THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DSTRICT REGISTRY

AT IRINGA

DC. CRIMINAL APPEAL NO. 55 OF 2021

(Originating from Criminal Case No. 36 of 2021, In the District Court of Makete District, at Makete).

FANUEL NKESANI NGALAWA ..... APPELLANT

VERSUS;

REPUBLIC..... RESPONDENT

JUDGMENT

29th July & 3rd October, 2022

UTAMWA, J:

In the District Court of Makete District, at Makete (the trial court), the appellant FANUEL NKESANI NGALAWA was charged with the offence of Rape contrary to sections 130(1) (2)(e) and 131(1) of the Penal Code, Cap.

16 R.E 2019 (now R.E 2022). It was alleged by the prosecution that, on the 24th day of June, 2021 at 23:00 hours at Kitula village within Makete District in Njombe region, the appellant unlawfully had carnal knowledge of a girl aged 14 years. In this judgment, I shall refer to the girl as the victim or PW.1 to conceal her identity for the sake of her own dignity.

The appellant pleaded not guilty to the charge before the trial court, hence a full trial which ended up with a conviction. He was sentenced to serve thirty (30) years in jail. The conviction and sentence were due to the judgment of the trial court dated 23rd August, 2021 (henceforth the impugned judgment). He is now challenging both the conviction and sentence. His appeal was based on the following five grounds which I reproduce for the sake of a readymade reference:

1. That, the trial honourable court erred in law in relying upon the evidence of PW.1 which was taken contrary to section 127(2) of the Evidence Act, Cap. 6 R.E 2019 in convicting the appellant.
2. That, alternatively to ground number 1 above, the trial court erred in law and fact in raising the issue of PW.1's demeanour at the stage of writing judgment without justification from the court proceedings.
3. That, the trial honourable tribunal erred in law and fact in relying upon the evidence of visual identification in convicting the appellant while such evidence was too week to warrant conviction against the appellant.

4. That, the trial honourable court erred in law and fact by failing to draw adverse inference against the prosecution for failure to call material witnesses to give evidence as no reason(s) was given for such failure to call material witnesses.
5. That, the trial court erred in law and fact in concluding that the case against the appellant was proved beyond reasonable doubt while the evidence on record does not suggest so.

Owing to these grounds of appeal, the appellant urged this court to allow the appeal and quash the impugned judgement and order his immediate release from prison.

At the hearing of the appeal, the appellant was represented by Mr. Jally Mongo, the learned advocate while the respondent was represented by Mr. Alex Mwita, the learned Senior State Attorney (The SSA). The appeal was argued by way of written submissions.

In his written submissions, the appellant's advocate argued grounds 1 and 2 of the appeal independently. He indeed, conversed on ground 2 alternatively to the ground 1. He further argued grounds 3, 4 and 5 jointly.

Regarding the first ground of appeal, the learned counsel for the appellant submitted that, the trial court based its conviction on the evidence of PW.1 which was received contrary to the requirements of section 127(2) and (4) of the Evidence Act (supra). This was because, the witness was a child of tender age, hence the law requires her to make a promise to tell the truth and not lies. This requirement is not reflected in the trial proceedings. He argued further that, the effect of non-compliance with such legal requirement renders the evidence received valueless and

invalid. He referred this court to the decision of the Court of Appeal of Tanzania (The CAT) in the cases of **Godfrey Wilson v. The Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** (Unreported) and **Mwalimu Jumanne v. The Republic, Criminal Appeal No. 18 of 2019, CAT at Dar es Salaam** (Unreported) to support his contention.

In relation to the ground of appeal number 2 the appellant's counsel argued alternatively that, in its impugned judgment, the trial court referred to matters which are not reflected in the proceedings. At page 4 (in the 3rd paragraph) of the impugned judgment for instance, the trial court included the demeanour of PW.1 which was not recorded in the proceedings. This occasioned miscarriage of justice to the appellant as the trial court aimed to solidify that PW.1 was credible and competent witness. The irregularity vitiated the entire decision in law. He supported this argument by citing the case of **Shija Sosoma v. The Republic, Criminal Appeal No. 327 of 2017, CAT at Mbeya** (unreported) which cited with approval its previous decision in **Athanas Julias v. The Republic, Criminal Appeal No. 498 of 2015**, (unreported).

Submitting on grounds of appeal numbered 3, 4 and 5 cumulatively, the appellant's counsel contended that, it is trite law in our jurisdiction that the best evidence on sexual offences comes from the victim. Section 127(7) of the Evidence Act also provides that, conviction in sexual offences may be grounded solely on the uncorroborated evidence of the victim. However, there is a need to subject the victim's evidence under scrutiny to ascertain that what she states is nothing, but the truth in accordance with section 127(7) of the Evidence Act.

The appellant's counsel further argued that, in the present appeal, apart from the PW.1 herself, no other direct witness testified that he/she saw the appellant committing the crime at issue. The court has therefore, to scrutinize the evidence of PW.1 with caution so as to test its veracity and credibility. The evidence of PW.1 on the identification of the appellant was the evidence of visual identification (recognition). Such evidence is in law of the weakest kind and should not be acted upon unless all the possibilities of mistaken identity are eliminated. The evidence of PW.1 did not also meet the guidelines for the evidence of visual identification as set in the case of **Khalid Mohamed Kiwanga and Another v. The Republic, Criminal Appeal No. 223 of 2019, CAT at Dar es Salaam** (unreported). This was because, the PW.1 failed to name the appellant as the rapist, she did not describe the intensity of the moonlight which allegedly assisted her to identify the appellant during the material night and she failed to describe the appellant to any person.

The appellant's counsel also faulted the prosecution's case on the failure to call a material witness. He contended that, the PW.1 testified that, when she made an alarm for help at the material time, a neighbour came to assist her by trying to apprehend the appellant, but the appellant beat the neighbour and he (appellant) run away. Nonetheless, the said neighbour was not called as the key prosecution witness to testify in court. Such failure entitles this court to draw an adverse inference against the prosecution case under section 122 of the Evidence Act. He also cited the case of **Alfred Makaranga v. The Republic, Criminal Appeal No. 300 of 2017, CAT at Dar es Salaam** (unreported) to cement the contention.

The appellant's counsel thus, urged this court to re-evaluate the entire evidence on record as the first appellate court and allow the appeal, reverse the impugned judgment and set the appellant at liberty since the case against the appellant was not sufficiently proved.

The learned SSA for the respondent on the other hand, supported the appellant's appeal. This was due the grounds that, the case against him was not proved beyond reasonable doubts. He argued that, PW.1 was a child of tender age, hence her evidence was subject to the legal requirement highlighted by the appellant's counsel. Nonetheless, such requirement was not met. The evidence was thus, valueless as held in the case of **John Mkorongo James v. The Republic, Criminal Appeal No. 498 of 2020, CAT at Dar es Salaam** (unreported). He also agreed with the appellant's counsel on the legal principle that, the best evidence in sexual offences is that of the victim as it was held in the case of **Seleman Makumba v. Republic (2006) TLR 379**.

The learned SSA for the respondent also conceded the fact underlined by the appellant's counsel that, there was no proper identification for the appellant. This was for the reasons stated by the appellant's counsel in his written submissions in chief. He further agreed with the contention by the appellant's counsel that, in order for the court to convict on evidence of visual identification, such evidence must eliminate all possibilities of mistaken identity as per the holding in the case of **Shiku Salehe v. Republic (1987) TLR 193.** He further referred this court to the case of **Jaribu Abdallah v. The Republic (2003) 271** to support

the position of the law on the requirements in relation to evidence of visual identification.

The learned SSA thus, urged the court to allow the appeal since the case against the appellant was not proved beyond reasonable doubts.

I have considered the grounds of appeal, submissions by both learned attorneys for both sides, the record the applicable law. In my settled view, the fact that the present appeal is not objected, is not alone, the reason why this court should not test its merits. That fact is also not the sole ground for this court to allow the appeal. These particular views are based on the firm and trite legal principle that, courts of law in this land are enjoined to decide matters before them in accordance with the law and the Constitution of the United Republic of Tanzania, 1977 (henceforth the Constitution). This is indeed, the very spirit underscored under article 107B of the Constitution. It was also underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60.** Furthermore, the CAT emphasized it in the case of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza**, (unreported Ruling). In that precedent, the CAT held, *inter alia*, that, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have the additional duty of ensuring proper application of the laws by the courts below. I will therefore, test the merits of the appeal at hand despite the fact that the respondent supports it.

According to the anatomy of the petition of appeal for this appeal, the major ground of appeal is the one manifested under the fifth ground of

appeal. The rest of the grounds were merely auxiliary to it and tended to give support to it. That major ground of appeal essentially faults the trial court for convicting the appellant though the prosecution had not proved its case beyond reasonable doubts against him. The single major issue for determination before me is therefore, *whether the prosecution had proved the case against the appellant beyond reasonable doubts before the trial court.*

In answering the major issue, I totally agree with the submissions of both sides of the case that, according to the record, the victim was in fact, aged 14 years, hence a child of tender age in law. The phrase "child of tender age" is defined to mean a child whose apparent age is not more than 14 years; see section 127 (4) of the Evidence Act, Cap. 6 R. E. 2019 and the decision by the CAT in the case of **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018, CAT at Mtwara** (unreported).

On the other hand, I partially differ from the stance agreed by both sides. What they tried to contend is that, the law [section 127(2) of the Evidence Act] always requires a child of tender age to make a promise for telling the truth before testifying in court. They are thus, trying to fault the trial court for taking the evidence of the victim in the matter at hand on oath and without her promise to tell the truth. Nevertheless, the stance they are trying to advocate jointly is not the correct position of our law in my opinion. This because, that requirement to make the promise is merely an alternative to the oath depending on the capacity of the child witness

before the court. The provisions of section 127(2) of the Evidence Act, guide thus, and I quote them verbatim for a trouble-free perusal:

> "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."

According to these provisions therefore, a child of tender age may give evidence either on oath or without oath. But, when he/she is to give evidence on oath or affirmation, she/he must firstly make the promise to tell the truth to the court and not to tell any lies.

In fact, the law on the evidence of a child of tender age in this land has changed substantially. The contemporary stance of this branch of the law is underlined under the said section 127 (2) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016. The same was interpreted by the CAT in some precedents including the **Godfrey Wilson case** (supra) and the **Issa Salum case** (supra). According to these two precedents such law guides thus:

a) That, a child of tender age can give evidence with or without oath or affirmation.

b) The trial judge or magistrate has to ask the child witness such simplified and pertinent questions which need not be exhaustive depending on the circumstances of the case. This is for purposes of determining whether or not the child witness understands the nature of oath or affirmation. The questions may relate to his age, the religion he professes and whether he understands the nature of oath and whether or not he promises to tell truth and not lies to

the court. If he replies in the affirmative, then he can proceed to give evidence on oath or affirmation depending on the religion he professes. However, if he does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the truth and not lies to the court.

c) Before giving evidence without oath, such child is mandatorily required to promise to tell the truth, and not lies to the court, as a condition precedent before the evidence is received.

d) Upon the child making the promise, the same must be recorded before the evidence is taken.

My construction of the law is thus, that: It is a crucial requirement of the contemporary law that, a child of tender age like the victim in the case at hand, has to give evidence on oath only when the trial court is satisfied, upon conducting a brief inquiry through putting some relevant questions to the child witness, that he/she knows the meaning of oath. Otherwise, where the trial court finds, upon making the brief inquiry, that he/she does not know the meaning of oath, the child witness shall give evidence without oath. Nevertheless, the witness shall make the promise to speak the truth and not lies to the court. The promise is made before he/she testifies. The two steps are thus, in alternative and not cumulatively.

Actually, I also underscored the construction of the contemporary law guided by the two precedents of the CAT elsewhere. I did so in my previous decisions including in **Alberto Kibamba v. Republic, Criminal Appeal No. 118 OF 2019, High Court of Tanzania, at Iringa** (unreported) or **(Media Neutral Citation [2020] TZHC 1867).**

In fact, I consider the legal requirement just mentioned above as crucial because the whole section 127 of the Evidence Act essentially guides on who is a competent witness for testifying before a court of law. Section 127 (2) thus, specifically guides on how to determine the competence of a child witness. The determination of an issue of competence of witness is thus, vital before the court receives his/her testimony if fair trial has to be promoted as required by the law.

In the case at hand however, the record of the trial court (at page 8 of the printed proceedings) shows that, when the victim appeared before the trial court for her testimony on the 23rd July, 2021, the trial Resident Magistrate straightforward subjected her to oath, she swore and proceeded to testify. She was not subjected to any inquiry envisaged above so that the court could determine as to whether or not she could take the oath or make the promise.

I therefore, agree with both attorneys in this case that, her evidence was erroneously in violation of section 127(2) of the Evidence Act. My consensus with them is however, as hinted above, for the reasons I have just adduced above, and not for the reasons they advanced, hence my partial agreement with them.

I consequently find that, since the evidence of PW.1 was erroneously received by the trial court, it is liable to be expunged from the record and I accordingly expunge it.

Upon expunging the evidence of PW.1 the sub-issue at this juncture is *whether there is any other evidence that supports the prosecution case as against the appellant.* In my settled opinion, the circumstances of the

appeal at hand call for a negative answer to this sub-issue. This is because, the prosecution case supported by only two witnesses, namely the PW.1 and PW.2 (called Dr. Stella Kilovele) who had medically examined the PW.1. Nonetheless, the evidence by PW.2 did not implicate the appellant in anyway. At most, she only supported the fact that the victim had been raped, but did go to the extent of showing by who. The PF.3 (exhibit P.1) made by PW.2 did not also go beyond the extent testified by the PW.2, its maker. It follows thus, that, the evidence by PW.2 and her PF.3 could not constitute any good basis for the conviction against the appellant.

In fact, as demonstrated above, both sides of the case went further to discuss on the improper identification of the appellant. They agreed that he was not properly identified. However, on my part, I will not dwell much on this kind of evidence. This is because, such evidence of visual identification was given only by the PW.1, but it has already been expunged. In my settled view, once evidence is expunged from record, it becomes a non-extent creature as if it was not received in evidence by the trial court. I also becomes incapable of being considered for any useful purpose. It is thus, superfluous for this court to discuss the non-existent evidence of PW.1 in considering the issue of visual identification of the appellant. In the same spirit, I will not discuss on the effect of the failure by the prosecution to call the said key witness (the neighbour who tried to arrest the appellant unsuccessfully) as envisaged by the learned counsel for the appellant. This is because, such averment was also made by the PW.1 through her evidence which no longer exists for being expunged. In fact, for that same reason again, I will not consider the arguments by the

appellant's counsel regarding the ground of appeal number 2. Such arguments expressed his dissatisfaction against the way the trial court considered the demeanour of the PW.1 in determining the credibility of her evidence, which has been expunged.

Owing to the above reasons, I determine the sub-issue posed above negatively that, upon this court expunging the PW.1 evidence, there is no any other evidence that remains on the plate to support the prosecution case as against the appellant. Due to this finding, I also answer the major issue negatively that, the prosecution did not proved the case against the appellant beyond reasonable doubts before the trial court. As the result, I uphold the major ground of appeal.

Having held as above, I allow the appeal at hand, set aside the impugned judgment of the trial court dated 23rd August, 2021, quash the conviction and set aside the sentence imposed against the appellant. I further order that, the appellant FANUEL NKESANI NGALAWA shall be released from the prison forthwith, unless held for any other lawful cause. It is so ordered.

JHK UTAMWA

JUDGE

03/10/2022

03/10/2022.

CORAM; JHK. Utamwa, J.

Appellant: present (By virtual court while in Iringa prison) and Mr. Jally Mongo, advocate.

Respondent: Mr. Veneranda Masai, State Attorney (present physically).

BC; Gloria, M.

Court; Judgement delivered in the presence of the appellant (by virtual court while in Iringa prison) and Mr. Jally Mongo, advocate for the appellant and Ms. Veneranda Masai, learned State Attorney for the respondent, this 3rd October, 2022.

JHK UTAMWA
JUDGE
03/10/2022.