IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 4 OF 2023

(Originating from the Judgment of Moshi District Court dated 30th July, 2021 in Criminal Case No. 315 of 2020)

LUCAS GABRIEL MKUSU ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25th July & 22nd August,2023

A.P.KILIMI, J.:

Lucas Gabriel Mkusu "the appellant" initially was arraigned in the District Court of Moshi at Moshi for two counts, both for the same offence of Rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 of the Laws "Penal Code". At the trial court, on the first count, it was alleged that on 6/7/2020 at Marangu area, within Moshi District and Kilimanjaro Region, the appellant did have carnal knowledge of the victim ABC (in pseudonym protect her dignity) a girl aged 9 years old. Also on the second count, it was alleged on same date, place and time, the appellant did have carnal knowledge of another one XYZ (in pseudonym) a girl aged 8 years.

The appellant denied both counts, at the trial, ABC and her witnesses did not turn up to prove her case, but XYZ did and witnesses were brought by the prosecution to prove alleged offence, the trial court found him guilty as charged for the second count, he was then convicted and sentenced to serve thirty years imprisonment.

The appellant, being aggrieved by the conviction and sentence, he has appealed to this court. Before, I dwell into the grounds of appeal, let me highlight the background, albeit in brief, as discerned from evidence at the trial court record. PW1 one STELLA SIMON MKUSU who is the mother of XYZ on the fateful day mentioned above, returned home during evening and noticed XYZ was walking unusual. Upon interrogating her, she disclosed what the appellant, who is her uncle, and said that the appellant ordered her and ABC to sleep, then he approached them, he ordered them to remove their pants, he also undressed his trouser and thereafter raped them. This was reiterated deeply by XYZ (PW2) in her testimony.

PW1 being excited did not report anywhere next day because it was holiday, on 8/7/2020 she reported the matter at victim's school and she and one teacher (PW3) to assist her, reported the matter at Police station, thereat was given PF3 for medical examination. That PF3 was later tendered and

admitted as exhibit PI, at the trial court. Then the appellant was later arrested and charged forthwith.

The appellant's defence relied an *alibi* that, being a boda boda rider, his motorcycle was stolen. In searching it, he went to Marangu. He stayed there for sometimes and communicated with his sister-in-law in respect to that incident. He had no witness. Later he was arrested and taken to the police station.

The trial court considered the evidence of the victim and was pleased that the victim's evidence was credible consequently found the same sufficient to ground conviction of the appellant. Henceforth found the second count against appellant was proved beyond reasonable doubt, thus convicted and sentenced as indicated above.

The appellant dissatisfied by the conviction and sentence of the trial court, has knocked the door of this court by way of appeal, basing on four grounds of appeal as hereunder;

1. That, the trial learned Magistrate grossly erred in law and fact when contravened section 127 (2) of the evidence Act, when recording the evidence of PW2.
2. That, the trial court grossly erred in law when convicted and sentenced the Appellant in contravention of section 240 (3) of the criminal procedure Act (CPA) Cap.20 RE 2019. The doctor/Author of the medical report was not summoned.
3. That, the trial court erred in law and fact in relying on hearsay evidence of PW1, PW2, PW3 and PW4 in convicting and sentencing the Appellant.

4. That, the trial court erred in law and fact when convicted and sentenced the Appellant in a case which was not proved beyond reasonable doubt against the Appellant and to the required standard by the law.

When this appeal was placed before me for hearing, the appellant was unrepresented, he appeared in person and submitted handwritten submission duly signed by his thumb print. In part of the respondent enjoyed the service of Mr. Peter Utafu and Edith Msenga, all learned State Attorneys.

In his submission, the appellant submitted that the trial Magistrate relied solely on evidence of the victim (PW2) to convict the Appellant, but failed to note that, that evidence was taken in contravention of section 127 (2) of the Evidence Act, Cap. 16 R.E. 2022. As follows; first, the Magistrate said he asked ten questions to test her intelligence, but the record does not display those questions; Second, the Magistrate's intention was to test the child's intelligence while the law particular section 127(2) of the Evidence Act requires the trial court to ascertain whether or not the child witness understands the meaning of an oath or affirmation and whether he/she promise to tell the truth and not tell lies; and third, the promise said by witness was half incomplete, since the child witness did not promise not to tell lies as stipulated under section 127 (2) of the Evidence Act. To buttress

the above, the appellant invited me to refer the case of **John @ Shayo vs. Republic**, Criminal Appeal No. 336 of 2019 at page 14-16 (unreported).

The appellant further beseeched that, by the above contravention of section 127 (2) of the Evidence Act, PW2 evidence being expunged from the record, and having so done, no any remaining evidence to let the appellant conviction stand, thus prosecution have failed to prove the offence charged.

In responding the above, Ms. Edith Msenga, learned State Attorney started by contending that, the trial court followed the procedure in 127(2) of the Evidence Act, which required the court, on taking evidence of a child, to make the test whether the child understand saying of truth, but also the child promise to say the truth. She further urged this court to see page 6 and 7 of proceeding of the trial court, where the record shows that the court identified the victim and her age, then the court address her to know about her understanding, and the court satisfied that the child understand the meaning of saying truth, but also PW2 promised to say the truth and not otherwise.

Ms. Msenga also contended that, displaying questions and answers when testing victim's understanding, has no back up of the law, because Section 127(2) of Evidence Act, moved the court to address on understanding, the provision does not dictate which question to be asked,

she invited this court to borrow leaf from **Issa Salum Namburuka vs. Republic** Criminal Appeal 272 of 2018 which was referred in the case CAT **Faraji Said vs. Republic**, Criminal Appeal No. 172 of 208, at page 21 and 22.

In respect, to ground number two of appeal, Ms. Edith Msenga contended that, the appellant was addressed on his right to call medical practitioner for cross examination, the appellant had no objection. Therefore, he agreed the evidence of PF3 be tendered by PW4 one WP2463 D/Sgt Happiness, but also added that the evidence of PF3 can stand itself and under Section 240(1), (2) of CPA Cap.20 R.E. 2022.

Ms. Msenga further acknowledged none fatal irregularity made by the trial court, when it addressed appellant considering Section 240(3) before the PF3 has been admitted in court, but she prayed to address this court that, the said irregularity did not prejudice the case against the accused person also did not occasion failure of justice, therefore is cured under section 388(1) of CPA Cap. 20 R.E. 2022.

In respect to PW4 who tendered the said PF3, the learned State Attorney submitted that was a competent witness to tender PF3 at the trial court, because she used to be custodian of the said document, and for special procedure as it is provided at page 16, 17 and 18 of proceeding, and

the same was the one who tendered it in court. To insist on that competence, the learned state Attorney prayed to me to consider the case of the **DPP vs. Mirzai Pirbakhshshi @ Hadji & 3 Others**, Criminal Appeal No. 493 of 2016 CAT at DSM.

Contending in respect to ground number three, Ms. Msenga said the Appellant was not convicted by hearsay evidence as said, but he was convicted by the testimony of the victim of offence, which was sufficient even without collaboration after the trial court satisfied with her credibility. To bolster her assertion, she referred section 127(6) of TEA Cap. 6 R.E. 2022.

Responding to the last ground of appeal, Ms. Msenga contended that, prosecution paraded four witness and also tendered PF3 which was admitted as Exhibit "P1", wherein PW2 explained coherence of acts, how she was ordered to undress, the undress of appellant, and how he inserted his dudu into her vagina, and later informed PW1. She was then taken to Hospital, examined and the medical report shows the victim was inserted in her vagina by blunt object which means it support penetration.

In conclusion of respondent case, Mr. Utafu, Learned State Attorney, submitted the victim (PW2) was aged 8 years, but the punishment awarded is 30 years, according to Section 130(3) of Penal Code Cap. 16 R.E. 2022 since the victim is below 10 years the punishment ought to be life sentence,

so the trial court misdirected on that, so he prayed if the court dismiss the appeal, then this court should increase the punishment as stipulated by the law.

Upon considering of the appellant's written submission and submissions from respondent part, it is my view the central issue for consideration is based on the four ground of appeal, and that is whether, the prosecution case was proved beyond reasonable doubts.

It is a trite law, this being the first appellate court is expected to make fresh evaluation of the evidence on record and come up with its conclusion. See **Yustus Aidan vs. Republic** Criminal Appeal 454 of 2019 CAT at Arusha (Unreported). Moreover, In the case of **Firmon Mlowe vs. Republic** Criminal Appeal No. 504 Of 2020 CAT at Iringa, the court insisted
the duty of the High Court to deal with all issues and the evidence led by the parties before recording the findings and referred the case of **Union of India v. K. V. Lakshman and Others,** AIR **2016** SC **3139,** when the Supreme Court of India held that:

> "... *The jurisdiction of the first appellate court while hearing the first appeal is very wide like that of the trial court and it is open to the appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first appellate court to*

appreciate the entire evidence and may come to conclusion different from that of the trial court."

Moreover, this being the offence of rape, I am guided by authorities that, it is of utmost importance to see whether the prosecution established evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. Also, the court to ensure that the witness gave the relevant evidence which proves the offence. See **Mattayo Ngalya @ Shaban vs. Republic,** Criminal Appeal No. 170 of 2006 (unreported).

Starting with the allegations of the appellant on the first ground, as rightly submitted by Ms. Msenga, the requirement of 127(2) of the Evidence Act, is test whether the child knows oath and if not may promise to say the truth and not lies. This is different with the previous amended law which require to test whether the child possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. This changes which was brought by Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8th July, 2016. Amended Section 127 (2) of the Evidence Act and provides as follows:

> *"A child of tender ager 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."*
>
> [Emphasis added].

This provision was interpreted by the court of appeal that, the above provides for two conditions. One, it allows the child of tender age to give evidence without oath or affirmation. Two, before giving evidence, such child is mandatory required to promise to tell the truth to the court and not to tell lies. See **Faraji Said vs. The Republic** Criminal Appeal 172 of 2018; **Geoffrey Wilson vs. The Republic,** Criminal Appeal No. 168 of 2018 and **Issa Salum Nambaluka vs. The Republic,** Criminal Appeal No. 272 of 2018 (All unreported).

In this matter at hand, the trial learned Resident Magistrate recorded what she inferred the above provision and at page 6 and 7 of the typed proceeding observed as follows;

> *"**PW2:** GLORY SIMON MKUSU, 8 yrs, student, Christian: - .*
> ***Court:** The witness is a child of tender age, **she has been asked some ten questions to test her intelligence as per S.127 (2) of the Evidence Act as amended.** The witness seems to understand the meaning of oath and also the meaning of telling the truth.*

R. Olambo, RM
4/9/2020

PW2: *I promise I will tell the truth.*
Court: *PW2 sworn and states as follows: -"*

[Emphasis added].

Having observed as above, I have asked myself whether the trial Magistrate offended the provision of the law above. Before, I proceed to answer this question, I find valuable to refer the decision of the court of appeal in the case of **Issa Salum Nambaluka vs. The Republic,** (supra) wherein, PW1 was a child of tender age and her evidence was received on affirmation without first being satisfied that the child witness understood the nature of oath, the court said;

> *"From the plain meaning of the provisions of subsection (2) of s. 127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because* ***the section is couched in permissive terms as regards the manner in which a child witness may give evidence.*** *In the situation* ***where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake***

not to tell lies**. Section 127 of the Evidence Act is however, **is silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not."

[Emphasis added].

From the excerpt above, in lieu of the trial court above, the trial magistrate asked PW2 some ten questions to test her intelligence as per section s. 127 (2) of the Act (supra), to my view this means the magistrate tested the understanding of the child on the conditions envisaged under the said section, that is why he concluded that the child understand the meaning of oath and also the meaning of telling the truth. Therefore, despite the child promised to tell the truth and did not promise not to say lies, to my view does not affect her credence, since the first condition stated above of the said provision, was complied with, after the court inquiry and satisfied that PW2 understands the meaning of oath.

Another allegation by the appellant is that, those ten questions were not displayed on record, I subscribe to the decision of **Issa Salum Nambaluka** (supra) when the court observed that, the law is silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not. Moreover, despite the fact each case needs to

be determined according to its circumstances, to my view the facts that the trial Magistrate recorded that she did ask ten questions, this court ought to believe that same was exactly done or transpired, taking regard her oath as a Magistrate. See **Khalfan Sudi vs. Abieza Chichili** Civil Reference no.11 of 1996 (unreported). In the premises, it is my settled view the said provision of the law was not offended.

The case of **Edmund John @ Shayo vs. Republic** (supra) cited by the appellant is distinguishable to the facts of this case, in that case the court did not the finding on whether the victim understands the meaning of oath or affirmation, while in this case the court did. Having evaluated above, it is my settled opinion the first ground devoid of merit and thus crumbles.

I now turn to the third and fourth ground of appeal, according to the evidence of the prosecution, only PW2 was the eye witness. It is trite law that for the offence of rape to be proved there must be penetration of male organ to female organ and not otherwise. But in the case of **Selemani Makumba vs. R,** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal considered whether or not the complainant had been raped by the appellant and observed: -

> " *True evidence of rape has to come from the victim, of an adult that there was penetration and no consent and* ***in the***

case of any other woman where consent is irrelevant that there was penetration..."

[Emphasis added].

According to the typed proceeding of the trial court at page 7 the victim PW2 had this to testify;

"On that day we were back from school with JASMIN. We found our uncle cooking at the kitchen. He told us to go and change our school uniform and wash them. After washing our clothes, he told us to go and take shower. He thereafter told us to wear our clothes and sleep. Few minutes later uncle LUCA came into our room and told JASMIN to remove her clothes, JASMIN removed her trouser and Uncle LUCAS slept on top of JASMIN. His trouser was down on his knees. He inserted his "dudu" into JASMIN'S organ. It is where JASMIN use to urinate JASMIN started crying, Uncle LUCAS told her to go outside.

He therefore came to me and told me to undress my clothes. He took out his "dudu" and inserted it here (PW2 pointed on her private parts). This is where I use to urinate. I felt paln and started crying. After such an act uncle LUCAS told us not to tell anyone. That if we tell anyone he will kill us."

I have considered the above, PW2 knew the appellant because he was her uncle, they live in one roof and as shown above as African customs she obeyed him, according to circumstances she explained above for appellant

who is a family member, the issue of mistaken identity does not arise, because PW2 was consistent and coherent when testifying on the series of action read to the commission of the crime. However, PW2 used the word "dudu" instead of penis and organ she used to urinate, this is obvious due to upbringing of African children and culture restrictions. Therefore, she proved that appellant's penis was penetrated to her vagina. See **Minani Evaristi vs. Republic** Criminal Appeal No. 124 of 2007 (unreported).

In view of the above analysis, I thus subscribe with the finding of the trial court when observed that PW2 gave a coherent narration of the incidence, and secondly, the evidence clearly shows that PW2 knew the Accused as he is familiar to her. The trial basing on that, continue to hold that the credible evidence of PW2 sorely is sufficient to ground conviction in terms of S. 127(7) of the Evidence Act.

Therefore, it is not true the trial court relied on hearsay evidence as appellant said in third ground of appeal when he mentioned PW1, PW3 and PW4. The trial court relied on the credibility and reliability of the evidence tendered by one witness PW2 and not the number of witnesses called to testify, which indeed I also concede. See **Goodluck Kyando vs. Republic**, Criminal Appeal No. 118 of 2003 CAT (unreported). Having endeavored above, it is also my settled opinion that, through the evidence of PW2 the

prosecution proved the charge of rape against the appellant beyond reasonable doubt, therefore, I am of considered opinion those grounds devoid of merit and dismissed forthwith.

In the last ground which stated that, the appellant was convicted in contravention of section 240 (3) of the criminal procedure Act (CPA) Cap.20 RE 2019. Because the doctor made the medical report was not summoned. For purpose of this ground, I reproduce the said provision thus;

> *"(3) Where a report referred to in this section is received in evidence* ***the court may, if it thinks fit,*** *and shall, if so requested by the accused person or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused person of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."*
>
> [Emphasis added].

In comply with the above provision the trial court gave the above right to the appellant; this was transpired at page 16 of the typed proceeding as follows;

> ***"State Attorney:*** *For hearing, we have one witness today. We have also tried to call our witness who is a doctor but he is nowhere to be found since he has already shifted from*

Mawenzi hospital. As per s.240 of CPA we pray for the witness to tender a PF3 if there will be no objection.

R. Olambo, RM

21/05/2021

Court: *The accused person has been addressed in terms of s.240 (3) CPA.*

R. Olambo, RM

21/05/2021

Accused: *I have no objection."*

Then, after that in the course of PW4 testimony as investigator prayed to tender the said PF3 which again the appellant did not object, hence admitted as exhibit "P1". As rightly contended by Ms. Msenga learned state Attorney, the issue of asking accused person on whether he requested the medical practitioner to summoned for cross examination, need to be done after the said document already admitted. But in my view the use of the words, "*court may, if it thinks fit, and shall, if so, requested"* gives the court discretion to inform that right to the accused person even if he don't request. However, it seems the court informed the accused after being informed a doctor is not found. Be it as it may, the above irregularity did not occasion any failure of justice on the part of the appellant, since when the same was tendered, he did not object, though he has the same chance in law to object it not to be

tendered. Therefore, I am settled view the said irregularity is curable under section 388 of the Criminal Procedure Act Cap.20 R.E.2022.

The last concern in this appeal, is the one raised by Mr. Utafu, Learned State Attorney, that since the victim at the commission of the offence was aged 8 years, the sentence ought to have been awarded was life imprisonment and not 30 years as awarded by the trial court.

Having entirely perused the record of the court, the second count which is in respect to the victim in this appeal, the appellant was charged for this offence of rape under Section 130 (1) (2) (e) and 131 (1) of the Penal Code, but the particulars of this offence charged were in following form;

> *"LUCAS S/O GABRIEL MKUSU on the 6th day of July, 2020 at Marangu area within the District of Moshi in Kilimanjaro Region, did have carnal knowledge of one XYZ* ***a girl of 8 years old."***
>
> [Emphasis added].

From the above, I am in agreement with Mr. Utafu about the age of the victim, but in my view above, on the charge sheet there is no provision of punishment put in respect when the victim of the offence is below (10) ten

years. Now, the next point to be considered is whether by not citing the above provision, the appellant was offended, and if not whether this court can impose an appropriate sentence.

In the case of **Maganga s/o Udugali vs. Republic,** Criminal Appeal 144 of 2017, the Court of Appeal sitting at Tabora, observed that in terms of sections 132 and 135 (a) of the Criminal Procedure Act Cap.20, every charge must contain a statement of a specific offence or offences with which the accused is charged. It is also required that, the statement of offence must make reference to the specific provision of the law creating such offence. Further, the charge must contain particulars of offence. The reason or aim of the charge to contain the statement and particulars of offence is to give an accused person reasonable information as to the nature and seriousness of the offence and to enable him prepare his defence.

In this case, the particulars of the offence quoted above, were read to appellant, therefore he was informed that the age of the victim is 8 years old. Also, before the victim testified as shown at page 5, the trial court before asked her ten questions to know her capability of knowing the nature of oath, asked and recorded that the victim is a child of tender age of 8 years. Furthermore, in examination in chief of PW1 one Stella Simon Mkusu, the

mother of the victim, at page 5 of typed trial court proceeding testified loudly that victim is 8 years old studying at Kirefure primary school in standard 1.

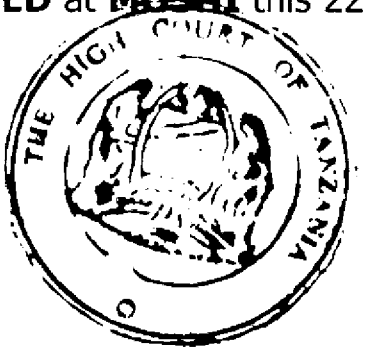
I have considered that, all the above was conducted in the presence of the appellant, and since the particulars of the offence and evidence were very clear as shown above. I am of considered opinion, the appellant was clearly informed about the age of the victim and the nature and seriousness of the offence he was facing. Therefore, it is my view the defect appears in charge sheet of not citing the required punishment provision is cured under section 388 (1) of the CPA Cap 20 R.E. 2022. (See **Jamali Ally @ Salum v Republic,** Criminal Appeal No. 52 of 2017, CAT at Mtwara, and **Jafar Salum @ Kikoti vs. Republic,** Criminal Appeal No. 370 of 2017, CAT at Dar-es-Salaam. (Both unreported).

Having observed as above, the said provision not cited is section 131 (3) of the Penal Code (supra), which provides that subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment. Thus, for the reasons I have given above, I therefore quash the illegal sentence of thirty (30) years imprisonment imposed by the Trial Court and substitute it with the mandatory sentence of life imprisonment in accordance with section

131 (3) of the Penal Code. In the event, for the foregoing reasons, the appeal against conviction is dismissed. The sentence is varied as stated above.

It is so ordered

DATED at **MOSHI** this 22nd day of August 2023.



A. P. KILIMI

JUDGE

22/8/2023

Court: - Judgment delivered today on 22nd day of August, 2023 in the presence of Ms. Edith Msenga Learned State Attorney for the Republic while Appellant also present by virtual.

Sgd: A. P. KILIMI

JUDGE

22/8/2023