THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

CRIMINAL APPEAL NO. 06 OF 2023

(Arising from Criminal Case no. 52 of 2021 from Mvomero District Court in Mvomero)

DANIEL MWIMBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last order: 27/03/2023

Date of judgement: 21/04/2023

MALATA, J

The appellant, Daniel Mwimbe was charged and convicted for the offence of rape contrary to section 130 (1) (2) and 131 (1) of the Penal Code, Cap 16 R. E. 2022.

Particulars of the offence were that, Daniel Mwimbe on diverse dates between 25th day of March 2021 and 18th day of May at Sarawe Village, Pemba within Mvomero District in Morogoro Region had carnal knowledge

of PW1 (victim) a girl of 13 years old. The accused (herein to be referred as the appellant) pleaded not guilty to the charge.

To prove the case against the appellant, the prosecution called a total of seven witnesses including PW1 and the appellant fended for himself without further witness.

PW1 testified that the appellant is her step father, she has four siblings from her mother. PW1 further testified that her mother ran away from the appellant since March 2021 and left her with other siblings at the appellant's place. PW1 testified that, the appellant used to stay with had sex with her and sometimes he sodomised her. She further stated that, when he wants to have sex with her the appellant used to call PW1 in his room and after finishing having sex with ordered PW1 to go back to her room.

PW1 further testified that she felt pain when the appellant raped her, he normally told her to bend over and sodomised her and when he want to have sex on the vagina he would tell her to lie upward on the bed and insert his penis. If he want to rape her at noon hours, he would order PW1's young sisters and brothers to go to shamba, when they remain alone, he raped her, and during the nights the appellant would wait until the young ones are sleep and he would awake PW1.

PW1 stated that the appellant threatened her not to tell anyone or he will kill her. The appellant fought with her mother and she ran away, till to date PW1 doesn't know where her mother is.

PW2, Selestin Michael Luziga (doctor) testified that on 21/05/2021 at noon hours while on duty he received the police officer, parent accompanied with a girl aged about 13 – 14 years, they requested for medical examination and he found that there was no bruises, no dead sperms but the examination shows that PW1 have already had sexual intercourse as such she was not virgin.

On fateful date when the girl was brought to the hospital she had no any indication that she had sex for few hours, rather she was old perforated. PW2 filled the PF3, signed it and gave it back to the police.

PW3, Omary Kimbo Malekela testified that, he knew the appellant is the residence of Masimba village. Between March and April 2021, the accused person came to his office and informed him that his wife ran away from matrimonial home. PW3 gave him the letter to report the incidence to the police station. Upon search PW3 found out that his wife is at Morogoro with her child, PW3 made a follow up and found out that the appellant's wife was at Morogoro and she told PW3 that she run away from the appellant because he used to beat her. PW3 further testified that, sometimes the appellant went to his office and told him that since his wife

ran away from him, he therefore made PW1 his wife. PW3 received a complaint from PW1's grandmother and decided to report the matter to the police station. The news spread to the whole building and on 18/05/2021 the appellant was arrested.

PW4, Ester Joseph testified that PW1 is her granddaughter she is 12 years. She testified that he knows the appellant as he used to be his son in law, he used to live with his daughter before he decided to have carnal knowledge with PW1. In March 2021 the appellant and the victim came on the motorcycle and the appellant told him that "*bibi umeniona na mke wangu, nimemtomba, hata bikira hana hata bikira".* PW4 further testified that, she was shocked and scared and started to think is it normal for someone to travel such distance to told her such news. She sensed that there is a problem and decided to report to the hamlet leader who directed her to the police station where he made a report. At the police she was told to wait while they make investigation on the information. Thereafter the appellant After some days the appellant and PW1 were arrested, the victim was taken to the hospital for check-up, and then she was transferred from her father's house to Kimbilio area makao salama.

PW5, Paulina Juma testified that the victim is her younger sister and the appellant is her step father. On the 2nd date the accused went to their place with the victim and told them he had sexual relationship with the

victim. They informed the hamlet leader who told them that he received the call with the same statement. He directed them to go to the police station.

PW6, Saidi Ally testified that he know PW1 as his nephew and the appellant to be his uncle but he directed him to call him brother-in-law as he told him that he has love affair with the victim in this case.

One day the appellant called him and told him that he wanted to kill my sister (his wife) as she left the matrimonial home but the appellant changed his mind and decided upon heard that, PW6 got scared and he made communication with his relatives and reported the matter to the police station and the accused was arrested.

PW7, D 6300 S/Sgt Hamisi testified that he knows the appellant, he remembered on 25/03/2021 at about 10.00 hours he was on duty at the police station when the appellant came to his office and informed him that his wife Sophia has disappeared from their matrimonial home. He opened the file for that matter KBT/14/2021, he then gave the appellant the RB to help the appellant find his wife. On 27/03/2022 while at the same office the appellant mother-in-law came to the office and told him that on 26/03/2021 the appellant went to his place and told her that she made PW1 his wife. PW7 told not worry as he will investigate on the case, he further stated that PW1 is the step daughter of the appellant and the two

were living together. Pw7 started to make investigation and found out the report to be true that the appellant is having affair with her daughter, PW7 informed the OCS of Mvomero and on 18/05/2021 the accused was arrested together with PW1. They issued PF3 for medical check-up and they instituted the case file, the accused was sent to Mvomero police station.

The trial court find the prosecution established, prima facie case thus gave the accused right to be enter defence.

DW1 stated that on 18/04/2021 in morning hours he saw the police officers, the militia and the village leaders coming to his place and arrest him. He was taken to the police station and told that he raped his daughter one Swaumu, the witness testimonies are not true. That was the end of defence evidence.

The trial court was satisfied that, the prosecution has proven the case beyond reasonable doubt, thus entered conviction and sentenced appellant to serve the term of thirty years imprisonment.

Aggrieved by the decision thereof, the appellant preferred an appeal to this court armed with seven (7) grounds, namely;

1. That the trial magistrate erred in law and fact to convict the appellant basing on the evidence of PW1 which do not comply with Section 127(2) of the Evidence Act, Cap 6, R.E 2019.

2. That, the trial magistrate erred in law and fact to convict the appellant basing on the fabricated evidence due to matrimonial/ family conflict.
3. That the evidence of PW3, PW4, PW5, PW6 and PW7 has no weight according to the laws as it was hearsay evidence.
4. That, there was no expert evidence to prove the allegations of PW1 evidence of being sodomised or being raped.
5. That the material witness, PW1'S siblings were not brought to court to prove the allegations.
6. That, the trial magistrate erred in law and facts to rely on the unbelievable testimonies of PW1, PW3, PW4, PW5, PW6 and PW7
   (a) How a reasonable person can speak a word bibi umeniona na mke wangu nimeshamtomba hata bikira hana to her mother-in-law unless he is insane.
7. The prosecution side failed to prove the case beyond reasonable doubt.

As such the appellant prayed for this honourable court to allow the appeal quash the conviction and sentence and set him free.

When the appeal came for hearing the appellant who appeared in person was given a chance to submit in support of his appeal. However, he had

nothing to submit, but prayed the court to consider the ground of appeal and allow the appeal quash conviction, set aside sentence and set him free.

Mr. Kahigi submitted that after going through the evidence on record, the republic is of the settled view that they support the appeal. He gave the reasons as why the republic was supporting the appeal. He stated that, ***one,*** the trial court did not comply with requirement of section 127 of the Evidence Act, PW1 the victim aged 13 didn't promise to tell the truth as required by the law as reflected on page 6 of the typed proceedings. He referred this court to the decision in **Faraji Said vs. Republic** Criminal Appeal no.172 of 2018 where by the court maintained its previous decision in the case of **Godfrey Wilson vs. Republic,** Criminal Appeal no. 168 of 2018 where it principled that, the evidence of a child without compliance of section 127 of Evidence Act or promise to tell the truth has to be expunged.

Having expunged the evidence of PW1 the remaining evidence is of the witnesses which are hearsay in principle.

Submitting in support of the appeal the learned State Attorney stated that the facts depict that 25/03/2021 and 18/05/2021 but the evidence on record do not prove the same. There is no witness who proved the commission of the offence on the respective dates month and year. To

cement the position, he cited the case of **Damas Mgova vs. Republic** Criminal Appeal no. 13 of 2022 where the court of appeal maintained its position in the case of **Mathias Samwel Vs. Republic** Criminal Appeal no. 271 of 2009 that when specific date, month or year is mentioned then the prosecution is required to prove the same, in the present case there is no proof as required by the law. As such, the appellant need to benefit from the same. Finally, he stated that, the appellant need to benefit for the left unfilled gaps on the prosecution evidence.

By way of rejoinder the appellant had nothing to add

This court has taken time to go through the trial court record however before coming to the finding, I wish to point out the duty of this court as first appellate court in the determination of appeal. This being a first appellate court has duty to re-evaluate the evidence adduced at the trial court and satisfied itself if the trial court correctly evaluated and considered it before finally airing the impugned judgement. This duty is gathered in numerous celebrated decision by this court and court of appeal. One of them being in the case of the **Registered Trustees of Joy in the Harvest Vs Hamza K. Sungura**, Civil Appeal No.149 of 2017 CAT (unreported), where court principled, among others that;

"the first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

Having carefully considered the evidence on record, the issues are whether the act of rape of PW1 was sufficiently proven.

Starting with the first ground of appeal based on the non-compliance with section 127(2) of the Evidence Act, the appellant submitted in his first ground that, the evidence of the victim should not have been relied upon on the ground of non- compliance with section 127 (2) of the Evidence Act. Mr. Kahigi conceded to this ground.

(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.

The direct meaning of the above provision of the law implies that the child of a tender age may give evidence either under oath or affirmation or otherwise.

In the case of **Issa Salum Nambaluka vs. The Republic**, Criminal Appeal no 272 0f 2018 (unreported) where the first prosecution witness, PW1 was a child of tender age and her evidence was received on affirmation without first being satisfied that the child witness understood the nature of oath and the Court of Appeal principled that;

"From the plain meaning of the provisions of subsection (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. Section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not"*

Having the above position in mind, if the child of tender age is to give the evidence under oath the trial court should assess whether a child understand the nature of oath or not before taking the sworn or affirmed evidence of a child. Example of the questions to be asked were propounded in the case of **Godfrey Wilson vs. Republic**, Criminal Appeal no. 168 0f 2018 (unreported), where the court of appeal expressed the import of section 127 by stating that;

"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."*

Therefore, the law permits the magistrate or judge to receive evidence of a child upon oath or affirmation after being satisfied that the child understands the nature of oath and consequences of telling lies under oath. There was no question asked by the trial magistrate aiming at obtaining answers as to whether the child witness understands the nature of oath to justify the reception of her evidence. This was a clear violation of settled principle under section 127(2) of the Evidence Act. As such, I full appreciate and agree with the submission by Mr. Kahigi that the evidence of PW1 doesn't have evidential value and it ought to be expunged as I hereby do. This ground therefore carries merits and is accordingly upheld.

Following expunging of evidence by PW1 the remaining evidence is that of PW2, PW3, PW4, PW5, PW6 and PW7. Based on the remaining evidence ground number two, three and six are going to be argued

together as they attack the credibility of evidence of remaining witnesses after the evidence by PW1 being expunged.

The remaining evidence given by PW1, it is the appellant's view that the remaining evidence is hearsay evidence which is inadmissible. It is an established principle of evidence that hearsay evidence which is as general rule of law inadmissible.

There is no doubt that there was a family conflict between the appellant and his wife which made the appellant wife left her matrimonial home. The only evidence that PW1 was being raped by the appellant is that of PW3, PW4, PW5 and PW6, who testified that the appellant told them at different occasions that he is having sexual intercourse with the victim. PW4, PW5 and PW6 are the relatives of the appellant wife, the allegation by the appellant that the witnesses fabricated the evidence against him due to matrimonial conflict, even during cross examination by the accused the witnesses maintained that the appellant told them that he is having a sexual relationship with PW1.

PW7 didn't say how he came to the conclusion that the allegation was true take into account that no medical examination was yet to be performed to PW1. Clearly the evidence by the said witnesses alone is not sufficient to prove that it was the appellant raped PW1

On the fourth ground of appeal the appellant's complaint is that there was no evidence of expert to prove that PW1 was raped or sodomized, PW2 (a doctor) testified on how he received the girl of the age about 13 to 14 years accompanied by her parents and the police officer, he was requested to do a medical check-up on the girl and came with the findings that there was no bruises, no dead sperms and was already had sexual intercourse she was not virgin and she was old perforated.

That finding was also filled in the PF3 which was received in the trial court as exhibit P1. In this regard first the victim vagina was penetrated and the evidence shows that there was no bruises and the medical practitioner remarks in the PF3 was that *"according to my investigation vagina is open means it has been penetrated earlier on"*. in this regard the case **of Selemani Makumba vs. Republic**, Criminal Appeal no 94 0f 1999 (unreported) becomes of relevance

> ***"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, there was penetration."*

Applying the above authority, it is clear that in the instant case the remaining prosecution evidence could not form a basis for convicting the

appellant. Therefore, the evidence on record was not watertight to convict the appellant for an offence of rape.

Another grievance by the appellant is that the prosecution failed to call material witnesses (PW1 siblings). In the case of **Aziz Abdalla vs. Republic** [1991] T.L.R. 71 the court stated that;

> *"The general/ and well-known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question; are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to the prosecution"*

The appellant in this ground of appeal stated that PW1's siblings were material witnesses who were not called, however after going through the trial courts record, I found nowhere in the evidence where PW1's siblings are connected to any material facts relating to the incident of rape.

Having found that, best evidence by PW1 was wrongly taken thence expunging, then prosecution case is necked as there is no evidence to be corroborated. PW2, PW3 PW4, PW5, PW6 and PW7 evidence now stand as evidence which need to corroborate the best evidence from the victim of which we don't have. This is because it was taken in contravention of mandatory provision of section 127 of the Evidence Act.

It is a settled principle that the best evidence in rape cases comes from the victim of rape as it was stated in the case of **Selemani Makumba vs. Republic** (2003) TLR 203. In the case of **Majaliwa Ihemo Versus the Republic. Criminal Appeal No. 197 Of 2020 (unreported)**

> *"the other principle of law relevant to this appeal, is that in sexual related trials, the best evidence is that of the victim as per our decision in* ***Selemani Makumba v. R,*** *[2006] TLR 379. We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point. See our decisions in* ***Shabani Daudi v. R,*** *Criminal Appeal No. 28 of 2000 and recently in* ***Pascal Yoya Maganga v. R,*** *Criminal Appeal No. 248 of 2017 (both unreported). In this case, since at the time of the alleged offence the victim was alone, it is critical that her credibility is impeccable, faultless and her evidence completely reliable."*

As other evidence should corroborate the evidence of the victim and that in this case there is no evidence by the victim it has become so difficult to get corroboration in the absence of victim's evidence. In other words, the

evidence by PW1 has to be corroborated by the evidence by PW2, PW3 PW4, PW5, PW6 and PW7.

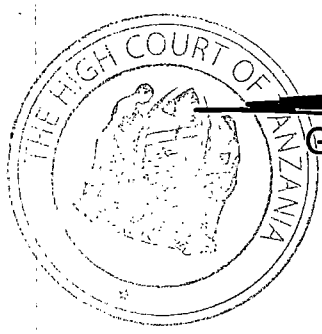
In the upshot, the evidence by PW2, PW3 PW4, PW5, PW6 and PW7 have nowhere to corroborate due to expunging the victim's evidence (herein referred to as the best evidence of the victim).

As such, I find the prosecution side to have failed to prove the case beyond reasonable doubt, thus inclined to agree with Mr. Kahigi learned State Attorney that, the offence not proven as required by law.

Consequently, I hereby allow the appeal, quash conviction and set aside sentence. The appellant be released forthwith unless lawfully held for other offence.

IT IS SO ORDERED.

DATED at **MOROGORO** this 21st April 2023.



G. P. MALATA

JUDGE

21/04/2023