IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 83 OF 2022

(Original Criminal Case No. 14 of 2021)

BARAKA JOHN EFRAHIMU .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

29th September & 6th October, 2022.

MWANGA, J.

The appellant above named is charged and convicted of rape contrary to Sections 130(1) (2)(e) and 131(2) of the Penal Code, Cap 16 [R.E 2019]. He was sentenced to 30 years imprisonment. The appellant was dissatisfied with the decision of the District Court of Kibaha, hence appealed to the high court against both conviction and sentence on the following grounds;

1. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant relying on tender age evidence of PW2 (the victim) contrary to Section 127 (2) of the Tanzania Evidence Act.
2. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant relying on illegally obtained cautioned statement of the appellant as it was recorded outside the time provided

by law, hence contradicted section 51(a) and (b) of the CPA [Cap. 20 R.E 2019).

3. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where the investigator failed to investigate, arrest and interrogated witch doctor who instigated the rape for wealth purposes.
4. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where identification of the actual rapist (if any) is in a serious doubt.
5. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where it goes beyond human reasoning and understanding.
6. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant relying on the contradictory evidence of PW2 (the victim), PW3 (doctor), PW4 (ten cell leader's wife) and PW5 (Selina, a neighbor).
7. That, the learned trial magistrate erred in law and fact by convicting and the sentencing the appellant in a case where the prosecution did not prove its case beyond reasonable doubt.

In the first ground of appeal on non-compliance of section 127 (2) of the Evidence Act, the appellant submitted that the record does not show that PW2 was tested by the trial court satisfy itself as to whether she knows to tell the truth by asking her, the age, the religion which the child prosses and whether she understands the nature of oath and also whether or not the child promised to tell the truth and not to tell lies. In support of his submission, he cited the case of **Faraji Saidi V. Republic** Criminal Appeal No. 172 of 2018 and made reference to page 20 & 21, that when a child witness gives evidence without oath or affirmation, she must make a promise to tell the truth and undertake not to tell lies. He added that, failure of the court to undertake such test allowed PW2 to tell lies throughout her testimonies.

On the contrary, the learned State Attorney submitted that Section 127(2) of the TEA was complied with as shown in page 8 of the typed proceedings. She further stated that, the court is not confined with the type of questions to be posed to the child. It was her views that, if the court hold otherwise, it should then consider invoking provision of Section 127(6) of the CPA. She referred this court in the case of **Wambura Kiginga V. R,** Criminal Appeal No. 301/2018 CA at Mwanza.

The provision of Section 27(2) of TEA was clearly discussed in **Gogfrey Wilson V Republic,** Criminal Appeal No 168 of 2018; CAT at Bukoba where it was held that:-

i. ***child of tender age can give evidence with or without oath or affirmation.***
ii. ***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.***
iii. ***The questing may relate to his or her age, the religion he professes, whether or not he or she understand the nature of OATH or AFFIRMATION, and whether or not he/she promises to tell the truth and not lies to the court.***
iv. ***If he/ she replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion he/she professes.***
v. ***However, if he/she does not understand the nature of oath or affirmation, he or she should, before giving evidence, be***

require to make a promise to tell the truth and not lies to the court.

vi. 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.'

Basing on the above decision, I agree with the learned state attorney that the court is not confined to ask specific questions. However, in the current appeal, there is no dispute that the trial court did not pose any question to the child witness. Looking at the proceedings at page 7 and 8, there is nowhere indicated that the victim who was 11 years of age, was asked any questions as required by section 127(2) of the TEA. The issue now is whether this is a fit case for the court to invoke section 127(6) of the TEA. The case of **Wambura Kiginga V. The Republic** (Supra) as cited by the learned State Attorney had this response in that particular question;

'Based on that understanding, we are satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127(2) of the Evidence is not complied with, provided that some conditions must be observed to the letter, that 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 noncompliance with section 127(2) of TEA, a person of tender age still told the truth'.

The court added further that,

'Invoking section 127(6) must be very cautious, rare and only in exceptional circumstances'.

The learned state attorney simply stated that the section should be invoked **'in order to do justice'.** The cited case can be distinguished with the one above because, at least, one can see at page 8 of the judgment that the victim was giving answers to questions posed by the court. But in this appeal, there are no questions let alone answers.

With the above decision, and considering the circumstances on which the incident occurred leaves a lot to be desired. It is on record that, PW1(mother of the victim), PW2(victim) and the appellant were living in the same room and the incident of rape occurred during the night in that room when both were sleeping., I do not find that the thresholds set by the court in the authorities cited were met by the prosecution this case. I therefore find this ground of appeal is meritorious.

Having expunged from the record the evidence of PW2(victim), the rest of the testimonies becomes a hearsay, hence unreliable and untrustworthy. It is of no relevance to proceed with the other grounds of

appeal. Consequently, this Appeal is allowed. Conviction and sentence of the trial court set aside. The appellant **BARAKA JOHN EFRAHIMU** is hereby discharged forthwith, unless he is otherwise lawfully held.

It is so ordered.

H. R. MWANGA

JUDGE

06/10/2022

ORDER:

Judgement delivered in Chambers this 6th day of October, 2022 in the presence of the appellant and absence of the learned State Attorney for the Respondent.

H. R. MWANGA

JUDGE

06/10/2022