IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

DC. CRIMINAL APPEAL NO. 139 OF 2022

KULWA RAMADHANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Ilala at Samora Avenue)

(F. E. Luvinga, RM)
Dated 22nd day of December 2020
In
Criminal Case No. 581 of 2019

JUDGMENT

03/05 & 05/07/2023

NKWABI, J.:

Protesting his innocence, the appellant appeared in person. The respondent, reluctant to support the conviction as it could, appeared through Ms. Yasinta Peter, learned Senior State Attorney.

The appellant, in the trial court confronted the charge of rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2019]. It was claimed that the offence was committed by the appellant on diverse dates between April 2019 and August 2019 at Bombambili area within Ilala District in Dar-es-Salaam region. That, the appellant had sexual intercourse with A.M. a girl aged fourteen years.

The appellant was convicted and sentenced to serve thirty years imprisonment. He is now challenging the conviction and sentence.

The ground of appeal which is conceded by the respondent is that the trial court erred in law to allow a child of tender age (PW1) to testify under oath without testing her competence and whether she knew the meaning and nature of an oath, thus the charge was not proved beyond reasonable doubt. Relying on the above lamentation, the appellant prayed this Court to allow the appeal, quash the conviction, set aside the sentence and acquit him.

In her written submissions, the learned Senior State Attorney, stated that section 127(2) of the Evidence Act was violated because the child witness was aged 14 was sworn to testify without the trial court ascertaining if the child of tender age knew the meaning and nature of an oath. So, as a child of tender age, her evidence was received in contravention of the provision of the Evidence Act. She added that PW1's evidence has no evidential value and should be discounted from the record. After doing so, contended Ms. Peter, the evidence of PW2 and PW3 is insufficient to prove the charge against the appellant.

I have had an opportunity to get guidance from the decision of the Court of Appeal in **Hassan Kamunyu v. Republic,** Criminal Appeal No. 277 of 2016 and **Yusuph Molo v. Republic,** Criminal Appeal No. 343 of 2017 where in the later case it was underscored that:

> *"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 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 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 ..."*

The trial court, as submitted by both parties to this appeal, clearly contravened the procedure stipulated by the Court of Appeal of Tanzania in **Godfrey Wilson v. R.,** Criminal Appeal No. 168 of 2018 CAT (unreported) where it was held that:

"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.*

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

The testimony of the victim, I am convinced, has to be discounted from the record as maintained by both parties to this appeal.

After expunging the evidence of the victim of the alleged offence, there is no other evidence that is sufficient to prove the charge against the appellant. Both PW2 and PW3 are not eye witnesses of the offence. On that basis, I agree with the appellant and the respondent that the evidence of the rest of the prosecution witnesses alone without that of the child victim, cannot

ground conviction as the same is intended to corroborate the evidence of the victim. See **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008, CAT (unreported) where it was stated that:

> *"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence."*

In the final analysis, I allow the appeal. The conviction and sentence meted out by the trial court against the appellant are respectively quashed and set aside. The appellant be set free from prison unless he is otherwise held there in for another lawful cause.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 5th day of July 2023.

HIGH COURT OF TANZANIA

J. F. NKWABI

JUDGE