IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 46 OF 2022

HENRICK MASWANYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Kinondoni at Kinondoni in Criminal Case No. 58 of 2020)

JUDGMENT

29th August & 20th September, 2022

KISANYA, J.:

On 25th June, 2021, the District Court of Kinondoni at Kinondoni convicted the appellant, Henrick Maswanya of rape contrary to section 130(1), (2) (a) (e) and 131 (1) of the Penal Code, Cap. 16, R.E. 2002 [now, R. E. 2022] and sentenced him to life imprisonment. In this appeal, the appellant challenges the conviction and sentence.

At the trial, it was alleged that, on 12th and 13th October, 2019, at Kimara Kibanda cha Mkaa area within Kinondoni District in Dar es Salaam Region, the appellant did have carnal knowledge of one, MZ (in pseudonym), a girl aged 11 years.

The appellant pleaded his innocence against the offence charged and the case proceeded to trial. To prove its case, the prosecution relied upon the evidence adduced by six witnesses and one exhibit to wit, the Medical Examination Report– PF3 (Exhibit P1). The evidence tended to show that on 12th October, 2019, MZ (also referred to "the victim" or "PW2") arrived home around 1600 hours. She was coming from her mother's (PW1) place of business. She proceeded to take a bath. As she entered her mother's room after taking shower, she found herself pushed on the bed by the appellant who entered his penis in the victim's vagina. It was the evidence of PW2 that the appellant threatened to kill her (PW2) if she would tell any person about the incident. The victim further testified that the appellant raped her again on 13th October, 2019.

At end of the day, the victim's mother (PW1) and sister (PW3) noticed that MZ was not able to walk properly. When they confronted her, MZ told them she had been raped by the appellant who happened to be their co-tenant.

The appellant was arrested two days later by the PW1's neighbors including Daudi Abel (PW4) who took him to Kimara Temboni Police Station, where WP 11530 D/C Dora (PW5) was assigned to investigate the matter. At the same time, the victim was issued with a PF3 and taken to Sinza Hospital for medical examination. She was examined by Dr. Gloria Lema (PW6) whose medical

examination report (PF3) revealed that MZ was not virgin and that her private part was discharging. PW6's oral testimony was supplemented by the PF3 (Exhibit P2).

On his part, the appellant relied upon his own testimony and evidence of two more witnesses (DW2 and DW3). He denied the charges and raised the defence of *alibi.* As regards DW2 and DW3, they testified that PW1 reported to them that the appellant had touched the victim's breast. They claimed further that it is when the two families sat to settle that issue where PW1 claimed that the victim had been raped by the appellant.

The trial court found credence on the evidence of the victim (PW2) and other witnesses called by the prosecution. It went on convicting and sentencing him as stated afore.

Undaunted, the appellant filed an appeal by way of petition of appeal predicated on seven grounds of appeal which are conveniently merged into six complaints as follows:-

1. That the learned trial magistrate erred in law and fact by sentencing the appellant to life imprisonment while the victim was not under the age of ten years.
2. That the learned trial magistrate erred in law and fact to convict the appellant basing on evidence of PW2 which was recorded in contravention of the law.

3. That the learned trial magistrate erred in law and fact to hold that the appellant's oral confession to PW1, PW3 and PW4 supported evidence of PW2 without considering that the said witnesses were reliable.
4. That the learned trial magistrate erred in law and fact to convict the appellant basing on evidence of PW1, PW2 and PW6 whose evidence is implausible, contradictory and based on suspicion.
5. That the learned trial magistrate erred in law and fact by not accepting and believing the appellant's defence and evidence.
6. That the prosecution case was not proved beyond all reasonable doubts.

At the instance of the appellant, this appeal was argued by way of written submissions. Both parties filed their respective written submissions in terms of the schedule issued by the Court.

The appellant prefaced his submission in support of the appeal by highlighting the material facts of this mater. With regard to the first ground of appeal, the appellant faulted the trial court for convicting him to life imprisonment while the victim's age was 11 years. He argued that the punishment for rape committed to a girl of ten years and above is not life imprisonment. Making reference to section 131 (3) of the Penal Code, the appellant submitted that the sentence of life imprisonment is passed when the victim of rape is under the age of ten years.

As regards the second ground, the appellant submitted that PW2's evidence was recorded in contravention of section 127 (2) of the Evidence Act, Cap. 6, R.E. 2022. His submission was based on the ground that the learned trial magistrate concluded that PW2 had promised to tell the truth while the record is silent on whether the court was satisfied that PW2 understood the nature of oath. Citing the case of **John Mkongoro James vs** R, Criminal Appeal No. 498 of 2020, and **Hassan Yusuph Ally vs R**, Criminal Appeal No. 462 of 2019 (both unreported), the appellant argued that the evidence taken in contravention of section 127 (2) of the Evidence Act cannot stand. He went on to argue that in the absence of evidence of PW2, the remaining evidence is not sufficient to want his conviction due to the grounds that: *One,* PW2 gave hearsay and contradictory evidence on the dates of commission of the offence. *Two,* PW2 took the victim to hospital after three days of the incident. *Three,* oral evidence alleged to have been made by the appellant has no probative value as PW1, PW2-and PW3 are not reliable witnesses and have interest to save and that, the person who confessed before PW4 is Heri instead of the appellant.

The appellant was of the view that the first two grounds are sufficient to dispose of the matter. However, he went on to submit in support of the fifth ground and contended that his evidence and that of his witnesses was not believed and or accepted by the trial court. Referring the court to the case of **Goodluck**

Kyando vs R [2006] TLR 363, the appellant argued that every witness is entitled to credence and his evidence must accepted unless there are good and cogent reason for not believing. He further submitted that the reasons for not believing a witness included giving improbable, implausible or contradictory evidence. To cement his submission, the appellant cited the case of **Aloyce Maridai vs R**, Criminal Appeal No. 2018 of 2016 (unreported). As regards the case at hand, the appellant faulted the trial court for not taking cognizance of his *alibi* on the incident of 12/10/2019. On the incident of 13/10/2019, the appellant contended that the trial court failed to consider that DW2 was with the appellant at the time when PW2 alleged to have been raped.

On the foregoing submission, the appellant prayed for this Court to find merit in his appeal and acquit him.

Responding, Ms. Elizabeth Mkunde, learned State Attorney, did not support appeal. Starting with the first ground, she contended that the offence was committed when the victim was 10 years and thus, punishable to life imprisonment under section 131(3) of the Penal Code.

On the second ground of appeal, Ms. Mkunde referred the court to the record which shows that PW2 was reminded that she was still under oath and that she promised to tell the truth. For that reason, the learned State Attorney went on contend that section 127(2) of the Evidence Act was complied with. It was her

further contention that PW2 gave detailed evidence on how she was raped by the appellant and that her evidence was not shaken by the appellant. Further to this, she submitted that the evidence of PW2 was consistent and that the trial court found her testimony to be credible and believable. The learned state Attorney then referred to case of **Wambura Kiginga vs R**, Criminal Appeal No. 301 of 2019 (unreported) in which the Court of Appeal held that the court can rely on such evidence even if section 127(2) of the Evidence Act was not complied with. Shaking

Regarding the third ground of appeal, Ms. Mkunde argued that the victim (PW2) gave evidence which was sufficient to warrant conviction of the appellant and that her evidence was corroborated by PW1, PW3 and PW4. The learned State Attorney urged me to consider the principle that reliability and credibility of the witnesses is by large and domain of the trial court. To bolster her point, she cited the case of **Wambura Kiginga** (supra). She then submitted that the trial court found PW2 as credible witness and that, in view of the principle in the case of **Seleman Mkumba vs R** (2006) TLR 379, the best evidence to prove the case at hand comes from the victim herself. The learned counsel also referred me to the principle that every witness is entitled to credence unless there are good and cogent reason to hold otherwise.

On the fourth ground of appeal, the learned State Attorney argued that the prosecution witnesses did not contradict each other. She contended that evidence

of PW4 that PW2 was sodomized has no effect because he was not present during the incident. It was her considered submission that PW2's evidence was credible and well corroborated by PW1 and PW6. She further contended that the contradiction, if any, is minor and that it did not go to the root of the case.

Countering the fifth ground, Ms. Mkunde argued that the prosecution case was proved beyond all reasonable doubt through evidence adduced by PW2 and corroborated by PW1. She further submitted that the appellant defence did not raise in the evidence of PW2. The learned counsel relied on the case of **Hassan Kamunyu vs R**, Criminal Appeal No. 277 of 2016 (unreported) where it was held that each case should be decided basing on its own merit and the facts. That said, Ms. Mkunde invited me to dismiss the appeal in its entirety for want of merit.

In his rejoinder, the appellant reiterated his submission that the sentence imposed by the trial court is illegal because the victim was not below the age of ten years. He further maintained his position that the evidence of PW2 was recorded in contravention of section 127(2) of the Evidence Act. With regard to the third ground, the appellant insisted that the evidence of PW1, PW3 and PW4 is not sufficient to warrant a conviction or corroborate evidence of PW2. He was of the view that the case of **Wambura Kiginga** (supra) is distinguishable from the circumstances of this case. It was also his contention that the respondent has

not responded to the fifth ground of appeal on the trial court's omission to consider the defence evidence.

After having considered the submission of the appellant and learned Senior State Attorney, the main issue for my determination is whether the appeal has merits.

I propose to start with the procedural flaw regarding the recording of evidence of the victim. The appellant argues that the evidence of PW2 was taken contrary to section 127(2) of the Evidence Act. It is not disputed that PW2 was a child of tender age. It also appears that both parties are at one that her evidence was required to be taken in accordance with section 127 (2) of the Evidence Act which stipulates:

> *"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.*

The above cited provision has been interpreted to mean that, a child of tender age may give evidence on oath or affirmation if he or she understands the nature of oath.-In the event the child of tender age does not understand the nature of oath, his or her evidence is recorded after promising to tell the truth and not lies. It is trite law underscored in the case **Godfrey Wilson** (supra) that, where a

child promises to tell the truth, his or her promise must be recorded before the evidence is taken.

In terms of the record of the instant appeal, the trial court did not make an inquiry as to whether PW2 understood the nature of oath. The record does not show whether PW2 knew or understood the nature of oath. Further to this, nothing to suggest that PW2 promised to tell the truth and not lies. This is because the promise alleged to have given was not recorded. However, the learned trial magistrate recorded that PW2 had promised to tell the truth. Since her promise was not recorded, it is hard to tell whether the guidelines given in the case of **Godfrey Wilson** (supra) were complied. As if that was not enough, when PW2 was recalled for cross-examination, she was reminded that she was still under oath. For the foresaid reasons, I agree with the appellant that the evidence of PW2 was taken in contravention of section 127(2) of the Evidence Act.

It has been a settled position that evidence of the child of tender age recorded in contravention of the said foregoing provision is deemed to have no evidential value and thus, liable to be expunged from the record [See for instance, the cases of **John Mkongoro James** (supra), **Hassan Yusuph Ally** (supra). However, in **Wambura Kiginga** (supra) relied upon by the learned Senior State Attorney, the Court of Appeal gave conditions under which the evidence recorded

in contravention of section 127(2) of the Evidence Act may be considered. The relevant part of that decision is reproduced hereunder:-

> *"Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are; first,* ***that there must be clear assessment of the victim's credibility on record*** *and;* ***second, the court must record reasons that notwithstanding non-compliance with section 127(2), a person of tender age still told the truth****."*
> (Emphasize supplied)

Being guided by the above position, the issue is whether PW2 was a credible and reliable witness. At the outset, I agree with the learned State Attorney that it is the trial the court which is in the best position of assessing the credibility of the witness. As submitted by both parties, the principle law of evidence as underlined in the case of **Goodluck Kyando** (supra) is that, every witness is entitled to credence and belief to his evidence unless there are good and cogent reasons to decide otherwise. I am also in agreement with them that, good and cogent reasons for not believing a witness include giving improbable and implausible evidence or adducing evidence which is materially contradicted any other witness or witnesses.

Although the trial court found PW2 as a credible witness, this being a first appeal, the court is bound to re-evaluate the entire evidence on record by reading the evidence and subjecting it to a critical analysis before making a decision of upholding the trial court's decision or arriving at its own conclusion. See the cases of **Napambano Michael @Mayanga vs R**, Criminal Appeal No. 268 of 2015 and **Faki Said Mtanda vs R**, Criminal Appeal No. 249 of 2014 (both unreported) in which that position was stated.

Having gone through the evidence of PW2 and other prosecution witnesses, I have noticed areas which were not considered by the trial court. Since the said areas raises eyebrow on the credibility of the evidence of the prosecution, I find it opportune to address them as hereunder:

One, in her evidence in chief, PW2 stated that when she was raped on 13th October, 2019 around 1800 hours, she went to see her mother (PW1) at her business place and that the latter detected that the victim was not walking properly. That is when PW2 told her mother (PW1) to have been raped by the appellant. PW2's testimony went as follows:

> "*The next day came on 13/10/2019 I was at hotel. My mother told me to go home and take a bath. ...It was around 18.00 hours. When I got home...I took a bath knowing that Hendrick was at his home.*

Upon completion, I entered inside to put on clothes. As I was looking for clothing (sic) he came and pushed me again on top of the bed and entered his penis into vagina. I blended (sic) and felt pain. I went and told my mother. My mother discovered that I was not walking properly. She started asking me. She was with my sister... I told her my stomach was aching but when she pressed me, I told her that Hendrick raped me."

However, when recalled for further cross-examination, PW2 testified to have told her mother on the next day.

Two, if it is taken that PW2 told her parent when she was raped by the appellant for the second time (13th October, 2019), her evidence is contradicted by her mother (PW1) who testified that the victim (PW2) was raped on 12th and 13th October, 2019 and that she (PW1) came to know about that fact on 14th October, 2019.

Three, if it considered that PW1 and PW3 knew about the incident when the victim was raped on 13th October, 2019, it is not known as to why the matter was reported to the police three days later, on 16th October, 2019. Since the victim testified that she was feeling pain, PW1 being the victim's mother was expected to report the matter and take her daughter (PW2) to the hospital for medical treatment immediately after the incident.

Four, the trial court considered that the appellant had confessed to have committed the offence. However, the prosecution differs on the person to whom confession was made. The victim (PW2) and PW4 stated that the appellant confessed when he was being taken to the police. On the other hand, PW1 stated that the confession was made before neighbours, while the victim's sister (PW3) stated that the appellant confessed when his relatives went to see PW1 with view of resolving the matter. PW3 stated further that the appellant confessed before neighbours. Yet the neighbours to whom the confession was made did not adduced evidence. If it is taken that PW4 is one the neighbours, his evidence suggests that the appellant confessed when PW1 and PW3 were not present. It was PW4's evidence that the appellant confessed when they were on their way to the police station. As if that was not enough, PW6 testified that the appellant confessed to have sodomized the appellant. He did not state whether the appellant confessed to have raped the victim. In view thereof, I am of the considered opinion that it was not safe for the trial court to conclude that the appellant confessed to have committed the offence laid against him.

Five, as hinted earlier, PW1 stated to have discovered the incident on 14th October, 2019. Her evidence that the appellant was arrested and the matter reported on the next day (15th October, 2019) is supported by the victim (PW2) and the victim's sister (PW3). It was further testified by PW2 and PW3 that the

victim was taken to hospital on 15th October, 2019. However, their evidence is contradicted by PW4 who stated on oath that the appellant was arrested and taken to the police station on 16th October, 2019 and the victim taken to the hospital on that day (16th October, 2019). It is also gleaned from the evidence of PW6 and Exhibit P1 that the victim was taken to hospital on 15th October, 2019. It is my considered view that the said contradiction cannot be taken lightly. It raises a doubt on whether the delay to report the matter has been explained thereby affecting the credibility of the evidence of prosecution.

Sixth, according to the victim (PW2), the appellant raped her on 12th and 13th October, 2019. However, the investigator (PW5) who recorded the statement on 18th October, 2019 testified in his evidence in chief that the victim told him to have been raped on 12th October, 2019. He maintained that position when cross-examined by the defence counsel at page 43 of the typed proceedings. Nothing was stated about rape alleged to have been committed on 13th October, 2019. If the victim did not tell PW6 about the incident of 13th October, 2019 her credibility is questionable. It is also not known as to why that date was included in the particulars of the charge if the victim did not tell PW5 about it.

In the light of the foregoing, I am of the view the above areas or issues in the evidence of witnesses called by the prosecution constitute good and cogent reasons to disbelieve them, including PW2 whose evidence was relied upon to

convict the appellant. Although section 127 (6) of the Evidence Act and the case of **Seleman Makumba vs R** (supra) are to the effect the evidence of the victim is sufficient to warrant conviction, it must be established that the victim is credible and not otherwise. On the foregoing reasons, the evidence of PW2 is hereby expunged from the record. Consequently, there remain no evidence to support the appellant's conviction. I will therefore not dwell into determining other grounds of appeal.

In the event, I allow the appeal, quash the conviction and set aside the sentence meted upon by the appellant. I further order for the appellant's immediate release from prison unless he is confined there for other lawful cause.

DATED at DAR ES SALAAM this 20th day of September, 2022.

S.E. Kisanya
JUDGE
20/09/2022

COURT: Judgment delivered this 20th day of September, 2022 in the presence of the appellant, Ms. Lilian Rwetabura learned Senior State Attorney for the respondent and Ms. Bahati, court clerk.

Right of appeal explained.

S.E. Kisanya
JUDGE
20/09/2022