks, PW2 was a free agent. Therefore, PW2 was supposed to report the incidence. Otherwise, the trial court should have drawn an adverse inference against PW2. He cemented the argument by the case of **Ahmed Said** (supra) at page 14 where the court held that:

> *"On the failure to name a suspect at the earliest possible opportunity, this court in the unreported Criminal Appeal No. 6 of 1995, Wangiti Marwa Mwita and Others vs The Republic, made the following observation;*
>
> > *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so, should put a prudent court into inquiry."*

On the basis of the above authority, the learned advocate argued that in this case PW2 had many possible opportunities to report the incidence but she did not do so. Thus, there is possibility that her evidence might be fabricated and unreliable.

In conclusion, Mr. Kilasara submitted that since the trial court found that the charges were proved beyond reasonable doubts, he prayed this court to find this appeal to have merit, quash conviction and set aside sentence against the appellant and set him free.

In reply, Mr. Rweyemamu grouped his submissions into two; first, on the issues of law which falls under the 1st and 3rd grounds of appeal and issues of facts.

Submitting in respect of the 1st ground of appeal which is to the effect that evidence of PW2 contravenes **section 127(2) of the Evidence Act**, Mr. Rweyemamu argued that **section 127(6)** of the same Act provides for exceptions to section 127(2). That, the same was held in the case of **Wambura Kiginga vs Republic, Criminal Appeal No. 301 of 2018** CAT at Mwanza. At page 13 of the typed proceedings when PW2 started giving her testimony, it is not indicated whether the victim/witness was asked questions in compliance to **section 127(2)**. It was stated that there are Court of Appeal decisions which directs that in the circumstances like in the instant case the court should order retrial. However, before ordering retrial the court should consider the whole evidence on record.

On the 3rd ground of appeal, Mr. Rweyemamu submitted that **section 312 of the Criminal Procedure Act, Cap 20 R.E 2019** prescribes how

judgment should be composed. That, evidence of both the prosecution and defence should be analysed before reaching at the decision. In this case evidence of both sides was reproduced but the same was not analysed and evaluated before convicting the appellant. No reference was made to the evidence on the record. The learned State Attorney stated that the remedy is to order the matter to be remitted back to the trial magistrate to compose the judgment. Mr. Rweyemamu said that they are aware that they had a victim in this case. However, evidence on record do not suffice to find a conviction. It is on record that the victim stayed with her mother for two weeks before being taken to hospital. The victim was attending school as usual. Being raped and sodomised the victim was not noted to have a problem by her mother who was sleeping with her. She was noticed at school by the teachers.

Mr. Rweyemamu noted that apart from the fact that PW1 didn't state whether she knew the accused or not. She referred to him as Babu Mwarabu. PW2 mentioned the names of the accused before the court but at school while being interrogated by her teacher, PW2 mentioned the accused as Babu Mwarabu. Mr. Rweyemamu questioned that if she knew the names of the accused why she failed to mention before her teacher.

Responding to the issue of PF3, Mr. Rweyemamu submitted that page 19 of the typed proceedings shows that after being cleared for admission, the PF3 was not read in court. Thus, the only remedy is to expunge it from the record.

Having gone through the law and evidence in a nutshell, Mr. Rweyemamu concluded that the available evidence is shaky to order a retrial. He

therefore supported the appeal on the advanced reasons and subscribed to the submission of the learned advocate for the appellant.

In his one sentence rejoinder, the learned advocate for the appellant implored the court to consider the cited cases and resolve the doubts raised in this appeal in favour of the appellant.

After keenly examining the grounds of appeal, submissions by the parties, and the trial court's record, it is obvious that the learned State Attorney supported the appeal. Thus, the issue is whether the advanced grounds suffice to dispose of this appeal as supported by Mr. Rweyemamu.

On the 1st ground of appeal, the learned advocate for the appellant noted that, PW2 the victim was of tender age and thus her evidence was supposed to be tendered under **section 127(2) of the Evidence Act** (supra). This was also supported by the learned State Attorney. Basing on such submissions, my duty under this issue to ascertain if the trial magistrate contravened the said section and what are the effect of such contravention. Under **section 127(2)** the law provides that:

> *"(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."*** *Emphasis added*

Looking at the trial court's proceedings particularly at page 13, the trial magistrate before recording the evidence of PW2 (the victim who was of the tender age) stated that PW2 had promised to tell the truth and not lies and that **section 127(2) of the Evidence Act** (supra) was complied

with. The issue here is whether writing that the child of tender age has promised to tell the truth and not lies sufficed to conclude that the above section was complied with. This issue was squarely answered by the Court of appeal in the case of **John Mkorongo James vs Republic (supra)** at page 12 to 13 of the judgment, the Court while facing the same issue had this to say:

> *"...The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court to tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court to tell the truth and not tell lies. It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief, to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the*

promise to the court tell the truth and not tell lies as per section 127 (2) of the Evidence Act."

I fully subscribe to the above authority in the sense that in this case, the trial magistrate didn't conduct examination to PW2 who was of tender age to test her competence and to ascertain whether she knew the meaning of telling the truth and not lies. Rather the trial magistrate jumped into conclusion that PW2 promised to tell the truth and not lies. In line of the above authority, it goes without saying that the trial magistrate contravened **Section 127(2) of the Evidence Act** (supra) as rightly submitted by Mr. Kilasara and supported by Mr. Rweyemamu, the learned State Attorney.

The remaining question is whether failure to examine the child of tender age as prescribed under **section 127(2)** is fatal. In the case of **John Mkorongo James (supra)** the Court decided that omission to conduct a brief examination on a child of tender age is fatal which renders such evidence valueless and hence expunged from the record. Thus, in the instant matter, since there is such omission, then evidence of PW2 is hereby expunged from the record.

Having expunged the evidence of PW2, the last question is; does the remaining evidence suffice to sustain the appellant's conviction? The answer is definitely *'NO'.* Apart from evidence of PW2 (the victim) there is no any other evidence to prove the offence beyond reasonable doubts. Even the PF3 which was tendered by PW3 and marked as Exhibit PE1 should be expunged since it was not read out in court after the same had been cleared for admission.

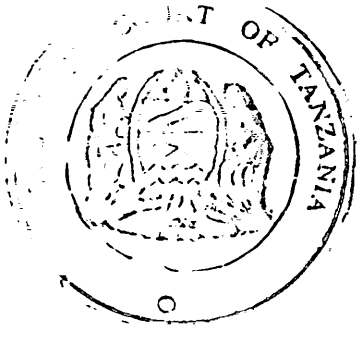
Even if it is assumed that evidence of PW2 was not expunged, still evidence from the record do not suffice to find conviction as suggested by the learned State Attorney for the respondent. That, the victim stayed for a week without being taken to hospital. She even attended to school as usual until when the matter was brought into attention of the teachers by one of the parents of the pupil. This creates doubts and shake the credibility of the victim (PW2). It has been said in a number of occasions that failure to report the matter at the earliest time put the credibility of the witness in question. See the case of **Lameck Bazil & Another vs Republic (Criminal Appeal 479 of 2016) [2018] TZCA 191 [Tanzlii] page 14 where it was held that:**

> *...the ability of the witness to name the suspect at the earliest opportunity is an important assurance of his reliability; and in the same way unexplained delay or complete failure to report must put a prudent court to inquiry."*

In the upshot, I am of considered opinion that all the raised grounds of appeal have merit as rightly submitted by the learned counsels of both parties. I therefore quash the appellant's conviction and set aside the sentence. The appellant is henceforth set free unless lawfully held.

Ordered accordingly.

Dated and delivered at Moshi this 15th day of September, 2022.



S. H. SIMFUKWE

JUDGE