

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MOROGORO SUB - REGISTRY)**

**AT MOROGORO**

**CRIMINAL APPEAL NO. 85 OF 2022**

**(Originating from the District Court of Ulanga, at Mahenge in Criminal  
Case No. 28 of 2022)**

**BETWEEN**

**SALVATORY MADAYA .....APPELLANT**

**VERSUS**


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

**JUDGMENT**

**9<sup>th</sup> March, 2023**

**CHABA, J.**

In the District Court of Ulanga, at Mahenge, Salvatory s/o Madaya was charged with one count of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R. E, 2019], now [R. E, 2022] (the Penal Code). According to the particulars of the offence, the prosecution side alleged that, the appellant, Salvatory s/o Madaya was charged on 9<sup>th</sup> day of June, 2022, at Chitita – Namgezi Village within Ulanga District in Morogoro Region did have carnally knowledge of one GA (her name withheld), a girl aged thirteen (13) years old, the pupil of standard five at Chikuti Primary School.



It is on record that, the appellant denied the charge laid against him and thus, the case had to proceed to a full trial in proving the charge. The prosecution relied on the evidence of four (4) witnesses and one documentary evidence, the PF.3 (Exhibit P.1). PW.1 Agripina d/o Matelya Lyezia gave an account on how her daughter, GA or the victim went missing early in the morning at or about 6:00hrs after she had asked her to go to the shamba/farm for cultivating. Since her efforts to trace her daughter ended in vain, she decided to go back home. On the way back home, she passed through her neighbour's house (the appellant) aiming to greet him. Thereby she knocked the door and entered therein. While inside, the appellant gets out from the bedroom naked while put on condom on his erected male organ. Seen that, she gets out the house and while on the way back home she saw her daughter getting out from the appellant's house. Upon noticed that, she raised an alarm for help and began to shout. With the help and assistance of the crowd of people, the appellant and the victim were apprehended and forwarded to the nearest police station at Mahenge for legal action.

PW.2, the victim also gave an account of how it all transpired at the crime scene. She told the trial Court that, on the previous date she met with the appellant who told her that on the following day / date (the date of incident) should not go to school and instead therefore, she had to go to the appellant's house and collect her gift. On that day / date, she went to the appellant's house with the aim of taking her gift. Upon reached to the appellant's house, she was told by the



appellant that before handing over his gift to her, Tshs. 2,000/= they had first to do or make sexual intercourse. According to her testimony, she agreed because she needed the money. Therefore, the appellant and the victim enjoyed sexual intercourse as agreed. Her evidence shows that, when they finished to make sexual intercourse, she got outside the appellant's house. However, unexpectedly she met her mother, PW.1 who caused both the appellant and the victim to be arrested and forwarded to the nearest police station at Mahenge. Later, she was taken to the hospital for medical examination. Upon medical examination, she was found to have no pregnancy.

PW.3, WP 106445 PC Matrida, gave evidence of material particulars to PW.2. Her testimony shows that, she filled the PF.3 and later sent the victim to the hospital for medical examination because there was an allegation that the victim was raped. PW.4 is Dr. Mellegi Mollel who testified that, he conducted medical examination of the victim on 9/6/2022 and interrogated the victim. The victim admitted the fact that she made sexual intercourse with the appellant and did use a condom. She was further informed by the victim that, before making sexual intercourse, the appellant promised her to give some money. His evidence shows reveals that, during medical examination, he found that her hymen was broken and there was white discharge and bad smell. Afterwards, he took samples of white discharge and urine for pregnancy test, but nothing was found. He admitted having involved to fill the PF.3 of the victim after he had completed to conduct

medical examination. He finally, tendered in evidence the said PF.3 and admitted as Exhibit P.1.

In defence, the appellant denied having committed the offence he stood charged before the Court. He admitted the fact that, the victim passed to his home and asked for drinking water. He allowed to enter inside his home and drunk some water. However, while getting outside his house, she met her mother, PW.1 who raised an alarm and shouted for help. She claimed that he, the appellant was living or staying with her daughter at home. Some few minutes later, he and the victim were apprehended and forwarded to Mahenge police station.

After a full trial, the trial Court accepted the version of the prosecution's case and specifically relied on the statement of the victim when cross examined by the appellant. In brief, the victim told the trial that she voluntarily agreed to make sexual intercourse with the appellant upon promised to be paid Tshs. 2,000/= . She said, no force was applied to procure her consent. The trial Court also relied on the testimony of PW.1, the victim's mother who recounted that, when she entered the appellant's house and called him, the appellant emerged from his bedroom naked while put on condom on his male organ. The trial analysed that PW.2 collaborated the testimony of the victim.

Thus, the appellant was found guilty, convicted and sentenced to serve thirty (30) years imprisonment term. In additional, he was sentenced to a corporal punishment of 12 strokes of the can to be inflicted on his buttocks as follows, half



of it to be executed while entering the door of prisons and the remaining six strokes of the canes to be executed upon completing his term of thirty (30) years imprisonment. The trial Court however, stated that infliction of the corporal punishment had to be effected upon approval of the appellant's health condition by the medical doctor. The trial Court further ordered that, the appellant to pay compensation to the victim to the tune of Tshs. 1,000,000/= (Say one million only).

Dissatisfied, the appellant preferred this appeal determined to challenge the decision of the trial Court. In his memorandum of appeal, the appellant raised one ground of appeal to the effect that, *the trial Court erred in law and fact to convict and sentence the appellant while the prosecution failed to prove the case beyond reasonable doubt.*

At the hearing of the appeal, the appellant was represented by Mr. Michael Michael Chami, learned advocate whereas Ms. Theodora Mlelwa, learned State Attorney entered appearance for the Respondent / Republic.

When invited to argue the appeal, the learned advocate for the appellant submitted that, the trial Court erred in law to receive and record the evidence of the child without adhering to the relevant provisions of the law. He submitted that, the trial Court record does not reflect if the child promised to say the truth or not. He added that, the evidence was taken and recorded in unusual way contrary to section 127 (2) of the Evidence Act [Cap. 6 R. E, 2022]. He said, this

irregularity is fatal, and it renders the evidence of the victim nullity. He accentuated further that, once the evidence of the victim is removed or expunged from the record, the remaining testimonies of other witnesses including PW.1, PW.3, and PW.4 cannot secure conviction of the appellant because the same are full of hearsay evidence.

With the above pieces of evidence, Mr. Chami submitted that it is safe to conclude that, the prosecution side failed to prove their case beyond reasonable doubt. To back up his contention, he cited the case of **Mamimu Yunusu Vs. The Republic**, Criminal Appeal No. 293 of 2019 on page 113. He said, in this case the Court of Appeal of Tanzania expunged the evidence of the victim on ground that the trial Court failed to adhere to the relevant provisions of the law as alluded to above.

He finally, prayed the Court to allow the appellant's appeal, quash conviction and set aside the sentence meted against the appellant and orders emanated therefrom.

In reply to the appellant's submission, Ms. Theodora Mlelwa did not seek to oppose the appellant's appeal. Indeed, she conceded that the prosecution side did not prove their case in the required standard. She underlined that, the trial Court erred in law when it recorded the evidence of the victim contrary to the requirement of the provision of section 127 (2) of the Evidence Act (supra). She reminded this Court that, in sexual offences the best and true evidence comes



from the victim as it was expounded in the case of **Selemani Mkumba Vs. Republic [2006] TLR 379**. She highlighted further that, the trial Court records reveals that, the victim is a girl of tender age (13 years old). This implies that the appellant committed a statutory rape. She said, the evidence adduced by the prosecution witnesses are silent in respect of the age of the victim. That means, the age of the victim was not proved as required by the law. She added that, even the victim and her mother, PW.1 did not recount on this facet of the age and proved that she was a girl of tender age.

Relying on the above anomalies, the learned State Attorney prayed the Court to allow the appellant's appeal, quash the conviction and set aside the sentence meted against the appellant.

In a brief rejoinder, the learned advocate for the appellant had nothing to add from what he submitted in chief.

Having carefully considered the ground of appeal, the submissions made by the parties from both sides and after having reviewed and examined the trial Court record, I am now able to face up to and deal with the ground of appeal raised by the appellant.

At first, I want to state that this is a straight-forward case. In his memorandum of appeal, the appellant raised one ground of appeal to wit, the trial Court erred in law and fact to convict and sentence the appellant while the prosecution side failed to prove the case beyond reasonable doubt.

In his submission, Mr. Chami accentuated that the evidence of key witness, the victim was received by the trial Court and recorded contrary to section 127 (2) of the Evidence Act (supra). He therefore prayed such piece of evidence be expunged from the record for lacking evidential value. He stressed that, if the Court removes the evidence of PW.2 then the remaining testimonies of other witnesses (PW.1, PW.3 and PW.4) have nothing to implicate the appellant with the offence he stands charged because the same are full of hearsay evidence. He cited the case of **Mamimu Yunusu Vs. The Republic** (supra) to reinforce his argument. His submission got support from the learned State Attorney who added that even the age of the victim was not proved considering that the appellant was charged with a statutory offence. The learned State Attorney referred this Court to the authority of the case of **Selemani Mkumba Vs. Republic [2006] TLR, 379** (supra) to buttress her contention.

From the foregoing, both parties are at one that the evidence of the victim was recorded as if she was an adult person. On reviewing the original Court record, the record taken on 6/9/2022 bears out that, I quote:

***"PW.2, GA (her name withheld) pogoro, resident Chitita, Student, Std V Chitati Primary School, 13 years old, Christian, Sworn and States as follows: -***

***XXD by PP....." [Emphasis is mine].***





The provision of section 198 (1) of the Criminal Procedure Act [Cap. 20 R. E, 2022] (the CPA) requires every witness in a criminal trial, subject to the provisions of any other written law, to give evidence upon oath or affirmation in accordance with the provisions of Oaths and Statutory Declaration Act. The law says:

*"Section 198 (1) - Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act".*

From the above extract of the provision of the law, one of the exceptions to this provision relates to a witness of tender age whose procedure for recording the respective evidence is provided for under section 127 (2) of the Evidence Act (supra) as amended vide the Written Laws (Miscellaneous Amendment) (No. 2 of 2016) which came into effect on 8/7/2016. The law provides that:

*"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".*

Interpretation of the above provisions of the law was made by the Court of Appeal of Tanzania in the case of **Godfrey Wilson Vs. Republic**, Criminal Appeal No. 168 of 2018 (unreported) wherein the Court lucidly expressed the import of the above section and enunciated that: -

*"To our understanding, the provision as amended provides for two conditions. One, it allows the child of tender age to give evidence without oath or affirmation. Two, before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies".*

On reviewing the trial Court record, in particular the testimony of PW.2, it is undisputed that until the victim adduced her testimony, the record shows that she was a child aged 13 years old, thus a child of tender age as provided for under section 127 (4) of the Evidence Act (supra) which says: -

*"For the purposes of subsections (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years".*

As I have depicted what transpired before the trial Court, and as correctly submitted by the learned counsel for the appellant and supported by the learned State Attorney, it is undisputable fact that although the trial magistrate received and recorded the evidence of PW.2 upon taking oath on 9/6/2022, but he didn't comply with the provision of section 127 (2) of the Evidence Act (supra) which renders the evidence PW.2 nullity. As her evidence has no evidential value, the same is hereby discounted from the record. As rightly submitted by the learned





State Attorney and defence counsel, the remaining testimonies of PW.1, PW.3 and PW.4 are too weak to ground conviction of the appellant.

As to the question of the age of the victim, there is no any piece of testimony in the Court record suggesting that the age of the victim being a child of tender age was proved as one of the condition precedent to prove the age of the victim. The Court of Appeal of Tanzania in the case of **Issa Amir @ Koshuma Vs. The Republic**, Criminal Appeal No. 120 of 2020 (unreported) emphasized that: -

*"..... This Court has consistently maintained that evidence as to proof of age may be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate (See: Isaya Renatus v. Republic, Criminal Appeal No. 542 of 2015 and Issa Reji Mafita v. Republic, Criminal Appeal No. 337 'B' of 2020 (both unreported).....".*

On this facet, I tend to subscribe to the submission made by the learned State Attorney that, the evidence as to proof of age of the victim was not given and proved by the persons laid down in the above cited case.

For the reasons I have endeavoured to deliberate above, I am in agreement with the learned counsel for the appellant and respondent / Republic that the prosecution side failed to prove the case beyond reasonable doubt. I allow the appeal, quash the appellant's conviction and set aside the sentence of thirty (30) years imprisonment term and all orders stemmed therefrom. I order the immediate

release of the appellant from prisons unless his incarceration is in relation to some other lawful cause. **It is so ordered.**

**DATED at MOROGORO** this 9<sup>th</sup> day of March, 2023.



  
**M. J. CHABA**

**JUDGE**

**9/3/2023**

**Court:**

The Judgment delivered at my hand and Seal of the Court in Chambers this 9<sup>th</sup> day of March, 2023 in the presence of Ms. Theodora Mlelwa, learned State Attorney who entered appearance for the Respondent / Republic and Mr. Michael Michael Chami, learned Advocate who appeared for the Appellant. The Appellant is also present.



  
**M. J. CHABA**

**JUDGE**

**9/3/2023**

**Court:**

Right of Appeal to the parties fully explained.





  
**M. J. CHABA**

**JUDGE**

**9/3/2023**