

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MWANZA  
AT MWANZA**

**CRIMINAL APPEAL NO. 55 OF 2023**

*(Originating from Magu District Court in Criminal Case No. 79 of 2022)*

**NURDIN ABDALLAH.....APPELLANT**  
***VERSUS***  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*24<sup>th</sup> July & 04<sup>th</sup> August, 2023*

***Kilekamajenga, J.***

The appellant, after being irked with the decision of the District Court of Magu approached this Honourable Court for justice. In this case, the prosecution alleged that, the appellant, on divers dates and times at Kisesa village within Magu District in Mwanza region, raped his own daughter aged six (06) years old. He was consequently charged for the offense of rape inline within **section 130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 RE 2019 now RE 2022**. The evidence at hand shows that, the victim (PW1) lived with her father who is the appellant in this case after the marriage between the appellant and her mother entered into squabbles. The victim further stated that, she used to sleep in one bed with her father when her mother relocated to Bunda. She also used to sleep with her aunt whenever she was around. The appellant used to rape her though never complained to her father. She further told her aunt, sister in law and the brother in law. One day, uncle Sime took her to Mama James



where she met her mother and the incident of rape of was revealed. She was thereafter taken to the police and hospital for medical examination.

PW2, who worked with a non-governmental organisation that deals with gender violence, received information about the rape against the victim and immediately informed the Social Welfare Officer. On the next day, they reported the incident to the police and took the victim to the hospital. The victim revealed to them that she was being raped by her father. PW3, being a Ward Social Welfare Officer stated that, on 09<sup>th</sup> August 2022 he was informed about the alleged rape against the victim. The victim's age was between 5-6 years old. They took the victim to the police where they were given a PF3 form and referred to the hospital for further examination. The medical examination revealed that, the victim suffered repeated incidents of rape. The victim informed PW3 that she was being raped by her father. PW4, a teacher at Lamadi and also the appellant's brother in law, testified that, he received information that the victim was being raped by her father (appellant). At that time, his sister was living in Bunda. PW5 (the medical doctor) examined the victim and found her with no hymen. He filled-in the PF3 which was admitted as exhibit P1. PW6 also confirmed that, the victim was six (6) years old who was allegedly raped by the appellant. PW6 also got information from the appellant that he had grudges with his wife.

In his defence, the appellant alleged to have been away when the victim was discovered to have been raped. Upon his return from Bunda, he was arrested and taken to the police at Magu. In his presence, the victim denied to have been raped by the appellant.

At the end of the trial, the prosecution believed the prosecution's side of the story, convicted and sentence the appellant to serve thirty (30) years in prison. Before this court, the appellant coined three grounds to challenge the decision of the trial court thus:

1. *That, the trial court erred in law by convicting the appellant while the offense was not proved beyond reasonable doubt.*
2. *That, the trial court erred in law by hearing and convicting the appellant without conducting preliminary hearing.*
3. *That, the trial court erred in law and fact by convicting and sentencing the appellant with evidence which were not adduced in the court during the trial.*

The learned advocate, Ms. Anastazia Mao who appeared for the appellant dropped the second ground of appeal and confined the discussion on the first and third ground. In expounding the first ground, she insisted that the offense against the appellant was not proved beyond reasonable doubt. In her view, penetration was not proved as per section 130(4)(a) of the Penal Code. The victim's evidence did not prove whether there was penetration and the evidence

of PW5 simply alleged the absence of the victim's hymen. The counsel further alleged the existence of contradictory evidence on the testimony of the victim (PW1), PW2 and PW5. It seems, the victim was taken to Mama James where she met her mother and the allegation of rape resurfaced. There is dearth of coherence between the victim's evidence with that of PW2. Also, there is contradiction between the evidence of PW1, PW2 and PW5. For instance, PW5 alleged to have received the victim on 01<sup>st</sup> August 2022 while PW2 alleged to have gone to the hospital for medical examination on 10<sup>th</sup> August 2022. The contradiction on the prosecution evidence suggests that the case was doctored because the appellant had separated with his wife hence the grudges between the couple led to this case.

Furthermore, some of the key witnesses in this case were not summoned; some of those witnesses are the victim's mother, the aunt who lived with the victim. Failure to summon such witnesses obliges the court to draw an adverse inference against the prosecution's case. The counsel referred the court to the case of **Jonas Paschal v. R**, Criminal Appeal No. 69 of 2021. Also, there was violation of section 127(2) of the Evidence Act as the trial court failed to record whether the victim promised to tell the truth and not lies as it was stated in the case of **Paschal Ndalahwa v. R**, Criminal Appeal No. 262 of 2020, CAT at Mwanza (unreported). Furthermore, the appellant seems to have been convicted

based on the evidence of David Mbasha whose evidence does not feature in the proceedings. The counsel finally urged the court to allow the appeal and set aside the decision of the trial court.

In response, the learned State Attorney, Ms. Jackline Mazura insisted that penetration was proved by PW1 where she testified to have been repeatedly raped by the appellant. The evidence of the victim was corroborated by the testimony of PW5 and the PF3 (exhibit P1). According to the case of **Seleman Makumba v. R**, [2006] TLR 379, the best evidence in rape cases comes from the victim. In this case, the victim's evidence was sufficient to prove the offense of rape. Furthermore, according to section 143 of the Evidence Act, the law does not require a certain number of witnesses to prove a fact. On the alleged contradiction on the prosecution evidence, the counsel believed that, there was a typographical error on the date of taking the victim to the hospital as the actual date is 10<sup>th</sup> August 2022. The counsel implored the court to refer to the handwritten record for verification. Furthermore, the evidence of David Mbasha did not move the trial court as the decision was based on the evidence of PW1 and PW5. On the violation of 127(2) of the Evidence Act, the counsel believed that, the victim's evidence was recorded after the court was satisfied that the victim has sufficient intelligence to testify though she did not promise to tell the truth. However, failure to promise to tell the truth does not mean that the

victim's evidence was not credible and authentic. He invited the court to cure the anomaly using section 127(6) of the Evidence Act. As the victim's evidence was corroborated, it was sufficient to ground a conviction. On this point, the counsel referred the court to the case of **Wambura Kigingira v. R**, Criminal Appeal No. 301 of 2018, CAT at Mwanza (unreported). The learned State Attorney finally urged the court to dismiss the appeal and uphold the decision of the trial court.

When rejoining, the appellant's counsel insisted on the absence of penetration in proving the offense. Also, due to the contradiction, the prosecution's evidence cannot be relied on. She further implored the court to expunge the victim's evidence which was recorded in contravention of section 127(2) of the Evidence Act.

In considering this appeal, the major issue for determination is whether or not the prosecution proved its case beyond reasonable doubt. In discussing this ground, the appellant's counsel raised several issues tending to prove that the case against the appellant was not proved. **First**, the counsel for the appellant insisted that there was no proof of penetration as required by section 130(4) of the Penal Code. In response to this point, the learned State Attorney stressed that penetration was proved by the evidence of PW1 and further coupled with the testimony of PW5 and exhibit P1. On this point, I join hand with the

submission of the learned State Attorney that the victim's evidence does not leave any doubt that there was penetration. In her testimony, the victim testified to have been raped by the appellant on several occasions. PW5 examined the victim and found no hymen which is a sufficient finding to prove that there was penetration leading to a perforated hymen. In fact, PW5's evidence goes further stating that the victim was penetrated with a blunt object. The doctor's finding was coupled with exhibit P1 which further confirmed that the victim's hymen was ruptured. There is sufficient evidence to prove penetration in this case. Therefore, the counsel's allegation that the offense was not proved due to lack of evidence on penetrations lack merit and I hereby dismiss it. However, the major question is whether or not the appellant raped the victim as alleged. I will delve into this issue below.

**Second**, the appellant's counsel alleged the existence of contradiction on the evidence of PW1, PW2 and PW5 who are actually key witnesses in this case. The counsel cited the major contradiction on the date when the victim was taken to hospital. On the other hand, the learned State Attorney did not find any contradiction though she invited the court to revisit the handwritten record to ascertain on the typographical error, especially on the date when the victim was referred to hospital. This issued moved my perusal of the proceedings to ascertain whether or not there was any contradiction on the evidence. PW1 did

not tell the date she was taken to hospital apart from informing the court that she was taken by uncle Sime to Mama James where she met her mother and the story of rape was born. PW2 alleged to have received the information about the alleged rape on 08<sup>th</sup> August 2022. She informed the Welfare Officer on 09<sup>th</sup> August 2022 and they went to the police and finally to the hospital on 10<sup>th</sup> August 2022. PW5 received the victim for medical examination on 01<sup>st</sup> August 2022. However, when I perused the handwritten proceedings, PW5 received the victim on 10<sup>th</sup> August 2022. Therefore, there was no contradiction on the date when the victim was taken to hospital.

**Third**, the counsel challenged the prosecution's evidence for failing to summon some key witnesses in this case. He urged the court to draw an adverse inference against the prosecution's case. The learned State Attorney found no merit in this argument as there is no particular number of witnesses to prove the alleged fact. In this case, the prosecution summoned six witnesses, PW1 was the victim, PW2 was an officer from the Non-governmental organisation called Shujaa wa Maendeleo na Ustawi wa Jamii Tanzania (SMUJATA); PW3 was David Mbasha who was the Welfare Officer; PW4 was the brother of the victim's mother who came all the way from Lamadi to Kisesa just to testify on something he never saw; he just got information that the victim was raped. PW5 was the medical doctor who examined the victim; PW6 was the police officer who

investigated the case. However, in her investigation, she discovered a family dispute between the appellant and his wife.

In my view, as argued by the counsel for the appellant, reading through the list of prosecution witnesses, it is evident that the prosecution failed to summon some of the key witnesses in the case. The victim's evidence clearly mentions uncle Sime; also, the victim stayed with her aunt. She sometimes slept with her father when the aunt was away; before the alleged rape, the victim was taken to Mama James where she met her mother and the alleged rape discovered. In my view, the following witnesses were the most pertinent in the case: uncle Sime, Mama James, the victim's aunt, and the victim's mother.

It does click in my mind summoning the victim's uncle all the way from Lamadi and exclude the victim's mother and Mama James who were the first persons to receive information about the alleged rape. On this point, I step into the shoes of the trial court and draw a negative inference against the prosecution case for excluding key witnesses in this case. The act of excluding the most important witnesses in this case amplifies the appellant's allegation that the case was doctored due to the conflict between the appellant and his wife. In fact, the appellant does not dispute the fact that he was sleeping with his daughter in one room after he separated with his wife. But, the case was cooked after he had

travelled from Kisesa to Bunda and the victim's mother returned to Kisesa to meet the victim. The hard look on the evidence suggests that the appellant and his wife were fighting over the custody of the victim. In my view, if the appellant's evidence could be carefully considered, the trial court's findings could have been different.

**Fourth**, the appellant's counsel argued that the recording of the victim's testimony contravened section 127(2) of the Evidence Act. In response to this point the learned State Attorney invited this court to cure the anomaly with the application of section 127(6) of the same Act. In this case, it is evident that the recording of the victim's evidence contravened section 127(2) of the Evidence Act which provides that:

During the trial, the trial court recorded the victim's evidence thus:

***"PROSECUTION CASE COMMERCIES (SIC)***

*PW1...5 years, Kisesa, Pupil, Christian.*

*The court has satisfied that the witness is knowledgeable on importance of peaking the truth after inquiring some matters from her."*

Thereafter, the trial court continued to record the victim's testimony. Under the law, the trial court is obliged to ascertain whether or not the child of tender age has sufficient intelligent to testify. Thereafter, the trial court must record whether the child of tender age has promised to tell the truth and not lies. The above requirements are provided under section 127(1)(2) of the Evidence Act that:

*127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*

*(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 to the court and not to tell any lies.*

The Court of Appeal of Tanzania has repeatedly expounded the above prerequisites. For instance, in the case of **Edward Nyegela v. R**, Criminal Appeal No. 321 of 2019; **Musa Ali Ramadhan v. Director of Public Prosecutions**, Criminal Appeal No. 426 of 2021 and **Emmanuel Masanja v. R**, Criminal Appeal No. 394 of 202.

In the case at hand, the trial magistrate did not ascertain whether the victim, who was 6 years old, had sufficient intelligence to testify nor promise to tell the truth as required by the law. The omission was fatal and vitiates the evidence of

the victim. In the absence of the victim's evidence, this case lacks legs to stand. Based on the reasons stated above, I hereby allow the appeal and order the release of the appellant from prison unless held for other lawful reasons. Order accordingly.

**DATED** at **Mwanza** this 04<sup>th</sup> day of August, 2023



**Ntemi N. Kilekamajenga**  
**JUDGE**  
**04/08/2023**



**Court:**

Judgment delivered this 04<sup>th</sup> August 2023 in the presence of the learned State Attorneys, Mr. Adam Murusuri and Ms. Jackline Mazura. Also, in the presence of the appellant and his advocate Ms. Anastazia Mao. Right of appeal explained to the parties.



**Ntemi N. Kilekamajenga**  
**JUDGE**  
**04/08/2023**

