IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.173 OF 2022

(Appeal from the decision of the District Court of Temeke at Temeke dated 25th day of August, 2022 Hon. Madili– RM in Criminal Case No. 130 of 2021)

IBRAHIM MGENI MZEE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14/12/2022 & 3/03/2023

POMO, J

The Appellant is aggrieved with the conviction and sentence of the Temeke District Court (the trial court) in Criminal Case No.130/2022 which was handed down on 25/08/2022 hence this appeal. Having been convicted, the trial court sentenced the appellant to serve life imprisonment, a fine of tshs 300,000/- and compensation to the tune of 500,000/- be given to the victim.

The appellant was arraigned before Temeke District Court facing a charge of statutory rape contrary to section 130(1), (2) and 131(1) of the Penal Code [Cap 16 R.E.2019]. The allegation in the charge sheet was that the appellant had carnal knowledge with a girl (name withheld) of tender age who is 11 years old at Mbagala Chamanzi on unknown dates and months in 2020 until 7th day of March 2021. The prosecution side having paraded four witnesses, the trial court was convinced that the charge laid down against the appellant is proved beyond reasonable doubt hence convicted and sentenced him to serve life imprisonment and paying compensation to the victim.

The brief background, albeit briefly, to the case against the appellant as can be gathered from the evidence testified in court is that, PW1 Farida Omari is a neighbour to the Appellant at Chamanzi area at Mbagala in the city of Dar es Salaam. That, on 7th day of March,2021 around 9 PM to 10 PM at night the appellant came to PW1's home and called PW2 the victim a girl aged 11 who is a daughter of PW1 Farida Omari intending to send her somewhere. PW2 the victim responded to the Appellant's call but in turn she was asked by him to enter into the toilet which is outside the Appellant's home. The appellant followed PW2 (the victim) into that toilet holding a

bucket in his hand. He asked PW2 (the victim) to undress her clothes and sit on the appellant's legs and he then proceeded to have carnal knowledge to PW2 (the victim) by inserting his penis into PW2's vargina. This was revealed by one Selemani who came to inform PW1 the victim's mother that he saw PW2 (the victim) the victim coming out of the Appellant's toilet together with the Appellant.

Acting on the information received from Seleman, PW1 Farida Omari called PW2 (the victim) in her room and undressed her and asked her to squat whereby upon so doing the sperms started coming out of her vergina. Having so observed PW1 asked PW2 to wear the same clothes. PW1 went to the appellant's home and asked him on what he has done to her daughter PW2 (the victim) and she then reported the incident to Chamanzi Police station. Thereafter the Appellant was arrested by the police and taken to Chamanzi Police Station. On the other hand PW2 (the victim) was taken to Hospital for medical examination which came to reveal that she had bruised virginal, slippery whitish fluid into the vargina due to sexual intercourse.

As alluded above, basing on the evidence adduced by four paraded witnesses by the prosecution side, the respondent republic herein, the trial court was satisfied the charge to have been proved beyond reasonable doubt

to ground the conviction against the appellant for the offence of rape henceforth sentenced him to serve life imprisonment and payment of compensation to the victim. The conviction and sentence meted to the appellant aggrieved him hence the present appeal armed with seven grounds of appeal. The grounds of appeal are as follows: -

1. *That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of PW2 (victim) whose testimony was received in contravention of the provision of section 127(2) of the Evidence Act, [Cap 6 R.E.2019] for failure to conduct a proper voire dire*

2. *That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of Pw2 (victim)when the same was incredible, improbable and unreliable by failing to disclose any reason of not telling her month and/or anybody in regard to the alleged incident the omission which cast doubt on the prosecution case*

3. *That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of Pw3 who was in the club taking local beer when the same failed to explain and describe the intensity of light, the distance from the scene of crime to where he was and the morphological appearance of the alleged assailant in order to prove his identification/recognition*

4. *That, the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution failed to establish the appellant's apprehension in connection with the charge at hand as neither the tenants, the said mjumbe who called the police officers nor the arresting officer were called to testify in court so as to prove the facts in issue, the omission which cast doubt on the prosecution case*

5. *That, the learned trial magistrate erred in law and fact in convicting the appellant without making a critical evaluation, analysis, assessment, weighing and consideration on the defence evidence the omission which resulted to a serious error amounting to a miscarriage of justice and constituted a mistrial*

6. *That, the learned trial magistrate erred in law and fact in convicting the appellant based on oral evidence of pw4 and Exhibit P.1 (PF 3) when there is nothing to link the appellant with the admitted evidence*

7. *That, the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution did not prove its charged against the appellant beyond reasonable doubt as required by law.*

When the appeal was called on for hearing on 14th December,2022, the appellant appeared in person unrepresented while the respondent

republic was represented by Dorothy Massawe, learned senior state attorney. I ordered the appeal be disposed by way of written submission the order which is dully complied with.

In determining the appeal, I will start with the first ground of appeal which also carries, more or less, the same meaning to the second ground of appeal thus will be, in my view, conveniently determined together.

Arguing the 1st ground of appeal, the appellant submitted, briefly but concise, that the evidence of PW1 (victim) was obtained in contravention of section 127(2) of the Evidence Act, as amended by Act No.4 of 2016 in that PW2 (the victim) was not asked as to whether or not she understood the nature of oath/affirmation requiring her to promise to tell the truth to the court and not lies. That the recording by the trial court at page 22 of the proceedings was not in direct speech recorded from the victim thus unprocedural and/ or unqualified to justify the evidence adduced

On the other hand, the respondent republic responding to the Appellant's submission on the first ground of appeal argued that looking at page 22 of the proceedings, the trial court before it started taking the evidence of PW2 (the victim) a child of tender age recorded that *"section*

127 of the Evidence Act complied with, witness promises to tell the truth and not lies before court". It is the respondent's republic further submission that the above statement complies with the requirement of the law. That, the court received PW2's evidence upon being satisfied that PW2 (the victim) was intelligent enough to answer questions posed and promised to tell the truth and not lies. That, the court dully assessed the credibility of PW2 (the victim) the victim.

Again, it was the Respondent republic argument that, as it is provided under **section127(2) of the Evidence Act, Cap 6 [R.E.2019]** a child of tender age may give evidence without taking an oath or making affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies

That, the fact that the questions asked to PW2 (the victim) with the respective answers were not recorded to indicate that the child of tender age was tested before promising the court to tell the truth and not lies did not prejudice the appellant since PW2 (the victim) before giving her evidence in that, she was asked her age, the religion which she professes and she answered those questions and promised to tell truth and not lies per the requirement of the law. That, from those questions asked to PW2 (the victim)

shows that the trial court made assessment to ascertain that PW2 (the victim) promised to tell the truth and not to tell any lies. With that, they prayed this ground be dismissed for want of merit.

In determining this ground of appeal, I find worthy reproducing the trial court proceeding concerning PW2 (the victim) before she could adduce her evidence. The said proceedings to which PW2 (the victim) a child of tender age adduced her evidence, which is page 22, reads thus:

> *01/06/2022*
>
> *Coram: Hon. Madili – RM*
>
> *S/A; Shija*
>
> *CC: Simango*
>
> *S.A; For hearing, I have one witness ready to proceed*
>
> *Accused: Ready to proceed*
>
> ***PROSECUTION CASE CONTINUE***
>
> ***PW2 Najma Abdallah, 11 years resides at Chamanzi, Chamanzi Primary School, Muslim*** *promises to speak the truth before court and not lies, section 27 of TEA Complied with*
>
> ***Signed by Hon. Madili – RM***
>
> *01/06/2022*

XD by S/A". End of quote and underlined emphasis supplied

In looking as to whether the above reproduced trial court proceedings met the legal requirement envisaged under section 127(2) of the Evidence Act or otherwise, again, it is prudent to reproduce the section for clarity. It reads thus: -

> *"S.127(2) – 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".* End of quote

The issue here is if PW2 (the victim) before she could adduce her evidence in court, being a girl of tender age, the requirement of section 127(2) was complied with

In **John Mkorongo James Versus Republic, Criminal Appeal No.498 of 2020, CAT at Dar es Salaam** (unreported) at pp. 8 – 15 confronted with akin situation had this to state: -

> *"Our task in determining the first ground of appeal is narrowed down to two issues;* ***first,*** *whether examining a child witness of tender age on his/her competence and whether he/she knows the meaning and nature of an oath so that if not, to let him/her testify on the promise*

to court to tell the truth and not tell lies, is a requirement of law or not and ***second, whether the omission to do so is fatal****".*

The Court of Appeal went on stating, at paragraph 3 of page 9 thus: -

"Before venturing into the above posed issues, we should first, for the sake of appreciating what transpired on 21.11.2019 before PW1's unsworn evidence was recorded, reproduce the relevant trial court's proceedings as shown at page 9 of the record of appeal:

"PROSECUTION CASE OPENS

The Victim (PW1) *10 years old, Resident of Mwananyamala, student at Mapambano, Mlugulu by tribe:*

COURT

PW1 Promises that he can tell the truth, and understand the duty of telling the truth".

The Court of Appeal, at page 11; having quoted the above trial court proceeding, went on to refer to its previous decision of **Godfrey Wilson Vs Republic, Criminal Appeal No.168 of 2018 (Unreported)**, where in which it was held: -

"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127(2) as amended ***imperatively require a child of a***

tender age to give promise of telling the truth and not telling lies before he/she testifies in court. <u>This is a condition precedent before reception of the evidence of a child of tender age</u>*. 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*
3. *Whether or not the child promises to tell the truth and not tell lies. Thereafter, upon making the promise,* ***<u>such promises must be recorded before the evidence is taken</u>****".*

Guided by the findings reached by the Court of Appeal in **John Mkorongo James case (supra)** on the requirements to observe **section 127(2) of the Evidence Act** by the trial court **before the** evidence of a witness of tender age is being taken, there is no gainsaying that the evidence of PW2 (the victim) was taken by the trial court in contravention of the said provision. This is because PW2 (the victim) adduced her evidence without

first giving promise to the court **to tell the truth** and **not to tell lies**. The trial court proceedings is wanting on this. There is nothing recorded per the dictate of the law and the guideline given by the Court of Appeal in **John Mkorongo James case (supra).** Taking particulars of the witness in a witness box is **one thing** and affirming/swearing before giving evidence is **another thing**. As it can be gathered from the excerpt above in respect of PW2 (the victim) evidence, what the trial court did took particulars of the witness and then recorded *"promises to speak the truth before court and not lies, section 27 of TEA Complied with".* The second limb was not complied with which is the core business envisaged under section 127(2) of the Evidence Act.

The submission by the Respondent republic that the trial court complied the requirement set under section 127(2) and that the Appellant was not prejudiced anyhow, such argument does not get any support from the said section 127(2) of the Act and the interpretation thereof by the Court of Appeal in **John Mkorongo James case (supra).** In that decision, the court of appeal, having found the non compliance of section 127(2) of the Act by the trial court in taking the evidence of a witness of tender age, the

remedy it gave to such evidence was to expunge the same out of record. It stated at page 15 thus:

> *"In the instant case, as we have amply demonstrated above, PW1's evidence was taken in contravention of section 127(2) of the Evidence Act. That being the case, the said evidence is valueless and* ***it is accordingly expunged from the record****".* End the quote

This court has not clothed with power to go contrary to the position of the superior court the fact being based on a simple reason that this court being the High Court is bound by the decisions of the Court of Appeal.

Consequently, since the evidence of PW2 (the victim) was taken in violation of section127(2), I hereby expunge that piece of evidence from the court record.

Having expunged the evidence of PW2 (the victim), the remining piece of evidence, which is that of PW1 Farida Omari, PW3 Seleman H. Kifile and PW4 Erasmo Kwendwa remain to be hearsay evidence because , it is a settled law, the best evidence in rape offence comes from the victim herself.

Again, having so allowed the grounds No. 1 and 2 of appeal, which suffices to dispose the appeal, I find no need to determine the rest of the

grounds of appeal raised by the Appellant on the ground that determining the same will remain to be an academic exercise

In the upshot, the appeal is hereby allowed and consequently I quash the conviction and set aside the sentence. I further order that, the appellant be released from prison forthwith unless held therein for other lawful cause.

It is so ordered

Right of Appeal explained

Dated at **Dar es Salaam** this 3rd day of March, 2023.

MUSA K. POMO

JUDGE

03/03/2023