IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 119 OF 2022

(Originating from the decision of the District Court of Ilala at Kinyerezi, in Criminal Case No. 440 of 2020, by Hon. Marando-RM dated 24th day of August, 2021)

EDSON FELIX FERDINAND ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14th, & 15th November, 2022

ISMAIL, J.

The appellant was charged with rape, contrary to the provisions of sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. The victim of the alleged incident is a nine-year girl, known in pseudonym as HS. The incident is alleged to have occurred on 8th August, 2020, at Majohe area, Ilala District, in Dar es Salaam Region. The allegation by the prosecution is that, on the fateful day, the said victim, who featured in trial proceedings as PW1, went to the appellant's barbershop, to enlist for his assistance to mend her torn bag. So

'generous' was appellant that after he had finished to mend the bag, he offered her a free haircut. Noticing that so much time had elapsed, PW1 became apprehensive of what awaited her at home. She opted to go to a traditional fiesta that was happening very close to their house. At around 6.00 pm, the appellant surfaced at the dance venue and forcibly took PW1 to his house where they spent a night together, during which he had carnal knowledge of her. In the morning, the appellant allegedly gave PW1 a sum of TZS. 1,500/- and ordered her out. Along the way, PW1 met PW2, her mother, who had been searching for her the entire day. She took her to a community police officer where PW1 revealed what had befell her.

The matter was subsequently reported to the police where investigation was conducted, culminating in the arraignment of the appellant in court. The trial proceedings saw the prosecution marshaling the attendance of three witnesses and production of one documentary evidence, against a sole witness for the defence. The appellant protested his innocence, maintaining that the allegations are a fabrication that he had no knowledge of. The trial court did not buy the appellant's factual account. Instead, the learned trial magistrate found the prosecution's story plausible and went along with it. Consequently, he found the

appellant guilty, convicted him and imposed a sentence of life imprisonment.

The conviction and sentence were met with serious outrage from the appellant, and it came as no surprise, that the instant appeal was instituted in this Court. Six grounds of appeal have been raised, as paraphrased as follows: ***One***, that the trial magistrate erred in law by convicting the appellant based on evidence of a witness (PW1) who did understand the nature of the oath and testified without giving any promise to tell the truth and not to tell lies, consistent with section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019; ***two***, that the trial magistrate erred in law in relying on the evidence of PW1 which was implausible, self-contradictory and materially contradictory with the testimony of other witnesses, particularly PW3; ***three***, that the trial magistrate erred in law in sentencing the appellant to life imprisonment based on the evidence of PW2 and Exhibit P1, a birth certificate, which was not read out after it was admitted in evidence; ***four***, that the trial magistrate erred in law in concluding that PW1 was raped while a doctor who examined the victim did not testify on whether PW1's vagina was penetrated and that no PF3 was produced to attest to the allegation; ***five***, that the trial magistrate erred in law in convicting the appellant based on a case which was

possibly concocted and that the appellant was held for 48 days before he was arraigned in court; and ***six***, that the trial court erred in law in convicting the appellant while the prosecution had not proved its case beyond reasonable doubt.

When the matter was called on for hearing, the appellant appeared in person and fended for himself. The respondent was represented by Ms. Florida Wenceslaus, learned State Attorney. The latter informed the Court that, after a thorough review of the lower court record, she was convinced that the appeal was meritorious. She, consequently, urged the Court to allow the appeal and quash and set aside the conviction and sentence. Learned State Attorney premised her position on the arguments she made in support of ground one of the appeal.

Ms. Wenceslaus argued that, looking at page 11 of the trial court proceedings, it is gathered that PW1 was deemed to have understood the meaning of the oath. That was after the witness had been taken through the usual ritual of question and answer. The trial court then concluded and recorded that PW1 would testify on oath. Surprisingly, however, the said witness was allowed to testify without any oath or affirmation. This, Ms. Wenceslaus argued, rendered the testimony of PW1 unworthy and an

affront to section 198 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2022. She argued that the inevitable consequence of all this is to expunge PW1's testimony from the record. Learned counsel buttressed her position by referring to a decision of the Court of Appeal in ***Abbas Kondo Gede v. Republic***, CAT-Criminal Appeal No.472 of 2017 (unreported).

The respondent's attorney further cemented her argument by citing the case of ***Selemani Makumba v. Republic*** [2006] TLR 379, in which it was held that the best evidence in sexual offences comes from the victim of the offence. She argued that, having expunged the testimony, the remainder of the testimony cannot support the charges against the appellant. Ms. Wenceslaus took the view that the residual testimony is so insufficient to support the prosecution's case, hence her urge to have the appeal allowed.

The appellant had nothing to submit. He only implored the Court to allow the appeal and sent him free.

As correctly submitted by Ms. Wenceslaus, the law is pretty settled, and it is to the effect that the testimony of every witness must be given on oath or affirmation. This is with respect to all criminal matters in which

adduction of oral testimony is involved. This is enshrined in section 198 (1) of the CPA which stipulates as follows:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

An exception to this general position is the procedure that obtains in section 127 (2) of the CPA, and it applies to child witnesses of tender age. In the instant matter, the trial magistrate was satisfied that PW1 knows the meaning of oath and affirmation. He went ahead and resolved that the testimony of PW1 would be given under oath. Nevertheless, PW1 testified without being sworn or affirmed, whichever is relevant to the witness. The ramifications of such anomaly have been underscored in various decisions, including the case of ***Abbas Kondo Gede v. Republic*** (supra). Noteworthy, the position in the cited case is a reiteration of the upper Bench's own subscription in ***Nestory Simchimba v. Republic***, CAT-Criminal Appeal No. 454 of 2017 (unreported), wherein it was held as hereunder:

> *"Since, in the present case, PW1 and DW1 gave that evidence without being affirmed, on the authorities*

above, their words recorded when they gave testimonies was no evidence at all and, in that accord, we entirely agree with Mr. Mtenga that such evidence deserved not to be considered by the Court to determine the guilt or otherwise of the appellant. The evidence of PW1 and DW1 is hereby accordingly discarded."

See also: ***Tafifu Hassan @ Gumbe v. Republic***, CAT-Criminal Appeal No. 436 of 2017 (unreported).

It behooves me to follow the footsteps set by the upper Bench and hold that, since the testimony of PW1 suffers from the malady similar to that demonstrated in the cited cases, the same deserves nothing less than having it discarded. Accordingly, the said testimony is crossed off the record.

Having done so, the question that follows is, what would become of the remainder of the testimony, adduced by PW2 and PW3? My hastened answer to this nagging question is that the same is of paltry evidential value and, therefore, unable to sustain a conviction. It is a bunch of a hearsay evidence that, as Ms. Wenceslaus alluded to, is unable to pass the test necessary for supporting the prosecution's case to any good effect.

In the upshot of all this, I allow the appeal, quash and set aside the decision of the trial court, and order that the appellant be immediately released from prison, unless he is held for other lawful reasons.

DATED at **DAR ES SALAAM** this **15th** day of **November, 2022.**

M.K. ISMAIL,

JUDGE

15/11/2022