IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 96 OF 2022

(C/f Criminal Case No. 90 of 2020 District Court of Kiteto at Kibaya)

NYANGUSI TARANGEI ..... APPELLANT

VERSUS

THE DPP ..... RESPONDENT

JUDGMENT

22nd May & 21st July, 2023

TIGANGA, J.

This appeal emanates from Criminal Case No. 90 of 2020 of the District Court of Kiteto at Kibaya (the trial court) in which the appellant was arraigned for the offence of rape contrary to section 130 (1), (2) (e) and 131 (1) of the **Penal Code,** [Cap 16 R.E 2002, [now R.E. 2022]. The facts of the case as particularized in the charge sheet and the evidence adduced in support of the charge are that, on 6th August, 2020 at Kaloleni Village within Kiteto District in Manyara Region, the appellant herein had sexual intercourse with **LS** (true identity hidden), a girl of fifteen years old and student of Secondary School.

The appellant pleaded not guilty to the charge, and during the preliminary hearing, he admitted to his particulars, and the fact that he was arrested and arraigned before the court. He disputed all other facts which constituted the offence he was charged with. To understand what led to the arrest, arraignment, and ultimately conviction of the appellant before the trial court, I find it apt, to narrate *albeit* briefly, the factual background of the case. According to the prosecution, the victim who testified as PW1 was lured into having sexual relations with the appellant while she was still 15 years old and a secondary school student.

According to the evidence of PW1, after several attempts by the appellant, she yielded to the appellant's request and agreed to have sexual intercourse with him. She had her first sexual intercourse with the appellant during Covid-19 season, in April, 2020. It did not end there, because on 06th August, 2020 around 01:00hrs while sleeping at their home, the appellant, their neighbour, knocked the door of the home of the victim, PW1. When PW1 opened the door, the appellant asked her to follow him to his room which was nearby, which she did. While in the room of the appellant, they had sexual intercourse for the second time. At around 05:00hrs while on her way back home, the victim met with her father, PW2, and other people

looking for her since his father noticed her missing. PW1 told them where she spent the night and with the help of PW3 the neighbour, and PW4 the street chairman, they went to the appellant's room and locked it from outside before calling the police who arrested him. PW5 a police officer from the gender desk took the victim, PW1 to the hospital where she was examined by Dr. Jackson Geko who concluded that, she was penetrated, and the PF3 which was filled in by the said Doctor was tendered and admitted without objection from the defence, as exhibit PE1.

In his defence, the appellant denied either knowing the victim or doing anything to her. He claimed that, on a faultful day he woke up and found himself locked in his room and later arrested, beaten by the police, and brought to court for the offence of rape.

In the end, the trial court was satisfied beyond reasonable doubt that, the prosecution had managed to prove the case against the appellant. It found him guilty, convicted, and sentenced him to serve thirty (30) years imprisonment. Disgruntled with the decision, the appellant initially filed three grounds of appeal challenging both the conviction and sentence. However, later he filed seven additional grounds of appeal and during the hearing, he

prayed to submit them and discard the initial three grounds. The seven (7) grounds are;

1. That, the trial magistrate erred in law and fact in convicting the appellant based on PW1 (the victim), while the same was taken contrary to the provision under section 198(1) of **Criminal Procedure Act** (CPA), Cap 20 [R.E 2019].
2. That, the trial magistrate erred in law and fact in not finding that, there was uncertainty in dates as there was a variance between the charge sheet and the prosecution evidence regarding the date of the commission of the offence.
3. That, the trial magistrate erred in law and fact in not finding that the purported PF3 of the victim (exhibit PE1) was wrongly received in evidence as the same was not read over to the appellant after it was admitted.
4. That, the trial magistrate erred in law and fact in not finding that the purported PF3 of the victim (exhibit PE1) was improperly tendered by an incompetent person (PW6) who was not a doctor hence there was non-compliance with the provision under section 240 (3) of the CPA.

5. That, the trial magistrate erred in law and fact in convicting the appellant on the evidence of PW2, PW3, PW4, PW5, and PW6 whose evidence was wholly hearsay and incredible on account that, the evidence adduced by these prosecution witnesses lacked corroboration and insufficient to warrant the conviction against the appellant.
6. That, the trial court erred in law and fact in failing to comply with section 192 (3) and (4) of the CPA.
7. That, the case against the appellant was not proved beyond reasonable doubt and to the standard required by the law.

Hearing of this appeal was by way of written submissions, the appellant appeared in person, unrepresented while the respondent was represented by Ms. Witness Mhosole, State attorney.

Supporting the appeal, the appellant submitted on the 1st ground that, the trial magistrate erred in law and fact in convicting him based on the evidence of the victim which was received without taking oath contrary to section 198 (1) of the CPA. He submitted that, the trial court did not lead the victim to give her testimony under section 127 (2) of **the Evidence Act**, [Cap 6, R.E. 2019]. He argued that, since the witness did not take oath, her

evidence is not worthy and the trial court erred in using it to enter a conviction against him.

On the 2nd ground, the appellant averred that, there was a variance of dates in the charge sheet and the one narrated in the evidence. He argued that, the evidence does not show the exact date when the offence was committed hence the trial court contravened section 234 of the CPA. He cited the cases David Livingstone Kwayi vs. The Republic, Criminal Appeal No. 146 of 2016, and Mohamed Kaavingo vs. The Republic [1980] TLR 279 to support his argument.

As to the 3rd ground of appeal, the appellant contended that, exhibit P1, the PF3, was not read aloud in court after its admission, thus, he did not understand its content. He prayed for the same to be expunged from the record. To cement his argument, he referred the court to the case of **Robinson Mwanjisi vs. The Republic**, Criminal Appeal No. 218 of 2003. Still on exhibit P1, the PF3, the appellant submitted in the 4th ground that, such exhibit was not tendered by a competent witness who was either a doctor or a medical expert. He cited the case of **Christin Cameroon vs. The Republic** [2003] TLR 84 to support his argument.

On the 5th ground of appeal the appellant challenged the trial court for relying on testimonies of PW3 and PW6 while the same was hearsay and not direct evidence. He pointed out that, on page 16 of the typed proceedings, the evidence shows that, the victim run after she saw her father going towards her direction but none of it shows that, she was found in his house. Thus, such evidence did not prove the case against him.

Still challenging the trial court's proceedings, the appellant submitted on the 6th ground that, a preliminary hearing was not done and signed by the appellant, his advocate, and the republic which is contrary to section 192 (3) of the CPA.

As to the last ground, the appellant contended that, the case against him was never proved to the required standard as there are a number of procedural irregularities as well as contradictory evidence. He also argued that, he had been convicted and sentenced twice as there are two different judgments which he received on 24th June, 2022 and the one of 04th July, 2022 hence making the whole judgment illegal. He prayed that this Court allow the appeal, set aside the conviction and sentence, and consequently acquit him.

In reply, Ms. Mhosole opposed the appeal and submitted on the 1st ground of appeal that, although PW1 did not give her evidence under oath, the same is not fatal and can be cured under section 388 of the CPA. She asserted that, the omission is curable and did not occasion any miscarriage of justice, thus, such failure was a normal error and had no connection as to whether or not the victim was penetrated which is the main ingredient of the offence.

As to the 3rd and 4th grounds regarding the PF3, Ms. Mhosole submitted that, when the exhibit was tendered, the appellant never objected and even after admission, he did not cross-examine on the same. Thus, failure to cross-examine is tantamount to admission of the fact in the issue. She cited the cases of **Wilson Elisa Kiunga vs. The Republic**, Criminal Appeal No. 449 of 2018, and **Selemani Makumba vs. The Republic**, Criminal Appeal No. 94 of 1999 in supporting her argument that, rape is not proved by medical evidence but rather the testimony of a victim herself who testified before the court that she was penetrated.

Regarding the variance of dates, the learned State Attorney submitted that, the offence of rape is not proved by the dates it happened but rather

on whether its ingredients such as the age of the victim which also determines whether there was consent or not; penetration and, who penetrated the victim. She argued that all of the above ingredients were proved against the appellant as he lured the victim who was 15 years old and still a student, to his room and had sexual intercourse with her on two different occasions. In her further view, the case against the appellant was proved beyond reasonable doubt, and even if the testimony of PW3 and PW6 was hearsay, and was to be disregarded still the victim's testimony was reliable and an important one which could solely warrant appellant's conviction.

Regarding the existence of two judgments, she argued that, there is only one judgment that she is aware of, the one which was attached to the Petition of Appeal. He prayed that the appeal be dismissed for want of merit.

In his rejoinder, the appellant maintained his innocence and prayed for the appeal to be allowed.

After going through both parties' submissions and the trial court's records, I will now proceed to determine the grounds of appeal starting with the 1st ground which the appellant challenges the victim's testimony for being

taken in contravention of section 198 (1) of the CPA. The alleged offended section reads thus;

> *"**198**(1) Every witness in a criminal cause or matter **shall,** subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

According to the record, the victim, PW1's testimony was taken without oath or affirmation. The record shows that, the victim was fifteen (15) years old when testifying, therefore as rightly argued by the appellant, she was no longer a child of tender years, therefore, does not fall under section 127 (2) of the Evidence Act. This is because, under section 127(4) of the same Act, a child of tender years is defined as follows;

> *"(4) For subsection (2) and (3), the expression "child of tender age" means **a child whose apparent age is not more than fourteen years.**"* [emphasis supplied]

In light of the above provision, during her testimony before the trial court as reflected on page 8 of the typed proceedings, the victim, PW1 was a 15-year-old, Christian hence, she was supposed to be sworn before giving her testimony. In the case of **Ahamad Salum Hassan @ Chinga**, Criminal

Appeal No. 386 of 2021 CAT at Dsm (unreported) Court of Appeal referred to its previous decision in the case of **Mwami Ngura vs. R**, Criminal Appeal No. 63 of 2014 (unreported) where it was stated that;

> *"...as a general rule, every witness who is competent to testify, must do so under oath or affirmation unless she falls under exceptions provided in a written law. As demonstrated above one such exceptions is section 127 (2) of the Evidence Act. But once a trial court, upon inquiry under section 127(2) of the Evidence Act, finds that the witness understands the nature of an oath,* ***the witness must take an oath or affirmation.***"

In yet another case of **Attu J. Myna vs. CFAO Motors Tanzania Limited**, Civil Appeal No. 269 of 2021, CAT at Dsm (unreported), the Court of Appeal held *inter alia* that;

> "*It is now clear that the law makes it mandatory for the witnesses giving evidence in court to do so under oath. It follows therefore that the omission by the witnesses to take oath before giving evidence in this case is fatal and it vitiates the proceedings. Fortunately, this is not a new territory; as the Court has discussed it in its various decisions, some of which are* ***Catholic University of Health and Allied Sciences(CUHAS) vs. Epiphania Mkunde Athanase,*** *Civil Appeal No. 257 of 2020;* ***Tanzania Portland Cement Co. Ltd vs. Ekwasi Majigo,*** *Civil Appeal No. 173 of 2019 and*

The Copycat Tanzania Limited vs. Mariam Chamba, *Civil Appeal No. 404 of 2020 (all unreported), For instance, in the first case, upon reproducing the relevant provisions cited above, the Court found that failure by witnesses to take oath before they gave evidence vitiated the proceedings and it stated thus:*

> *"Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case."*

I fully subscribe to the positions elaborated above that PW1 being a witness who was supposed to give evidence on oath but did not do so, her evidence lacks evidential value. This being a rape case that mainly depends on the evidence of the victim her testimony being taken without oath vitiates the whole proceedings as her testimony lacks evidential value for it was taken in noncompliance with the mandatory procedure of swearing. I am alive of the invitation by the learned State Attorney to take such an error as a minor omission that can be cured by section 388 of the CPA which calls for the court to stick to substantive justice. I, however, with due respect do not agree with her. In my considered view, the import of section 388 of the CPA was not designed to blindly disregard the rules of procedure that are couched

in mandatory terms. In the case of **Njake Enterprises Ltd vs. Blue Rock Ltd & Another** (Civil Appeal No. 69 of 2017) [2018] TZCA 304;

> *"The overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case ... "*

See also **Mondorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others,** Civil Appeal No. 66 of 2017 (CAT-unreported).

As in the cases of **Mwami Ngura vs The Republic** (supra) and **Attu J. Myna vs CFAO Motors Tanzania Limited** (supra) it was held that with the exception of special cases provided by law, the evidence must be taken under oath or affirmation, it follows that, being taken and recorded without oath, the evidence of the PW1 is vitiated and deserves to be expunged or disregarded which I hereby do.

Now having disregarded PW1's evidence, the issue is whether, in the absence of the evidence of the victim, the case against the appellant can be said to have been proved beyond reasonable doubt. From the outset, my answer is NO for the obvious following reasons;

First, except for PW1's testimony, the evidence of the other five prosecution evidence remains hearsay because none of them saw or caught

the appellant penetrating the victim. It was PW1 who told them that she spent a night with the appellant and that had sex with the appellant.

Second, exhibit P1, the PF3 was tendered by PW6, the investigator. However, the same was not read after it was admitted in court. The learned State Attorney noted such an anomaly but insisted that rape is never proved by medical proof, and it is not necessary in rape cases as the victim's evidence suffices. In the appeal at hand, as long as the victim's testimony is discarded, the PF3 could have been a link between the offence, the victim, and the offender. But, since the same was not read aloud, under the authority in the cases of **Lack Kilingani vs. The Republic**, Criminal Appeal No. 402 of 2015 (unreported) which was cited with authority in the case of **Erneo Kidilo & Matatizo Mkenza vs. The Republic**, Criminal Appeal No. 206 of 2017 CAT at Iringa (Unreported) that;

> *"Even after their admission, the contents of the cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful."*

That being the position of the law, the PF3 which was not read aloud after it was tendered, cannot stand as evidence, and in the circumstance of cases like this in which the accused had no representation, the omission did not only flout the procedure but also denied the appellant the opportunity to understand its contents and thus he could not conduct an informed cross-examination, it is therefore expunged. That said, it becomes instructive to find that without the victim's testimony and the PF3 further weakens the prosecution case.

Third, while the victim told the court that, she was caught together with the appellant who was escorting her from his room after they had sex for the second time, the evidence of other prosecution witnesses i.e. PW2, his father, PW3 the neighbour, and PW4, the street chairman is different. They told the court that the victim was alone heading home and started running straight to DW2's room after seeing her father searching for her. This testimony tallies with that of DW2 which questions the victim's credence as to whether she told the court the truth hence casting doubt on the prosecution evidence.

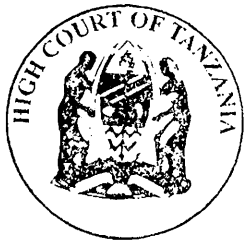
This brings me to the conclusion that the case against the appellant was not proved at the required standard beyond a reasonable doubt this is

because without the evidence of the victim and the PF3, important ingredients of the offence were not proved as provided under section 130 (4) of the Penal Code and as held in the cases of **Selemani Makumba vs. The Republic**, [2006] T.L.R. 379, **Jilala Justine vs. The Republic**, Criminal Appeal No. 441 of 2017, CAT at Shinyanga, **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 and **Godi Kasenegala vs. The Republic**, Criminal Appeal No. 10 of 2008 (all unreported).

With the above analysis and without belaboring on other grounds of appeal, I allow the appeal, quash the conviction, and set aside the sentence meted against the appellant. I proceed to order the immediate release of the appellant unless held for other lawful cause.

It is accordingly ordered

Dated and delivered at **Arusha** this 21st day of July, 2023.



J.C. TIGANGA

JUDGE