IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 190 OF 2021

MAGUDO BAYIGWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Ilala at Kinyerezi in Criminal Case No. 481 of 2019)

JUDGMENT

14th & 24th May, 2022

KISANYA, J.:

The appellant, Magudo Bayigwa was charged before the District Court of Ilala at Kinyerezi with two counts namely, rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16, R.E. 2002 (now R.E. 2019) and abduction contrary to sections 133 and 134 of the Penal Code (supra). The particulars of offence in respect of the offence of rape were to the effect that, on diverse dates between 26th May, 2019 and 17th June, 2019, at Kigogo area within Ilala District in Dar es Salaam, the appellant raped AAA (name withheld), a girl aged 13 years old. As regards the offence of abduction, the prosecution alleged that, on the 13th day of June, 2019 at Gongo la Mboto area within Ilala District in Dar es Salaam, the appellant abducted the said AAA.

In terms of evidence adduced before the trial court, the victim who appeared in the proceedings as PW2, testified that the appellant promised to marry her and raped her in May, 2019. It was her evidence that the appellant went into her room where he undressed her and inserted his penis into her vagina. However, the victim did not tell any person about the incident. She stated that the appellant had threatened her. The victim further deposed that, in June, 2019, the appellant induced and travelled with her to Kigoma by using train as a means of transport.

The victim's father features in the proceedings of the trial court as PW1. He stated that he searched for the victim when the latter went missing. Upon detecting that the victim was heading to Kigoma with the appellant, he reported the matter to the police. Subsequent, the appellant was arrested by the police when the train arrived at Morogoro Station. The duo were returned to Dar es Salaam where the appellant was interrogated by the police and arraigned before the trial court for the foresaid offences.

Having considered the evidence adduced by both sides, the trial court found the appellant guilty and convicted him of the offence of rape only. Accordingly, it proceeded to sentence him to serve imprisonment for a term of

30 years in respect of the offence of rape and acquitted him on the offence of abduction.

Aggrieved, the appellant has preferred an appeal to this Court. He lodged a memorandum of appeal comprising of six grounds of appeal to the following effect: -

1. That the trial court erred in law and fact by convicting the appellant basing on evidence of PW2 (victim) which was taken in contravention of section 127(2) of the Evidence Act.
2. That the appellant was convicted basing on evidence of PW2 which was not corroborated.
3. That trial court erred in law and fact in convicting the appellant basing discredited evidence of PW4 and Exhibit P1.
4. That the trial court erred in law and fact by failing to analyze evidence adduced by the witnesses called by the prosecution.
5. That the trial court erred in law and fact by disregarding the defence case.
6. That the prosecution case was not proved beyond all reasonable doubts.

When the appeal came for hearing on 11th April, 2022, it was agreed that the hearing would be disposed of by way of written submissions. However, the respondent did not file their written submissions in reply. Upon considering that one, Ms. Angelina Nchalla, learned Senior State Attorney was present on 11th April, 2022, I will proceed to determine this appeal basing on the submission

made by the appellant only. In terms of the settled position, the respondent is deemed to have failed to appear on the date of hearing of the appeal.

Having gone through the appellant's submission, the main issue for determination is whether the evidence of PW2 was taken in accordance with the law. It was his argument that the victim's evidence was in contravention of section 127(2) of the Evidence Act, Cap. 6. R.E 2019. His argument was based on the fact that PW2 did not promise to tell truth. Citing the case of **Godfrey Wilson vs. R,** Criminal Appeal No. 168 of 2018 (unreported) the appellant submitted that PW2's evidence is worthless and thus, urged me to expunge the same.

Pursuant to section 127(2) of the Evidence Act, a child of tender age tender age who understands the nature of oath may be give evidence on oath or affirmation. In the event the child of tender age does not understand the nature of oath, his or her evidence may be given without taking an oath or affirmation. However, before giving evidence, the said child of tender age must promise to tell the truth to the court and not to tell lies. It is settled law stated in a number of authorities including the case of **Godfrey Wilson** (supra) that the said promise must be recorded before the evidence is taken by the trial court.

Reading from the proceedings of the trial court, I have noticed that PW2 was a child of tender age. It is also on record that her evidence was taken without taking oath or affirmation. However, her promise to tell the truth and not lies was not recorded. In that regard, I am in agreement with the appellant that the evidence of PW2 was taken contrary to section 127(2) of the Evidence Act.

It has been a time bound position that the recourse against evidence of a child of tender age taken in violation of section 127(2) of the Evidence Act is to be expunged. One of the authorities in which that stance was taken is the case of **Godfrey Wilson** (supra) relied upon by the appellant. However, in the recent case of **Wambura Kisinga vs R**, Criminal Appeal No. 301 of 2018 (unreported) the Court of Appeal has underlined the conditions under which evidence taken in violation of section 127(2) of the Evidence Act may not be expunged. The Court of Appeal held that: -

> *"Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are;* ***first,*** *that there must be clear assessment of the victim's credibility on record and;* ***second****, the court must record reasons that*

notwithstanding non-compliance with section 127(2), a person of tender age still told the truth."

In the instant case, although the trial court indicated that PW2 had promised to tell the truth, she stated on oath that it was her first time "to give untruth worth evidence." In view of the above stated position, her evidence cannot be considered. It is liable to be expunged.

Even if the evidence of PW2 is not expunged, the second issue is whether the prosecution proved its case beyond all reasonable doubts. As alluded earlier, the particulars of offence were to the effect that the offence was committed on diverse dates between May and June, 2019, thereby implying that the victim was raped more than once. In her testimony, PW2 stated that she was raped in May, 2019. It was not stated at all whether the appellant raped her more than once. Considering that the charge sheet was not amended, I find that the evidence adduced by the prosecution did not prove the charge laid against the appellant. This stance was taken in **Abel Masikiti vs Republic**, Criminal Appeal No. 24 of 2015 (unreported) when the Court of Appeal held that: -

"If there is any variance or uncertainty in the dates then the charge must be amended in terms of section 234 of the CPA. ***If this is not done, the preferred charge will***

remain unproved and the accused shall be entitled to an acquittal."

In view of the foregoing deliberations, I am of the considered opinion that the offence of rape was not proved beyond all reasonable doubts. This is so because evidence adduced by the remaining witnesses (PW1, PW3 and PW4) did not prove the offence of rape. Therefore, I find it not necessary to stretch my muscles to discuss other issues raised in this appeal.

In the event, the appeal is found meritorious and allowed. Accordingly, I quash the conviction and set aside sentence meted on the appellant. It is further ordered that the appellant, Magudo Bayigwa be released from the prison, unless he is being held there for other lawful cause.

DATED at DAR ES SALAAM this 24th day of May, 2022.

S.E. Kisanya
JUDGE

Court: Judgment delivered this 24th day of May, 2022 in the presence of the appellant, and in the absence of the respondent. B/C Bahati present.

S.E. Kisanya
JUDGE
24/05/2022