IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 178 OF 2021

(Originating from Criminal Case No. 174/2021 in the Resident Magistrate Court of Geita at Geita by Hon. C. Waane, RM)

JOSEPH SULUBA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

19th October & 15th November, 2022

ITEMBA, J.

In the District Court of Geita, Joseph Suluba, the appellant herein, was charged with and convicted of the offence of rape contrary to section 130(1)(2)(e) and 131 of the Penal Code. It was alleged that on diverse dates in May 2021, at Isulwabutundwe village within the District and Region of Geita, the appellant had carnal knowledge of XY, a girl aged 10 years, hereinafter referred to as the victim. After a full trial, the appellant was sentenced to thirty (30) years imprisonment. Being aggrieved with both conviction and sentence, the appellant filed the present appeal based on the following grounds:

1. *That, the trial Court Magistrate erred in law and facts when failed to quash the charge against the appellant because the Medical Officer (PW3) clarified that the victim had no bruises in her vagina, this shows that there was no any act of rape.*
2. *That, the trial court Magistrate erred in point of law and facts to make decisions of convicting the appellant without taking into consideration that the evidence which adduced by the victim (PW1) was weak because was not clarified the time and place where unlawful act done, she stated that she lives together with all two grandparents.*
3. *That the prosecution side failed to summons the victim's two teachers to whom the matter was reported by the victim as she stated before the court.*
4. *That, the trial court decisions was not fair in all matter of law and facts because was no taking into consideration that the source of this case was confirmation with the woman (PW2) over land.*
5. *That the decisions of the trial court in general erred in point of law and facts due to the reasons that the prosecution side failed to prove the allegation/case beyond reasonable doubt.*

When the appeal was called up for hearing, the appellant, an 80-year-old man, fended for himself while the respondent republic was represented by the Mr. George Ngemela learned state attorney.

When given an opportunity to address the court, the appellant briefly stated that he was framed in rape case because he had conflict over boundaries with the victim's family. The appellant added that he was looking at the children who were making bricks and he was arrested but he did not rape the victim.

In response, the learned state attorney was opposing the appeal. He tackled the grounds of appeal as they appear in the petition of appeal. Starting with the first ground, he stated that it is not a legal requirement to prove the offence of rape through bruises. He cited section 130(4) of the Penal Code which provides that penetration, however slight is sufficient to prove the offence of rape. And that, according to the evidence of victim herself (PW1) and the medical Dr. (PW3), there was penetration. In the second ground, he stated that the victim clarified the places where rape took place, that; for the first time, it was inside the appellant's house and then at her grandmother's house. In the third ground he argued that even a single witness can be relied to prove a case. He relied on section 143 of the Evidence Act which states that there is no requirement for a specific number of witnesses to establish any fact. Responding to the 4th ground, he stated that the appellant did not even mention the name of the woman

whom they had grudges and he did not cross examine PW2 on that aspect. And, in the last ground the learned state attorney finalized by stating that the prosecution case was proved beyond reasonable doubt as the victim was under age and there is proof of penetration. In this, he referred the court to the case of **Selemani Makumba v R** TLR (2006) at page 378.

In rejoinder, the appellant insisted that there were grudges over land that is why he was framed in this case, that even the village authority was not involved in his arrest. He prayed to be released. That was the end of submissions from both parties.

Considering that PW1 who is the victim was of tender age, the court moved both parties to address on her competency to testify, the admissibility and weight of her evidence. The learned state attorney, explained that PW1's evidence was not under oath and that records shows that she did not promise to tell the truth, for that reason he prayed for her evidence to be expunged. The appellant had nothing to state.

At this point, the issue to be pondered is whether the appeal is meritorious. I will start with the concern about the competency of PW1. Looking at page 6 of the typed proceedings this is what transpired:

"VOIRE DIRE TEST

Court: *What is your name and age? Where do you go school?*

Victim: XY *Thomas aged 10 years and I study at Isulwabutundwe.*

Court: *Where are you and what did you come to do here? What class are you in?*

Victim: *I am in court and I came to testify and I am in standard IV.*

Court: *Voire Dire Test is Successful"*

Signed.

PROSECUTIONS CASE OPENS *[IN CAMERA]*

PW1: *XY aged 10 years states as follows: ....."*

Back to the governing principles and procedures of producing evidence of a child of a tender age, sections **127(1)(2)(6)** of the Evidence Act provide as follows:

> ***"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.***

(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.****" (Emphasis supplied).*

According to the proceedings at page 6, the victim was 10 years old and the court did a *voire dire* test on her. However, looking at the questions thrown unto her when responding she did not promise to tell the truth as provided for under section 127(2) of the Evidence Act. Secondly, it appears that the victim was the only independent witness in this matter.

Furthermore, the trial magistrate did not record the reasons which satisfied him that XY, the child of tender years is telling nothing but the truth as per section 127(6) of the same Act. For these reasons, the evidence of PW1 was taken contrary to the procedure and it was not in the ambit of the Evidence Act, I find it very dangerous to rely on it to convict the appellant.

I agree with the learned state attorney that the evidence of PW1 should be expunged from records as PW1 was not a competent witness to testify. It is trite law that in rape cases the evidence of the victim is the best evidence, see the decision in **Selemani Makumba v R** as cited by the learned state attorney. See also the case of Edward **Nzabuga v R** Criminal Appeal No. 136 Of 2008, CAT, Mbeya. Having expunged the evidence of PW1 who is the key witness, we are left with **PW2**, the victim's grandmother named Suzana Thomas, **PW3** Abdul Hussein Abdul, a medical doctor and **PW4** G 8254 DC Mayunga who recorded the accused cautioned statement. Basically, their evidence, in its totality was corroborating the victim's. In the absence of the victim's evidence, the evidence of the rest of the witnesses remains without any foundation.

Under the circumstances, I am of the firm view that the prosecution evidence was not in the required standard to establish the offence of rape against the appellant. That being said, this appeal is hereby allowed. The conviction against the appellant is quashed and sentence is set aside. It is ordered that the appellant be set at liberty unless he is held for another lawful cause.

Dated at MWANZA this 15th day of November, 2022.

L. J. ITEMBA
JUDGE
15.11.2022