IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA.

CRIMINAL APPEAL NO. 27 OF 2022

(Arising from Criminal Case no. 264/2020 at Karagwe District Court)

ROBERT MATHIAS.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

28/09/2022 & 03/10/2022

ISAYA, J.

The Appellant, Robert Mathias was charged and convicted by the District Court of Karagwe for the offence of attempted rape contrary to sections 132 (1)(2)(a) and 132 (3) of the Penal Code Chapter 16 R.E 2019. He was charged of attempting to rape N.M who was aged four (4) years old. The Appellant refuted the accusation whereupon the prosecution paraded four witnesses and one documentary exhibit (PF3) to support the charge.

It was alleged by the prosecution side that on 28th day of August, 2020 at Bugene village within Karagwe District in Kagera Region, the Appellant attempted to rape the victim in one of the unfinished houses belonging to PW3.

In evidence, PW1 stated that the Appellant told her that he was going to buy sweets for him but he took her to the unfinished house, lied her down and

started to pull down his trouser. She shouted. She was rescued by PW3. PW2 arrived at the scene after being phoned. Having arrived, he took the victim and the Appellant to the Police Station where the PF3 was issued. Thereafter the Appellant was arraigned to court facing the offence of attempted rape.

In his defence, the appellant denied to commit the offence arguing that he met the victim together with another child walking in the main road. He interrogated them on why they were walking in the main road alone. He continued with his journey. Few metres ahead, he was arrested and assaulted with no reason. At the police station he was told that he was accused of attempting to rape a child.

The trial court was satisfied with the prosecution evidence and convicted him of the offence. It sentenced the appellant 30 years imprisonment, hence this appeal.

At the hearing of the appeal, the Appellant appeared in person and unrepresented, where Mr. Amani Kilua, the learned State Attorney represented the Respondent Republic. In his appeal, the Appellant fronted eight (8) grounds of appeal but I will not reproduce them as they all concern a complaint that the case was not proved against him, I will therefore examine them generally.

Amplifying the grounds of appeal, the Appellant urged his grounds of appeal to be adopted. He insisted the court to consider his evidence and set him free contending that he did not commit the offence. That the case was fabricated

against him by PW3 who thought he had money as he had taken his boss's cow to Lukole Market.

In response, Mr. Kilua supported both, the conviction and sentence meted out against the appellant contending that the case was proved to the required standards.

In his submission, the learned counsel stated generally that all the grounds of appeal have no basis. That the victim's evidence proved how the Appellant was attempting to rape her and that the evidence was corroborated by the evidence of PW3. Relying on the case of **Selemani Makumba vs Republic,** (2006) TLR 379, he stated that the best evidence of rape is that of the victim. On the other grounds, Mr. Kilua stated that they have no legs to stand; he prayed the appeal to be dismissed because the case was proved beyond reasonable doubt. He prayed the sentence meted out by the trial court to be upheld.

When probed by the court if section 127 (2) and (4) of the Evidence Act Cap 6 R.E 2019 was adhered, Mr. Kilua submitted that the section was complied with because she promised to tell the truth. However, he was of the view that if section 127 (2) was not complied, that can be cured by sub section (6) of section 127.

Having gone through the record of proceedings of the trial court and having considered the arguments for and against the appeal, it is evident that, the conviction of the Appellant hinges on the evidence of the victim (PW1) and

PW3. PW2, the father of the victim was phoned after the appellant was apprehended and PW4 investigated the case; they did not witness the incident.

It is in the record that, PW1 stated how she was seduced by the Appellant to take her to the shop to buy her sweets and how he was about to rape her before the mission was interrupted by PW3 who is residing near to that house. PW3 stated that he is the owner of that house and on the material date he was inspecting his house when he heard a child screaming from one of the rooms in that house. Since the victim was aged five (5) years, section 127(2) of Cap 6 must be complied before the evidence is taken by the court. The section 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 otherwise.*

According to the above provision, and as it was insisted by the Court of Appeal in **Godfrey Wilson vs Republic,** Criminal Appeal No. 168 of 2018 (CA), the child of tender age is allowed to give evidence without oath or affirmation but before giving evidence she must promise to tell the truth and not to tell lies. However, before reaching that stage, the magistrate ought to ask the witness of a tender age simple questions to enable the court to come to the conclusion

that the child possesses sufficient intelligence and understands the duty of speaking the truth. Such questions can be:

1. The age of the child.
2. The religion which the child professes
3. Whether she understand the nature of oath
4. Whether or not the child promises to tell the truth and not to tell lies.

In this case, before recording the evidence of the victim, the trial magistrate stated at page 5 of the typed proceedings that:

> *PW1: [N.M] 5 years old, resident of Omurushaka, pupil, Christian, knows nothing about an oath, has promised to state nothing but the truth unsworn as follows:*

In the present case the records are silent on what transpired before reaching into a conclusion that the child does not understand the oath and what was said by the child in promising to tell the truth and not lies. As it was pointed out in **Godfrey Wilson vs Republic** (supra), the questions that were asked to child and the answers thereto, were supposed to be recorded. That was not done. Shortly, there is no promise to state the truth from the child as required by law. The very words stated by her were to be recorded in giving her promise to state the truth. I find the evidence of the victim to have no evidential value. By invalidating the crucial evidence of the victim, the remaining evidence does

not corroborate to sustain the conviction. In the event, I find the issue raised by the court to be meritorious.

On the grounds that were raised by the Appellant, generally in all of the grounds, he is complaining that the case was fabricated against him by PW3 who contended to have been at the scene before and during the time the Appellant was attempting to rape the victim. However, this complaint was not considered by the trial magistrate in her judgment. In analyzing the defense evidence, the trial magistrate stated what was asserted by the Appellant without going further to establish the truth or otherwise of it. At page 4 of the judgment, she said that:

> *"However, accused person in his defence disputed the fact that he attempted to rape PW1 but he admitted that he heard PW1 talking to another child if her mother was there for the purpose of going to Omurushaka, the other child said that her mother is coming. What he did was to warn the two children not to go to the main road alone, the (sic) have to wait for their mother. After that he left, he walked for few meters that is when he was arrested and assaulted, and no one told him the reason of assaulting him. All her (sic) clothes were teared apart, he was taken to the police station while naked"*

In my considered view, the trial magistrate ought to have dealt with the prosecution and defence evidence before concluding that the case was proved to the hilt. This instance was stated by the Court of Appeal in **John Mghandi @ Ndovo vs The Republic,** Criminal Appeal No. 352 of 2018 that:

> *"In our view, the proper approach should have been for the magistrate to deal with the prosecution and defence evidence and after analyzing the whole of the evidence, the Magistrate should have then reached the conclusion."*

See also; Hussein Idd and Another vs The Republic [1986] TLR 166.

Being the first appellate court, this court is required to reconsider and evaluate the evidence on record and come to its own conclusion. See the cases of **Armand Guehi vs Republic,** Criminal Appeal No. 242 of 2010; **Audiface Kibala vs Adili Elipenda and Others,** Civil Appeal No. 107 of 2012 and **Maramo Slaa Hofu & Others vs Republic,** Criminal Appeal No. 246 of 2011.

In his evidence, the Appellant contended that he met the victim with other children walking in the main road. Whereas, the victim stated that she met the Appellant on the way who asked her to accompany him to buy sweets but ended up taking her to a small hut and attempted to rape her. However, PW3 alleged that the incident took place in one of the rooms in his unfinished house. Considering what was said by the prosecution side, there is contradictions on the place where the incident took place. Without Mincing the words, there is a

difference between a small hut, and a house. PW3 said the incident took place in one of the rooms; meant the house was big, not a small hut as was alleged by the victim. Therefore, the place where the alleged incident took place is not clear. With such contradictions, I find the prosecution evidence wanting.

Consequently, I find the appeal with merit, allow it and order the release of the Appellant from custody unless held in relation to any other lawful cause.

DATED at **BUKOBA** this 3rd day of October, 2022.

G. N. ISAYA

JUDGE

03/10/2022

Court:

Judgement delivered on 3rd day of October, 2022 in the presence of the Appellant in person, Mr. Amani Kilua, learned State Attorney for Republic.

G. N. ISAYA

JUDGE

03/10/2022