IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 9 OF 2021

(Appeal from the Decision of the District Court of Mvomero, at Mvomero)

in

Criminal Case No. 14 of 2019

POLLY KINYATA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

30th November, 2022

CHABA, J.

Formerly, the appellant, Polly Kinyata was arraigned before the District Court of Mvomero, at Mvomero facing the offence of rape contrary to sections 130 (1) & (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002] Now [R.E. 2022] (the Penal Code). It was alleged by the prosecution that on 2nd day of July, 2018 at Wami Sokoine Ranchi - Kibaoni area, Dakawa Ward within Mvomero District in Morogoro Region the appellant had carnal knowledge of one T. J. or the victim (her name withheld) a girl of 11 years old.

After a full trial, the appellant under section 131 (1) of the Penal Code was convicted and sentenced to serve thirty (30) years imprisonment. Dissatisfied, the appellant filed eight (8) grounds of appeal. For reasons which I will unveil later, I see no need to reproduce all of them.

At the hearing of the appeal, Mr. Emmanuel Kahigi, learned State Attorney who entered appearance for the Respondent / Republic and right away supported the appeal lodged by the appellant. On the other hand, the appellant appeared in person, and unrepresented.

Arguing in support of his appeal, the appellant submitted and told the court that since he is a layperson and that he does not know to read and write, he prayed the court to allow his appeal and find him not guilty of the offence he stands charged before this court.

On the side of the Respondent / Republic, through the service of the learned State Attorney, Mr. Emmanuel Kahigi commenced by accentuating that the offence of rape was not proved beyond a reasonable doubt, and he gave the following reasons: **One;** for the offence of rape to be proved, it is pertinent for the victim to promise the court that she will tell the court the truth and not tell lies pursuant to the provisions of the law under section 127 (2) of the law of Evidence Act [Cap. 6 R. E. 2019], now [R. E. 2022]. He prayed the testimony of the victim herein featured as PW2 be expunged from the court record. He further submitted that, if the evidence of the victim will be expunged from the record, there is no other cogent evidence to rely on to sustain the appellant's conviction.

He further stressed that since the age of the victim is crucial to seek conviction of the appellant, but the truth is, it is evident from the court record that all the prosecution witnesses failed to prove the age of the victim as the law requires. He highlighted that in absence of this key piece of evidence, the benefit of doubt falls in favour of the appellant.

Following the respondent's submission, the appellant had nothing useful to add in his re-joinder. He prayed the court to find him not guilty to the offence

he stands charged and he be released from prison.

From the foregoing submissions by the parties, even though this appeal is not resisted by the Respondent / Republic, I find it apposite to enlighten the following observations.

I have impassively considered the grounds of appeal by focusing on the main controlling issues and/or most important points at issue which forms the basis of conviction of the appellant. These are the age of the victim and non-compliance by the victim in respect of the provisions of the law under section 127 (2) of the Evidence Act (Supra). As regards to the age of the victim, I fully subscribe to what the learned State Attorney's submitted before this court. I have read and perused the trial court record starting with the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 and found that there is nowhere in the court record indicating that the age of the victim was mentioned, determined and resolved to the extent of proving the charge. In the case of **Robert Andolile Komba v. DPP,** Criminal Appeal No. 465 of 2017 (Unreported), the Court of Appeal of Tanzania at pages 17 to 19, held inter-alia that:

> "... the law requires that in statutory rape cases, the age of the victim must be proved. See also the cases of **Rwekaza Bernado v. Republic,** Criminal Appeal No. 477 of 2016, **Mwami Ngura v. Republic,** Criminal Appeal No. 63 of 2014 and **Solomon Mazala v. Republic,** Criminal Appeal No. 136 of 2012 (All unreported).

The Court went on to state that:

> .... Not only that, but in cases of statutory rape, age is an important ingredient of the offence which must be proved".

In **Makenji Kamura vs. The Republic** (Supra) our Apex Court articulated that; "As we understand the law, age of the child can be proved by the victim, relatives, parents, medical practitioners or a birth certificate. It may as well be proved by inference of existing facts. See, for instance: **Isaya Renatus v. R,** Criminal Appeal No. 542 of 2015 and **Iddi s/o Amani vs. R,** Criminal Appeal No. 184 of 2013 (Both unreported)".

Based on the above precedents, in the present appeal, all the prosecution side, failed to prove the age of the victim. Thus, this ground is answered in the affirmative.

Now, coming to the issue of non-compliance under section 127 (2) of the Evidence Act [Cap. 6 R. E, 2022], the provision is well elaborated by our Apex Court in **Godfrey Wilson vs. R,** Criminal Appeal No. 168 of 2018 (Unreported) where the Court observed that:

> "Section 127 (2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/ she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age."

The Court of Appeal had this to say regarding the consequences of failure to comply with the above provision:

> "In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016.

Hence, the same has no evidential value. Since the crucial evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of sustaining the conviction."

In the instant case, the victim who testifies as PW1 at page 12 of the typed trial court proceedings, reveals quite clearly that the requirement under section 127 (2) was not complied with. Following expungement of the evidence of PW1 from the court record on the ground of being wrongly procured by the trial court, as alluded to above, there is no other evidence connecting and or linking the appellant with the present appeal. In the same wavelength the universal standards of proof in as much as this case is concerned was not proved.

In the result, I allow the appeal, quash the conviction and set aside the sentence imposed to the appellant. I order the immediate release of the appellant from prison unless his incarceration is in relation to some other lawful cause. **It is so ordered.**

DATED at **MOROGORO** this 30th day of November, 2022.

M. J. CHABA

JUDGE

30/11/2022