**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MOROGORO)**

**AT MOROGORO**

**CRIMINAL APPEAL NO 67 OF 2022**

*(Originating from Criminal Case No. 27 of 2021 in the District Court of Morogoro)*

**SAMWEL STANLEY ..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Final Court Order on: 13/12/2022*

*Judgment date on: 01/02/2023*

**NGWEMBE, J:**

The appellant, Samwel Stanley found his way to this house of justice after being convicted and sentenced to serve life imprisonment. The offence which led him to life imprisonment was rape contrary to section 130 (1) (2) (e) and section 131 (3) of the Penal Code Cap 16 R.E. 2019. According to the particulars of charge sheet, the journey of the appellant to life imprisonment commenced on 25th day of April, 2021 at Mtego wa Simba prison area, Mkambarani Ward within the district and region of Morogoro, whereas, the appellant was alleged to have carnal knowledge with a girl of 8 years old.

Since the victim on the eventful date was under the age of majority, that is eight (8) years old, her actual name throughout this judgement shall be hidden for good reasons of preserving her respective privacy, integrity and future respect in the society. This is born out of section 33, read together with section 76 of the Law of the Child Act, accompanied with the Chief Justice's Circular No. 2 of 2018, dated 20th March, 2018. Thus, this court proceed to baptize her into **ABC** or **Victim** used interchangeably throughout this judgement.

It is on records that, the parents of **ABC** and the appellant are neighbours, living in Prison quarters at Kingolwira Prison camp. It is also evident that the appellant is employed and working as prison officer of Kingolwira prison. Likewise, the mother of **ABC** is professionally a Clinical Officer and working at Kingolwira. The appellant Samwel Stanley is also known as "Baba Leila" meaning a father of Leila who is a friend of the victim.

On the eventful date and according to the evidences adduced by PW1 (mother of ABC), it is alleged the event occurred on Sunday of 25th April, 2021, while at home she saw the appellant accompanying her daughter (ABC) from the appellant's house to the victim's house. The daughter looked tired wanting help to sleep. That later was disclosed that, such daughter was given **K-Vant** by "Baba Leila" to drink and later raped her. PW1 as a Clinical Officer, observed the private parts of her daughter and found blood on her underwear and bruises to her vagina. Hence, went to Kingolwira Health Center for medical examination. The medical examination was conducted by another Clinical Officer who according to his

opinion, the daughter was raped not only once but many times, hence, triggered legal action in the District Court of Morogoro.

After being arraigned in court, the prosecution lined up six (6) witnesses and one exhibit marked PE 1 (PF-3), while the appellant defended himself. At the end of trial, the court was satisfied that a *prima facie* case was established and proved against the appellant. Hence, proceeded to convict him on the offence of rape and subsequently pronounced statutory sentence of life imprisonment.

Being so convicted and sentenced, the appellant preferred this appeal by issuing notice of appeal within time, and actualized his intention by lodging a petition of appeal, grounded by nine (9) grievances. In the course of this appeal, the appellant successfully, asked this court to make two additional grounds of appeal, thus constituting eleven grievances namely:-

1. **That,** the trial court magistrate erred in law and in fact to convict the appellant while the prosecution side failed to prove their case beyond reasonable doubt the standard required by law.
2. **That,** the trial court magistrate erred in law and in fact for receiving and relying on the unsworn evidence of the children of tender age (PW2 and PW3) without following procedures stipulated under section 127 (2) of the Evidence Act, Cap. 6.
3. **That,** the trial court magistrate erred in law and in fact for failure to evaluate and analyze evidence on record properly, hence reaching an erroneous decision.

4. **That,** the trial court magistrate erred in law and in fact for disregarding the discrepancies of the prosecution testimony, hence causing injustice to the appellant.
5. **That,** the trial court magistrate erred in law and in fact for convicting and sentencing the appellant without taking into consideration of the wholesome of the evidence adduced by the prosecution.
6. **That,** the trial court magistrate erred in law and in fact to hold that appellant raped the victim after giving her K-Vant whilst PF3 report did not prove that the victim was intoxicated.
7. **That,** the trial court magistrate erred in law and in fact to hold that bottle of K-Vant was found outside the accused house whilst no certificate of seizure was tendered to prove the same and neither the bottle of K-Vant was tendered in court.
8. **That,** the trial court magistrate erred in law and in fact to hold that inconsistent statement made by PW2 and PW3 are minor whilst PW2 and PW3 are core witnesses whose evidence corroborate one another;
9. **That,** the trial court magistrate erred in law and fact for convicting and sentencing the appellant by adding extraneous matters in her judgment (matters which were not in the record of proceedings);
10. **That**, the trial magistrate grossly erred in law to convict and sentence the appellant based on the evidence of PW2 and PW3, which were incredible because their evidence were highly improbable and implausible; and

11. **That**, the trial court magistrate erred in law and in fact to convict and sentence the appellant using the concocted evidence of PW5 Clinical Officer from Kingolwira Health Center instead of the one from Morogoro Government Hospital without noticing that PW1 and PW5 were clinical officers working at the same center.

In the cause of hearing of this appeal, both parties sought assistance from legally trained brain. While the Republic/respondent was represented by learned State Attorney Jamilah Mziray, the appellant was represented by two counsels namely, Neema Ndayanse and Damali Nyange. Unanimously, counsels successfully, prayed to dispose of the grounds of appeal by way of written submissions. Having so granted, the appellant's counsels made thorough legal research and professionally submitted their written arguments challenging vigorously, the conviction and sentence meted by the trial court.

With soft tone, the Republic knew what they did in complying with this court's order on the date of filing their written arguments in this court. I need not to labour much on what happened, rather reserve my energy to deal with the matter on merits.

With a slight touch, failure to file written submission according to the court's order is equal to failure to appear on the hearing date. It is a settled legal principle in our jurisdiction, that, written submission is equal to appearance in court on a hearing date. Failure to comply with the court order of filing written submission is tantamount to failure to appear in court on a hearing date and prosecute his case. This position was made clear in

the case of **Godfrey Kimbe Vs. Peter Ngonyani, [2017] T.L.R. 157.** As such I proceed to treat the written arguments of the Republic as equal to failure to appear in court on the hearing date.

Having so said, I proceed to recap the arguments of the appellant's counsels hereunder. The learned advocates argued only on nine grounds leaving the two additional grounds untouched. The defence counsels raised and argued quite correctly on the duties of the prosecution in criminal cases. They rightly, cited section 3 (2) of the **Evidence Act,** supported with a case of **Pascal Yoya @ Maganga Vs. R, Criminal Appeal No. 248 of 2017,** whereas the Court of Appeal held: -

> *"It is the cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only need to raise some reasonable doubt on the prosecution case and he need not prove his innocence"*

The learned defence counsels concluded the first ground by referring to some evidences which raised doubts, hence convinced this court that the prosecution failed to prove the case of rape beyond reasonable doubt.

Arguing on the second ground related to how to record the evidences of a child of tender age, the learned counsels cited section 127 of the **Evidence Act** as amended, also referred this court to several useful precedents in respect of procedures prior to recording the evidences of child of tender age. PW2 and PW3 were children of tender age whose

testimonies fall under section 127 of the **Evidence Act.** In light of this ground, the Court of Appeal provided a living guidance in the case of **Godfrey Wilson Vs. R, Criminal Appeal No. 168 of 2018,** that prior to recording testimonies of a child of tender age, the trial court is mandatorily required to ask simple questions with a view to test the understanding/intelligence of the said child. The required questions and answers should be recorded verbatim by the trial court. The Court of Appeal by its own words held: -

> *"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 of the case, as follows: -*
>
> 1. *The age of the child;*
> 2. *The religion which the child professes and whether he/she understands the nature of oath; and*
> 3. *Whether or not the child promises to tell the truth and not to tell lies"*

The learned defence counsels proceeded to challenge the recording of evidences of PW2 and PW3, that the trial magistrate did not follow the letters of law and guidance provided for by the Court of Appeal. They supported their argument by referring this court to the case of **Seleman Bakari Makota Vs. R, Criminal Appeal No. 269 of 2018** whereas the Court of Appeal sitting at Mtwara held: -

*"It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution case"*

Challenged further that, the promises made by PW2 & PW3 were recorded as "reported speech" as opposed to promises made in their own words. Above all, the promise was incomplete because they did not promise not to tell lies as required by law. Thus, convincingly referred this court to section 127 (2) of the **Evidence Act**, that was not complied with prior to taking the evidences of PW2 and PW3 who were children of tender age. Added that the trial court in pages 8 & 9 went direct to the conclusion that, PW2 & PW3 promised to tell the truth without first showing how such promise was made.

Strongly argued that, failure to comply with mandatory requirement of section 127 (2) of the Evidence Act renders the evidence of PW2 & PW3 nugatory with no evidential value, hence be expunged.

Arguing jointly, grounds 3 & 5 the learned counsels for the appellant strongly resisted the conviction and sentence based on failure to prove the alleged alcohol from **K- Vant** as per the evidences of PW2 as per page 8 of the trial court's proceedings. The fact that the victim was raped after being intoxicated by alcohol made **K - Vant** was not established and proved by Clinical Officer (PW5).

Arguing on grounds 4 & 8 jointly, the learned advocates insisted that, the evidences of PW2 & PW3 were tainted with discrepancies, inconsistencies, improbable and implausible statements, which pose danger

to convict the accused based on those evidences. Insisted that, the two children PW2 & PW3 were coached/fed on what to tell the court as there was no coherence in their testimonies. To support their argument, referred this court to the case of **Athuman Hassan Vs. R, Criminal Appeal No. 292 of 2017 (CAT – Arusha)** wherein the Court insisted on credibility of witness which is tested by coherence of the testimony compared with testimonies of other witnesses.

Submitting on grounds 6 & 7 of the appeal, the learned advocates argued that, the appellant was convicted purely based on hearsay evidences based on failure to prove the existence of the alleged alcohol made **K- Vant**.

Rested by arguing the 9th ground of appeal, that there was inclusion of extraneous matters in the judgement of the trial court by referring to pages 7, 10, 23 & 24 of the proceedings. Finally, concluded by referring to the case of **Shija Sosoma Vs. R, Criminal Appeal No. 327 of 2017 (CAT – Mbeya),** where the Court of Appeal insisted that, inclusion of extraneous matters outside the testimonies adduced in court is irregular occasioning injustice.

The learned advocates for the appellant did not address this court in respect to the two additional grounds of appeal. This court therefore, presumes that, the appellant has abandoned them. As I have already concluded, the response by the Republic was filed in this house of justice contrary to this court's order, hence inapplicable as if they did not respond therein.

From the outset, let it be known that, in our jurisdiction rape cases to girls below the age of majority (below 18 years) is a serious offence, which attract minimum sentence of thirty (30) years for a girl between ten (10) years to below 18 years. The sentence of life imprisonment covers girls below the age of ten (10) years. Above all those punishments are accompanied with corporal punishment and compensation.

Such heavy punishment is intended, I presume, to deter whoever had in mind to have sexual relationship with a child below the age of majority. Equally important is to note that, for a girl below 18 years, the question of consent does not arise.

Perhaps the legislature when was enacting such heavy punishment, assumed a civilized society who speaks only truth; respect to other human life; and reliabilities in their testimonies as an order of a day. Further, assumed the victim should tell only truth on exactly what happened on the eventful date when the offence of rape occurred, the one who committed the offence, and the circumstances which led into such offence. Having that in mind, the legislature came up with such humiliating punishment of long imprisonment sentence; corporal punishment; and compensation to the victims.

However, nowadays, such assumption of trust is highly qualified in many cases. It has been proved that some victims have misused the trust by telling total lies in court. Even some adults have misused such trust by training innocent children to tell lies in court with a view to victimize other male persons who are not in good terms with them. This position was

found vividly in **Criminal Appeal No. 108 of 2020 between Godfrey Leslie Ndumbaro Vs. R,** where the High Court sitting at Mtwara, found important to use science to prove fatherhood of the child. With a help of Science, DNA test from the Chief Government Chemist reported that: -

> *"Tegemeo la nafasi (Chances) ya baba Godfrey Leslie Ndumbaro kuwa baba mzazi wa mtoto Yusra Godfrey Ndumbaro ni asilimia sifuri (0.00%) ukizingatia "ZPB" ni mama mzazi wa mtoto Yusra Godfrey Ndumbaro".*

At the end the court found the appellant as a school head teacher, never fathered the alleged child, hence was released from prison of thirty (30) years, corporal punishment and compensation.

In similar circumstances, another person was alleged to plead guilty to an offence of raping a girl of six (6) years old. When was arraigned in the district Court, it was recorded that he pleaded guilty. Thus, convicted and sentenced to life imprisonment. However, upon appealing to this house of justice, the court sought additional evidence on mental abilities from the regional medical Doctor from Ligula Regional Hospital. That is **Criminal Appeal No. 102 of 2020 between Bashiru Saidi Rashidi Vs. the Republic.** The regional medical doctor after thorough examination on the mental capabilities of the appellant, he concluded as quoted hereunder: -

> *"Kwa ujumla wa maelezo yake anaonyesha kuwa na tatizo la kumbukumbu na kukosa mtiririko mzuri wa kufikiri, hivyo kitaalamu mteja wangu huyu anatatizo la afya ya akili (Mental subnormal) inamchukua muda mrefu kuongea au kujibu swali kwa*

*maana ufahamu wake uko chini sana na amechukua dakika kadhaa kujieleza'*

Simply means the appellant is suffering from disease of mind called mental subnormal. Obvious, a person suffering from disease of mind is incapable of pleading and has reduced responsibilities in the society. This court proceeded to find that since the appellant has been proved to be subnormal mentally, then the trial court, ought to observe him properly. Accordingly, this court siting at Mtwara quashed the conviction and set aside the sentence meted by the trial court. Proceeded to order the appellant be under supervision of the Social Welfare Officer of Kilwa District.

Another similar case is **Criminal Appeal No. 17 of 2019 between Shilanga Nguku Maeda Vs. R,** the appellant was alleged to have sodomized a boy of seven (7) years old. After all rigors of trial, the appellant was sentenced to life imprisonment. On appeal, among other issues, the appellant raised the defence of impotence, that he never had sexual intercourse with any woman in his life time because his penis did not erect. Out of that defence, this court sitting at Mtwara invoked section 369 (1) of **Criminal Procedure Act** to seek additional evidence by subjecting the appellant to undergo medical examination from the regional medical doctor on his capacity to erect his penis.

The medical examination was conducted by Doctor Herbert G. Masigati of Ligula Regional Referral Hospital. The report had the following contents:

*"The mentioned person was tested for male sex hormone testosterone and found to be normal, however physiological arousal test done on 24th July, 2020 failed to stimulate him enough to erection. To this regard Mr. Shilanga Nguku Maeda is likely to be impotent"*

Out of that medical report, it was scientifically proved that the appellant can never commit the offence of rape or offence against nature as was charged. Hence, the conviction was quashed, subsequently the sentence to life imprisonment was set aside and immediately was released from prison.

Having in mind those cases, I am settled in my mind, the crux of this appeal, raise two fundamental questions; **one** whether the victim was actually raped? When this question is answered in affirmative; the **second** question is who raped her? If the first question is answered in negative, obvious the second question likewise would become inapplicable. The essence of the second question is to connect the appellant with the alleged rape and print out the circumstances and environment which led into that offence. To the best all grounds of appeal are within the clock of those two questions.

Essentially, the offence of rape is created under section 130 (1) of the **Penal Code,** whose ingredients are provided for under subsection 2 (e) of section 130 of the Act. For clarity the section is quoted hereunder: -

*"**Section 130**.- (1) It is an offence for a male person to rape a girl or a woman.*

*(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*

*(a) – (d) NA*

*(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

The offence of rape under section 130 (1)(2)(e) of the **Penal Code,** unless falls under exceptions, otherwise is termed as *statutory rape*, where in the case of **George Claud Kasanda Vs. The DPP, Criminal Appeal No. 376 of 2017, (CAT at Mbeya),** the Court of Appeal explained in clear terms that: -

*"In essence that provision creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that; it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent"*

As above, certain elements are so fundamental, they must be established and proved by irresistible evidences. Those include; **one** – carnal knowledge (penis penetration to a female vagina), consent is immaterial to a girl below 18 years; **two** – age of the victim; **three** (for the purpose of section 131 (3)) if the age of the victim is below ten years or below 18 years it is termed as statutory rape, if is above 18 years it is

termed as normal rape; **four** lacks of consent to a woman above 18 years is material; and **lastly**, proper identity of the rapist.

The issue of penetration, however slight is so fundamental that rape cannot be established and proved in the absence of penetration. Section 130 (4) (a) of the Penal Code insist on penetration as quoted hereunder: -

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*

In similar emphasis, the Court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No.10 of 2008 (CAT)** raised a valid question on what constitutes an offence of rape? They proceeded to answer as follows: -

> *"Under our Penal Code, rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of 18 years without her consent. Two, having sexual intercourse with a girl of the age of 18 and below with or without her consent (Statutory rape). In either case,* ***one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of penetration*** *i.e.,* ***the penetration, even to the slightest degree, of the penis into the vagina"***
> (Emphasis added)

Similarly, the Court of Appeal in the case of **Mbwana Hassan Vs. R, Criminal Appeal No. 98 of 2009 (CAT – Arusha)**, held: -

*"It is trite law also that, for the offence of rape ..... there must be unshakeable evidence of penetration"*

In the absence of unshakeable evidence on penetration even to the slightest degree, rape cannot be constituted. Penetration being a core element of rape, undoubtedly, must be unshakably established and proved beyond reasonable doubt to constitute an offence of rape.

As such I find inevitable to deal with this element before considering other relevant elements of rape as a way of answering those grounds of appeal. A critical review of the evidence testified by PW5 who is a Clinical Officer at Kingolwira Health Center whose profession of medicine was obtained from Tandabui Institute of Science and Technology at Mwanza, testified boldly, that after examining private parts (vagina) of the victim ABC, he observed that, her vagina was penetrated (raped) not only once, but several times. Recapping his own wording as per the record he said *"the open space at victim's vagina showed that it was not the first time for the victim being raped"* Added, *"blunt object entered in the victim's vagina"* proceeded to testify that *"blood was inside the vagina which was caused by bruises"*

Such oral evidence was supported by exhibit PE1 (PF3) which was recorded by that Clinical Officer. As a doubting Thomas, this court being the first appellate court, found it inevitable to satisfy itself if at all, such scientific opinion of PW5 was reasonable enough to convince the consciousness of this court to believe and act on it. Thus, upon critical review of the whole evidences led into conviction of the appellant together

with the termed scientific opinion of PW5, reasonable doubts cropped up on the proof of penetration. While the court was proceeding with composition of this judgement and having that reasonable doubts of penetration, I invited both learned counsels together with the appellant in court to address the court on the need to take additional scientific evidences on the allegations of rape.

Unanimously both counsels, consented on the need to subject the victim ABC for proper examination before a qualified Reginal Medical Doctor from Morogoro Referral Hospital. Being so agreed, this court applied **section 369 (1) of Criminal Procedure Act, Cap 20 R.E. 2022**, to call for additional evidence from the Reginal Medical Doctor. The applicable section is quoted hereunder: -

> ***Section 369 (1)*** *"In dealing with an appeal from a subordinate court, the High Court if it thinks additional evidence is necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a subordinate court"*
>
> *(3) "Unless the High Court otherwise directs, the appellant or his advocate shall be present when the additional evidence is taken"*
>
> *(4) "Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court"*

Consequently, this court on 21st November, 2022 issued two orders to the Regional Medical Doctor namely; **first** whether the victim was ever intoxicated by any alcohol at any given time of her life time; and **second**,

thorough investigation of her private parts (Vagina) to observe, if at any given time she was raped.

Those court orders were effectively complied with by Doctor Deodata Ruganuza, a medical doctor from Morogoro Regional Hospital and a specialist of obstetrics and gynecology, possessing masters on that field. Thorough examination of the victim was done professionally and when she was called in court to testify and present her investigative report, she honestly testified and opined her examination that, she could not have complied with the first court order of conducting thorough examination on whether the victim at any given time was intoxicated by any alcohol in her life time. The reason of failure to do so was lapse of time. She testified that, the girl was sobber, able to speak fluently, looked intelligent and nothing abnormal were observed. Above all she disclosed that, it was not possible to find any form of intoxication due to lapse of time. That the event complained of occurred on 25th April, 2021 while the examination was done on 5th December, 2022 thus, lapse of more than a year. In any event intoxication could not be easily observed.

Proceeded to testify on the second order that, she conducted thorough examination of the victim's private parts and boldly testified professionally that, she found normal labia majora and labia minora; no bruises or abnormal discharge seen; no visible scars seen; ruminants of hymen tags were vividly intact.

On cross examination by learned counsels, she strongly disclosed on how she performed such examination, that it was physical examination and

found no any abnormality on the victim's vagina, there was no scar found and hymen tags around the vagina were intact. According to her expertise, concluded that, there was no penetration of any sort in the vagina of the victim.

Proceeded to testify on cross examination that the absence of rapture or scar in the vagina of 8 years girl meant there was no penetration (rape). She tendered her examination report, which same was admitted as exhibit CP1.

On cross examination by the learned State Attorney, Doctor Ruganuza clarified that, had it been penetration by a grown-up male to the vagina of ungrown girl of 8 or 9 years old, her vagina would be raptured and the whole hymen of the victim would be removed totally. Above all she could over bleed and unable to walk. Further testified that, once hymen tags are removed is forever, there is no possibility of regeneration or regrowth. She stood to the position that, to her best knowledge and expertise, the victim was not raped, which same information was disclosed to the victim's mother who accompanied her to the Hospital.

Disclosed further that, the victim's mother appeared to be knowledgeable on medical profession. Having so concluded, with permission, she left the court and both counsels were satisfied that she spoke her professional opinion and was truthful.

Notably, I am fully aware that, medical reports are not determinant factor in proving or disproving the offence before any court of law. Always medical doctors and other professionals give expert opinion to the court.

The trial judge or magistrate may be lacking such medical knowledge, but always their opinions shall remain opinions not binding to the court.

Other jurisdictions like India and other Common law Countries, have similar legal position like ours. For instance, in India in the case of **Ramesh Chandra Agrawal Vs. Regency Hospital Ltd. and others, MANU/SC/1641/2009: JT 2009 (12) SC 377,** Apex Court considered the issue pertaining to expert opinion in a detailed way. In para 11, the Court held: -

> *"The law of evidence is designed to ensure that the Court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person.... The scientific question involved is assumed to be not with the Court's knowledge. Thus, cases where the science involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed. The other requirements for the admissibility of expert evidence are:*
>
> *i. that the expert must be within a recognised field of expertise*
> *ii. that the evidence must be based on reliable principles, and*
> *iii. That the expert must be qualified in that discipline.*

In same judgement at page 15 the Court went on to hold as I quote: -

*"An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions"*

The same Court went on to qualify the expert opinion that, in order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a **special study on the subject** or **acquired a special experience therein** or in other words that he is **skilled and has adequate knowledge on the subject**.

In similar vein, the matter was discussed in the case of **Mt. Titli Vs. Alfred Robert Jones, MANU/UP/0107/1933: AIR 1934 All 273**, the Court discussed that, it is not the province of the expert to act as Judge or Jury. The real function of the expert is to put before the Court all the materials, together with reasons which induce to come to the conclusion, so that the Court, although not an expert, may form its own judgment by its own observation of those materials.

Likewise in our jurisdiction the position of India is similar and settled that, expert opinion/evidence with a qualified and experienced expert on the field, deserve high respect, though not binding as was held in the case of **Said Mwamwindi Vs. R. [1972] HCD No. 212.**

It is evident that, Medical Doctors when called to testify in court, are not witnesses of facts, but are experts in their field providing expert opinion. Doctor Deodata Ruganuza, though was a court witness as opposed to parties' witnesses during trial, she demonstrated her expertise, experience, and professionalism on the field of obstetrics and gynecology. Therefore, her expert opinion is of high assistance to this court to provide scientific information, which same was outside of court's knowledge and experience. This position was also articulated by the Court of Appeal in the case of **Edward Nzabuga Vs. R, Criminal Appeal No. 136 of 2008.**

The question remains, whether the victim ABC was ever raped by any male person? To answer this question, requires inquisitive perusal to the evidences of PW1, PW2 (Victim) & PW3 (minor). It is evident, no single witness testified to have witnessed the alleged rapist raping the victim. The allegations of rape are also associated with alcoholism from **K-Vant. K-Vant** is defined as spirit infused with carefully selected indigenous Tanzania Botanical. It contains 35% alcohol. Notably such level of alcohol when induced to a child of eight (8) years may badly intoxicate him/her, possibly unable to stand and walk and may even cause death. In any event, though I am not an expert on alcoholism and I have no experience at all on it, yet such concentration of alcohol at 35% may cause damage to

the brain of a child below 18 years. Since I have no experience on it, I leave it to the experts.

In the contrary, the evidence of PW2 that, she was intoxicated by **K-vant** prior to being raped; yet she was able to remember all what happened to her private parts with the alleged rapist/appellant; the fact that the victim was able to walk freely from the alleged crime scene to her parents' house; such alone create serious doubt on credibility of her evidences. The prosecution ought to lead her to testify more than what she adduced during trial.

Agreeably, Dr. Deodata Ruganuza testified professionally that, rape to an immature girl of eight (8) or nine (9) years by a grown-up male, like the appellant "Baba Leila" would rapture the whole private parts of such girl and cause over bleeding. That she could not even manage to walk as the victim did. The exhibit of CP1 has contradicted totally the evidences testified by PW5 (Clinical Officer) and his exhibit PE1 (PF3).

Evidently, PW5 insisted that due to his examination of the victim, indicated she has been raped not only once. In the contrary, Dr. Ruganuza confirmed that the victim was not raped at all, because of availabilities of labia majora and labia minora, which were intact proving her virginity.

I am highly attracted with the reasoning of the Indian Court on admissibility of expert opinion. Rightly, the scientific opinion must come from an expert on the field. Also, should demonstrate the methodologies used to arrive to the conclusion. In the contrary, PW5 and PF3 was made by a nonprofessional one from the field of medicine. A Clinical Officer is

neither a medical doctor nor an expert in the field of medicine. Under normal circumstances a specialist must be a holder of master's degree or above in the field. A diploma holder is neither a doctor nor a specialist.

Due to the nature of sexual related offences and their seriousness, I hastily opine that, medical reports for court use should be from a medical doctor or medical specialist in the field like Doctor Deodata Ruganuza. Much as we respect Clinical Officers, yet wherever possible they should refrain from conducting medical examinations of victims subject to court cases.

In respect to this appeal, had the victim ever being raped, scars could be vividly seen, permanent absence of labia majora and labia minora as specifically adduced by Dr. Ruganuza. In the contrary, all signs of virginity were vividity seen by Dr. Ruganuza, thus proving absence of penetration to the victim's vagina.

Equally important is the rule of best evidence that, comes from the victim as per the famous case of **Seleman Makumba Vs. R, [2006] T.L.R. 379** in page 384 where the Court of Appeal held: -

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration"*

Under normal circumstances, the best evidence on rape cases should come from the victim. However, nowadays, such assumption is qualified in

many circumstances. It has been proved that some victims have misused that trust by telling lies in court. Even some adult persons, misused such trust by training innocent children to tell lies in court with a view to victimize male persons who are not in good terms with them. The court as of now verifies critically on the evidences of the victim on rape cases. This position was also arrived by the Court of Appeal in the case of **Hamisi Halfan Dauda Vs. R, Criminal Appeal No. 231 of 2019** (unreported), the court held: -

> *"We are alive however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s)"*

The court nowadays stand alerted when handling cases related to sexual offences, despite the settled rule of the best evidence that, comes from the victim, yet for such misuse and mistrust, the court must verify if the victim is trustful and tells nothing but only truth. The Court of Appeal in the case of **Pascal Sele Vs. R, Criminal Appeal No. 23/2017, CAT at Tanga** (unreported), qualified such rule by guiding subordinate courts to be critical on credibility of victim's evidences. In other words, the rule of best evidence comes from the victim is only the best if the witness is credible and testifies reliable evidences. Otherwise, the rule on best evidence cannot be relied upon if the witness is not credible and reliable in the eyes of law.

In this appeal, obvious there are inconsistencies as indicated above, which required critical consideration on credibility of the victim and other prosecution witnesses. Second, the trial magistrate failed to follow the letters of section 127 of the Evidence Act prior to recording the evidences of PW2 & PW3. As rightly argued by the defence counsel, recording of the evidences of children of tender age, require compliance to section 127 of the Evidence Act as amplified in various decided cases, including in the case of **Godfrey Wilson Vs. R (Supra).** The verdict of failure to comply with letters of section 127 and the precedents of this court and of the Court of Appeal, the whole testimonies become invalid, consequently and by application of guiding principles as discussed above, the whole testimonies of PW2 & PW3 must be expunged as I hereby do. What remains, cannot support the offence of rape.

May be by *obita dicta*, the prosecution has dual purpose in prosecuting offenders in a court of law, first is to net true offenders and let the court punish them according to the existing laws; second is to establish and prove guilty or innocence of an accused person before a court of law. In so doing, the prosecution ought to muzzle all evidences to prove the alleged offence.

In this appeal, the prosecution ought to know that the victim's mother was/is also a Clinical Officer working in the same office with PW5. Thus, the need to have an expert opinion from a qualified and independent medical doctor from a reliable hospital like Morogoro Referral Hospital, which was quite close to the alleged crime scene.

I would add a wise advice to both, the prosecution and investigation, whenever possible to use scientific instruments to unearth the truth of the allegations before subjecting innocent persons into rigours of court proceedings and may be up to imprisonment, just to find on appeal the appellant was innocent from the beginning. Consequently, lead into social complaint that the true offenders, sometimes, are left free, while innocent persons may find themselves languishing in jail. In many other countries, science has helped the court to arrive into unqualified conclusions.

In totality and on the circumstances of this appeal, together with the medical opinion from specialist of obstetrics and gynecology proved rape was not committed to ABC and in fact she is still virgin, meaning there was no penetration which is the most important element to prove rape.

Accordingly, this appeal is meritorious, I therefore, proceed to quash the conviction and set aside the sentence of life imprisonment passed to the appellant, consequently, I order an immediate release of the appellant, unless otherwise, held on account of any other lawful cause.

**Dated** at Morogoro in Open Court this 1st February, 2023

**P.J. NGWEMBE**

**JUDGE**

**01/02/2023**

**Court:** Judgement delivered at Morogoro in Open Court on this 1st February, 2023 in the presence of the appellant, defence counsels Ms.

Neema Ndayanse assisted by Damali Nyange and Ms Neema Haule, Senior State Attorney for the Republic.

**Right to appeal to the Court of Appeal explained.**

**P.J. NGWEMBE**

**JUDGE**

**01/02/2023**