IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 16 OF 2022

(Arising from Criminal case no. 43 of 2021 in the district court of Serengeti at Mugumu)

DAUDI MGAYA MWIKWABE @ MGAYANATI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

25th & 25th October, 2022

F.H. MAHIMBALI, J.:

Daudi Mgaya Mwikwabe @ Mgayanati , the appellant was charged and convicted by the District Court of Serengeti at Mugumu of one offence of rape contrary to section 130 (1), (2) (e) and section 131 of the Penal Code, Cap 16 R.E 2019. It was alleged by the prosecution that on the 30th day of May, 2021 at Borenga area within Serengeti District in Mara region had carnal knowledge of one girl (name withheld) aged 15 years.

Upon hearing of the case, the appellant was convicted and sentenced to 30 years imprisonment after the satisfaction of the prosecution case that the charge was established beyond reasonable

doubt.

Not amused by the findings of the trial court, the appellant has preferred this appeal to this Court armed up with a total of six grounds of appeal.

During the hearing of the appeal, the appellant was self-represented whereas the respondent was dully represented by Ms Monica Hokororo, learned state attorney. The appellant during the hearing of the appeal, just prayed that his grounds of appeal dully lodged be adopted by the Court to form part of his submission and prayed that they be considered for his acquittal.

In her reply, Ms. Monica supported the appeal but on other legal grounds. She submitted in the first place that in her reading to the proceedings of the trial court and evidence adduced thereat, she had the following in her submission.

That according to PW1's testimony, the victim was 15 years. That notwithstanding, the trial magistrate proceeded under section 127(2) of the Tanzania Evidence Act, Cap 6 purporting testing the ability of the minor to give her testimony either on oath or not. That in her observation to the proceedings thereof at page 16, after the said interrogation by the trial magistrate, it was expected that there were court's findings. There was none of the trial magistrate's findings.

However, she being of an age of 15 years, the law does not put such a requirement that has to give promise to say truth. The trial magistrate proceeded to record the evidence of the said witness (PW2) not under oath which was not proper as per law. She criticized that according to law, the evidence taken from an adult person without an oath was unlawful. With this anomaly, she prayed that her evidence be expunged.

With PW3, she submitted that her testimony is corroborating what Pw2 had testified. As the evidence of PW2 is liable to expunge, there is nothing then to corroborate. Moreover, she submitted that since PW3 is a child of tender age, as per section 127(2) of the TEA, Cap 6, there ought to have been findings by the trial court upon such preliminary inquiry, if the child of tender age can give evidence under oath or not and whether she had promised to tell the truth. As that has not been done, then the proceedings have been vitiated. She invited this Court to be inspired by the decision of the Court of Appeal in **Shomari Mohamed Mkwawa V. Rep**, Criminal Appeal No. 312 of 2019.

She further challenged the medical examination report tendered in Court as exhibt PE1. As the said PF3 appears to be filled and signed by Nursing Officer, as per Medical Practioners Act, nurse does not fall in the category of qualified personnel to practice medicine.

With this submission, she prayed that the appeal be allowed,

conviction and sentence thereof be set aside and that the appellant be set free.

In order to appreciate what Ms Monica Hokororo, learned state attorney has submitted in respect of the testimony of PW2 and PW3, I better reproduce what the relevant provisions provide:

> *(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.*
>
> *(3) Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (6), the evidence of a child of tender age received under subsection (2) may be acted upon by the court as material evidence corroborating the evidence of another child of tender age previously given or the evidence given by an adult which is required by law or practice to be corroborated.*
>
> *(4) For the purposes of subsections (2) and (3),* ***the expression "child of tender age****" means a child whose* ***apparent age is not more than fourteen years****.*
>
> *(5) A person of unsound mind shall, unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them, be competent to testify.*
>
> *(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 age 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.*

As PW2 was above the above apparent age, she was not properly subjected to interrogation by the trial magistrate on the pretext of

ascertaining whether she is capable of giving evidence without taking an oath or making an affirmation or that can promise to tell the truth to the court and not to tell any lies. Since she was above 14 years old, the law does not make requirement of her making a promise of telling truth and not lies. That is the only option available to witnesses of tender age. By law, a child of tender age is that whose apparent age is not more than fourteen years. As PW2 was 15 years age, she was beyond that apparent age of tender age as per law. That said, the trial magistrate had erred to treat PW2 as a witness of tender age pursuant to section 127 (4) of the TEA while she was beyond that age limit.

As per trial court record, the trial Magistrate improperly recorded the evidence of PW2 improperly as per law, and thus liable for expunge as I hereby do.

The proper interpretation of section 127 (2) of the TEA was once given by the Court of Appeal in the case **of Selemani Moses Sotel @ White V. Republic**, Criminal Appeal No. 385 of 2018, while making reference the case of **Godfrey Wilson V. Republic**, Criminal Appeal No. 168 of 2018.

Upon expunge of the testimony of PW2 (the victim), then the evidence of PW3, PW1 and PW4 becomes of no legal value. Thus, there is nothing to corroborate by the said witnesses.

Furthermore, the PF3 (exhibit PE1) of the victim was filled by Nursing Officer (PW5). In law that had no any value as a nurse is not a licensed practitioner of medicine in Tanzania, East Africa and parts of Southern Africa, who is trained and authorized- to perform general or specialized medical duties such as diagnosis and treatment of disease and injury, ordering and interpreting medical tests, performing routine medical practice. Therefore what the kindness she did to the PW2 remains as good as first aid only but not accorded any legal weight for her testimony in a court of law.

As per this finding, this Court agrees with Ms Monica Hokororo that as there is nothing material evidence remaining to hold the appellant responsible with the said charge, appeal is hereby allowed. Conviction is quashed and sentence meted out is hereby set aside.

This court orders the immediate release of the appellant from custody unless he is lawfully held for another course.

It is so ordered.

DATED at MUSOMA this 25th day of October, 2022.

THE HIGH COURT OF TANZANIA
MUSOMA

F.H. Mahimbali

Judge