THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA.

(RM) CRIMINAL APPEAL NO. 71 OF 2021

(Originating from Criminal Case No. 148 of 2021, in the Court of Resident Magistrate of Njombe, at Njombe).

FABIANO LUHANGANO @ MPWAGA..... APPELLANT

VERSUS;

REPUBLIC..... RESPONDENT

JUDGMENT

29th August & 7th November, 2022

UTAMWA, J:

Before the Court of Resident Magistrate of Njombe, at Njombe (The trial court) the appellant, FABIANO LUHANGANO @ MPWAGA was charged with two counts of rape contrary to section 130(1) & (2)(e) and 131(3) of the Penal Code, Cap. 16 RE. 2019. He was convicted and sentenced to serve life imprisonment. It was alleged by the prosecution that, on the 25th day of

January, 2020 at Iboya village within the district and region of Njombe the appellant had carnal knowledge of two girls. For the protection of the victim's dignity, I will refer to them as PW.1 and PW. 2 respectively. The appellant pleaded not guilty to the charge. A full trial ensued, hence the conviction and sentence mentioned above.

Discontented by both the conviction and sentence, the appellant preferred the present appeal based on the following grounds:

1. That, the trial court Magistrate wrongly admitted the evidence of tender age adduced by PW. 1 and PW. 2 which led to unfair decision as the appellant formally was discharged by the court in lack of enough evidence.
2. That, the learned trial magistrate erred in law by convicting the appellant basing on the evidence of PW. 3 which does not prove the element of rape and totally failed to narrate the contents of the PF.3.
3. That, the learned trial magistrate erred in law and fact by convicting the appellant basing on hearsay evidence adduced by PW.4 and PW.5 (parents of victims) which the said evidence was totally irrelevant and prejudicial to the appellant.
4. That, the learned trial magistrate erred in law and fact by ignoring the defence of *alibi* given by the appellant.
5. That, the trial court erred in relying on the evidence of the police officer and admitting the cautioned statement without cross-examination.

6. That, the learned trial magistrate erred in law and fact by convicting the appellant while the prosecution did not prove the case beyond reasonable doubts.

The appellant therefore urged this court to allow his appeal, quash the conviction, set aside the sentence and set him at liberty.

During the oral hearing of the appeal, the appellant appeared in person and unrepresented. On the other hand, the respondent Republic was represented by Ms. Pienzia Nichombe, learned State Attorney.

At the hearing, the appellant adopted his grounds of appeal as they appear in his petition of appeal. He had thus, nothing of substance to add.

On her part, the learned State Attorney for the respondent supported the appellant's appeal based on ground number 3 that, the appellant's defence of *alibi* was not considered. She submitted that, at page 22-23 of the typed proceedings of the trial court, the appellant testified that he arrived at the village and stayed for 10 days only. He he did not know the victims (PW. 1 and PW. 2) and their parents. Moreover, DW. 2 (Stanley) testified that, he was with the appellant at the material time in the bush making charcoal.

The learned State Attorney submitted further that, though the appellant had not given notice or particulars of his defence of *alibi* as required by section 194 of the CPA, the trial Magistrate still had the duty to consider it and make a finding, but he did not to do so. He urged this court, being the first appellate court to consider the appellant's defence as it was held by the Court of Appeal of Tanzania (The CAT) in the case of **Prince**

Charles Junior v. Republic, Criminal Appeal No. 250 of 2014 CAT at Mbeya (unreported).

The leaned State Attorney argued further that, the prosecution in this case did not prove the case beyond reasonable doubts as required by the law. The PW.1 and PW.2 (the victims) gave evidence yes, but they did not name the person who raped them. Moreover, PW.1 did not tell the trial court that she knew the appellant before the incident. The appellant testified that, he had stayed for only 10 days in the village before the incident. The State Attorney added that, the PW.2 only testified during cross-examination that, the one who raped her was Jack's uncle (*baba mdogo wa Jack* in Kiswahili). Both victims did not thus, testify as to how they knew the appellant. Moreover, the prosecution did not tell the court that the said Jack's uncle and the appellant were one and the same person.

In conclusion, the learned State Attorney joined hands with the appellant that the prosecution failed to prove the case beyond reasonable doubts since the victims did not identify their culprit. She thus, supported the appellant's appeal. The appellant had nothing to re-join to the submissions made by the learned State Attorney.

I have considered the grounds of appeal, submissions by the State Attorney, the law and the record. In my settled view, the fact that the present appeal is not objected, is not 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 views are based on the understanding that, it is a firm and trite judicial 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, Cap. 2 RE. 2002 (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 Magéndo 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. The CAT underscored the same principle in the case of **Joseph Wasonga Otieno v. Assumpter Nshunju Mshama, Civil Appeal No. 97 of 2016, CAT at Dar es Salaam** (Unreported). I will therefore, test the merits of the present appeal despite the fact that the respondent supports it.

In determining the appeal, I opt to discuss the sixth ground first. This is because, according to the anatomy of the petition of appeal, the same seems to be the major ground of appeal. The rest of the grounds only tend to supports it. In that major ground of appeal the appellant is challenging the conviction against him on the ground that the prosecution did not prove the case against him beyond reasonable doubt. The major issue is therefore, *whether the prosecution proved the case against the appellant beyond reasonable doubt*. Indeed, the law is well settled that, the prosecution bears the burden of proving the case against an accused and the standard of proof is beyond reasonable doubts; see section 3(2) (a) of the Evidence Act, Cap.

6 R.E 2022 (Evidence Act) and the holding by the CAT in the case of **Hemed v. Republic [1987] TLR 117.**

In the present case, the appellant was charged with two counts of rape contrary to sections 130(1) & (2)(e) and 131(3) of the Penal Code. The appellant's first complaint is that the trial Magistrate wrongly admitted the evidence of PW.1 and PW.2. The guiding law in this is section 127 of the Evidence Act. It sets guidelines in taking evidence of a child of tender age. The provisions were also interpreted by the CAT in the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, CAT at Bukoba** (unreported). In this case the Court observed that, the amendment provides two conditions which have to be met before a child of tender age gives evidence in court. One, allows the child of a tender age to give evidence without oath or affirmation. Two, before giving evidence, if the court finds that the child does not understand the meaning of oath, such child is required to make a promise to tell the truth to the court and not to tell lies.

The law further guides on how to determine whether the child knows the meaning of oath or not. Such determination is vital before the court receives his/her testimony. In the present case, there is no dispute that PW. 1 and PW. 2 were children of tender age since they were only 6 and 3 years old respectively. The record shows that both of them gave a promise to speak the truth as required by the law before they testified. However, the record does not show whether they were subjected to any inquiry so that the court could determine as to whether or not they knew the meaning of oath. In the **Godfrey Wilson Case** the Court observed that in making such determination, the trial Magistrate can ask the witness of a tender age such

simplified questions which may not be exhaustive depending on the circumstance of each case. The questions include those related to the age of the child, the religion she/he professes, whether he/she understands the nature of oath and whether or not he/she promises to tell the truth and not lies to the court.

Owing to the omission pointed out above, I agree with the parties that the evidence of both PW. 1 and PW. 2 were erroneously received in evidence. I therefore expunge their respective testimonies from the record.

Now having expunged the testimonies of PW. 1 and PW. 2 the sub-issue at this point is *whether there is any other evidence that supports the conviction of the appellant.* I am inclined to answer this issue negatively because, having expunged the testimonies of the victims the only evidence on record is that of PW.3, PW.4 and PW.5. The evidence of PW.3 (Doctor Robert) who medically examined the victim only proved that there was penetration of the victims as shown in the respective victims' PF.3. His evidence did not implicate the appellant since it did not show who raped the victims. Moreover, the evidence of PW.4 and PW.5 cannot ground any conviction because, they only testified on events that occurred after the incident.

Owing to the above discussions, I answer the main issue posed above negatively that, the prosecution did not prove the case against the appellant beyond reasonable doubts. I therefore uphold the main ground of appeal.

Having held as above, I allow the appeal at hand, set aside the impugned judgment of the trial court, quash the conviction and set aside the

sentence imposed against the appellant. I further order that, the appellant be released from the prison forthwith, unless held for any other lawful cause. It is so ordered.

JHK UTAMWA

JUDGE

7/11/2022.

07/11/2022.

CORAM; JHK. Utamwa, J.

Appellant: present in person.

Respondent: Ms. Pienzia Nichombe, State Attorney.

BC; Gloria, M.

Court; Judgement delivered in the presence of the appellant and Ms. Pienzia Nichombe, State Attorney for the respondent Republic, in court, this 7th November, 2022.

JHK UTAMWA

JUDGE

07/11/2022.