**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 24 OF 2023**

(Originating from Criminal Case No. 94 of 2021 of Mkuranga District Court, at Mkuranga before R.E. Mwaisaka -SRM)

**MWINYI SAID @ PEMBE.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

Date of last Order: 8th May, 2023

Date of Judgment: 26th May,2023

## E.E. KAKOLAKI J.

Mwinyi Saidi Pembe is in this fountain of justice, struggling to challenge the conviction and sentence of life imprisonment passed by the District Court of Mkuranga at Mkuranga for the offence of Rape; Contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, [Cap 16 R.E 2019] now [R.E 2022]. It was prosecution case during trial that, the appellant on 4th day of May, 2021 at Mwanadilatu village area within Mkuranga District in Coastal region, did have canal knowledge of a girl of 8 years of age who for the purpose of concealing her identity shall be referred ti as KB or victim /PW2 in this Judgment.

For better understanding of the matter, I find it apt to narrate albeit briefly the facts which led to the appellant's arrest, charge, conviction and imprisonment sentence as can be deduced from the testimonies of the prosecution witnesses. On the evening of 04/05/2021, KB (PW2) went to Madrasa session where the appellant was a teacher or instructor. After the session was finished appellant told PW2 to remain in the classroom while releasing other students, where after a while ordered her to remove clothes but she refused informing him that, she was going to report the matter to her mother. Appellant without hesitation proceeded to remove PW2's underwear by force and raped by force while sleeping on the floor, before he threatened her not to raise alarm. After satisfying his sexual desire, the victim work up, put on her underwear and left for home without informing anybody, until the next day when she felt pain while urinating and decided to inform her mother (PW1) of the pains she was undergoing. It was until on 10/05/2021, when the victim's mother reported the incident to the village chairman resulting into arrest of the appellant, taken to the police station and the victim issued with Pf3, for medical examination (exhibit P1), the examination which was conducted by PW3 the medical doctor from Mkuranga District Hospital on the same date, who confirmed that PW2 was

raped. The appellant was charged as earlier on stated, but flatly denied to have committed the offence. His trial was successfully conducted as at the end was awarded a sentence of life imprisonment after the trial court was satisfied that, the charge tabled against him was proved to the hilt. The conviction and sentence irritated the appellant and protesting for his innocence, he is now before this Court armed with eight (8) grounds of appeal going thus:

1. The learned trial magistrate erred in both law and fact by convicting the appellant based on the evidence of Pw2 whose evidence was recorded contrary to section 127 (2) of the Evidence Act R.E 2019 as no examination was conducted by the trial court on Pw2 to test her competence and whether she knew the meaning and nature of an oath.
2. That the learned trial magistrate erred both in law and fact by violating section 234, 2 (b) of CPA Cap 20 R.E 2019 as the appellant was not informed of his right to recall Pw1 when the charge sheet was substituted

3. That, the learned magistrate erred in both law and fact by abdicating his duty of subjecting the entire evidence to an objective scrutiny and as a result ended up disregarding the appellants defence
4. That, the learned magistrate erred in both law and fact by convicting and sentencing the appellant based on incredible, conflicting, tenuous and uncorroborated evidence of the prosecution witnesses.
5. That, the learned magistrate erred in both law and fact by convicting and sentencing the appellant based on the evidence of PW3 (the doctor) who alleges that examined the victim (PW2) but the names of the patient examined by PW3 and that of the victim Pw2 does not co relate.
6. That, the learned magistrate erred in both law and fact by basing the appellant conviction and sentence on the evidence of PW2 and Pw1 as it defeats reasoning a mature woman and mother could see her daughter in bad condition in pain on her private parts urinating blood and not examine or take her to hospital for four days.
7. That, the learned magistrate erred in both law and fact by convicting and sentencing the appellant based on exhibit P1 (PF3) which was not read aloud after it was admitted as exhibit.

8. That, the learned magistrate erred in both law and fact by convicting and sentencing the appellant in a case that was not proved to the hilt.

It is on account of the above grounds of appeal, the appellant is praying this Court to allow the appeal, quash the conviction, set aside the sentence and set him at liberty. At the hearing of this appeal which was disposed by way of written submission, appellant appeared in person, while respondent was represented by Elizabeth Olomi, learned State Attorney.

In support of the first ground of appeal it was appellant's submission that, the trial magistrate erred in convicting the appellant basing on the evidence of PW2 which was taken contrary to the provisions of section 127(2) of the Evidence Act, as there is no evidence on record to indicate whether examination was conducted by the trial magistrate to PW2 to test her competence and whether she knew the meaning and nature of an oath, before concluding that PW2 had promised to tell the truth to the Court and not tell lies. He referred the court to page 11 of the proceedings. He argued, it was improper for the trial magistrate to jump into conclusion that PW2 had promised to tell the truth without first having tested her competence and she knew the meaning of an oath. He took the view that, the omission fatally contravened section 127 (2) of the Evidence Act, thus rendering PW2's

evidence valueless. To buttress his position, he cited to the court the case of **John Mkorongo James Vs. R,** Criminal Appeal No. 498 of 2020 (unreported) at page 12 and 13, which stated among other things that, any child of tender age who is brought before the court as witness is required to be examined first albeit brief to know whether he /she understand the meaning and nature of oath before it is concluded that, she can give her evidence under oath or on the promise to the court to tell the truth and not to tell lies as per section 127 (2) of Evidence Act. He invited the court to adopt the authority cited above and proceed to expunge the evidence of Pw2 from the record, hence find merit on this ground and allow the appeal.

In response it was Ms. Olomi's submission that, the victim's evidence was taken in compliance of section 127 (2) of the Evidence Act, as per that section a child of tender age may give evidence without oath or affirmation but he/she must promise to tell the truth and not to tell lies. She contented, in the case at hand the victim was addressed in terms of that section by the court as depicted at page 11 of the proceedings and promised to tell the truth and not to tell lies. She was of the view that, the court satisfied itself that the victim was competent witness as per section 127 (1) of the Evidence Act that is why it continued to receive her evidence. She therefore recanted

the submission by the appellant that, PW2's evidence taken in contravention of the alleged section, hence prayed the Court to dismiss the ground as it has no merit. In his short rejoinder, appellant reiterated his submission in chief as well as his prayer for the Court to find merit in his first ground of appeal.

I have dispassionately considered the submission by both parties as well as perusing the trial court's records seeking to satisfy myself of the complaint raised by the appellant in this ground of appeal. Undoubtedly, at the time of giving her evidence, PW2 was a child of tender age i.e. under 14 years as provided for by section 127 (4) of the Evidence Act as the record shows that she was of 8 years old. Her age is proved by her mother (PW1) who is competent witness to establish child's age, when testified in Court on 17/07/ 2021 as indicated at page 5 of the typed proceedings. See also the cases of **Edward Joseph Vs. R**, Criminal Appeal No. 19 of 2009, **Iddi Amani Vs. R**, Criminal Appeal No. 184 of 2013 and **Mustapha Khamis Vs. R**, Criminal Appeal No. 70 of 2016 (all CAT-unreported).

Now the issue for determination by this Court is whether PW2's evidence was recorded in compliance with the provisions of section 127(2) of Evidence Act. To respond to this issue and for easy reference I find it apposite to

reproduce the provisions of section 127(2) of Evidence Act as I do hereunder:

> *"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 and not to tell any lies."*

From the above section, it is no doubt that, the law imposes a mandatory requirement of the child of tender age to promise first to tell the truth to the Court and not tell lies, before reception of his/her evidence. The requirement of him/her to promise the Court to tell the truth and not tell lies comes in after the Court is satisfied that, being a child of tender age does not understands the nature of oath and the duty of telling the truth, having in mind the common fact that he/she is also a competent witness to testify under oath, upon satisfaction of the Court of his/her competency. Now as to how does the Court satisfy itself the child of tender age does not understand the nature of oath and the duty of speaking the truth before resorting to requiring him/her to promise the Court to tell the truth and not to tell lies, there are guiding procedures to be followed as it was well articulated in the case of **Godfrey Wilson Vs R,** Criminal appeal No. 168 of 2018 (CAT-Unreported), that questions and answers to be recorded in the proceedings

must be put to the child witness. In so doing the Court of Appeal had this to say:

> *"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 requires a child of a tender age to give a promise of telling the truth and not telling lies before he/ she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. 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 understand 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."*

See also the cases of **John Mkorongo James (supra), Salum Nambaluka Vs. R,** Criminal Appeal No. 272 of 2018, **Hamisi Issa vs. R,** Criminal Appeal No. 274 of 2018 **and Jafari Majani Vs. R,** Criminal Appeal No. 402 of 2019 (all CAT-unreported). Now the follow up question is whether

the trial court followed the procedure laid down in the above cited case? The appellant laments that the procedure was not followed while the respondent contends that it was well followed. To disentangle parties from this legal conflict, I took time to peruse the records, especially the testimony of PW2, which is found at page 11 of the typed proceedings. For clarity, I find it imperative to quote the excerpt from that part of the proceedings as shown at page 8 and 9 of the typed proceedings:

> **EVIDENCE OF A CHILD OF TENDER AGE**
>
> *Court: PW2 is a child of tender age she has been addressed in terms of section 127 (2) of TEA Cap 6 R.E 2019 and responded here under,*
>
> *Pw2: I promise to speak the truth and not lies.*

As it is can be depicted from the above excerpt, it is apparent that the trial magistrate acted in contravention of section 127 (2) and unprocedurally proceeded to receive PW2's evidence without first complying with the conditions outlined in that section and postulated in the case of **Godfrey Wilson** (supra). I am therefore in agreement with the appellant's submissions that, there was non-compliance of the said provision. What is depicted in the record is the fact that, the trial magistrate made a finding that, the witness (PW2) promised to tell the truth without laying the base of

his conclusion by putting first to PW2 the above proposed questions and have the answers therefrom recorded accordingly. The Court of Appeal has been insistent and pronounced itself in categorical terms on adherence of the requirements by the trial court to put questions and record the answers of the child witness (of tender age) reflecting his/her words promising to tell the truth and not tell lies, before the trial court allows him/her to testify. See the case of **Athumani Ally Vs. R**, Criminal Appeal No. 61 of 2022, (CAT - unreported) and **Yusuphu S/O Molo Vs. R,** Criminal Appeal No.343 of 2017 [2019] TZCA 344. The effect of non- compliance with the provisions of section 127 (2) of Evidence Act (supra) was well articulated in a number of cases including the case of **Yusuph Molo** (supra) where the Court of Appeal had this to say:

> *"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's case…if there was no such undertaking, obviously the provisions of section 127 (2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity****. The effect is to render the evidence of PW1 with no evidentiary value. It is as if she never*

*testified to the rape allegation against her. It was wrong for the evidence of Pw1 to form the basis of conviction…" (Emphasis added)*

The same stance was pronounced in the case of **Athumani Ally** (supra), where the Court of appeal echoed thus:

> *"From authorities of the Court, Mr. Paul Kusekwa, the learned State Attorney, is correct to fault the way the trial* ***magistrate in this appeal failed to record her engagement with ADM before writing down her conclusion that this child of tender age promised to speak the truth. We think before a trial magistrate or judge allows a child under the age of fourteen to testify under section 127(2) of the Evidence Act, the trial court must record how it engaged that child to conclude*** *that the child promised to tell the truth to the court and not to tell any lies.* ***While there is no formula for what actual words the trial courts should record, what is essential is for the trial court's*** *record to leave no doubt that what the court recorded was what the child said. For the reasons we have outlined, we shall delete the testimony of ADM from the evidence on record.*
> (Emphasis supplied)

Guided by the above cited authorities, it is my profound view that, infraction of the provisions of section 127 (2) of Evidence Act, by the trial court in this matter fatally affected evidential value of PW2's evidence, the result of which

is to expunged the same from the record, which course I hereby take and order accordingly.

Having expunged from the record evidence of PW2, the follow up question is whether there is other independent evidence to support prosecution case on the charge of **Rape** against the appellant. Having explored the entire record, I find none since the remaining evidence from other prosecution witnesses is not direct evidence for not witnessing the incident, thus, not sufficient to prove that it was the appellant who committed the offence of rape to PW2, in contravention of the provision of sections 130 (1), (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2019 now R.E 2022 as the appellant's conviction relied much on the testimony of PW2, which is already expunged. I so find as evidence of PW1 referred to what was told by PW1 and how she reported commission of the offence by the appellant to the street authority and later on at police six days passed, which delay also renders her evidence doubtful as there was no explained reasons for such inordinate delay. Another piece of evidence is that of PW3, the doctor who examined PW2 whose evidence does not incriminate the appellant as perpetrator of rape to PW2 rather establishing that, PW2's private parts were penetrated by blunt object and that, she had her hymen removed.

The resultant consequence, I find the prosecution case against the appellant to be left hanging as the same is not proved beyond reasonable doubt. Thus, the first ground of appeal is meritorious and since the same is sufficient to dispose of the appeal, I find no reason to deal with the remaining grounds. In the event this appeal is allowed. Appellant's conviction is hereby quashed and his sentence of life imprisonment set aside. I order his release from prison with immediate effect unless otherwise lawful held.

Order accordingly.

DATED at Dar es salaam this 26th May, 2023.

E. E. KAKOLAKI

**JUDGE**

26/05/2023.

The Judgment has been delivered at Dar es Salaam today 26th day of May, 2023 in the presence of appellant in person, Ms. Doroth Massawe, Principal State Attorney for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

**JUDGE**

26/05/2023.


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY