IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 93 OF 2021

(Arising from Criminal Case No. 262 of 2020 in the District Court of Tarime at Tarime)

MARTINE MATHAYO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

26 & 31 October, 2022.

M. L. KOMBA, J.:

The appellant, Martine S/O Mathayo was charged and convicted of the offence of incest by male contrary to sections 158 (1) (a) of the Penal Code, [Cap 16 R.E 2019, now R.E. 2022] by the District Court of Tarime at Tarime (the Trial Court). It was alleged by the prosecution that on various dates between 01 March, 2020 and 19 July 2020 at Michere village within rorya District in Mara region, the accused person had prohibited sexual intercourse with one Neema D/O Martine Mathayo a girl of 11 years old. The accused person pleaded not guilty and followed a full trial. In proving the case, prosecutors had four witnesses and one exhibit and the appellant was

convicted and sentenced 30 years imprisonment. He was dissatisfied by the conviction and sentence.

In a nutshell, the history of this appeal is like this. PW1 a 11 years girl and the student of Michere primary school was living with her sister and brother and that sometimes in July 2020 she escaped from their home, Michire village and went to other village because her father used to have sexual intercourse with her. The girl usually taking the food cooked by her mother to her father who was living alone, in that circumstances the father took a chance.

PW1 narrated that because she was in fear of being killed by her father if tell anybody that unhuman act, which was persisted, she decided to run away and drop in the house of one grandmother who took her to Utegi Police station and later on to Shirati Police Station where during interrogation she said her father was the victim, later on she was taken to hospital for diagnosis.

PW2 who is the wife of Martine testifies that one day she noticed her daughter to be unhappy and when she asked her, she said nothing and later on she disappeared. When her daughter went missing, she searches for her

to relatives and announced to local radio in vain. After four days she received a call from Police station Tarime where PW3, WP 10131 informed PW 2 that PW1 was raped by her father. After that brief PW2 was given PF3 and took PW1 to KMT Shirati Hospital where the meet PW4 (Joel Mathube) a clinical officer who was informed that PW1 was raped like seven days ago. After physical examination in labia minora (inner part of the vagina) PW4 found no bruises nor sperms nor hymen but the inner part was enlarged that shows that there was penetration in PW1's vagina.

On the other side, appellant was the only witness in defense side where he informed the trial court that he started living in Michire village in 2002 and in 2004 he married PW2 and were blessed with four children. In 2020 he married a second wife and the quarrels started. PW2 started to abuse him. He further said on 23 July, 2020 he was arrested and taken to Shirati Police Station where he was informed that PW2 was condemning him for raping his daughter. He said the case was framed and the PW2 is involved because she married second wife.

The learned trial court's Magistrate found the evidence given against the appellant sufficient to prove the charge. In so finding, he relied on the evidence two witnesses including on of PW1 who was the victim and tested

two important ingredients as the offence which are the age and whether the appellant did what was prohibited by law to his daughter. Relying in **the case of Selemani Makumba V. Republic** [2006] T. L. R 379 that true evidence of rape has to come from the victim, the trial court convicted the appellant, as said earlier, being dissatisfied, the appellant lodge this appeal having 8 grounds. I will reproduce all of the grounds as lodged by the appellant for reasons which will be known later. Grounds are as follows; -

1. *That, the trial magistrate misdirected himself in his finding to hold that the innocent appellant was committed the alleged matter in issue while the same was not true.*
2. *That, the trial magistrate erred both in law and fact by convicting the innocent appellant without any reasonable cause.*
3. *That, the trial magistrate failed to discover that this matter in issue was cooked one and it was implicated to the appellant by (PW1) daughter and (PW2) mother when the appellant decided to marry another woman as his second wife. Thus the decision of the appellant to marriage the second wife brought family conflicts and misunderstanding between the firs wife against the appellant.*
4. *That, the trial magistrate erred in law to convict the appellant by basing on cooked evidence of PW1, PW2, PW3, PW4 who were incredible witnesses and they were not telling the truth.*

5. *That, there was high possibility of the witnesses framing up a case against the appellant, Thus PW1 and PW2 being daughter and mother respectively were capable cooking up a story against the innocent appellant for their own interest.*
6. *That, it is trite in law to convict the innocent appellant basing on hearsay evident and the expert evidence which is not conclusive evidence that the said victim in issue was having sexual intercourse with her father. Thus, it may be this matter can be made by any person at the alleged place where the said victim in issue was living during the said days.*
7. *That, the trial magistrate failed to evaluate the evidence and fact before him and such failure leads him to reach wrong and unclear judgment.*
8. *That the evidence adduced by the prosecution side was not enough to prove its case beyond all reasonable doubts.*

The appeal was heard in semi teleconference whereas the appellant was remotely connected with technology, unrepresented while the State Attorney, Mr. Nimrod Byamungu State Attorney was present in court representing Republic.

When invited to argue his appeal, the appellant adopted the grounds of appeal as listed in his petition of appeal and he request this court to adopt petition of appeal as filed and that he did not wish to submit any more.

Mr. Byamungu on his part, at the outset, he submitted that he agrees with the appeal but not on the grounds as listed by the Appellant rather on the point of law, that PW1 was 11 years at the time she was testifying and she was the key witness. He said the wordings of S. 127 (2) of the Evidence Act, [Cap 6 R. E 2019] (here in after the Evidence Act) compel PW1 to tell the truth. On record, at page 10 of proceedings this child swears on which was in line with the analysis of the Court of Appeal in **Seleman Moses Sotel V. R Criminal Appeal No. 385 of 2018 CAT (un reported)** that the section does not bar the child to swear. However, he further adduced that before a child swear in, the court must satisfy that the child understands the meaning of swear in, that was not done by the trial court.

Mr. Byamungu pray the evidence of PW1 to be expunged from record of the court. After that he said the remaining the evidence of witnesses that is PW2 (the mother of Victim) and PW3 the police officer and PW4 the doctor their testimony remains to be hearsay as they have been informed by PW1 on what happened. He further said in cases of this nature the evidence of the victim is very important especially when there is no one see what happened. On that point he prays the court to quash and set aside conviction and sentence of appellant from district court and make him free.

When given a chance for rejoining his arguments the appellant had nothing to say.

I have duly gone through the records and arguments done by the State attorney. I will first analyse the issue credibility of PW1 as posed by Mr. Byamungu. PW1 was the key prosecution witness in the trial, gave her evidence on affirmation. At page 10 of the proceedings of the Trial Court the following is what transpired before the said witness gave her evidence:

> *'PW1 -Neema D/o Martine Mathayo, 11 years, Sukuma, a student of standard III at Michire Primary School, Christian, sworn and state as follows; -*
>
> *xd of PW1 by State Attorney for Republic.*

From the above excerpt, the court did not certify itself whether the child understand the nature of speaking the truth or meaning of oath. In the **case of Seleman Moses Sotel** (supra) the Court of Appeal while accepting credence of the evidence of a child of tender age, was of the consideration that the child understands the nature of oath, in that case the trial court satisfy itself that a child know the meaning of oath and it was on record. Contrary to the case at hand, as quoted, the trial court didn't. It is true that is great development of the law on how evidence of a person of tender age

can be tendered in court. All traces its root from section 127 of Evidence Act:-

> **S.** 127.-(1) *Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*
>
> *(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 to tell any lies.' (Emphasis supplied)*

Sub section 1 of the above quate enunciates that every person is competent to testify unless where the court finds the contrary and consequently, the Court must test whether the witness is competent to testify or not. That can only be done by the court by imposing some questions to the witness as observed by the Court of Appeal in **Geoffrey Wilson V. Republic,** Cr. App No. 168 of 2018 CAT (unreported) that;

> *'We think the trial Magistrate or Judge can ask the witness of tender age such simplified questions which may not be exhaustive depending on the circumstances of the case as follows:*

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

From the answers given by the child, the court will be satisfied whether a witness is competent to testify or not. The record of the trial court is silent on satisfaction whether the child understand the meaning of oath and duty of telling the truth. That mean the assessment of the credibility of the evidence was not done. Wordings of section 127 of the Evidence Act are clear on this to wit;

S. 127-(1)...

(2)...

(3)...

(4)...

(5)...

(6) *Notwithstanding the preceding provisions of this section, 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 the sexual offence is telling nothing but the truth.***

The trial court did not satisfy itself whether the child was telling the truth and therefore PW1 was not credible witness. This court has no other option than expunge her testimony from the record of the court. As I hereby do. It follows that the rest of evidence are hearsay which is not admissible before court law as always was emphasized that the best evidence in cases of this nature must come from the victim see the cases of **the case of Selemani Makumba V. Republic** [2006] T. L. R 379, **Shani Chamwela Suleiman V. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022; **Mohamed Said V. The Republic**, Criminal Appeal No, 145 of 2017, CAT at Iringa (unreported).

In the end, from the circumstances of this case and analysis done, I allow the appeal on the point of law. I quash conviction and set aside sentence

meted against the appellant, I order the appellant be released from the prison immediately unless otherwise lawfully held.

It is so ordered.

M. L. KOMBA

JUDGE

31 October, 2022

...dgement delivered in my chamber via teleconference and all parties were connected full time.

M. L. KOMBA

JUDGE

31 October, 2022