THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 71 OF 2022

(Originating from Criminal Case No. 06 of 2022 Mvomero District Court)

JUMANNE DANIEL KIPANDEI ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

Hearing date on: 10/03/2023
Judgment date on: 23/03/2023

NGWEMBE, J.

This is an appeal arising from conviction and sentence of 30 years imprisonment meted by the trial court. The appellant was arraigned before Mvomero District Court for the charge of rape contrary to sections 130 (1)(2)(e) and 131 (1) of the **Penal Code Cap 16 RE 2019**. The Republic alleged in the charge sheet that, on 29th November, 2021 at Kidudwe Village within Mvomero district herein Morogoro region, he committed an offence of rape by having carnal knowledge with a girl of 13 years old, (name anonymised for solitude). The appellant pleaded not guilty while also denying main facts constituting the charge during Preliminary Hearing.

In the efforts to establish and prove the offence as charged, the prosecution marshalled five witnesses, including a medical doctor as an expert witness and two documentary evidences.

The prosecution evidence was to the effect that, one Sunday Morning, the victim's brother, Mr. Omary Yusuph Omary, was notified

that his sister (the victim) is sick. When he went home and asked her, she told him that she was raped by Kipandei (the appellant). He instantly procured militia men, arrested the appellant who by then was at Pombe Shop in Kidudwe village and took him to the village office, where he admitted to have raped the victim.

It seems people were outraged and wanted to kill the appellant so he was taken to the police station. The victim gave her statement to the effect that, the appellant called her inside his house when she was going to the market, raped and gave her TZS. 1000. Further said, that was the second time. It looks some 6 days after the event, the victim was taken to the hospital by her guardian aunt who had secured PF3 from police. The medical doctor opined that, the victim had been penetrated several times before as the vagina was open and the interior was reddish. A PF3 and affidavit of birth were tendered during trial.

In the eyes of the trial court, the above evidence established a *prima facie* case, so the appellant was invited for defence. The appellant in his defence stated that he was making bricks when *police* came to arrest him. They asked him about rape, when he could not answer, the victim's brother confirmed that he is the one who raped the victim. They then brought the victim to confirm the rapist and she confirmed. He maintained his denial that, he did not rape the victim but in vain. At the end he was convicted and sentenced accordingly. Soon thereafter, he lodged notice of appeal and finally appealed to this court clothed with12 grievances namely: -

1. That the trial magistrate erred in law and in fact by infringing section 26 of the Written laws (miscellaneous amendment) Act No. 2 of 2016 since the victim PW2 is a child of tender age as all procedures were not followed as required by law and the

court did not satisfy itself as the intelligence of the witness to speak the truth at page 15 of the proceedings.

2. That, the trial magistrate erred in law and in fact by failing to notice the credibility of PW2 and PW3 and PW4, were undermined by delaying to report immediately this crime to the authority, since the offence occurred on the 29th day of November 2021 and the medical doctor (PW5) received the victim (PW3) on 6th day of December 2022 for examination;
3. That the trial magistrate erred in law and in fact in not analysing the actual date of which the alleged offence was committed as in criminal case number 5 of 2022 she said there were three men who raped her Pwagu, Juma and Kipandei;
4. That the trial magistrate erred in fact and law in not reading the exhibits which were tendered in court and in not allowing the accused person to cross examine the medical doctor PW5 as required by law.
5. That the trial magistrate erred in law and fact by convicting the appellant while erroneously failed to assess, evaluate and analyse the whole evidence of the prosecution witnesses in order to arrive in the fair decision.
6. That the trial magistrate erred in law and fact by failing to notice that she was shifted the burden of proving the charge to the appellant.
7. That the learned trial magistrate erred in law and fact by failing to realise that there was no any evidence which implicate the appellant with the said offence as on 6th day of December when she was examined by the medical doctor, she had already alleged to have been raped by Selemani Hemedi in Criminal Case number 5 of 2022 at Mvomero District Court, tried by the

same magistrate and convicted on the same day with the appellant.

8. That the learned trial magistrate erred in law and fact by failing to consider the defence of the appellant neither giving reasons for disbelieving his evidence before conviction.
9. That the trial magistrate erred in law and in fact in accepting the evidence of PW2 Hadija Rajab who was mentally irrational or with good state of mind and her contradiction with PW3 and PW4.
10. That the trial magistrate erred in law and in fact in not examining the contradictions between PW1, PW2 and PW4 which went to the root of the matter.
11. That the prosecution did not prove its case beyond reasonable doubt.
12. That the trial magistrate erred in law and fact in relying on hearsay evidence of PW2, PW4 and DW3 of which the evidence lacked credibility.

On the hearing date of this appeal, the appellant was represented by the learned advocate Daudi Mkirya and the Republic was represented by Ms. Vestina Masalu, learned State Attorney. Mr. Daudi Mkirya dropped grounds 5, 6, 9 and 11 while arguing jointly grounds 7 & 8 and grounds 10 & 12. Regarding the first ground, Mr. Mkirya submitted that the trial magistrate did not adhere to section 127 of **the Evidence Act** as she did not ascertain intelligence of the victim.

In respect of the second cluster; grounds 2, 3 and 4 the learned advocate pointed out that the offence was committed on 29th November, 2021 but same was reported on 5th December, 2021 some six or seven days later. He pointed page 10 of the proceedings and argued that, such long delay to report the incidence raised doubt.

On ground 7 and 8 the appellant's counsel submitted that, in another Criminal Case No. 5 of 2022, three people named, Pwagu, Jumanne Kipandei and Selemani Hemedi were alleged to have raped the same victim that could not be possible unless the offence ought to be gang rape.

Submitting on ground 10 and 12 said there were serious contradictions as per page 9 of the judgment. Such contradictions were major and went to the root of the case itself. Rested by a prayer that the appeal be allowed.

In turn the learned State Attorney strongly opposed the appeal. She followed the sequence invented by Mr. Mkirya, she proceeded to reply that, the victim testified properly after complying with section 127 of the **Evidence Act.** Referred this court to page 17 of the trial court's proceedings.

On reporting the incidence, she countered that, the victim reported the offence to her sister and named the rapist, but the guardians are the ones who delayed to report the incident because her aunt is mentally disordered. Pointed at page 20 of the proceeding that, it is the victim's brother who reported the matter to police.

Argued the remaining grounds jointly that PW1, PW3, PW5 and PF3 proved the victim's vagina was penetrated by the appellant's penis. Added that the prosecution case was proved beyond reasonable doubt. There were no contradictions, in the prosecution's case. If any, same were minor as was so decided in the case of **Marabo Slaa Hofu and others Vs. R, Criminal Appeal No. 246 of 2011**. Rested by a prayer that, the appeal be dismissed, instead the trial court's conviction and sentence be upheld.

In rejoinder Mr. Mkirya reiterated his submission in chief, and added that reporting the incident to the authority was inordinately

delayed without any explanation. Further added that one Mwamvita, a victim's cousin, had information on 04/12/2021, but took no action until 05/12/2021 when the victim's brother reported the same. Moreover, argued that the prosecution's evidence was contradictory; cited those contradictions that PW1 testified that the victim was raped when was on her way home, but the victim before the trial court testified that she was at home, the appellant called her and raped her.

Having those rival arguments, obvious the fundamental duty of this court is to decide whether the appeal has merits. In this appeal when considered in line with the rival arguments of learned counsels, two issues are apparent, that is whether section 127 of the Evidence Act was complied with in recording the testimony of PW3 and whether the offence was proved beyond reasonable doubt. While the first is a point of law as it questions adherence of the laid down procedures, the second one constitutes both law and fact.

In respect to the first issue, Mr. Mkirya challenged the trial magistrate that the victim being a child of tender age was not tested properly of her intelligence before she could testify in court. In the adversarial side, the learned State Attorney was firm that the provision was complied with. I will reproduce the section hereunder for a focused approach in determining the ground, section 127 (1)(2) provides: -

> **Section 127.-** *(1) "Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*
>
> *(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."

It is important that, the trial court must test her intelligence, correctly as Mr. Mkirya submitted. It is upon making its findings of the witness, then will decide whether the witness should take oath or otherwise. In alternative where it resolves that the witness cannot swear or affirm, it must require him or her to promise telling the truth and not lies. A comprehensive interpretation of the section was offered in the case of **Issa Salum Nambaluka Vs. R, [2020] 1 T.L.R. 379 [CA]** where it was *inter alia* held: -

"From the plain meaning of the provisions of sub-section (2) of s. 127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies."

In the same vein, the Court of Appeal amplified same in the case of **Geoffrey Wilson Vs. R, Criminal Appeal No. 168 of 2018 (unreported)** held: -

"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 to

tell lies. Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

The above has been confirmed as a proper procedure to be applied in each case depending on the circumstance. For instance, in the case of **Hamisi Issa Vs. R, (Criminal Appeal 274 of 2018) [2019] TZCA 384** the trial court adopted the above procedure.

Though the trial court's proceedings had some grammatical, lexical and logical errors, it was good enough to grasp what transpired. Hereunder is what the court recorded at page 15: -

"Asha Samwel Kidudwe, Student, Christian.

Court: Ascertaining if the witness whom we have been told she is 13 know the meaning of oath.

Qn: Do you go to church.

Ans: Yes, I go to Sabato church of Saturday.

Qn: Can you tell me if you ever heard of swearing before God or man.

Ans: I don't know, but I saw people.

(Akionesha kidole chake na kupitisha shingoni, akisema haki ya Mungu usiseme uongo ikimaanisha hadanganyi).

Qn: So, you can also promise me to tell the truth

PW2: I promise to tell the truth and not a lie"

Those discussion between the victim and magistrate sufficed for the purpose of section 127 (2) of **the Evidence Act.** Therefore, I find no reason to bless the arguments advanced by the learned advocate for the appellant. Rather safely rest this ground by dismissal.

The second question is whether the offence was proved beyond reasonable doubt. The law as stands today is that evidential burden of proof is on the prosecutor to establish guilt of the accused beyond

reasonable doubt. Section 3 (2)(a) of **The Evidence Act** provides that the court must be satisfied beyond reasonable doubt that the fact exists. In **D.P.P. Vs. Ngusa Keleja @ Mtangi & Another [2020] 2 T.L.R. 204 [CA],** it was reiterated as follows: -

> *"We now pose to restate the basic principle of law that the burden of proof in criminal cases lies squarely on the prosecution shoulders, the standard of which is beyond reasonable doubt - See Woolmington v. DPP (1935) AC 462 and Mohamed Said Matula v. Republic [1995] T.L.R. 3. An accused has no duty of proving his innocence, and in making a defence, an accused is merely required to raise a reasonable doubt. We must add here that even, the accused person can only be convicted on the strength of the prosecution case and not on the basis of weakness of his defence"*

Recollecting from the precedents, proof beyond reasonable doubt is to lead the evidence that establish a watertight conclusion that it is none else but the accused who committed the offence. In the case of **Samson Matiga Vs. R, Criminal Appeal No. 205 of 2007** (unreported) as to what proof beyond reasonable means the court, held:-

> *"What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence"*

In this case, the appellant was charged for rape contrary to sections 130 (1)(2)(e) and 131 (1) of the **Penal Code Cap 16 RE**

2019. While section 131 prescribes punishment for rape, Section 130 (1)(2)(e) creates the offence of rape.

To prove statutory rape as above, two ingredients are required; *first* - penetration to the victim by the accused; *two* – age of the victim to be apparent 18 years and below. In this appeal, the trial magistrate made her findings that penetration was proved and that the victim's age was established to be 13 years at the time the offence was committed. Further, reasoned that despite contradictions which had featured in the prosecution evidence, best evidence in rape was that of the victim as per the case of **Selemani Makumba Vs. R, [2006] T.L.R. 379**.

I agree that the rule in the above case still prevail and apply in our jurisdiction. Also, that in this case all other witnesses did not have direct evidence save the victim. However, the learned trial magistrate missed the tail to that rule. The rule requires the court to take a serious consideration of the victim's truthfulness and credibility before it accords any reliance. In the case of **Mohamed Said Vs. R, Criminal Appeal No. 145 of 2017** it was held: -

> *"We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with the rules of evidence in general, and s. 127 (7) of Cap 6 in particular, and that such compliance will lead to punish offenders only in deserving cases."*

Likewise in the case of **Juma Antoni Vs. R, (Criminal Appeal 571 of 2020) [2022] TZCA 250,** the Court of Appeal took the above precedent among others of its previous decisions and insisted that: -

> *"In the premises, although the best evidence of rape is that which comes from the victim, however, that is not a waiver on*

the court assessing the credibility in order to satisfy itself that the witness is telling nothing but the truth"

It has been consistently insisted by this court and Court of Appeal ever since. Apart from the above referred cases, the rationale of the rule was pointed in the case of **Hashim s/o Amasha Vs. R, (Criminal Appeal 28 of 2017) [2019] TZCA 267** where the Court of Appeal emphasized that: -

"We wish to emphasise here that the determination of the credibility of the victim's testimony is a most basic consideration in every trial involving a sexual offence, ***for a single witness's testimony, if credible is sufficient to sustain a conviction."***

Apart from the above, it is undeniable that falsehoods and lies in the courts of law tend to be common by parties and witnesses. It is even more in sexual related offences which, obvious prescribes a minimum of 30 years up to life imprisonment in our jurisdiction.

In the Book written by **Bellin, Jeffrey, "The Evidence Rules That Convict the Innocent" (2021) Faculty Publications 2020** at page 305 of **Cornell Law Review**, refers to a number of US court cases along with the book by **Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011)*** *observed as follows: -*

"In 1923, Judge Learned Hand famously mused that since the trial process provides the accused with "every advantage," the prospect of the "innocent man convicted" was "an unreal dream." Few observations have aged as badly. In the past two decades, DNA tests definitively established the innocence of hundreds of defendants convicted of serious crimes. These

revelations "changed the face of criminal justice." No one doubts any longer that the system convicts the innocent."

In number of cases, by additional evidence like DNA and other scientific findings, this court has found that an innocent man was convicted and punished in rape cases when there was no probable cause against him in the first place. To emphasize on this point, I intend to refer to some cases decided by this court, including **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 of the appellant from the regional medical Doctor. That is, **Criminal Appeal No. 102 of 2020 between Bashiru Saidi Rashidi Vs. the Republic.** The regional medical doctor after thorough examination on his 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. Thus, the court proceeded to order the appellant be under supervision of the Social Welfare Officer.

Another similar case is **Criminal Appeal No. 17 of 2019 between Shilanga Nguku Maeda Vs. R,** where 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. This court subjected him to undergo medical examination from the regional medical doctor on his capacity to erect his penis. The medical examination was conducted and the medical report said: -

"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 of life imprisonment was set aside.

The above precedents prove beyond doubt that failure to critically review the evidences of the victim may end up imprisoning innocent persons. As such this being the first appellate court, I am entitled to re-evaluate the whole evidences laid before the trial court. Regarding the duties of the first appellate court, see the cases of **Siza Patrice Vs. R. Criminal Appeal No. 19 of 2010 (unreported)** and **Bonifas Fidelis @ Abel Vs. R, [2015] T.L.R. 156 [CA]** where the Court of Appeal observed: -

> *"We understand that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-valuate the entire evidence in an objective manner and arrive at its own findings of fact if necessary."*

Starting with the victim's testimony, she testified that on the day of rape when she went home, her mother (PW2) and her brother one Omary saw that she was not walking properly and did beat her, thus she told them that she was in pain and that Kipandei had committed some *evil acts* to her without mentioning the date. However, other witnesses said that the victim was going to the market, passed near the appellant's home, that is when the appellant forced her in his house, raped her and gave her TZS. 1,000/=. The victim herself testified the contrary that, the appellant found her at her home, he called her to his home raped her and gave her TZS. 2,000/=, the basic part of her testimony at page 15 – 16 goes: -

"I know the accused person his name is Kipandei he raped me; it was in his house; he found me at home and call me; he told me We, aliniambia Asha njoo; nikamwambia sitaki akanilazimisha; akanipandisha kitandani; alitoa mdudu alafu akaniingiza alinivua nguo; na yeye akavua akanipa hela elfu mbili (2) akaniambia niende nyumbani. When I went back home my mother saw me, I was not walking properly and beat me; I told him moja mbili tatu Kipandei kanifanya matendo mabaya. I told him my brother that I am in pain and he took me to hospital at Bwagala"

From such testimony, while the victim suggests that, her mother (PW2) Hadija Rajabu Mkombi) saw her at home on the same day of rape that she was not walking properly, PW2 in her testimony told the court that her cousin one Mwamvita is the one who on 04/12/2021 informed her that the victim was not walking properly.

PW1 F8859 D/Cpl Msafiri stated that, the victim said the appellant had raped her even before, but in her testimony the victim did not disclose about it. PW5's evidence, was full of uncertainties and suspense. While in the PF3 he wrote that he found the victim's vagina swollen, in his testimony in court, he did not mention such findings, instead he stated that, the vagina was open and the victim seemed to be used to sex. The said PF3 was filled in by the said doctor on the physical state of the victim as: -

"Swollen labia minora and reddish vagina interior...there is evidence of penetration to vagina orifice and it is likely forceful"

Yet, there is a testimony before the trial court of his examination of the victim, he stated: -

"In my examination I discovered that was not the first time she was penetrated; her private part was open which indicate that

was penetrated. Kwamba alikuwa na wekundu ambao ulionesha ameingiliwa"

The witness did not state anything on the ordinary colour of *labia minora* when not penetrated. Whether virginity can be lost without any sign of bruises or lacerations? Whether the inner part of the vagina *(labia minora)* being reddish implies penetration or is a normal colour? If being reddish in colour is abnormal, whether there would be any suggestion of other infections? The methodology and how he got to that finding is unknown and this court finds no answers to those serious questions, neither did the trial court have. It was for the prosecution to provide them and avoid unanswered questions which raise serious doubts.

In other jurisdictions like India and other Common law Countries, have strict rules on a person called to examine and his report to be used in a court of law. 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**.

It is unknown if PW5 passed those tests before his expert opinion is admitted in court. Otherwise, we face nowadays difficulties to underscore the said expert opinion if at all is from a specialized person like in this case.

In regard to contradictions apparent from the face of record, this may be answered by referring the case of **Mohamed Said Matula Vs. R, [1995] T.L.R 3**, where was held, if contradiction is found in the testimony, the court is bound to resolve them and rule the effect. Same is quoted that: -

> *"Where the testimony by witnesses contains inconsistencies and contradiction the court has the duty to address the inconsistencies and try to resolve them where possible, or else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"*

This has been followed in all relevant cases, including **Maramo Slaa Hofu and Others Vs. R,** and **Agustino Lodaru Vs. R, [2014] T.L.R. 45[CA].** In this appeal, the records of trial court indicate several contradictions and serious doubts as above pointed.

The victim, a standard five pupil did not scream in the act of rape and even after rape was not threatened by anyone, but she did not report the incident to anyone till when she was questioned and beaten some 6 or seven days later on 04/12/2021. Then the appellant was arrested on 05/12/2021. Failure to report the offence within reasonable time and failure to arrest the accused in time, usually weakens the prosecution's case; see the cases of **Elisha Edward Vs. R, Criminal Appeal No. 33 of 2018 CAT at Shinyanga** and **Marwa Wangiti & Another Vs. R [2002] T.L.R 39.**

Even PW4 Omary Yusuph Omary (the victim's brother) testimony that the appellant admitted to have raped the victim seem to have no value as same is much attributed to fear of the mob outrage as seen at page 21 of the proceedings, thus would not qualify to be confession under section 3 (1) and part III of the **Evidence Act.**

Also, age of the victim was not clearly established. As earlier pointed, age of the victim is a necessary ingredient of the offence. In **George Claud Kasanda Vs. R, Criminal Appeal No. 376 of 2017** (unreported) also followed in **Leonard s/o Sakata Vs. The DPP, Criminal Appeal No. 235 of 2019 CAT at Mbeya,** it was held: -

> *"In essence that provision (section 130 (2)(e) of the Penal Code) 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. In that sense age is of great essence in proving such an offence."*

PW2 testified in court that the victim is 13 years old, but she could not remember the victim's birth date. She tendered the affidavit of victim's birth which showed that she was born on 01/07/2008. Further testified that after they reported the incident to police, the officers wanted her to prepare such affidavit, which she did. The victim did not state anything regarding her age. Considering the circumstances, I am satisfied the said affidavit was not reliable evidence on age of the victim.

I am aware of the legal principles regarding proof of age, including that of **Isaya Renatus Vs. Republic,** which seemed to guide the trial magistrate. Likewise, I accept that PW2 being the aunt and guardian of the victim was a competent witness on the victim's age as a matter of law. However, as a matter of fact, PW2 did not have the material to prove age of the victim. It is obscure as to how did the trial magistrate resolve the victim's age to be under 18 years old. Having considered the testimonies of all the witnesses, particularly PW1, PW3 and PW4 I am satisfied that the age of the victim was not proved.

Despite all the contradictions unearthed herein, which are not exhaustive, the trial magistrate was of the position that such

contradictions were minor. Ms. Masalu supported this finding, but Mr. Mkirya held his stance that the contradictions were major and went to the root of the case. I would accept Mr. Mkirya's observation as I find those contradictions to be serious as they all hinge around the question of whether the victim was below 18 years old and whether she was raped. I am satisfied the questions were not answered at all, let alone who raped the victim.

Having reasoned as above, I find merit in grounds 2, 3, 10 and 12. The prosecution case suffered from various ailments and thus unable to bring conviction. As analysed above, failure by the victim to report the offence and name the rapist at the earliest stage and failure to arrest the appellant in reasonable time, raised serious doubt. Likewise, contradictions pointed out by the appellant in ground 10 and 12 were serious and went to the root of the case, while the age of the victim was not proved at all even proof that the victim was penetrated on the date named in the charge was not established.

Under the circumstance the trial court erred in its conclusion, the offence was established beyond reasonable doubt. Had the trial magistrate followed the principles I have expounded herein, which she is presumed to be aware of, she would have reached into a different conclusion that the offence was not proved beyond reasonable doubt as this court finds.

Such error justifies this court to quash conviction and set aside the sentence of thirty years imprisonment meted on the appellant. I further order that the appellant be released forthwith unless otherwise held for any other lawful cause. Order accordingly.

Dated at Morogoro in chambers this 23rd March 2023.

P. J. NGWEMBE

JUDGE

23/03/2023

Court: Judgement delivered at Morogoro in Chambers this 23rd day of March, 2023 in the presence of Mr. Daudi Mkirya, learned advocate for the appellant and Ms. Vestina Masalu, learned State Attorney for the respondent.

Right of appeal to the Court of Appeal explained.

Sgd: L. Lyakinana

Ag, DEPUTY REGISTRAR

23/03/2023

I Certify that this is a true and correct copy of the original

Deputy Registrar

Date 31/3/23 at Morogoro