THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC. CRIMINAL APPEAL NO. 27 OF 2022

(Originating from District Court of Mufindi, at Mafinga, in Criminal Case No. 235 of 2018).

MAJULISHO s/o MAKOMBE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

7th September & 5th December, 2022.

UTAMWA, J:

The appellant, MAJULISHO s/o MAKOMBE was aggrieved by the decision (impugned judgment) of the District Court of Mufindi District, at

Mafinga (The trial court) in Criminal Case No. 235 of 2018. He thus, appealed to this court.

Before the trial court, the appellant was charged with and convicted of the offence of Rape contrary to section 130(1) and (2)(e) and 131(1) of the Penal Code, Cap. 16 RE 2002 (Now RE. 2019). He was sentenced to life imprisonment.

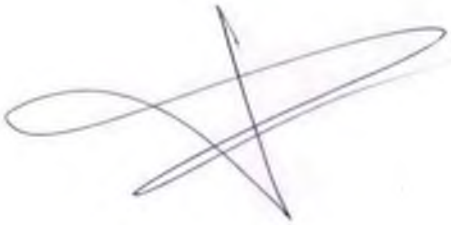
It was alleged by the prosecution that, on 19th day of November, 2018 at Nzivi village within Mufindi District in Iringa region, the appellant had carnal knowledge of a girl aged 5 years old (The victim). The appellant pleaded not guilty to the charge, hence a full trial, the conviction and sentence as shown earlier.

The appellant's petition of appeal was based on the following six grounds couched in the layman's language which is understood with difficulties. I reproduce the grounds of appeal for a readymade reference:

1. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant based on PW.3 (The victim) evidence on the offence of rape while that PW.1 state only "accused finger" interred in private part when such words were too ambiguity to think if it means a penis or otherwise without the prosecution side to explained more by asking the victim what does it mean.
2. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without considering the

testimony of the Doctor who declared that he is not sure if the act of rape be happened after examined the victim and found no penetration which is a water tight that the act of rape it was be in question.

3. That the learned trial Resident Magistrate misdirected himself to considering the evidence of PW.1 as direct evidence without taking into account that the PW.1 didn't seen the act of rape due of the PW.3 (victim) evidence who stated that one's PW.2 came appellant run away.
4. That, the learned trial Resident Magistrate misdirected himself to convict and sentenced the appellant of the offence of rape without considering that the charge sheet was defectiveness when the PW.3 declared that its only accused finger touched the female organ and the truth statement comes from the victim who states that its only finger and not otherwise.
5. That, the learned trial Resident Magistrate erred in law and fact to convict and sentence the appellant based on contradictory evidence adduced by PW.1 who said to see accused running away while PW.3 (victim) declared that one's PW.1 came accused running away but also the evidence of PW.2 & PW.5 were totally hearsay which were not acceptable by the statutory.
6. That, the prosecution side failed totally to prove the case against the appellant beyond reasonable doubts.



At the oral hearing of the appeal which was conducted by virtual court, the appellant appeared in person and unrepresented while in Iringa Prison. On the other hand, the respondent Republic was represented by Ms. Blandina Manyanda, learned Senior State Attorney (The SSA).

The appellant had nothing of substance to add to his grounds of appeal when given the opportunity to be heard. On her part, the learned SSA supported the appellant's appeal on the following grounds: that, the prosecution did not prove the offence of rape beyond reasonable doubts. The victim's evidence as appearing at page 10 and 11 of the typed proceedings did not show that she was raped. She had promised to tell the truth and testified that, at the scene of crime the appellant did a bad thing to her since he put his finger in her private parts. This does not mean rape was committed because, the appellant only put a finger and not his penis in the victim's private parts.

The learned SSA also faulted the way the evidence of PW.1 was recorded since it was not taken according section 127(2) of the Evidence Act, Cap. 6. Such provisions require a child of 14 years or below to make a promise to tell the truth. The record does not show that PW.1 made the promise. The evidence of PW.1 thus, lacked evidential value. She cited the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, Court of Appeal of Tanzania (CAT) at Bukoba, Media Neutral Citation [2019] TZCA 109** to support the argument. The precedent guided that, evidence of a child of tender age recorded contrary to section 127(2) of Cap. 6 is liable to be expunged.

It was also the contention by the learned SSA for the respondent that, the doctor who examined the victim did not tender the PF.3 himself in evidence. The same was tendered by the prosecutor. The consequences of tendering the PF.3 by the prosecutor is that, the same lacked evidential value in law, hence liable to be expunged from the record. To support this contention she referred this court to the case of **Frank Massawe v. Republic, Criminal Appeal No. 302 of 2012, Media Neutral Citation [2013] TZCA 278.** After the expungement of the PF.3, the evidence of the victim will be inadequate. This is because, PW.4 did not explain what he had seen after examining the victim. After pointing out the weakness of the evidence shown above, the remaining evidence of PW.4 was hearsay because, she was only informed of the alleged rape and made a follow up. In rejoinder the appellant had nothing to add.

I have considered the record, grounds of appeal, submissions by the learned SSA for the respondent and the law. 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 Magendo 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 an additional duty of ensuring proper application of the laws by the courts below. The same principles were also underscored in **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 learned SSA for the respondent supports it.

In determining the appeal, I opt to firstly discuss the sixth ground. This is because, according to the anatomy of the petition of appeal, that ground seems to be the major ground of appeal. The rest of the grounds only support it. In that major ground of appeal, the appellant is challenging the conviction against him on the reason that the prosecution did not prove the case against him beyond reasonable doubts.

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 required standard of proof is beyond reasonable doubts; see section 3(2) (a) of Cap. 6 and the holding by the Court of Appeal of Tanzania (The CAT) in the case of **Hemed v. Republic [1987] TLR 117.**

In the present appeal, the PW.1 and PW.2 were undisputedly children of tender age since they were both only 14 and 6 years old respectively. Their evidence was not however, recorded according to the law. Section 127 (2) of Cap. 6 sets guidelines for taking evidence of a child of tender age like the two witnesses. These provisions were also interpreted by the CAT in the **Godfrey Wilson case** (supra). In that precedent, the CAT observed that, the amendment of Cap. 6 through the Written Laws Miscellaneous Amendments, Act No. 4 of 2016 provided two conditions which have to be met before a child of tender age gives evidence in court. **One**, the provisions allow a child of 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 witness knows the meaning of oath or not. In the **Godfrey Wilson case** (supra), the CAT observed that, in making such determination, the trial court can ask the witness of 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 he/she 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. Indeed, such determination is vital before the court receives his/her testimony. In the present case however, though PW.1 was 14 years of age when giving

evidence in court and PW.2 on the other hand was only 6 years, the above legal requirement was not followed. The record shows that the PW.1 was sworn before she testified and PW.2 simply made a promise to tell the truth. The record does not show that they were subjected to any inquiry so that the trial court could determine as to whether they knew the meaning of oath or not.

Owing to the omission pointed out above, the evidence of both PW.1 and PW.2 was erroneously received in evidence. I therefore expunge their respective testimonies from the record as rightly opined by the learned SSA.

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 against the appellant*. I am inclined to answer this issue negatively because, having expunged the testimonies of the two key witnesses in this case, the only evidence remaining on record is that of PW.3 and PW.4. The evidence of PW.3 (Dr. Emmanuel) who medically examined the victim only proved that there was penetration of the victim as shown in the victims' PF.3. He opined in the PF.3 that, there is no evidence of laceration, but the hymen was not intact, this means that there was penetration. His evidence does not however, implicate the appellant since his duty was only to prove that there was penetration to the victim; see the case of **Osward Kasunga v. Republic, Criminal Appeal No. 17 of 2017, CAT at Mbeya** (unreported). Moreover, the PF.3 was wrongly admitted in evidence as rightly argued by the SSA. The prosecutor is not a

witness, this course deprived the appellant of the chance to cross-examine PW.3. The case of **Frank Massawe v. Republic, Criminal Appeal No. 302 of 2012, Media Neutral Citation [2013] TZCA 278** guides that, a prosecutor cannot produce exhibit or document as witness, but can only lead the witness in tendering the exhibit. Again, the evidence of PW.4 (Rose) cannot ground any conviction because, her evidence was hearsay. This is so because, she testified on the information she had received from PW.1.

Due to the above findings, I am inclined to 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 sixth ground of appeal.

That said and done, I feel not obliged to test the rest of the grounds of appeal since the sixth ground which I have upheld was the major ground and suffices in disposing of the entire appeal. I accordingly allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I further order for an immediate release of the appellant from the prison unless held for any other lawful reason. It is so ordered.

JHK UTAMWA

JUDGE

05/12/2022

COURT: Judgment delivered in the presence of appellant in person and Ms. Masambu, learned State Attorney for the respondent Republic. Ms. Gloria Makundi (clerk) also present.

MALEWO M. A.

DEPUTY REGISTRAR

05/12/2022

Right of appeal explained.

MALEWO M. A.

DEPUTY REGISTRAR

05/12/2022