THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

(DC) CRIMINAL APPEAL NO 03 OF 2022

(Originating from Mufindi District Court at Mafinga

Criminal Case No. 257 of 2016)

MODESTUS MFILINGE ---------- APPELLANT

VERSUS

REPUBLIC ---------- RESPONDENT

04/04 & 27/04/2022

JUDGMENT

MATOGOLO, J.

The appellant one Modestus s/o Mfilinge appeared before the District Court of Mufindi charged with rape contrary to Section 130(1)(2)(e) and 131(1) of the Penal Code, (Cap. 16 R.E. 2002). At the end of trial he was found guilty convicted and sentenced to life imprisonment because the rape was committed against a girl of the age of (9) years old.

Aggrieved with both conviction and sentence, he appealed to this court where he filed petition of appeal with six grounds of appeal as follows:-

1. That, the trial Magistrate erred in law and fact by convicting the appellant when believing the evidence of PW1 (victim) regard that PW1 failed to answer properly the questions during testing her, this makes her evidence testified to be unbelievable in eyes of law.
2. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant based on the evidence of PW2 (doctor) who tendered the PF3 (exhibit P1) and portrayed that PW1 has no hymen, regard that PW1 had no bruises even sperms into her vagina which are the best signs of rape.
3. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant rely on the evidence of PW1, PW2, and PW3 without consider that corroboration was uncompleted (sic) due to the fact that, the social welfare officer was not summoned to testify the allegation.
4. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant without considering the evidence of the appellant.
5. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant on Armed robbery without considering

that no any properties stolen therein found to the appellant's residents (sic).

6. That, the prosecution side failed totally to prove this case against the appellant beyond reasonable doubt.

He therefore prayed for this appeal to be allowed conviction quashed and sentence set aside and order him immediate release from the prison. At the hearing, the appellant appeared unrepresented. Alice Thomas learned State Attorney appeared for the respondent Republic. The appellant after he has prayed to withdraw 5th ground of appeal the prayer which was granted by this court, he prayed for his grounds of appeal to be considered and the appeal be allowed. The learned State Attorney supported the appeal she submitted that at the trial of the appellant the prosecution called three witnesses who testified. PW1 who was the victim of the offence while her intelligence being tested although the trial court recorded voire dire test, at the end her evidence was taken without being sworn as the witness failed to answer properly the questions put to her. She said Section 198 of the Criminal Procedure Act (the CPA) requires that every witness in a criminal trial before give evidence must be sworn or affirmed. But the victim's evidence was taken without been sworn as it was recorded by the trial magistrate. The reason given is that the victim failed to answer properly the questions put to her. But for children of age below 18 years their evidence can be taken under Section 127(2) of the Evidence Act, that is witnesses of tender age what they are required is to promise the court that will tell the truth and not lie. She said the evidence

of PW1 was recorded without oath thus her evidence was recorded in violation of the law. She referred the case of ***Davies vs Republic***, Criminal Appeal No. 127 of 2015 CAT (unreported) in which the case of case of ***Remigius Hyera vs Republic***, Criminal Appeal No. 167 of 2005 was referred in which it was held that failure to conduct voire dire to a witness under 18 years is fatal. Her evidence required corroboration, she said in this case corroboration would come from the Medical doctor (PW2) and from her teacher (PW3). But in the doctor's testimony he just explained how he observed the victim after examining her but explained what is contained in the PF3 as can be seen at page 9 of the trial court proceedings. The PF3 was tendered in court by the public prosecutor which is against the law. But the same was not read after been admitted. She said in the case of ***Nirzai Pirbarkshi and 3 Others vs. Republic***, Criminal Appeal No. 493 of 2016 CAT (unreported) at page 7 and 8 the court explained in details as who can tender document in court. These include the possessor, actual owners etc capable of tendering the intended document but not the PP who was just conducting the case. He was not legally empowered and not the right person to tender the PF3 in court. By doing so rendered the PF3 of no legal effect. She prayed for the same to be expunged from the court record. But also the evidence of PW3 the teacher, her evidence is hearsay. What she told the court is what she was told by the victim. That it is her father who was raping her. But in her evidence PW3 did not explain if she examined the victim before she took other steps. Her evidence is mere hearsay with less evidential value. She said in the decision of the Court of Appeal it was insisted on the fact that

unsworn evidence must be corroborated. She said she is also aware of the requirement of Section 127(6) of the Evidence Act that in sexual offence the evidence of the victim alone suffices without even corroboration. But this provision must be read together with subsection (2), failure to do so renders the evidence of less evidential value. She therefore supported the appeal. The appellant has nothing to add.

Having read the appellant's complaint in his grounds of appeal, the trial court proceedings and what was submitted by the learned State Attorney, the issue for determination in whether this appeal has merit.

Although the appellant has presented a total of six grounds, I will only confine myself to two grounds. That is the first ground and the fourth ground because these alone suffices to dispose of the appeal.

The first ground is failure by the victim of the offence PW1 to take oath before her evidence was recorded, it was rightly argued by the learned State Attorney that it is requirement of the law under Section 198(1) of the CPA that before a witness give evidence he/she must be sworn first unless fall in the category of witnesses of age of 14 years and below. But PW1 at the time she was testifying she was 9 years old whose evidence can be taken under Section 127(2) of the Evidence Act. The victim (PW1) at the time she was testifying she was falling in the category whose evidence is recorded under Section 127(2). Section 127(2) of the evidence Act provides:-

> *"127(2) A child of tender age may give evidence without taking oath or making an affirmation but shall before giving evidence, promise to tell the truth to the court and not to tell any lies"*

However in order to determine whether or not the witness is intelligent enough and he/she understand the meaning of telling the truth an inquiry is to be made for the court to satisfy itself of the witness intelligence. The evidence of the witness taken without oath or affirmation may be acted upon but require corroboration. However corroboration in this case is wanting. Corroborating evidence must be independent. (see the case of ***Remigues Hyera vs Republic***, Criminal Appeal No. 167 of 2005 CAT (unreported).

It was nightly submitted by Ms. Alice Thomas learned State Attorney in this case corroborations would come from the medical doctor (PW2) and from her teacher (PW3). PW2 examined the victim and Prepare PF3 but this was not tendered by PW2 but it was tendered by the public prosecutor which is against the law. The same was not read after been admitted. The proper person to tender in court documentary evidence is the possessor, actual owner, and any other person legally capable of tendering the same as it was held in the case of ***Nirzapirbakhshi and 3 Others vs. Republic***, Criminal Appeal No. 493 of 2016 CAT (unreported). The public prosecutor was just conducting the case, he was not legally empowered to tender the PF3 in court. By so tendering the PF3 rendered

the PF3 of no legal effect. But even after been admitted the PF3 was not read in court. Even if could be tendered by PW2 who was the author of the document, provided that it was not read in court. The same could not be relied up in terms of the decision of the Court of Appeal in the case of ***Robinson Mwanjis and 3 Others vs. Republic [2003] TLR 218***.

The PF3 is hereby expunged from the court record. Without the PF3, the evidence of PW.2 cannot corroborate the evidence of the victim likewise the evidence of PW3 which is hearsay. Although the court can act upon the evidence of the victim of the offence without corroboration. But provided that the evidence of PW1 is unsworn evidence, then it requires corroboration which is wanting in this case. I therefore find merit in this ground.

Regarding failure to consider appellant's defence as complained in the 4th ground. The trial court record reveals that the trial magistrate while preparing judgment did not consider the appellants defence. In a criminal trial defence of the accused must be considered. The Court of Appeal of Tanzania in the case of ***Jose Mwalongo vs. The Republic***, Criminal Appeal No. 217 of 2018 (unreported) at page 9 has this to say:-

> *"likewise, in the case under scrutiny, since the appellant was deprived of having his defence properly considered he was denied a fair and full hearing when determining his rights. In the circumstances the conviction imposed cannot be allowed to stand. We*

accordingly quash, the conviction and set aside the sentence".

The same circumstances are involved in the present case the trial magistrate did not scrutinize appellant defence, there is only summary of it. Basing on the two shortcomings, I allow the appeal, quash conviction and set aside sentence imposed against the appellant. The appellant is to be released from the prison custody immediately unless held for other lawful causes.

DATED at **IRINGA** this 27th day of April, 2022.

THE HIGH COURT OF TANZANIA

F. N. MATOGOLO

JUDGE.

27/04/2022

Date:	27/04/2022
Coram:	Hon. F. N. Matogolo – Judge
Appellant:	Absent
Respondent:	Jackline Nungu – State Attorney
C/C:	Charles

Jackline Nungu – State Attorney:

My Lord I am appearing for the Republic. The appellant is present. The appeal is for judgment we are ready.

COURT:

Judgment delivered.

F. N. MATOGOLO

JUDGE

27/04/2022