IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA - SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 94 OF 2021

(Arising from Criminal Case. No. 57 of 2020 in the District Court of Tarime at Tarime)

MWITA LUCAS MARWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

9th and 25th February, 2022

F.H. MAHIMBALI, J.:

Mwita Lucas Marwa, the appellant was arraigned before Serengeti District court at Mugumu charged with the offence of rape contrary to section 130(1), (2) (2) and 131 (3) of the Penal Code, Cap. 16 RE 2019. He denied the charges levelled against him. The trial court heard the parties and at the end, the appellant was convicted and sentenced to serve thirty years imprisonment.

The material facts leading to this appeal can be stated as follows. The victim who is 7 years old and a pupil of standard one at Nyangoto Primary School within Tarime District surprisingly was attending tuition

classes to the home of the appellant – Mwita Lucas Marwa from 15.00hrs. That on one day in February, 2020 after she had returned home from school, she went to tuition classes as usual. It was on that day when her teacher after he had given her mathematics and writing exercises and completed them, she was called in the bedroom of her tuition teacher, laid on the bed, pulled her clothes and removed her pants. That just after he had pulled off her clothes down and removed her pants, the teacher pulled out his penis did saliva it and inserted it into her vagina. As she felt pain, she cried for help but there was no body to assist. She was then washed in her private parts and given her clothes and dressed up and warned not to tell anyone. The victim girl first reported the whole episode to her grandmother (PW2) upon her return home and later to her dad (PW3) upon his arrival from work. The matter was then reported to police station where the victim was given PF3 for medical examination at hospital (PE1) which it established a contrary finding that the victim's vagina was intact and tight. No bruises, sperms or any penetration.

In his defense testimony, the accused person testified to have known the victim girl as one of his tuition pupils at his school. Others are primary school pupils, secondary school students and the adults. That on the

material day of 12th February 2020, the victim girl attended tuition class as usual but on delay. He whipped her but later gave her assignments together with other late comers and later on discharged them after they had completed the assignments. They all left. He thus denied to have raped the said girl as alleged. The wife of the appellant testified for her husband alleging that the case was fabricated against the appellant, (her husband) simply because she was once a girl friend of the victim's father and that she neglected him for the welfare of her marriage. She said this despite the fact that on the material day and time she was not at home.

DW3 (12 years) the son of the appellant testified on oath for the appellant that on the said date from 16.00hrs he had been at home alone and his father had returned home later, finding him there. There was nothing of rape incident at their home as per his knowledge.

After hearing both parties, the trial court ruled that the prosecution had proved its case beyond reasonable doubt and hence convicted and sentenced the appellant as stated above.

The trial court's decision did not amuse the appellant hence he has come to this court through his petition of appeal armed with ten grounds of appeal. The ten grounds of appeal can be rephrased as follows for

purposes of understanding them well;

1. *That the trial magistrate erred in relying on hearsay evidence*
2. *That the trial magistrate erred in according weight to incredible prosecution witnesses (PW1 – PW4).*
3. *That the prosecution's case is planted against the appellant following existing grudges between PW1 and the appellant.*
4. *That the testimony of PW1 and PW2 were daughter and father, thus unreliable witnesses*
5. *That PW1's evidence is cooked and untrustworthy.*
6. *That there was no evidence in place linking the appellant and the offence committed.*
7. *That there was no any evidence by villagers of the said area to testify for the said rape incident if truthful.*
8. *That the PW5's testimony was not considered by the trial court which denied the possibility of any rape against the victim girl.*
9. *That there was no any critical analysis of the evidence on record to arrive at a guilty conviction.*
10. *The case is not proved beyond reasonable doubt.*

When this matter came up for hearing, the appellant was present *in* person and unrepresented while the respondent enjoyed the legal services of Mr. Malekela, learned State Attorney.

The appellant prayed his grounds of appeal be adopted to form part of his appeal's submission. He thus prayed that he be acquitted from the

charge, considering the evidence of PW5 (expert witness), the said victim is safe and intact. How then should he responsible of rape?

Mr. Malekela, learned state attorney replying on the grounds of appeal to the petition of appeal, submitted that on ground no 1 of the appeal, the argument that the trial magistrate relied on hearsay evidence is not true. Reading the testimony of PW1, there is no where that the said testimony of PW1 (victim) is hearsay. Her evidence is direct as it is the evidence of the victim herself. Her evidence is corroborated with the testimony of PW5 (exparte witness).

On the second ground of appeal, the argument that the PW1 – PW4 were not credible is a strange argument. PW1 is the victim of the offence. Her evidence is direct. She testified that she was 7 years old and that it was the appellant who raped her. PW2 is the grandmother of PW1 who was the first person to be informed by the victim. PW3 is the father of the victim who took the victim to police. Pw4 is the investigating officer of the case. In totality of the testimony of PW1 – PW4, they are credible witnesses and that there is nowhere in his understanding and digest that they testified hearsay evidence. In addition, their evidence is jointed and coherent in nature.

Turning to the third ground of appeal that the appellant and PW3 had quarrels, the proceedings are silent on this assertion. When PW3 was testifying, the appellant didn't question anything on that fact. Furthermore, there is no any evidence by the appellant that there existed any quarrel between them. Thus, as per available evidence, there is no any scintilla truth of the allegation by the appellant. It is an afterthought ground of appeal.

In the fourth ground of appeal, the argument by the appellant that the testimony of PW1 and PW2 is fabricated (daughter and father respectively) is unfounded. As per evidence in record, Pw1 is the victim (daughter) and Pw2 is the grandmother of PW1. She is not the father of PW1. Thus, this ground of appeal is itself confusing. He prayed that it be dismissed.

Replying to the fifth ground of appeal, he submitted that what he had replied in the second ground of appeal be pasted here as it is replica. He submitted that there is nothing of fabrication established by the appellant as alleged.

In replying to the ground no 6, that the trial Court misdirected itself in convicting the appellant, he replied that ground of appeal is un-explained by the appellant. However, digesting what is replied in grounds 1 and 2 of the petition of appeal, the reasons why the appellant was convicted is because of the strength of the prosecution case via PW1 – PW4. He had no more to add.

As regards to ground no 7, that as the local leaders had not testified in this case, this is not a legal requirement. This is because, a witness is any person possessed with sufficient evidence to tell the court what he/she knows about the fact in issue. Thus, it is not one's personality that determines the destiny of the case but the real witnesses. As there is no proof that those said local leaders were witnesses of the said incident, their presence in court was not necessary and uncalled for. This is also in line with section 143 of the TEA that number of witnesses in proving a particular fact is unnecessary. He prayed that this ground of appeal be dismissed for want of merit.

Arguing for ground no 8 that the trial magistrate failed to accord weight to the testimony of PW5 that there was no rape (bruises and

penetration), he countered it. He submitted that PW5's evidence is merely an opinion, and the court is not bound to accept if it has cogent reasons to do so. As PW5's testimony is not binding, the trial magistrate was not bound to follow it as he did. He thus prayed that this ground of appeal to fail as well.

As far as the ninth ground of appeal is concerned, the argument that there was no critical analysis and scrutiny of the evidence is baseless. The same is replica to grounds no 1, 2 and 10. Therefore, as they all talk of evidence, I consider it wanting as the Hon. trial magistrate did consider all evidence on record in reaching the final verdict. Therefore, he found this ground of appeal being bankrupt of merits.

In totality, the respondent's state attorney submitted that this appeal be dismissed in its entirety. However, considering the age of the victim was 7 years the appropriate sentence ought to be life imprisonment and not 30 years as imposed.

Responding to an issue posed by the Court whether there was strict adherence of section 127 (2) of TEA? He replied that reading the provision of section 127 (2) of the TEA a child of tender age can give his/her

testimony on oath provided she knows the nature of oath. Therefore, depending on the circumstances, she could give her testimony on oath as rightly done. However, on the duty of promise to tell the truth and not lies, he submitted that the proceedings are silent on this. Nevertheless, as she testified on oath, he is of the opinion that she meant promising telling truth. This is because for a person who gives his/her testimony on oath, signifies that is promising to tell the truth and not lies. Therefore, a duty/promise of telling the truth has been fully complied with in his understanding. Nevertheless, he left it for the Court to give a proper directive on it.

Having heard the submissions of the parties and gone through the court's record, this court will now determine if this appeal has merits. In digest to the all grounds of appeal filed and argued, I find them all revolving on the issue of evidence, which is a point of fact. I boil them into one main ground, whether considering all the prosecution's evidence, the prosecution's case has been proved beyond reasonable doubt. Secondly, I will consider whether the provisions of **section 127(2)** of the Evidence Act, on the reception of evidence of a child of tender age has been complied with.

As the best evidence in sexual offences always comes from the victim of it [**Selemani Makumba V. Republic** (2006)T.R.L 379, it is this Court now to digest whether the evidence of PW1 was credible and reliable. The law is, every witness is entitled to credence (see **Goodluck Kyando vs Republic,** [2006] T.L.R. 363). Her evidence is essentially this one that on one day in February, 2020 after she had returned home from school, she went to tuition classes as usual. It was on that day when her teacher after he had given her mathematics and writing exercises and completed them, she was called in the bedroom of her tuition teacher, laid her on the bed, pulled her clothes down and removed her pants. That just after he had pulled off her top cover clothes and removed her pants, the teacher pulled out his penis did saliva it and inserted it into her vagina. As she felt pain, she cried for help but there was no body to assist. She was then washed in her private parts and given her clothes and dressed up and warned not to tell anyone. The victim girl first reported the whole episode to her grandmother (PW2) upon her return home and later to her dad (PW3) upon his arrival from work. The matter was then reported to police station where the victim was given PF3 for medical examination at hospital (PE1)

which it established a contrary finding that the victim's vagina was intact and tight. No bruises, sperms or any penetration.

Considering the negation of the fact that the said girl was raped as per findings in PE1 exhibit following the PW5's testimony, if those findings were doubted by the prosecution, they had reasons to go for the second opinion from a reputable Hospital/physician. Nevertheless, I agree with the trial magistrate that lack of medical evidence does not necessarily in every case mean that rape is not established where all other evidence point to the fact that it was committed. (See **Hatari Masharubu @ Babu Ayubu Vs. Republic,** Criminal Appeal No. 590 of 2017 by Court of Appeal of Tanzania searchable at www.tanzlii.org.tz). The vital issue is the credibility of the prosecution witness on the said fact. The issue for consideration now is whether, in the circumstances of this case, PW1 was credible witness to be relied. I have considered the circumstances that it was a tuition class, how was it possible for PW1 to be called before the appellant's home without being witnessed by any other pupil? Why was there no any other pupil to testify that if on that day after the tuition class PW1 was called by the appellant, their teacher. Though it is true that in sexual offences, true evidence comes from the prosecutrix, the same

should not be considered as gospel truth. It must be weighed into scales of justice. In the circumstances of this case, I beg to differ with the findings of the trial court on the manner PW1's testimony was analyzed and considered in this case.

Furthermore, the manner the testimony of PW1 (the victim) was recorded by the trial court, didn't comply with the strict conditions set by the law under section 127(2) of the Evidence Act, Cap 6, R.E 2019 which provides:

> *"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". [emphasis added].*

Reading the proceedings of the trial court, it is obvious this requirement was not complied with by the trial magistrate. PW1 being of 7 years age, is a child of tender age (section 127(4) of Cap 6) whose evidence is only received upon there being a promise of telling the truth. The argument by Mr. Malekela, learned state attorney that by testifying under oath encompasses the duty of giving promise, thus underscoring the duty of telling truth, is his own belief but not that as provided by law. The

proper interpretation of that section was once given by the Court of Appeal in the case of **Selemani Moses Sotel @ White V. Republic**, Criminal Appeal No. 385 of 2018, while making reference the case of **Godfrey Wilson V. Republic,** Criminal Appeal No. 168 of 2018. It stated clearly that from the recent amendment to s. 127 of the Evidence Act, (amendment of 2010) the purpose was to do away with the old procedure of conducting voiredire examination on the child witness. That procedure was intended to ascertain first, whether the child understands the nature of oath and whether or not he or she has sufficient intelligence to justify reception of the evidence of a child witness. Obviously, the provision is silent on the procedure which a trial court should apply to decide whether a child witness should give evidence on oath or affirmation or upon a promise to tell the truth and on undertaking not to tell lies. Addressing that lacuna, the Court had this to say while making reference to the case of **Godfrey Wilson V. Republic**, Criminal Appeal No. 168 of 2018

> "*The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions which may not be exhaustive depending on the circumstances o f the case as follows:*

1. *The age o f the child.*
2. *The religion which the child professes and whether she/he understands the nature of oath.*
3. *Whether or not* ***the child promises*** *to tell the truth and not to tell lies."*

That said, the testimony of PW1 is expunged from court's record and set aside. Upon that expunge, there is nothing valuable evidence in the trial court record that holds the appellant assuming that what PW1 stated was gospel truth.

All said and done, I allow this appeal for the reasons given, quash the conviction and set aside the sentence. The appellant should be released forthwith from prison unless he is otherwise lawfully held.

It is so ordered.

DATED at MUSOMA this 25th day of February, 2022.

F.H. Mahimbali

Judge

25/02/2022