IN THE HIGH COURT OF TANZANIA

(IN THE MWANZA SUB-REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 77 OF 2022

(Originating from Case No. 251 of 2018 at Sengerema District Court at Sengerema)

MASOUD STEVEN @NGEREZA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order:24/03/2023

Date of Judgment: 15/05/2023

Kamana, J:

This is an appeal from the judgment of the District Court of Sengerema delivered on 31st May, 2019 in which Masoud Steven @Ngereza was found guilty of rape contrary to sections 130 (1) and (2) (e) and 131(1) of the Penal Code, Cap. 16 [RE.2002] and sentenced to thirty years imprisonment and twelve strokes. The particulars of the offence were that on 12th December, 2018 at 2200hrs at Kabagaga Village within Sengerema District in Mwanza Region, the Appellant Masoud Steven @Ngereza did have carnal knowledge with AA (name withheld to conceal her identity), a girl of 14 years of age and a pupil of standard VI at Kabagaga Primary School.

During the trial, the Prosecution fielded three witnesses. Those were AA (PW1), Det.Cpl. David (PW2) and Dr. Derick Aron Mashauri (PW3) who tendered Police Form No. 3. The Defence did not have any witness other than the Appellant himself.

According to PW1, on 12th February, 2018 around 2200hrs at Kabagaga Village in Sengerema District within Mwanza Region, when on her way from Kabanga Village where a party was thrown by her relatives, the Appellant appeared and ordered her and her brother to kneel while threatening to stab them with a knife.

Thereafter PW1 was taken to a forest where the Appellant undressed her undies while threatening to kill her with a gun. Helplessly, she felt pains as the Appellant's male organ penetrated her vagina. In the course of raping, the Appellant proposed to marry her. She responded positively and requested him to accompany her to her home so that she could take her clothes and elope. After quenching his horniness, the Appellant and PW1 went to the latter's home where she informed her parents of her ordeal. Sensing danger, the Appellant ran away and from that she, her father and brother pursued him.

PW2 testified that in the course of his duties, he interrogated the Appellant who was accused of raping PW1 a schoolgirl of 14 years of

age. The witness stated that the Appellant agreed to make his statement and told him that on the material date, he went to the center of Kabagaga Village where he saw PW1. After seeing her, the Appellant, according to the witness, approached PW1 and agreed to make love after she accepted Tshs. 1,000/- from the Appellant for sexual services she agreed to offer. When the party ended, the witness testified that the Appellant took PW1 to the cassava farm where they had two rounds of sexual intercourse. Thereafter, the duo went to PW1's home with the understanding that PW1 would elope to his place. At PW1's house, the Appellant saw her relative and he ran away. On the following day, according to the witness, the Appellant was arrested while at his home.

PW3, a Senior Clinical Officer, testified that on 13th December, 2018 at 1300hrs he examined a girl of 14 years of age. The witness stated that he was told by the man who accompanied the girl (PW1) that she was raped by the young man. After examining her, it was his findings that she was raped as he found sperm in her vagina. According to this witness, PW1 told him that she committed sexual intercourse.

When he was called to defend his case, the Appellant simply asserted that he had carnal knowledge of PW1 after she accepted his proposal to fornicate her. He further stated that all complaints arose

because he did not give her Tshs. 5,000/- she wanted for sexual services.

Based on that evidence, the trial Court convicted and sentenced the accused accordingly. The conviction and sentence did not amuse the Appellant. Hence, he preferred this appeal armed with six grounds which are condensed as follows:

1. That the successor Magistrate erred in law by not assigning a reason for taking over the case against him and failing to afford him an opportunity to recall the witness already testified before the predecessor Magistrate.
2. That the trial Magistrate erred in law and fact by convicting him based on the weakness of his defence while the Prosecution case was not proved beyond a reasonable doubt.
3. That the age of the victim was not proved by cogent evidence since the victim's parents were not called to testify without any reason and no document was tendered to prove the age.

4. That the unsworn evidence of the victim was characterized by discrepancies and inconsistencies which create doubts and the same was not corroborated with his brother who was alleged to be with her at the incident.
5. That the trial Magistrate failed to append his signature at the end of every piece of evidence as per section 210 (1)(a) of the Criminal Procedure Act, Cap. 20.

The appeal was argued orally for and against. The Appellant appeared without representation. The Respondent had the services of Ms. Sabina Chogogwe, learned State Attorney. Being a lay person, the Appellant simply beseeched this Court to consider his grounds of appeal and release him from prison.

For the purpose of this judgment, I will deal with the fourth ground of the appeal relating to the age of the victim and the issue raised *suo moto* by the Court regarding compliance with section 127(2) of the Tanzania Evidence Act, Cap.6 [RE.2019] as they determine this matter in its entirety.

On whether the provisions of section 127(2) of the Evidence Act, Cap. 6 were complied with, Ms. Chogogwe, learned State Attorney submitted that the purported PW1's promise to tell the truth is

incomprehensible in the sense that it does not qualify to be the promise envisaged under that section. The Appellant did not submit on that,

Regarding the age of the victim, the learned State Attorney contended that the same was proved by PW3 (Medical Practitioner) who examined the victim to be 14 years of age. To buttress her position, the learned State Attorney invited this Court to consider the case of **George Claud Kasanda v. DPP**, Criminal Appeal No. 376 of 2017.

Having heard the arguments advanced by the State Attorney and the ground of appeal and the issue raised *suo moto* by the Appellant and the Court, there are two issues for consideration. One, whether section 127(2) of the Evidence Act was complied with. Two, whether the age of the victim was proved.

Regarding compliance with section 127(2) of the Evidence Act, I think it is relevant to reproduce the same hereunder:

> *'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.'*

According to section 127(2), a child of tender age must promise to tell the truth to the court and not otherwise unless such a child gives

evidence on oath or affirmation. From the records, the trial Court, before PW1 adducing her evidence, recorded the following:

> *'PW1:……(Name withheld)*
>
> *Age: 14yrs*
>
> *Relg: Christian*
>
> *Court: Since the victim is and (sic) child of tender age I hereby require him to promise to tell the truth as per section 127 TEA as amended.*
>
> *PW1: Promise and State'.*

From the excerpt above, as rightly submitted by Ms. Chogogwe, learned State Attorney, that is not the promise to tell the truth envisaged by section 127(2) of the Act. Further, the trial Court did not record how it reached that conclusion since there were no questions and answers that may be deemed to have been asked by the Court in arriving at the promise and conclusion that PW1 is capable of telling the truth.

In the case of **Godfrey Wilson Versus the Republic,** Criminal Appeal No.168 of 2018, the Court of Appeal stresses on the importance of explaining how the trial Court concluded that the child understands

the nature of truth and the duty to speak truth. The Court observed that:

> *'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 understands the nature of oath.*
>
> *3. Whether or not the child promises to tell the truth and not to tell lies.' (Emphasis added).*

In that case, the Court of Appeal was of the position that the evidence taken in contravention of section 127(2) is no evidence in the eyes of the law. The Court observed:

> *'In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016.'*

Given this, I hold that the evidence of PW1 was not the evidence within the purview of section 127(2) of the Evidence Act, Cap. 6. In that case, such evidence was not supposed to be used in convicting the Appellant. Therefore, I expunge that evidence from the records of the trial Court.

Coming to the next issue, I do agree with Ms. Chogogwe, learned State Attorney that the Medical Practitioner is capable of testifying the age of the victim in a case like this one. However, it should be noted that

when the charge is preferred under sections 130 (1) and (2) (e) and 131(1) of the Penal Code, Cap. 16, proof of the victim's age is necessary for the Prosecution to prove the offence beyond a reasonable doubt.

I have dispassionately gone through the evidence of PW3, the Medical Practitioner, who examined the victims. Apart from stating that the victim is of 14 years of age, this witness did not state how he came to that conclusion. It is my considered view that though the Medical Practitioner is capable of testifying as to the age of the victim, such testimony should not come out of the blue. Being an expert, the witness was supposed to prove the age by medical or scientific means and not by mere utterances that the victim is of 14 years of age. In his evidence, PW3 did not tender any age assessment report to prove that the age of the victim was properly assessed. Assuming that PW3 testified as to how he concluded that the victim's age is of 14 years, still such evidence is not a conclusive one. In the case of **Mukarrab and Others v. State of U.P.** Criminal Appeal Nos. 1119-1120 of 2016, the Supreme Court of India stated the following:

'The medical evidence as to the age of a person, though a very useful guiding factor, it is

not conclusive and has to be considered along with other cogent evidence.'

The best evidence as to the age of the victim is the one adduced by the parents. These are the ones who witnessed the birth of the victim. In the circumstances of this case where both parents were present, the Prosecution was under the duty to field them to prove the victim's age which is an essential ingredient of the offence with which the accused was charged. In the case of **Edward Joseph v. Republic**, Criminal Appeal No. 19 of 2019, the Court of Appeal stated:

'Evidence of a parent is better than that of a medical Doctor as regards the parent's evidence on the child's age.'

I understand that the Prosecution is at liberty to parade any witness of its choice. However, that goes without exception. When the Prosecution fails to parade a key witness of a certain fact without assigning reasons for such failure, the Court may draw an adverse inference against the Prosecution. This position was elucidated in the case of **Baya Lusana v. R**., Criminal Appeal No. 513 of 2017 where the Court of Appeal had this to state:

'In the absence of any evidence that those witnesses were not within reach or could not be found, the prosecution was duty bound to call those witnesses who, from their connection with matter at hand were able to testify on material facts. Failure to call the material witnesses entitles this Court to draw an inference averse to the prosecution - See- ***AZIZ ABDALLAH VS REPUBLIC*** *[1991] TLR 71.'*

In the circumstances of this case, I draw an adverse inference against the Prosecution for its failure to parade the victim's parents to testify about the age of the victim.

Surprisingly, assuming that the evidence of PW1 was not expunged by this Court, still the same states nothing about the age. The Prosecutor did not bother to lead the witness to testify her age. What is on record is the age of the victim which was recorded during the preliminaries or in other words before promising to tell the truth. It is trite law that particulars of the witness do not form part of the evidence. The Court of Appeal in the case of **George Claud Kasanda v. DPP** stated:

'……we find it opportune to remind the courts below and the prosecution that preliminary answers and particulars given prior to giving evidence are not part of evidence as the same are not given on oath.'

I am aware that the Appellant in his defence did not dispute knowing carnally the victim. However, he maintained that he did not rape her as she agreed to serve him sexually upon paying Tshs.5,000/-.

I would have taken a different course if the victim would be of ten years of age or below. I hold so taking into consideration that the likelihood of a girl of 10 years of age to look as a girl of under 18 is near to impossible. I am persuaded in this by the observation of this Court in the case of **Festo Lucas @Baba Faraja @Baba Kulwa v. R**, Criminal Appeal No. 27 of 2022 where it was stated:

'It is unlikely for a child of either 4 up to nine years to look like an adult. In those cases, even without strict proof of age will not be hard to tell whether the victim is a child of a certain age or otherwise.'

In the absence of PW1's evidence which was expunged from the records and the failure of the Prosecution to prove the age of the victim, I take it not safe to dismiss the appeal. The remaining evidence of PW2 and PW3 so far as linking the Appellant with the charged offence is wanting as their testimony is of little weight when it comes to the victim's age.

I allow the appeal. Masoud Steven @Ngereza is acquitted of the offence of rape contrary to sections 130 (1) and (2) (e) and 131(1) of the Penal Code, Cap. 16 [RE.2002]. I order his immediate release unless otherwise held for other lawful cause. Order accordingly.

The Right to Appeal Explained.

DATED at **MWANZA** this 15th day of May, 2023.

KS KAMANA

JUDGE