

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

CRIMINAL APPEAL NO. 99 OF 2022

(Arising from Criminal Case No. 55 of 2021 of Morogoro District Court at Morogoro)

ALLY PETER GEORGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 13/03/2023

Date of Judgement: 24/03/2023

MALATA, J

This is a judgment in respect to appeal by the appellant following conviction and sentence by the District Court of Morogoro for the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code. Dissatisfied thereof, the appellant appealed to this court challenging

conviction and sentence imposed by the trial court by raising the undermentioned grounds of appeal;

1. *That, the learned RM erred in law and fact to convict and sentence the appellant by relying on the evidence of children of tender age which was taken contrary to section 127(2) of the Evidence Act, Cap 6 R.E 2019*
2. *That, the learned RM erred in law and fact to convict and sentence the appellant without following the procedure of the laid down by S. 312(2) of the CPA, Cap 20. R.E 2019.*
3. *That, the learned RM erred in law and fact to convict and sentence the appellant based on (exhibit PE1) caution statement which admitted unprocedural as no inquiry case conducted after objection raised by the accused contrary to the law.*
4. *That, the learned RM erred in law and fact to convict and sentence the appellant relying on repudiated / retracted (exhibit PE1) caution statement that was recorded illegally by PW4.*

5. *That the learned RM erred in law and fact to convict and sentence the appellant based on (exhibit PE2) PF3 which is not read for loud after admitted in court contrary to the law.*
6. *That the learned RM erred in law and fact to convict and sentence the appellant by consider the unreliable and incredible evidence by PW3 (victim).*
7. *That, the learned RM erred in law and fact to convict and sentence the appellant believing on incredible and unreliable hearsay evidence of the prosecution witnesses PW1, PW2, PW4 and PW5.*
8. *That the learned RM erred in law and fact to convict and sentence the appellant for failure to consider the offence of rape whereas there was no sufficient evidence to establish the said crime against the appellant.*
9. *That the learned RM erred in law and fact to convict and sentence the appellant while the prosecution case was never proved to the standard hilt.*

The appellant prayed to this court to allow the appeal, quash conviction, set aside the sentence and set him free.

In nutshell, the facts leading to the offence depict that, on diverse dates between July, 2019 and December 2019 at Mambani Village, Kibogwa Ward within Morogoro District in Morogoro Region, the appellant had carnal knowledge of, a girl aged 13 whose identity is concealed in this judgement. The accused (appellant herein) pleaded not guilty to the charge.

To prove their case the prosecution paraded five witnesses while the accused defended himself with one witness. The prosecution witnesses were Kadiri Muhidini (PW1), Salima Issa (PW2), the victim (PW3), WP 4620 D/CPL Rehema (PW4) and Sarah Zakaria (PW5). This court also admitted exhibits, that is Cautioned Statement of the accused person as Exhibit P1 and the PF3 of the victim as Exhibit P2.

PW1 testified that, he received information from a good samaritan that there is a girl who is sexually abused by his step father and he was told that the man is Ally Peter and he was raping the victim who is a girl of STD III.

As such, he informed other leaders and they called the accused (herein the appellant) and his family in order to discuss the matter. In interrogating the victim, she started crying and told him that the appellant used to rape her and threatened to cut her ears if she will disclose it to

anyone. He further testified that the appellant was asked and confessed to have raped the victim and asked for forgiveness and he said that it is the devil which made him to rape the victim. That, the appellant was taken to the police station and the victim was taken to the hospital for medical examination.

PW2 is the mother of the victim and she testified that the appellant is her husband and from May, 2019 to December, 2019 she was living with the appellant and her children including the victim. While she was bathing the child (the victim) she discovered that she was not normal in her vagina, it seemed like she was raped. PW2 testified that, her vagina was enlarged than when she was born. She asked the victim what happened to her and the victim told her that, the appellant used to rape her in the afternoon when PW2 was on the farm and threatened to cut her ears if the victim tells PW2.

PW3 who is the victim testified that from May-December 2019 she was living with her young sisters and brothers and that her step father is the appellant and he raped her. She went on to testify that the day of the ordeal she came from school, changed her clothes and she also cooked. She testified that after cooking she took her exercise book and started writing and the accused person told her to bring him some drinking water,

after bringing it and put it aside, the appellant carried her to his bed. That her mother was at the farm and her young brothers were playing in the kitchen at that time. She testified that, the accused person, undressed her underwear and also undressed himself and took his urinating organ and inserted it in the vagina. she further testified that she did not shout because the accused person tied her mouth with a cloth and also robbed her so that she could not shout.

That she felt pain in her vagina but she did not tell her mother because the accused person threatened to cut her ears if she tells her mother. She also testified that the accused has been raping her many times and threatened to cut her ears and she therefore feared to tell anyone including her mother.

PW4 testified that, she interrogated the accused person and he told her that he started sexual relationship with the victim at the end of June 2019 and he had sex with her two times at different dates. She tendered Exhibit P1. At page 24 of the typed proceedings, it is written that,

Accused: *I object the cautioned statement not be admitted because I did not tell her if I did the act of rape on may, 2019. She did not explain to me my rights to call a relative, lawyer or friend.....*

Court: I hereby overrule the objection raised by the accused person..."

The last prosecution witness is PW5 a clinical officer who testified that on 26/12/2019 she was at home and a man came and told her that there is a patient at the Dispensary. She went and found a man, a woman and a child who was alleged to be raped and they had a PF3 from police which required her to examine the victim. She examined her vagina and it was open something which is not normal. She also examines if she had HIV and STD's and she was not infected and there was also no sperms and injuries. There was penetration but not for the first time. When cross examined by the accused person, she replied that there were signs of penetration but she could not exactly tell what penetrated in her vagina. She tendered Exhibit P2. This marked the end of prosecution evidence and case.

On the other hand, the defense side was testified by the accused person and one witness. Accused person who testified as DW1 told this court that on 26/12/2019 the chairman followed him and told him that he is needed in his office and when he reached the office, he was told to enter inside. In entering inside, the chairman shut the door and ordered the four youths who were there to tie him with a rope on allegations that, he raped his

step child. Then he was taken to the police station. The appellant further testified that he did not rape the child and he have a conflict with the chairman arising from land.

DW2 testified that on 26/12/2019 in the morning, he heard a person calling and greeted the accused person and he told him that he needed him at his home. The accused person entered inside and told DW2 to wait for him because he was going to talk with the chairman. He waited for him for one hour but he did not come and he decided to follow him and he found him outside tied with a rope. He asked what was wrong and he was told that, the accused person raped a child and the chairman is the one who knows and he wanted to ask the chairman but he was not there. He further testified that he asked the neighbors about the habit of Ally Peter and they told him.

During the hearing of the appeal, the appellant appeared in person (unrepresented) The respondent, the Republic, was represented by the learned State Attorney, Mr. Emmanuel Kahigi.

The appellant submission in support of appeal was brief, he requested this court to consider the grounds of appeal and allow it by quashing conviction, set aside the sentence and set him free.

Submitting in opposition of the appeal, the learned state attorney had this to say; With ground number one Mr. Kahigi stated, the allegation that Section 127 of the Evidence Act was not complied with is unfounded. The Court record depict that, PW3 was subjected to requirement of Section 127 of Evidence Act before giving evidence, and the court satisfied PW3 was in a position to tell the truth and not lies, this is reflected on page 15 of the proceedings, procedure for taking evidence of a child of tender age was complied with. He rested ground **ONE**

Mr. Kahigi conjoined ground number **THREE** and **FOUR** and argued together and submitted that, the appellant's complaint that the trial court erred in law in admitting cautioned statement while the same was repudiated and retracted, the appellant raised objection that it shouldn't be admitted there was no trial within trial to ascertain its voluntariness.

The appellant just stated that, I did not tell her if I did the act and that he was not given right of calling a relative, lawyer or friend. There was no allegation that he was tortured, hence the same do not fall within repudiated or retracted confession. He rested ground **THREE** and **FOUR**

As to ground number **FIVE** on the exhibit P2 was not read over before the court, the allegation is unfounded as the exhibit was read over, thus

this ground lacks merit. He referred this court on page 44 of the proceeding which reads "*.....the witness has read exhibit P2 to the court*"

Submitting on ground number **SIX, SEVEN** and **EIGHT** together, Mr. Kahigi firmly submitted that, the case against the appellant was proven beyond reasonable doubt through the victim is a credible witness who testified how the incident occurred. To support his submission, he cited the case of **Selemani Makumba vs. Republic** [2006] TLR 379.

On that account PW3's evidence was sufficient to warrant conviction against the appellant, evidence by PW1, PW2, PW4 and PW5 are hearsay evidence but evidence of PW3 standalone suffice to prove the commission of offence, this grounds therefore has no merit.

On the second ground the learned state attorney stated that the judgement did state the provision of the law under which the accused was convicted, thus, section 312 of the Criminal Procedure Act was complied with.

He prayed for the appeal to be dismissed.

The appellant had nothing to rejoin he prayed for his appeal to be allowed.

The first ground of appeal challenges the admissibility of evidence of the victim (PW3), the procedure for dealing with a testimony of a child of tender age is set out under Section 127(2) of the Evidence Act,

"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."

In terms of Section 127 it requires the child of tender age to promise to tell the truth and not lies before the reception of his/her evidence. There are number of decisions supporting this position, **Godfrey Wilson vs. The Republic**, Criminal Appeal no 168 of 2016 where the court held that;

"... the above cited provision as amended, provides for two conditions. One, it allows the child of tender age to give evidence without oath or affirmation. Two, before giving evidence, such a child is mandatorily required to promise to tell the truth to the court and not to tell lies."

In the present appeal the trial magistrate dutiful caused PW3 to promise to tell the truth and not lies as reflected at page 15 of the trial court typed proceedings. This ground has therefore lacked merit and is hereby dismissed.

On ground number **three** and **four** which attacks the admissibility of exhibit P1 (cautioned statement), when the cautioned statement was shown to the appellant, he raised an objection and stated that, what is recorded are not true and that he was not given rights to call relative, friend or a lawyer. The objection was overruled by the trial court for the reasons that; **one**, the witness is the one that will prove if really, he committed the offence and **second**, the objection can be answered by PW4 who took the statement. The court proceeds to admit the cautioned statement.

Objections to the admissibility of confessional statements may be taken on two grounds. **First**, under Section 27 of the Evidence Act which provides that;

27.-(1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.

(2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.

Second, under section 169 of the Criminal Procedure Act, that it was taken in violation of the provisions of section 50, 51, 52, 53, 54, 55, 56, 57 and 58 of the Criminal Procedure Act. Where objection is taken under

the Evidence Act, the trial court, has to conduct a trial within trial or an inquiry to determine its admissibility. When the admissibility of the appellant's cautioned statement was objected by the appellant on account of the content therein, the learned trial Magistrate was duty bound to conduct an inquiry and come up with a determination as to whether the same should be admitted or otherwise.

In the case of **Frank Michael vs. Republic**, Criminal Appeal no. 323 of 2013, Court of Appeal (unreported) the court had these to say;

*"The trial court have a duty to hold a **trial within a trial** whenever an accused confessional statement is either **repudiated/ retracted** before its admission in evidence. Once an objection is made by the defense after a trial court has informed the accused of his right to say something in connection with it which is unavoidable duty on part of the trial court, the trial court must stop everything and proceed to trial within trial giving each side opportunity to call witnesses in support of position."*

The clear meaning of repudiated and retracted confession was analyzed in the case of **Amiri Ramadhani vs. Republic**, Criminal

Appeal no. 228 of 2005 the court of appeal made a difference between repudiated and retracted confession, and this is what the court said;

*"To repudiate a statement is to deny ever to have made it. In our view, to repudiate a statement is different from retracting a statement. In the latter one is not denying that one made a statement but that what was said was not true or that one was forced to say what is in the statement, or one is **revoking** or **unsaying** what one previously said."*

Based on the objection by the accused that he did not tell PW4 that he raped the victim means the appellant is retracting or withdrawing what he stated in the statement made by him, thus the court had to conduct an inquiry.

However, it was the view of the learned state attorney that the objection by the appellant doesn't fall within the meaning of repudiated and retracted confession.

It is a well settled principle of law that once the accused person objects tendering and admission of confession statement in evidence, the court must stop everything and conduct trial within a trial in order to ascertain

whether the statement was freely and voluntarily given. There is a plethora of authorities to that effect. For example, in **Daniel Matiku vs Republic** Criminal Appeal No. 450 of 2016, the Court of Appeal while quoting with authority its previous decision in **Twaha Ally and 5 Others vs Republic**, Criminal Appeal No. 78 of 2004 (both unreported) demonstrated:

"...if that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within trial) into the voluntariness or not of the alleged confession. Such inquiry should be conducted before the confession is admitted in evidence..."

See also: **Ali Salehe Msutu vs Republic** [1980] TLR 1 and **Shihobe Seni and Another vs Republic** [1992] TLR 330.

Failure to conduct trial within a trial constitutes fatal irregularity. This renders the confession statement which was admitted contrary to the above procedure baseless. Since the same has already been expunged from Court record, it wouldn't form the basis of the trial court decision basing on the above pointed out anomaly.

With due respect I wish to disagree with both the trial court magistrate and the learned state attorney. The trial court had a duty to conduct an inquiry to ascertain the objection made by the appellant, failure to do so is fatal and prejudicial to the appellant and for that reason the exhibit P1 the cautious statement is expunged from the record.

On ground number five, that exhibit P2 (PF3) was admitted contrary to the procedural law, that is, the same was not read aloud in court after its admission. This court gathered what is written on record as hereunder that;

Court: the PF3 tendered is admitted and marked as exhibit P2.

Sgd. E. B Ushacky – RM

4/11/2021

Court: we pray for exhibit P2 so that the witness can read it to the court.

Court: Prayer granted. The witness has read exhibit P2 aloud.

Sgd. E. B. Ushacky

RM

Based on the above extract of the proceedings at the trial court, the exhibit was read before the court and thus the complaints that the same was not read is unfounded. This ground of appeal fails.

On grounds number 6, 7 and 8 that the case against the appellant wasn't proved beyond reasonable doubt, the appellant complaint that the evidence of PW3 is unreliable and uncredible, based on the principle in the case of **Selemani Makumba vs. Republic [2006] TLR 379**, that the best evidence in sexual offences comes from the victim, the victim stated how the appellant raped her and how he has been doing that for many times. In his testimony the victim narrated the incidence of one day although later she stated that the appellant has been raping her many times.

Truly, PW3 when testifying in the trial court said that the appellant asked her to bring him drinking water, when she brought the water the appellant put it aside, carried her and put her on bed, undressed her and rape her.

With regard to penetration, its general rules supported by many authorities that true evidence of rape has to come from the victim, for instance the Court of appeal in the case of **Godi Kasenagala vs. Republic**, Criminal Appeal no. 10 of 2008 the court observed,

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

The issue is whether the evidence of PW3 is credible.

There is no dispute that no one saw the appellant raping PW3, in other words there is no other evidence supporting the allegation that PW3 was raped, it is the PW3's words against the appellant. This is particularly so where the appellant denied the offence which put the burden on the prosecution side to prove the offence against the appellant.

Upon, re-evaluation of the evidence on record by PW3 the victim which in law is the best evidence as per principle in **Selemani Makumba Vs Republic**. This court has noted that, **one**, PW3 the victim is thirteen (13) years old, **two**, she was standard three (STD III), **three**, while being bathed by PW2 discovered that PW3 vagina was enlarged thus sign of rape, **four**, PW3 had never disclosed it to anybody on allegation that she was threatened by DW1, **five**, there was no sperms or injuries found at the PW3's vagina, **six**, vagina seemed to have been injected with blunt object, **seven**, PW3 was medically examined by PW5 the clinical officer II at kisem Dispensary, **eight**, exhibit P2 the PF3 depict that,

"there is evidence of penetration of penis in vagina not for the first time, no injuries..."

Further, **nine**, PW5's testimony is to the effect that, there was no sperms observed, **ten**, PW3 did not report the incidence to anybody, **eleven**, it is not known when the victim was raped but it is on record that, it is between July to December, 2019, **twelve**, PW1 testified that after receiving the information from undisclosed informer he interrogated the victim who named the appellant thence arresting him, **thirteen**, PW2 the mother of PW3 did report to undisclosed relatives.

Having analysed what the evidence are all about, this court is satisfied that, the same raise doubt which touches the root of the matter in that; **one**, the informer to PW1 that PW3 was being raped by DW1 was neither called nor testified in court, **two**, PW1 is the one who knew the rapist, he called PW3 to confirm and arrested DW1 but PW2 the mother of PW3 did not testify anything in relation of the same nor did not say that she was the one who reported to PW1, **three**, PW3 testified that she told PW1 that she was being raped by her father though she did not mention his name,

At page 16 of the proceedings PW3 stated that;

*"I was called by the village chairman. I told him that my **father** was raping me. I was taken to hospital and they examined me"*

Four, PW2's testified that, DW1 is a step father, **five**, PW3 did not mention the name of the person who raped her, **six**, PW3 testified at page 16 of the proceeding; *"I did not tell my mother because the accused person threatened to cut my ears if I will tell my mother"*, **seven**, PW3 did not at any point in time testified that, she told her mother PW2 on issue of raping, **eight**, the story by PW2 standalone without any corroboration or connection with the story by PW3, **nine**, PW3 did not testify that, She told PW2 of the incidence of being raped at any time including at the time being bathed by PW2, **ten**, Exhibit P2 depict of the presence of evidence of penetration but there is no further explanation but a mere statement that, there is evidence of penetration without detailing it, **eleven**, there is no sperm or injuries or bruises at the vagina, **twelve**, there is no corroboration of evidence between what PW3 testified with PW1, PW2, PW4 and PW5 is mere clinical officer, with no doubt much as I doubt expert knowledge, she did not have any assistance to the prosecution side as her evidence is not exhaustive and precise but mere statement which anybody can write on the PF3, it lacked expert opinion which one can expect to get from rather than a bare statement.

In my view, the expert opinion, consists of; **one**, appropriate issue in question. This is the equivalent of the helpfulness foundation for lay expert witness opinion, **two**, educational qualification and professional experience. The person put forward as an expert must have educational qualification and professional experience in an appropriate area of expertise. The witness qualifies as an expert, **three**, the expert must base his opinion on information, observations, tests, experiment and other data. Here expert knowledge and experience is needed not personal knowledge, **four**, it must be rational, in the sense that, it must be; **first**, within the expert's area of expertise and related to the issue, **second**, rational related to data and **third**, scientifically reliable.

The above elements distinguish from opinion of a layperson to that of expert person.

The case at hand lacked material element of the expert opinion as stated herein above in the analysis of the evidence of PW5.



Based on the above re-evaluation of evidence on record, this court is satisfied beyond sane of doubt that, neither the evidence by PW3 herein referred to as best evidence nor evidence of PW1, PW2, PW3, PW4 and PW5 proved the offence beyond the shadow of doubt as required by the law, shortfalls of which are numerated here in above. All the prosecution

evidence raises more doubts to the occurrence of incidence and if at all it happened and that it is the appellant who raped PW3 taking total evidence on record.


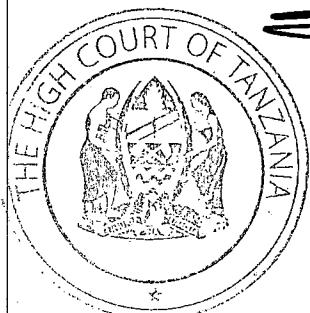
In the upshot, and on the basis of the reasons given above, I find this appeal meritorious, and I hereby allow the appeal, quash conviction, set aside the sentence and order for immediate release of the appellant one **ALLY PETER GEORGE** unless held for other lawful reasons.

IT IS SO ORDERED

DATED at MOROGORO this 24th March, 2023



G. P. MALATA
JUDGE
24/03/2023

DELIVERED at MOROGORO this 24th March, 2023



G. P. MALATA
JUDGE
24/03/2023