IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 232 OF 2021

(C/F Criminal Case No. 40 of 2021 District Court of Ilala at Kinyerezi)

INYASI AMEDEUS @ UNCLE BOB ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24th August, 2022 & 28th September, 2022

MASABO, J.:-

The Appellant, Inyasi Amedeus @ Uncle Bob, was charged with and convicted of the offence of rape contrary to section 130(1), (2)(e) and 131(3) of the **Penal Code**, [Cap. 16 R.E. 2019] and sentenced to life imprisonment. During the trial before the District Court of Ilala at Kinyerezi (the trial court) the prosecution rendered evidence to establish that a 4-year old girl victim, **EMF** (true identity hidden) was was raped by the appellant on 20th December, 2020 at Tabata Kisukuru area within Ilala District in Dar es Salaam Region. That, the victim (PW2)'s home neighbouring the appellant's. On the unfortunate day, the appellant called PW2 to his room as she was coming from bathroom. The appellant told her to lay on bed and he inserted his "dudu" in her private parts used for urination (vagina). Imediatey thereafter, she narrated the ordeal to her elder sister who informed their mother (PW1). PW2'S father was also informed and he reported the matter to the justice machinery. The

appellant denied to have committed the offence and in his defence he claimed that, the case against him was frabricated. In the end, the case gainst him was found to have been established and he was convicted and sentenced to serve life imprisonment.

Aggrived by the conviction and the sentence passed against him by the trial court, the appellant preferred this appeal containing eight detailed grounds of appeal. During his submission in support of the appeal he sumarized his grounds into the following four grounds; *first*, the trial court erred in law and fact in not drawing adverse inference to the prosecution side when unreasonably failed to summon very important witnesses. *Second*, the trial magistrate misdirected himself by relying on the evidence of PW2 (victim) without making a critical assessment of the same. *Third*, the learned trial magistrate wrongly relied on the evidence of PW3 (medical doctor) which was unreliable and *lastly,* the trial magistrate wrongly convicted the appellant in a case which was not proved beyond reasonable doubt by the prosecution as mandatorily required by law.

Hearing of the appeal was done by way of written submissions. The appellant appeared in person, unrepresented whereas Ms. Sabrina Joshi, learned State Attorney, appeared for the respondent, the Republic.

Supporting the first ground of appeal, the appellant submitted that the trial court erred in law and fact in failing to draw an adverse inference to the prosecution side when it failed to summon important witnesses

without showing any sufficient reasons. He argued that, the prosecution has statutory duty of proving its case beyond reasonable doubt against the accused. Its failure to call one Hossana (PW2's sister) to testify in court casts a reasonable doubt as to what was the prosecution trying to hide. He elaborated that according to the record, immediately after the alleged incident, PW2 narrated the ordeal to Hossana and it was the latter who reported the incident to their mother (PW1) who informed her husband and they reported the matter to Police. However, neither the said Hossana nor PW1's husband were summoned to testify before the court while they were very essential witnesses to prove the veracity of PW1's and PW2's testimonies. In fortification, he referred the court to the case of **Samwel Japhat Kahaya Vs. R**, Criminal Appeal No. 40 of 2017 (unreported) where the Court of Appeal held that when a party fails to summon a material witness, an adverse inference may be drawn against that party.

Regarding the 2nd ground, it was the appellant's submission that PW2's evidence was illegally recorded in contravention of section 127 (2) of the Evidence Act as she was not asked on whether or not she understood the nature of oath or the duty to speak the truth. He argued that, when the *voire dire* test was conducted at the trial court, PW2 was not asked of her age, the religion she professes, whether or not she understood the nature of an oath and whether or not she promises to tell the truth to the court and not lies. Consequently, the trial court just ruled that **EMF** has promised to speak the truth whereas the record at page 12 of the trial court's proceedings does not show who made that promise. He

prayed that this court discard PW2's evidence for lacking evidential value and referred to the case of **Hassan Yusuph Ally Vs. R**, Criminal Appeal No. 462 of 2019 (unreported). He went on submitting that, after discounting PW2's evidence the remaining evidence of PW1, PW3 and PW4 cannot stand alone to prove the offence of rape against him as their evidence was pure hearsay and insufficient to ground his conviction.

As to the 3rd ground, it was the appellant's submission that, the evidence of PW3, the medical doctor, was unreliable as he only stated that *"I noted that the child was penetrated because she had bruises on her vagina and perforated hymen..."*. He argued that, this observation left a lot to be desired such as whether or not he observed any spermatozoa or blood as the proceedings does not show hat PW2 was bathed before being sent to hospital. He urged the court to disregard PW3's evidence for being unreliable.

On the 4th and last ground, the appellant submitted that the case against him was not proved as required by law. He cited the cases of **Jonas Nkize Vs. R** [1992] T.L.R 213 and **Joseph John Makune Vs. R** [1986] T.L.R 44 which expounded that in criminal cases the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution and when there are deficiencies and doubts, they render the prosecution case futile and the same should be resolved in favour of the accused. He insisted that the above pointed doubts weaken the prosecution evidence and renders it unreliable to ground his conviction. In summation, he prayed that this court allow the entire appeal by

quashing the conviction, set aside the sentence and release him from prison.

In reply, Ms. Josh, learned State Attorney, argued on the 1st ground is without merit as section 143 of the Evidence Act as well as the decision of the court in Court of Appeal case of **Richard Jared Vs. The Republic**, Criminal Appeal No. 23 of 2018 (unreported) and other authorities emphasize that no particular number of witnesses is required for proving any fact before the court. She ardently averred that, in this appeal, all important witnesses were summoned at the trial court. She also cited the case of **Halfan Nduhashe Vs. Republic**, Criminal Appeal No. 493 of 2017 where Court of Appeal underscored that what matters is not the number of witnesses but the quality and the relevancy of the evidence given by the witness(s).

She added that, it is the settled principle that the best evidence in sexual offence cases comes from the victim as emphasized by the Court of Appeal Cases of **Selemani Makumba Vs. Republic** [2006] TLR 379 as well as **Goodluck Kyando Vs. Republic** [2006] TLR 367. Henceforth, the evidence of PW1, PW2, PW3 and PW4 was sufficient and proved the prosecution's case beyond reasonable doubt. The victim, PW2 narrated clearly what happened to her on 20/12/2020. Her narration was corroborated by that of her mother, PW1 and verified by the medical doctor, PW3 who tendered the PF3 which was marked as exhibit X1 showing that the victim was indeed penetrated. Further, she argued that apart from corroboration by other witnesses, PW2's testimony was

coherent such that there was no reason for the trial court believe or even suspect that she fabricated the case as alleged by the appellant. The appellant's contention that the case had been fabricated against him due to family grudges was not substantiated in his testimony.

In regard to the 2nd ground, the learned state attorney argued that, the best evidence in sexual offences comes from the victim and in this case the victim was PW2. She proceeded that, although at the time of testifying PW2 was of tender age according to the law, her evidence was credible as she promised to tell the truth before giving evidence. Thus, her testimony passed the test of truthfulness as held in the case of **Mohamed Said Vs. Republic**, Criminal Appeal No. 145 of 2017 (unreported). Further, PW2 succinctly explained what happened to her and the trial court undoubtedly believed that she spoke nothing but the truth. Hence, a credible witness as stipulated in section 127 (2) of the Evidence Act. The learned State Attorney further conceded to the fact that according to page 12 of the trial court's proceeding, PW2 did not promise to tell the truth. However, at page 10 when the matter was adjourned, PW2 had already promised to tell nothing but the truth hence, the trial magistrate complied with the procedure of taking evidence of a child of tender age.

As to the 3rd ground regarding reliability of PW3's testimony, Ms. Joshi argued that, every witness is entitled to credence and must be believed unless there are good cogent reasons. PW3 testified that the victim was penetrated and her hymen was perforated hence corroborating PW2's

evidence. Besides, the appellant did not cross examine PW3 on whether or not spermatozoa or blood was found on her vagina. The failure left PW3's evidence unchallenged.

On the last ground, Ms. Joshi submitted that for a case to be proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave a remote possibility in his favor. She maintained that the case against the appellant was proved beyond reasonable doubt. Through PW2, PW3 and the PF3 it was proved there was penetration. The appellant was adequately implicated. PW2 knew the victim before the incident and she named him by his alias name uncle Bob at the earliest opportunity she got after meeting her sister Hosana. Based on these facts, the Learned Stata Attorney prayed that appellant's appeal be dismissed and his conviction and sentence be upheld. There was no rejoinder.

After going through parties' submissions and the trial court's records, the issue for consideration is whether the case against the appellant was proved to the required standard. In answering this question, I will now address myself to the grounds of appeal stating with the 2nd ground of appeal. In this ground the appellant has challenged the credibility of the victim's testimony. Starting with the age, the law is settled that proof of age of a victim of a sexual offence may come from either the victim, her relative, parent, medical practitioner or by producing a birth certificate (***Victory Mgenzi @ Mlowe v Republic***, Criminal Appeal No. 354 of 2019, CAT (unreported) and ***Issaya Renatus v Republic***, Criminal

Appeal No. 542 of 2015, CAT (unreported). **In the present case,** the charge sheet shows that the victim was four years old. Her mother, PW1, also clearly stated that the victim was four years and PW2 herself stated that she was four years old. Thus, legally, there was a sufficient proof of the victim's age. Besides, the appellant neither cross examined the victim nor her mother on this fact thus he was presumed to have believed that she was 4 years old. As held in **Nyerere Nyague V The Republic**, Criminal Appeal No. 67 of 2010 CAT (unreported);

> "a party who fails to cross examine the witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the court to disbelieve what the witness has said"

In the circumstances, the lamentation that there was no sufficient proof of the victims age is unmeritorious. Coming to her evidence, section 127(2) of the Evidence [Cap 6 RE 2022] Act provides;

> "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 lies"** (emphasis mine)

From this provision it is categorically clear that, a child of tender age can give his/her testimony under oath or without oath provided that if the evidence is to be taken as unsworn evidence, an undertaking to tell the truth and not lies must first be obtained before her evidence is recorded.

Failure to obtain the undertaking is fatal as it vitiates the evidence so recorded.

In the appeal at hand, the appellant alleges that the above requirement was not complied with by the trial court when recording PW2's testimony. Before her evidence was recorded, she did not undertake to speak the truth and not lies. On the other hand, the respondent has argued that PW2 made the undertaking and that the provision of section 127(2) of the Evidence Act was strictly complied with. While straining the the trial court's records on that aspect I gathered that, on 20th April 2021 (page 10 of the trial court's typed proceedings) PW2 appeared in court as a witness and the following transpired:

> 'PW2 Ebeneza Mandanda Frank, 04 Years old female, kkindergarten pupil.
>
> Questions Answers
>
> -What is your father's name? ... My father is called Mandanda Frank.
>
> -What is your mother's name? ... I have forgotten name.
>
> -What is the name of your school? ... I go to school at Teacher Ana's school.
>
> -Where do you live? … I live at Tabata.
>
> -What happens to a person who tell lies? ... It is bad to tell lies.
>
> -Do you promise to speak the truth? ... I Ebeneza Mandanda Frank promise to speak nothing but the truth."

The court was satisfied with her competence as a witness and started to record her evidence. However, soon after PW2 stated to give her testimony she felt sick. The hearing was consequently adjourned to 20th May 2021

when she was examined again (page 12 of the proceedings). On that day, the proceedings went as follows;

> **PW2**; Ebeneza Mandanda, 04 years old female, Mmakonde, Kindergaten pupil
>
> Questions Answer
>
> -What is your name -Ebeneza Mandanda
>
> -Where do go to school - I go to teacher Anna School
>
> -What is your father's name - Mandanda
>
> -What happens if one tell a lie – To lie is very bad.
>
> Ebeneza Mandanda has promised promise to speak the truth.

Much as it is true that on this day PW2 did make the undertaking to tell the truth and not lies, the record is clear that she had already made such promise and even started giving her testimony after the trial magistrate was satisfied that she possessed sufficient intelligence to tell the truth. In the light of the above, I am of the considered view that the undertaking made by PW2 on the first day she appeared in court as a witness sufficed. For this reason, the 2nd ground of appeal fails.

In the first ground of appeal, the appellant has challenged the prosecution for failing to summon important witnesses. The law as set out under section 143 of the Evidence Act places less weight on the number of witnesses. As correctly submitted by Ms. Joshi, what matters in any given case is the quality of the evidence and not the number of witnesses. Even the testimony of a single witness can be safely relied upon to enter a conviction if found material, credible and entertains no

reasonable doubt. Expounding this principle in **Yohanes Msigwa Vs. R** (1990) TLR 148, the court held that;

> "As provided under section 143 of the Evidence Act, no particular number of witnesses is required for the proof of any fact. What is important is the witnesses' opportunity to see what he/she claimed to have seen, and her credibility".

In the present case, the appellant believes that the victim's sister one Hossana and her father were material witnesses and the omission to call them as witnesses was injurious to the prosecution's case. In my considered view, much as it is true that the victim first relayed her ordeal to Hossana and the said Hosanna, together with the victim's father who reported the incident to the relevant authority were not summoned to testify in court, their omission is not injurious to the prosecution's case. Looking critically at the evidence on record, it is obvious that the evidence of these two witnesses would have added no value as none of them was an eye witness to the offence. Their evidence would have been merely hearsay based on what was relayed to them by the victim hence devoid of any value. I, therefore, find no merit in this ground as calling the two witnesses would only add the number of witnesses not the value of evidence which is immaterial in terms of section 143 of the Evidence Act.

The third ground of appeal concerns reliability of the evidence of the medical doctor and the major contention raised is that, it does not show whether there were sperms or blood in PW'2's vagina. Without much ado, I will outright reject this ground. The argument that the

victim was found with no sperms is flawed as the absence of sperms has nothing to do with proving penetration as in terms of S. 130 (4)(a) of the Penal Code penetration, however slightest is sufficient to constitute rape. Besides, the fact that there was no hymen and bruises imply penetration. This ground also crumbles.

Regarding the 4th ground of appeal, I agree with the both parties that the onus to prove the charges lies solely on the prosecution and the standard required is proof beyond reasonable doubt (see **Jonas Nkize Vs. R** [1992] T.L.R 213 and **Joseph John Makune Vs. R** [1986] T.L.R 44). The question for determination is whether in the light on the evidence on record, the charges were proved against the appellant. The law deems the charges to have been proved beyond reasonable doubt if the proof so rendered is strong against the accused person as to leave a remote possibility in his favour.

In the present case, PW2 coherently narrated how the appellant lured her to his room, lay her on bed and inserted his "dudu" in her private parts used for urination (vagina) hence there was proof that there was penetration. Also, it is uncontroverted that the appellant was well known to her as they were living in in the neighborhood. She mentioned him immediately after the incident and consistently maintained that he is the one who raped her. Thus, there is no room for mistaken identity as argued by the appellant. Besides as demonstrated while determining the third ground, the victim's evidence was corroborated by PW3 who medically examined her and

found out that she had bruises in her vagina and perforated hymen hence indicative that she was penetrated by a blunt object.

In any case, it has to be borne in mind that the present case involved a sexual offence whose proof is predicated on the evidence of the victim which is regarded by law as the best evidence. In the case of **Seleman Makumba vs. Republic** [2006] T.L.R. 379 which has been reinforced by a plethora of subsequent authorities from the Court of Appeal, it was held that, the best evidence of rape has to come from the victim as there can be no more direct evidence than the evidence of the victim of the crime concerned (Also see **God Kasenegala vs. Republic**, Criminal Appeal No, 10 of 2008, CAT and **Alex Ndendya vs. Republic**, Criminal Appeal No. 3 of 2017, CAT. **Victory Mgenzi@ Mlowe vs Republic** Criminal Appeal No. 354 of 2019 (unreported). This position is derived from section 127 (6) of the Evidence Act which states thus:

> *"……*, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that, such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth".

The victim in the present case was of a tender age and her evidence was found credible and sufficient to mount a conviction even in the absence of any corroboration. I find no justification upon which to fault the trial court's finding as regards PW2's credibility. Moore so, as demonstrated in the foregoing, the trial court did not solely rely on the victim's testimony but other prosecution witnesses who corroborated her testimony. This ground also fails.

For the foregoing reasons, I find the conviction and sentence of life imprison to have been well grounded. The trial court's conviction and sentence are upheld and the appeal is consequently dismissed in its entirety for want of merit.

It is so ordered.

DATED at DAR ES SALAAM this 28th September, 2022.

X

Signed by: J.L.MASABO

J.L. MASABO
JUDGE
28/09/2022