UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

CRIMINAL APPEAL NO. 15 OF 2023

(Originated from Criminal Case no. 11 of 2023 in the District Court of Malinyi at Malinyi)

ADO STEPHANI @NJITANGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last order: 29/05/2023

Date of Judgement: 30/06/2023

MALATA, J

The appellant was charged and convicted for offence of rape contrary to section 130(2) (e) and 131(3) of the Penal Code Cap. 16 R.E. 2022 and sentenced to serve custodial sentence of life imprisonment, six strokes of cane and a compensation of TZS 500,000/=.

The factual background of this appeal is, it is alleged that, the accused (the appellant) on 8th February, 2023 at Makelele village in Malinyi District, Morogoro Region unlawful had sexual intercourse with MM a girl aged 6 years, on the same day the appellant was arrested by the Police Officers H. 9872 DC Faustine and brought to Malinyi Police Station for interrogation of the alleged offence, and on 15th February, 2023 the appellant was brought before the court to answer rape allegation.

To prove the case, the prosecution paraded a total of five witnesses and tendered two exhibits.

PW1, Joyce Casto Kahaya testified that, she resides at Makelele with her family, her husband and four kids. That, on 08/02/2023 at 2.00 pm in the noon she sent her daughter (the victim) to charge her mobile phone battery, the victim took the battery but delayed to come back home.

Upon her return PW1 asked the victim why she delayed to come back home, but she didn't reply, she took her inside and start to inspect her. she undressed the victim and inspected her private parts and found out that, she was bleeding and had sperms on her vagina.

PW1 asked the victim who did that to her and she replied that, Ado (the appellant) raped her. PW1 summoned her neighbour one mama Mtitu so that, she could also inspect the victim who also confirmed that the victim

had recently been raped and advised her to take the victim to the hospital. PW1 informed her husband (PW5) about what happened and PW5 asked the victim to be take them where the incident happened. The victim took them to the appellant's house. They saw the appellant outside the house and he asked them what they want, they decided to return home and went to report to the police station where they named the appellant as the person responsible. They were issued with the PF3 form. The victim was referred to Lugala Hospital for medical examination and it was confirmed that she was raped. The appellant was later arrested for rape allegations.

PW2, the victim testified that, the appellant is the person who put his dudu into her organ used for urination, (PW2) pointed at the accused person before the court. She further testified that, on the day her mother sent to charge the battery on the way back the appellant held her hand and took her inside his house where he undressed her and put her on bed and proceeded to insert his *dudu* into her vagina.

Some bloods were coming out and she felt pain, nobody was around and the appellant told her not to tell anyone at home. When she got home PW1 asked her as to where she was, PW2 told PW1 that she was at the appellant's house and explained what the appellant did to her. PW1 took

her inside, inspected her private parts and saw some fluids on her underwear, PW1 took her to the hospital.

PW3, Hidaya Miraji testified that, she is the resident of Makelele since 2007, on 08/02/2023 at 2:00 pm PW1 went to his house and asked her to accompany her to PW1's house to inspect her daughter. PW3 went to PW1's house and inspected the victim. PW3 saw the blood and slippery fluid that resembles with sperms. PW3 asked PW1 as to where she sent the victim, she told her that, she sent the victim to go and charge the battery upon her return PW1 found the victim was raped. PW3 asked PW1 to take the victim to the hospital.

PW4, Gregory Jacob Swai testified that, he resides at Lugala and graduated from Bugando University and he now works at Lugala hospital. He further testified that on 08/02/2023, he examined a child aged 6 years after being requested to do so by the police officers and parents of the girl. He inspected the victim's vagina and noticed that PW2 had perforated hymen, she had hyperaemia on her labia majora and labia minora and the victim appeared to be in a lot of pain.

There was also a foul smell, PW4 took the sample and did laboratory examination but observed no sperms. PW4 concluded that, the child has been penetrated by a blunt object, he filled a PF3 form and returned it to

the Police Officer. PW4 identified PF3 and the same was admitted and marked as **Exhibit X1**.

PW5, Castory Twaibu Harabu, testified that, he lives at Makelele village with his wife and four children, on 08/02/2023 he was informed by PW1 that, the victim has been raped. PW5 came back home and asked PW1 as to what happened. PW1 told PW5 that, PW2 was sent to charge PW1's cellular phone's battery on return finds PW2 raped.

Having heard such evidence the trial court found out that, the appellant had a case to answer. He was given the right to defend his case, generally he denied to have any involvement with the case.

The appellant, as DW1 testified that, on Wednesday 08/02/2023 he went to the farm at 6.00 a.m., he worked and returned around 6.00 pm when he was arrested by the police and taken to the police station where he was charged with rape. He denied involvement of the offence laid against him.

On assessment of the evidence, the trial court was satisfied that, the prosecution had proved the case against the appellant beyond reasonable doubt, the learned trial Magistrate convicted and sentenced the appellant to serve life imprisonment.

Aggrieved by conviction and sentence, the appellant raised four grounds of appeal as follows;

1. **That**, the trial court erred in law and fact by convicting the appellant while the prosecution side failed to prove their charge levelled against the appellant to the required standard of the law to wit beyond reasonable doubt.
2. **That**, the trial court erred in law and fact by failing to properly weigh, analyse and scrutinise evidence of both sides on record and considering discrepancies and contradiction on prosecution evidence hence due to such failure illegally proceeded to convict the appellant herein.
3. **That**, trial court erred in law and fact when it failed to conduct voire dire test against PW2 properly in accordance with section 127(2) of the Evidence Act [Cap 6 R.E 2022]
4. **That**, the trial court erred in law and fact when it failed to record the reply by the appellant in regard to admission of exhibit X2 hence unprocedural proceeded to admit the same and unlawfully relied to it in evidence.

When the appeal was called for hearing both parties were represented, the appellant was represented by Mr. Jovin Manyama, learned counsel

assisted by Mr. Mathew Mtemi while the respondent (Republic) was represented by Mr. Emmanuel Kahigi assisted by Mr. Simon Mpina, learned State Attorneys.

Submitting in the support of the appeal Mr. Manyama stated that, the present appeal emanates from Criminal Case no. 11 of 202 of Malinyi District Court in respect of its decision dated 21/02/2023, the appellant was convicted to serve life imprisonment for the offence of rape, he stated that they have four grounds of appeal whereas, the 1st and 2nd grounds will be argued together while the 3rd and 4th grounds will be argued separately.

The submission started with the third ground of appeal whereby Mr. Manyama learned counsel submitted that, it is a legal requirement that, the evidence of a child of a tender age has to be taken in full compliance with section 127(2) of the Evidence Act, the provision among others, requires that there must be a promise to tell the truth by the child and the same must be recorded by the trial court in the words used by the child.

The testimony by the victim at page 10 of the typed proceedings depicted that the victim is a child of six (6) years old and therefore her evidence ought to have been proceeded with in compliance with

section 127(2) of the Evidence Act. The court has to ask questions and upon being satisfied that she has promised to tell the truth, proceed to take evidence. In the instant appeal the court proceeded to take evidence without any promise to tell the truth by PW2 as required by section 127(2) of the Evidence Act.

Mr. Manyama learned counsel, further submitted that, the proceedings are silent on whether the court was satisfied that, the victim had sufficient intelligence. Also, the trial court did not record that the child understand the duty of speaking the truth. He cemented his submission by citing the case of **Hamis Hassan vs. Director of Public Prosecution, Criminal Appeal no. 208 of 2009, CAT** at page 5 of the judgement where the court quoted its previous decision in the case of **Khamis Samwel vs. Republic**, Criminal Appeal no. 320 of 2010 where the court stated that;

> *"The trial court must first find and form an opinion and record in the proceedings; **first**, that the child is of sufficient intelligence and **secondly** that the child understands the duty of speaking the truth. In practice this is preceded by a process called a voire dire examination. The purpose of a voire dire examination is for the record to show how and why the court came to those*

opinions. These are statutory requirements, and the trial court has no option but to do such an examination and record its opinion. If this stage is omitted or if the child does not satisfy those tests a trial court cannot receive the evidence of such child, because then the child still remains an incompetent witness by reason of tender age as per section 127(1) of the Evidence Act.

Mr. Manyama submitted that, in the present case, the court posed questions to PW2, and afterwards, it is recorded that, the victim has promised to speak nothing but the truth and she stated as follows.

The statement is recorded that, the victim promised to speak the truth, the proceedings are silent as to the answers from the victim. The trial court was required to pose question to PW2 and record her answers as she responded. On the same page of the proceedings there is nowhere that the court was satisfied of the intelligence of the victim on the duty to speak the truth. The court did not form opinion and record in the proceeding as directed by the court in the afore stated cited case of **Khamis Samwel vs. Republic.** The evidence by PW2 is invalid and need to be expunged from the record.

Submitting on the 4th ground of the appeal, the learned counsel stated that, at page 15 of the proceedings exhibit X2 which is the birth certificate

of the victim was tendered by PW5, the said exhibit was admitted without asking and recording the response of the appellant on whether he object it or not. What is on record is that the appellant was asked but his response was not recorded.

Before a document is admitted it has to go through three stages, ***one,*** clearance, ***two,*** admitting and ***three*** reading out. To bolster his submission, the learned counsel referred this court to the case of **Lack Kilingani vs. Republic, Criminal Appeal no. 402 of 2015 CAT** at page 8 of the judgement where the Court of Appeal referred in the case of **Robinson Mwanjisi and three others vs. Republic, [2003] TLR 218**, where the three stages were discussed.

The absence of the response from the appellant herein in respect of the admission of **exhibit X2** the court skipped the stage of clearing and admission of exhibit X2. Mr. Manyama was of the opinion that exhibit X2 was wrongly admitted for failure to abide to the three stages, as such it has to be expunged from the court proceedings.

Mr. Mtemi submitted in support of the 1st and 2nd grounds of appeal by stating that, the case was not proven beyond reasonable doubt and that the court failed to properly evaluate the evidence on record as to the time for commission of offence. The proceedings are silent as to the time of

the commission of the offence, ***first***, there is no time mentioned in the charge sheet as at what time the accused committed the alleged offence. PW1 testified that, on 08/02/2023 at 2.00 pm she sent the victim to charge her battery, and that the victim delayed to come back, at the same time she testified that she called PW3 to inspect the victim, the victim and PW3 also mentioned the same time to have been called by PW1 to inspect PW2, but there is no mentioning of time the offence was committed.

Two, existence of contradiction. Mr. Mtemi submitted that, PW1 stated that, she sent PW2 to charge a battery at 2.00 pm noon but she delayed to come back home, PW1 did not state at what time PW2 came back home but PW3 stated that at 2.00 pm noon PW1 went to her house asking her to go at the and house inspect the victim. Mr. Mtemi succumbed that, this contradiction is fatal as how was it possible for the same person to be at home for inspection by PW3 and at the same time to have been sent to charge a battery.

Responding to the submission by the appellant, Mr Mpina stated that they oppose the appeal. They prayed to submit in a similar way with what the appellant did.

On the ground of lack of voire dire examination are unfounded. Voire dire was properly conducted in accordance with section 127(2) of the Evidence

Act. at page 10 of the typed proceedings the court posed some questions to the victim and the victim answered the questions. Therefore, it was the court's opinion that the victim had sufficient intelligence to testify. The court was satisfied based on the questions posed and responses thereto. However, the court did not record as to how it became satisfied that, the victim had sufficient intelligence. He further submitted that, there is no requirement of writing opinion by the court as to how it became satisfied, the legal requirement is only for the court to pose the question and record the answers.

Additionally, Mr. Mpina submitted that, the victim promised to tell the truth and the same was recorded by the court, through questions and answers.

With regards to the issue of promise to tell the truth by the victim the records speak that, the victim promised to speak the truth, at page 10 of the proceedings.

Submitting on the 4th ground, Mr. Mpina stated that, the complaint by the appellant is unfounded. The court read the original record which shows that, at the trial court the accused (the appellant) was given right to object and he raised no objection to it. The court proceeded to admit the exhibit, the complaint was therefore unfounded.

Coming to grounds 1st and 2nd Mr. Mpina stated that, there are two complaints one is on time for commission of the offence and two on contradiction. As to the issue of time the charge sheet doesn't indicate time within which the offence was committed. It shows only the date, month and year but no time for commission of the offence, and that is the minor slip on the charge sheet but did not occasion injustice to the appellant.

It is also true that, neither the victim nor the rest of the prosecution witness mentioned the time of the commission of the offence, the same slip is not fatal and it doesn't go to the root of the matter.

As to the contradiction by PW1, PW3 and PW5, Mr. Mpina stated that, there is contradiction of events and not time as alleged by the appellant, however the same is not fatal and do not go to the root of the matter.

Mr. Kahigi submitted on the 3rd ground on the voire dire examination, and he stated that, the principle in the case of **Hamis Hassan vs. Republic** is no longer a valid law following the amendment of Act no. 4 of 2016 which require the victim to be asked questions and promise to tell the truth, he cited the case of **Godfrey William vs. Republic, Criminal Appeal no. 168 of 2018 CAT**

"Section 127 (2) as amended imperatively require a child of tender age to give a promise of telling the truth and not telling lies before he/ she testifies in court. This is a conditional precedent before reception of evidence of a child of tender age. The question however will be on how to reach at that stage. We thin the trial magistrate or judge can ask witness of tender age such simplified questions which may not be exhaustible depending on the circumstances of the case."

The witness therefore is required to promise to tell the truth and not lies and has to be recorded in court proceeding. There is no need of a court recording how it was satisfied that, the witness had sufficient intelligence to adduce evidence. In the case at hand, the records show that, there is a promise by the witness a child of tender age, there is no special style of writing question and answers coming from the witness in such circumstances.

By way of rejoinder, Mr. Manyama the learned counsel submitted that, on the 3rd ground there is no promise from the victim, what is on record is a reported speech from the court that, the victim promised to tell the truth.

He referred this court in the case of **Jiumba Maduka vs. Republic**, Criminal Appeal no. 73 of 2022 which requires the court to satisfy itself.

To start with, this being the first appellate court, has a duty to revisit the whole proceedings, evidence and any other records admitted in court during trial, with the view of understanding the evidence and procedures used to arrive at the conclusion. This position was promulgated in the case of **Leonard Mwanashoka vs. Republic**, Criminal Appeal no. 226 of 2014 (unreported), where the court of appeal held that;

> *"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the of the first appellate court, to not only summarise but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about."*

That being the position I shall consider the grounds of appeal as submitted by the counsels while re-evaluating the evidence of the trial court.

The determination of the appeal, in my strong view, solely depends on whether or not the evidence by PW2 was valid. PW2 being the victim of the ordeal and whose evidence is considered to be the best in sexual

offences (see **Selemeni Makumba vs Republic [2006] T.LR. 379),** gave a detailed account of what befell on her. She was sent by PW1 to charge her phone's battery. PW2 who was alone testified while on her way back the appellant held her hand and took her into his house and inserted his dudu into her vagina. Carefully considered, the evidence by the PW2 could sufficiently establish the appellant's guilt. Therefore, PW2 is crucial witness in this case. Being children of tender age, the crucial issue before this court is whether her evidence was properly taken.

Counsel for both parties were in disagreement that, the testimony by PW2 was received in violation of section 127(2) of the Evidence Act, While Mr. Manyama for the appellant based his submission on the fact that, the trial Magistrate did not conduct voire dire examination to the victim, Mr. Kahigi stated that, the principles in the case of **Hamis Hassan** are no longer good law following amendment of section 127(2) of the Evidence Act via Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8/7/2016.

In effect, the amendment deleted subsections (2) and (3) and substituted them with a new subsection (2) which reads: -

"(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 lies."

The amendment did away with the requirement of the court to conduct voire dire examination to a child of tender age so as to determine his or her understanding of the nature of an oath or affirmation.

Instead, the amendment introduced the requirement for the child of tender age to undertake the duty of telling the court nothing but the truth as a condition precedent before reception of his/her evidence.

The position was settled in the case of **Geofrey Wilson vs Republic,** Criminal appeal no. 168 0f 2018 and **Yusuph Molo vs Republic,** Criminal Appeal No. 343 of 2017 (both unreported).

It cannot be disputed that, the trial magistrate was bound to abide to the new position of the law which does not require the trial court to conduct voire dire examination before reception of evidence of a child of tender age. The trial magistrate when taking the evidence of a child of tender age is required to ask the child like simple questions like the age of the child, religion which he professes and other simple questions to ascertain if the child will tell the truth, and the same be recorded in the proceedings.

The record, in the present case, vividly shows that, the trial Magistrate asked the victim questions and stated that the victim promised to tell the truth, and this is another complaint by the learned counsel for the appellant, that the promise of the victim was only reported by the court, it was not a direct speech from the victim promising to tell the truth. Section 127(2) of the Evidence Act has been interpreted by case laws that, the promise by the child shall be in direct speech from the child.

In the case of **John Mkorongo James vs. Republic**, Criminal Appeal No.498 of 2020, CAT at Dar es Salaam at page 13 the court held that;

> *"We have also observed that besides the omission or failure by the trial court to have first examined PW1 to test his competence and know if he understood the meaning and nature of an oath before jumping to the conclusion that PW1 would give unsworn evidence on the promise to the court to tell the truth, PW1's promise was incomplete and it was in form of an indirect or reported speech instead of a direct speech. It was incomplete because while section 127 (2) of the Evidence Act, require that the promise should be in telling the truth and not telling any lies, what PW1 is said to have promised is only to tell the truth. He did not promise not to tell any lies. **It is recommended that***

the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete."

The evidence of the victim in this case, was recorded in indirect speech as opposed to what is principled in the above cited case. This position has kept similar stand in various court decisions and further stated that, that evidence received in violation of section 127(2) and (3) of Evidence Act is invalid and has no evidential value [see **Masoud Mgosi vs Republic**, Criminal Appeal No. 195 of 2018, **Abdallah Nguchika vs Republic**, Criminal Appeal No. 182 of 2018 (both unreported), **Yusufu Molo vs Republic** (supra) and **Geoffrey Wilson vs Republic**, (supra)].

It is undisputed by both parties to the case that, the evidence by PW2 was recorded through indirect speech which is in contravention of the court of appeal directives in the case of **John Mkorongo James vs. Republic.**

Further, by so doing the evidence by PW2 is invalid under the legal principles in the cases of **Masoud Mgosi vs Republic, Abdallah Nguchika vs Republic, Yusufu Molo vs Republic** and **Geoffrey Wilson vs Republic.**

That said, I hereby discount the evidence by PW2. **This ground of appeal for that reason, succeeds.**

A follow-up issue for discussion would definitely be whether there still remains other evidence supporting the charge. The court's record evidenced that none of the remaining witnessed the incident. PW1 testified what she was told by the victim, PW3 and PW5 told the trial court what they were told with PW1. In the absence of PW2's evidence from whom the information was sourced, the testimonies of all these witnesses are second-hand information or hearsay evidence. Faced with a somehow identical situation in the case of **Masoud Mgosi vs Republic**, Criminal Appeal No. 195 of 2018 the court of appeal stated that;

> *" . . . We agree with the learned State Attorney that PW1's evidence was invalid because she did not promise to tell the truth and not lies as required by section 127 (2) of the Act. Like we did in Ibrahim Hauie's case (supra). we hereby expunge that evidence from the record. Having expunged PW1's evidence,* ***the remaining evidence from PW2, PW 3, PW 4, PW 5 and PW 6 is wholly hearsay. It was incapable of incriminating the appellant of the charged offence."***

The above finding of the Court of appeal squarely applies in this case. By resemblance, I similarly hold the evidence of PW1, PW3, and PW5 to be

hearsay evidence hence incapable of linking the appellant with the commission of the offence.

I am, however, mindful of the testimony by PW4 and the exhibit he tendered before the court, that is exhibit X1 (PF3) which was admitted without objection, however, I hasten to say that it does establish the victim being penetrated only. PW4 testified that, the victim who medically examined on the same day of incidence, that is say, 8th February, 2023 and found with no spermatozoa, PF3 depict.

Further, PW1 took the victim instantly and went to police and thereafter to hospital. PW1 testified to have seen sperms but on same day PW4 who medically examined the victim stated that, he did not see any signs of sperms. This leaves doubt if at all the victim was raped and when. As all the incidences of time of raping, sending the victim to police and finally to hospital for medical examination happened from 2:00pm to 6:00pm in the absence any other explanation expects to see similar story of observing signs of sperms from the victim's vagina.

Additionally, PW1 testified that; one, she sends the victim to charge a battery at 2:00pm, two, PW2 delayed to come back from charging battery, three, that at 2:00pm went to call PW3 to inspect PW2, four, PW2 came back at 2:00pm while raped. These incidences cannot occur at the same

time while there is also allegation of delay to come back home by PW1 to PW2. It is not clear as to when the offence was committed if real it was. This court is therefore satisfied that, the evidence was so weak to prove the offence based on this kind of evidence. **This marks the conclusion of discussion in respect to ground No. 4 of grounds of appeal.**

This courts now directs its mind to the issue of contradiction, while PW4 testified that, there was no symptom of sperms from the victim's vagina, PW1 and PW3 stated that, there was spermatozoa. Further, PW1 and PW3 testified that, the victim was sent to charge cellular phone battery at 2:00pm and at the same time they stated that the victim was raped and at the same time PW3 was called to inspect the victim on her incidence. Further, PW1 testified that, PW2 delay in returning back home from where she was sent to charge cellular cellular phone battery. Based on their testimonies four incidences happened at exactly 2:00 pm. This casts more doubt as to how was it possible.

The law is well settled that not all discrepancies or contradiction in evidence in material or goes to the root of the matter. In the case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 242 of 2010 (unreported) in which the Court was faced with analogous situation, we held that:

"Contradictions by witness or between witnesses is something which cannot be avoided in any particular case."

It is only the discrepancy which will cause the prosecution case to flop that has to be considered. In the case of **Chukwudi Denis Okechukwu and 3 others vs. Republic**, Criminal Appeal no. 507 of 2015 (unreported)

It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of evidence is contradictory then the prosecution case will be dismantled.

In the light of the above position of the law, I observed that, the evidence shows contradiction on the events from when the incidence is alleged to have happened as stated herein above. Based on the evidence on record, it is shown that, all events happened at 2:00 pm while Pw1 stated that at 2:00pm she sent the victim to go and charge a battery. The evidence by PW1, PW2 and PW3 are contradictory.

The contradiction raises doubts as to how can all events occur at once. I wish to differ with the learned state attorney that the contradiction is minor, thus not touching the substantive part of the case. **This ground therefore has merit and is hereby allowed.**

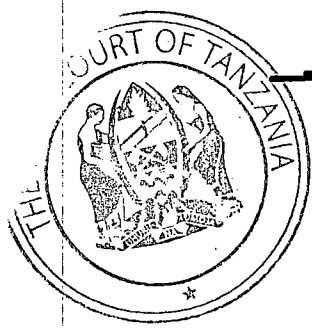
Having re-evaluated the evidence in line with the grounds of appeal, the question then remain as to the first ground of appeal, does the prosecution

proved the case against the appellant beyond reasonable doubt? It is my firm holding that, based on the re-evaluation of the above evidence, the charges against the appellant were not proven to the required standard before the trial court for the reasons stated herein above.

In the result, the appeal has merits and I allow it. Furthermore, I hereby quash conviction, set aside the sentence meted against the appellant. I order for immediate release of the appellant unless lawfully held for other reasons.

IT IS SO ORDERED.

DATED at **MOROGORO** this 30th June, 2023

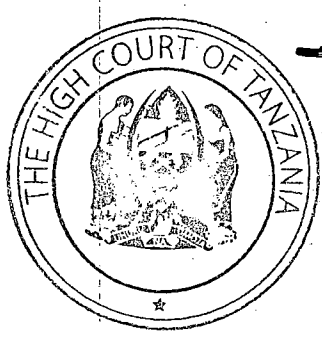


G. P. MALATA

JUDGE

30/06/2023

JUDGEMENT delivered at **MOROGORO** this 30th June, 2023



G. P. MALATA

JUDGE

30/06/2023