THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 35 OF 2022

(Originating from Criminal Case No. 14 of 2020 in the Resident Magistrate Court of Morogoro)

SADICK HAMAD NDIUNZE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Final Court Order on: 09/8/2023

Judgment date on: 14/08/2023

NGWEMBE, J:

Sadick Hamad Ndiunze found himself in jail for life imprisonment after being convicted for raping a girl of five (5) years old. The journey to life imprisonment commenced on 6th December, 2019 when the appellant was alleged to have carnal knowledge with a girl at Mbuyuni area in Rudewa Ward within Kilosa district in Morogoro region. That having committed such offence, he was arrested by civilians, taken to Ward Executive Officer and later to police and finally was arraigned in court charged accordingly. At trial, the prosecution lined up six witnesses and

two exhibits with a view to establish and prove a prima facie case against the accused/appellant. Having a case to answer, the appellant defended himself without calling other defence witnesses. At the end he was convicted and sentenced accordingly.

Since the victim on the eventful date was under the age of majority, that is five (5) years old, her actual name throughout of this judgement shall be hidden for good reasons of preserving her respective privacy, integrity and future respect in the society. This is born out of section 33, read together with section 76 of the Law of the Child Act, accompanied with the Chief Justice's Circular No. 2 of 2018, dated 20th March, 2018. Thus, this court proceed to baptize her as the **"Victim"** throughout of this judgement.

Having so said, the appellant after being so convicted and sentenced, he preferred this appeal after obtaining extension of time. Nine grievances were preferred in this court; however, I find the first ground summarizes most of the issues raised in this appeal. To answer this ground and bearing in mind that, this is the first appellate court, then I will first recap briefly the arguments of parties in this appeal; second, I will re-evaluate, though briefly, the evidences adduced during trial; and lastly, I will determine the merits or demerits of this appeal prior to arriving into conclusion.

Before recapping the trial court's recorded evidences, let me revisit the arguments advanced by parties in this appeal. On the hearing date, the appellant was not represented by learned advocate, hence had limited arguments on his grounds of appeal. Briefly, he denied generally that he

never had any sexual intercourse with the victim. Justified that he has his wife and children, thus, he could not have committed such offence to a child of five years. Rested by a prayer that, his appeal be allowed for the offence was never committed.

In the adversarial side, the learned state Attorney Josbert Kitale, stood firm to support the trial court's findings, conviction and statutory sentence. Arguing on first ground, the learned State Attorney, relied on the case of **Deo John Vs. R, Criminal Appeal No. 361 of 2020** at page 8.

Submitting on ground 3 the learned State Attorney, argued strongly that, the appellant admitted to have committed the offence. Justified by referring to the case of **Abas Kondo Gede Vs. R, criminal Appeal No. 472 of 2017** at page 21. Equally, on ground 4, the State Attorney, tried to convince this court that, in fact there was no contradiction of evidence during trial, if any, same is curable. The rest of the grounds of appeal were generally argued that, they lack merits because the prosecution produced unshakable evidences, which led into conviction of the appellant. Thus, rested by a prayer that, the appeal lacks merits same be dismissed and the appellant should tolerate the statutory sentence.

In rejoinder the appellant raised equally an important point that he, being a grownup person of 26 years old, he could not rape a child girl of five (5) years and that child be able to walk freely to her home. Insisted that he never raped her.

When I was in the course of composing this judgement and upon careful review of the whole proceeding and judgement of the trial court, I found something quire calling for additional expert evidence, in respect to

whether a child girl of five (5) years can be able to *enjoy sex* as she testified in page 16. Further I noted another disturbing issue in the whole evidences of the victim (PW2), that she was couched by her father. Even during re-examination, yet the victim reiterated her testimony that, she forgot what her father couched her. *"I forgot what father couched me"* Upon reviewing the whole evidences of the prosecution, I found the only relevant and reliable evidence is of the victim which in essence is calling for additional evidence. Thus, prudence; common sense; and justice demanded to have additional scientific evidence from Medal specialist of Gynaecology, prior to composing my judgement.

Consequently, on 11th July, 2023, this court invited both parties in court and expressed the apparent need to have additional scientific evidence on whether the girl was indeed raped or otherwise. As such parties agreed and consented to have additional evidence from a Specialist of Gynaecology from Morogoro Referral Regional Hospital. Thus, I invoked section 369 of the Criminal Procedure Act to order the victim child girl be re-examined and the medical doctor should furnish this court with his/her medical examination report within ten (10) days.

However, after several adjournments, at last the learned State Attorney Daniel Makala on 9/8/2023 informed this court that, together with the offices of Regional Crimes Office, have failed totally to convince parents of the alleged victim to allow their child be re-examined on the alleged rape. As such he prayed this court to vacate its order and proceed with composing its judgement based on the available evidences and arguments advanced by parties on the hearing of this appeal. The court had no

alternative, but to vacate its previous order and proceed with writing this judgment, without having an advantage of having an expert opinion on whether the alleged rape was committed to the victim.

The need to use science in proving offences capable of being proved scientifically should not be overemphasized, I find to do justice in a society which speaking truth is increasingly becoming a foreign vocabulary, courts have no alternative than to use science. Even the so-called medical doctors, to my understanding and for the need to do justice must have acquired special skills as will be discussed in due course.

The above position is not new in other jurisdictions, considering the moral stability of the current generation, where a woman can train her daughter to bear false witness even against her own father. Likewise, a father may train his daughter to bear false witness against his neighbour with whom they are not in good terms or they quarrel over a piece of land of probate and alike. The deceiving women and their trained daughters may cause serious sufferings to innocent persons, thus causing outcry to the society.

What sexual offences appears in courts nowadays, makes it real what Sir Matthew Hale Lord Chief Justice of the King's Bench Court, in his book **The History of The Pleas of The Crown 635 (1847)** stated at the time of Saxon laws when rape was punished with death, he observed: -

> *"It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused,*

though never so innocent. I only mention these instances, that we may be the more cautious upon trials of offenses of this nature"

That observation has commonly applied in common law courts and been discussed by prominent jurists including Sir William Blackstone in his book **Commentaries on the Laws of England, 16th edition (1825).** Under the circumstance therefore, it is of utmost importance that before convicting a man for rape or any other sexual offence, the court should get assured that the evidence laid before it proves all the ingredients and that it has been established crystal clear, the accused before it is the true offender in respect of the particular victim.

Having so said, I am now tasked to re-evaluate the trial court's evidence as if I am rehearing it. The rule of placing the first appellate court to reevaluate the whole evidences of the trial court traces its genesis from many decades through unbroken chain of authoritative precedents of this court and the Court of Appeal, including the following cases: - **Salum Mhando Vs. R [1993] T.L.R. 170; Siza Patrice Vs. R, Criminal Appeal No. 19 of 2010; Bonifas Fidelis @ Abel Vs. R [2015] T.L.R. 156; and Alex Kapinga & 3Others Vs. R, Criminal Appeal No. 252 of 2005.** In **Siza Patrice,** it was *inter alia* held: -

"We understand that a first appeal is in the form of a rehearing. The first appellate court has a duty to revaluate the entire evidence in an objective manner and arrive at its own findings of fact if necessary"

In performing the above statutory duty of reevaluating the trial court's evidence, I will be revaluating it in line with the first ground of

appeal. I find the first ground raise a fundamental legal issue of whether the offence was ever committed to the victim? If this issue is answered in affirmative, then the court will proceed to deal with the rest of grounds of appeal, but when the issue is answered in negative, there will be no need to deal with the rest of grounds of appeal.

The key witness in the whole offence was the victim herself testified as PW2. Testified briefly that she was schooling at Nursery school while living at Kigunge with her parents. She knew the accused/appellant herein, that "*Sadock undressed my clothes "chupi" he undressed himself and put his penis into my "kibibi" (vagina). I was* ***enjoying*** *because I felt pain" When he completed, he put on his clothes and I put on my chupi then I left to our home and Sadock remained in his home"*

In cross examination, the girl testified as quoted hereto "***I forget what father couched me.*** *Continued "father did not teach me to say that I felt pain when Sadock entered his penis into my kibibi"*

Such piece of evidence was noted and recapped in the judgement of the trial court at page 3 that *"her father coached to speak".* In re-examination, by the learned State Attorney, she repeated that "*she forgot what her father coached to speak"*

The evidence of her father Ramadhan Hemed proved the date of birth of the victim, that was on 15/12/2014 schooling at Nursery school. The birth certificate was produced and admitted in court marked exhibit PE1. Also, he testified on the eventful date that was on

06/12/2019, that is when the victim was raped. The process of reporting the incidence to Village Executive Officer and then to Kimamba police post commenced. Then was taken to Hospital for examination. PW1 was informed after rape and was not the first person to be informed after the event, so he testified what he witnessed and participated after the event.

The evidence of PW1 that he took her daughter to Kimamba Health Centre while carrying PF 3 from Police. PW4 identified as a medical doctor holding Advanced Diploma and had 15 years' experience. He admitted to have received and examined the victim aged five (5) years on 06/12/2019 about 08:00 hours night. His examination found as I quote in page 22 of the proceedings, "*Upon examination I discovered her private parts (vagina) were bruises and a whitish liquid was coming out and had no virginity. When I penetrated my two fingers entered indicating the vagina was hallowed*"

In cross examination, PW4 admitted that "*Hymen was seen in the vagina it is different from the urinating organ*"

The evidence of PW3 (mother of the victim) equally she testified after the alleged event has occurred and how she acted soon after being informed of what happened to her daughter. Briefly she testified that, her daughter came home with a juice, when was asked, she replied that the accused gave her that juice. Later she started crying, when asked for reason of such cry, told her that she is raped by the accused. Upon inspecting her, found sperms in the inner part of her

vagina. The remaining witnesses testified similar to the evidences of PW1 & PW3.

Having such evidences in mind, yet the question, remain unanswered of whether the offence was ever committed to the victim? I find this ground is fundamental to be determined first. If this question is answered in affirmative, then the court will proceed to deal with the rest of grounds of appeal, but when is answered in negative, there will be no need to deal with the rest of grounds of appeal.

Rightly so to speak, section 3 (2) (a) of the **Evidence Act,** supported with the case of **Pascal Yoya @ Maganga Vs. R, Criminal Appeal No. 248 of 2017,** the prosecution has uncompromised duty to establish and prove the accusations as per charge sheet beyond reasonable doubt. The Court of Appeal on the cited case held as follows: -

> *"It is the cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only need to raise some reasonable doubt on the prosecution case and he need not prove his innocence"*

Moreover, another rule of evidence known by any court of law is the fact that, any reasonable doubt found in the prosecution should be decided in favour of the accused. Reasonable doubt include contradictions and evidences which goes contrary to nature, common sense and dictates of principles of justice. For instance, when a child of less than ten years of age allege to have enjoyed sex, obvious such

assertion goes contrary to principles of nature, common sense and social fabric.

Considering the application of section 127 of the Evidence Act, it is obvious the evidences of a child of tender age, meaning below the age of 14 years, certain procedures must be followed prior to recording her/his evidences. Usually courts have amplified the section by giving it breath by demanding certain questions should be asked to test her understanding/intelligence and ability to express what happened to her. In light of section 127, the Court of Appeal provided a living guidance in the case of **Godfrey Wilson Vs. R, Criminal Appeal No. 168 of 2018,** that prior to recording the testimonies of a child of tender age, the trial court is mandatorily required to ask simple questions. The required questions and answers should be recorded verbatim by the trial court. The Court of Appeal by its own words held: -

> *"The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows: -*
>
> 1. *The age of the child;*
> 2. *The religion which the child professes and whether he/she understands the nature of oath; and*
> 3. *Whether or not the child promises to tell the truth and not to tell lies"*

Even in the case of **Seleman Bakari Makota Vs. R, Criminal Appeal No. 269 of 2018** the Court of Appeal sitting at Mtwara repeated the same as quoted hereunder:

> *"It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution case"*

The records in the trial court's proceedings at page 15 to page 16, the learned magistrate rightly followed that procedure religiously.

Notably, in our jurisdiction, rape cases to girls below the age of majority (below 18 years) is a serious offence, attracting minimum sentence of thirty (30) years for a girl between ten (10) to below 18 years. The sentence of life imprisonment covers rape cases to children below the age of ten (10) years. Above all those punishments are accompanied with corporal punishment and compensation.

Such heavy punishment is intended, I presume, to deter whoever had in mind to have sexual relationship with a child below the age of majority. Equally important is to note that, for a girl below 18 years, the question of consent does not arise.

Perhaps the legislature when was enacting such heavy punishment, assumed the law will be operating in a civilized society who speaks only truth and not otherwise; respect to human life; and reliabilities in their testimonies as an order of a day. Further, presumed the victim will tell only truth on exactly what happened on the eventful time and date when the offence of rape occurred. The victim will exactly speak on the one who committed the offence, and the circumstances which led into such offence.

"Tegemeo la nafasi (Chances) ya baba Godfrey Leslie Ndumbaro kuwa baba mzazi wa mtoto Yusra Godfrey Ndumbaro ni asilimia sifuri (0.00%) ukizingatia "ZPB" ni mama mzazi wa mtoto Yusra Godfrey Ndumbaro"

In simple interpretation, the appellant did not father the alleged child. At the end the court found the appellant a school head teacher, never fathered the alleged child, hence was released from prison of thirty (30) years imprisonment.

In similar circumstances, another person was alleged to plead guilty to an offence of raping a girl of six (6) years old. When was arraigned in the district Court, it was recorded that he pleaded guilty. Thus, convicted and sentenced to life imprisonment. However, upon appealing to this house of justice, the court sought additional evidence on his mental ability from the regional medical Doctor of Ligula Regional Hospital. That is **Criminal Appeal No. 102 of 2020 between Bashiru Saidi Rashidi Vs. the Republic.** The regional medical doctor after thorough examination on the mental capabilities of the appellant, he concluded as quoted hereunder: -

"Kwa ujumla wa maelezo yake anaonyesha kuwa na tatizo la kumbukumbu na kukosa mtiririko mzuri wa kufikiri, hivyo kitaalamu mteja wangu huyu anatatizo la afya ya akili (Mental subnormal) inamchukua muda mrefu kuongea au kujibu swali kwa maana ufahamu wake uko chini sana na amechukua dakika kadhaa kujieleza"

Simply means the appellant is suffering from disease of mind called mental subnormal. Obvious, a person suffering from disease of mind is incapable of pleading and has reduced responsibilities in the society. This court proceeded to find that had, the trial court, observed the accused properly it would not have convicted him. Accordingly, this court siting at Mtwara proceeded to quash the conviction and set aside the sentence meted by the trial court. The appellant was placed under supervision of the Social Welfare Officer of Kilwa District.

Another similar case is **Criminal Appeal No. 17 of 2019 between Shilanga Nguku Maeda Vs. R,** the appellant was alleged to have sodomized a boy of seven (7) years old. After all rigors of trial, the appellant was sentenced to life imprisonment. On appeal, among other issues, the appellant raised the defence of impotence, that he never had sexual intercourse with any woman in his life time because his penis does not erect. Out of that defence, this court invoked section 369 (1) of **Criminal Procedure Act** to seek additional evidence by subjecting the appellant to undergo medical examination from the regional medical doctor on his capacity to erect his penis.

The medical examination was conducted and the report had the following contents:

> *"The mentioned person was tested for male sex hormone testosterone and found to be normal, however physiological arousal test done on 24th July, 2020 failed to stimulate him enough to erection. To this regard Mr. Shilanga Nguku Maeda is likely to be impotent"*

Having that in mind, the legislature came up with such humiliating punishment of long imprisonment sentence; corporal punishment; and compensation to the victims.

However, nowadays, such assumption of trust is highly qualified in many cases. It has been proved that, some victims have misused the trust by telling total lies in court. Even some adults have misused such trust by training innocent children to tell lies in court with a view to victimize other male persons who are not in good terms with them. This position was found vividly in **CRIMINAL APPEAL NO 67 OF 2022 between Samwel Stanley Vs. R, [2023] TZHC 15701** where this court lamented bitterly, on failure of the society to speak truth and the danger of using the offence of rape to victimize persons who are innocent, but are in bad blood with the complainants family. In brief, the appellant on the cited case was alleged to rape a girl of eight (8) years, as such the trial court convicted him and sentenced to life imprisonment. The alleged rapist and mother of the alleged victim were officers working in the same camp and were living as neighbours. However, when the appeal came to the High Court, the siting judge demanded additional evidence by subjecting the girl child for reexamination by a specialist gynecology. The report was as clear as a day light that the girl child was as virgin as she was born.

In similar case of **Criminal Appeal No. 108 of 2020 between Godfrey Leslie Ndumbaro Vs. R,** the High Court sitting at Mtwara, found important to use science to prove fatherhood of the child said to be born after commission of the rape. With a help of Science, DNA test from the Chief Government Chemist reported that: -

Science proved that, the appellant cannot commit the offence of rape or offence against nature as he was charged. Hence, the conviction was quashed, subsequently the sentence of life imprisonment was set aside and immediately the appellant was released from prison.

Having in mind those cases, I am settled in my mind, the crux of this appeal, calls to answer the question of whether the victim was raped?

Essentially, the offence of rape is created under section 130 (1) of the **Penal Code,** whose ingredients are provided for under subsection 2 (e) of section 130 of the Act. For clarity the section is quoted hereunder: -

> ***"Section 130**.- (1) It is an offence for a male person to rape a girl or a woman.*
>
> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(a) – (d) NA*
>
> *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

The offence of rape under section 130 (1)(2)(e) of the **Penal Code,** unless falls under exceptions, otherwise is termed as *statutory rape,* where in the case of **George Claud Kasanda Vs. The DPP, Criminal Appeal No. 376 of 2017, (CAT at Mbeya)**, the Court of Appeal explained in clear terms that: -

> *"In essence that provision creates an offence now famously referred to as statutory rape. It is termed so for a simple*

reason that; it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent"

As above, certain elements are so fundamental, they must be established and proved by irresistible evidences. Those include; **one** – carnal knowledge (penis penetration to a female vagina), consent is immaterial to a girl below 18 years; **two** – age of the victim; **three** (for the purpose of section 131 (3)) if the age of the victim is below ten years or below 18 years it is termed as statutory rape, if is above 18 years it is termed as normal rape; **four** lacks of consent to a woman above 18 years is material; and **lastly**, proper identity of the rapist.

The issue of penetration, however slight is so fundamental that rape cannot be established and proved in the absence of penetration. Section 130 (4) (a) of the Penal Code insist on penetration as quoted hereunder: -

"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"

In similar emphasis, the Court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No.10 of 2008 (CAT)** raised a valid question on what constitutes an offence of rape.

In the absence of unshakable evidence on penetration even to the slightest degree, rape cannot be constituted. Penetration being a core element of rape, undoubtedly, must be unshakably established and proved beyond reasonable doubt to constitute an offence of rape.

I am well aware that, medical reports are not determinant factor in proving or disproving the offence before any court of law. Always medical doctors and other professionals give expert opinion to the court. The trial

judge or magistrate may be lacking such medical knowledge, but always their opinions shall remain opinions not binding to the court. Usually, expert opinion or scientific proof helps the court to arrive to a justifiable conclusion. For instance, when there is a dispute on who is a father of a child, nowadays it is very easy, science will provide an immediate answer through DNA. Likewise, when there is an allegation of rape to a child, equally science will help to prove if at all there was rape as was done in the case of **Samwel Stanley Vs. R (supra).** Therefore, the use of science in the current age of fourth industrial revolution led by Information Technology, is increasingly becoming inevitable.

In respect to this appeal, it seems the victim was taken to health centre for checkup, but such medical examination was conducted by a holder of advanced diploma in medicine, instead of a medical doctor. I doubt if at all he had enough expertise to issue an expert report for court use in serious offences like raping a girl of five (5) years which upon proof may cost life sentence of the accused. In other jurisdictions like India and other Common Law Countries, have developed rules related to who should provide expert opinion for court use. India in the case of **Ramesh Chandra Agrawal Vs. Regency Hospital Ltd. and others, MANU/SC/1641/2009: JT 2009 (12) SC 377,** the Apex Court considered the issue pertaining to expert opinion in a detailed way. In para 11, the Court held: -

> *"The law of evidence is designed to ensure that the Court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for expert*

evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person.... The scientific question involved is assumed to be not with the Court's knowledge. Thus, cases where the science involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed. The other requirements for the admissibility of expert evidence are: -

i. that the expert must be within a recognised field of expertise;

ii. that the evidence must be based on reliable principles; and

iii. that the expert must be qualified in that discipline.

At page 15 the Court went on to hold as I quote: -

"An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions"

The same Court went on to qualify the expert opinion that, in order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a **special study on the subject** or **acquired a**

special experience therein or in other words, that he is **skilled and has adequate knowledge on the subject**.

In similar vein, the matter was discussed in the case of **Mt. Titli Vs. Alfred Robert Jones, MANU/UP/0107/1933: AIR 1934 All 273**, the Court discussed that, it is not the province of the expert to act as Judge or Jury. The real function of the expert is to put before the Court all the materials, together with reasons which induce to come to the conclusion, so that the Court, although not an expert, may form its own judgment by its own observation of those materials.

I am highly attracted with the reasoning of the Indian Court on admissibility of expert opinion. Rightly, the scientific opinion must come from an expert on the field. Also, should demonstrate the methodologies used to arrive to the conclusion.

This is not new in our jurisdiction, the position of India is similar and settled that, expert opinion/evidence with a qualified and experienced expert on the field, deserve high respect, though not binding as was held in the case of **Said Mwamwindi Vs. R. [1972] HCD No. 212.**

It is evident that, Medical Doctors when called to testify in court, are not witnesses of facts, but are experts in their field providing expert opinion. PW4 testified not as a witness of fact but as an expert. The question is whether he deserved to be called an expert? I think not because he had no expertise required to be called medical doctor. Above all, his evidence was full of contradictory. At one time he testified that the girl was bleeding with bruises, but when was cross examined, testified that hymen was found and intact different from urinary blader. Moreover, that

he tested by insetting fingers in the vagina of the victim. How can this house of justice rely on such shoddy opinion in arriving to a justifiable and realistic conclusion in a serious offence like rape which may cost a life imprisonment of the accused. Therefore, the opinion of PW4 did not assist the court to provide scientific information, contrary to what was decided in the case of **Edward Nzabuga Vs. R, Criminal Appeal No. 136 of 2008.**

The decisive issue before this court is yet to resolve; whether the offence was committed. Following the principles earlier pointed out, I have revisited the evidence which was laid before the trial court. As earlier alluded, the evidences adduced by the alleged victim was full of contradiction and confusion. How can a girl child of five (5) years enjoy sex? Regarding her age, the evidence was watertight that she was 5 years old when she enjoyed sex. In the case of **Alex Ndendya Vs. R, Criminal Appeal No. 340 of 2017** the Court insisted with clear words on proof of age that: -

> "*Age is of utmost importance and in a situation where the appellant was charged with statutory rape then age of the victim must specifically be proved before convicting the appellant*"

Also, how can she testify that she forgot what she was couched by his father? What does it mean in the eyes of law? Considering deeply on the testimonies of the victim I have no doubt to conclude that she was not credible and reliable. Connecting with the denial of her parents to subject her for critical and expertise examination by a specialist of gynecology, concludes that they knew what they did during trial. In the case of **Omari**

Ahmed Vs. R, [1983] T.L.R 52, the Court insisted on the need to reassess on credibility of the victim as follows: -

"The trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility"

In similar case of **Shani Chamwela Suleiman Vs. R, (Criminal Appeal No. 481 of 2021) [2022] TZCA 592** the court said: -

"On appeal the credibility of a witness can be gauged through coherence and consistence of his testimony"

The whole evidences testified by PW2, together with PW1, PW3 and PW4 left more questions than answers. Even when the State Attorney reexamined the victim, yet she proved that she was trained by her father to speak what she testified contrary to what she experienced on the alleged rape. Therefore, this court is justified to rule that, PW2 was not only incredible, but she testified what she was trained by her parents.

Even by using common sense and nature, a girl of 5 years her private parts are not developed to be used for enjoyment as she testified. Under normal circumstances, she would be raptured, over bleed, unable to walk and may be hospitalized.

With deep understanding of the nature of the offence, and having discussed in details on the available evidences and circumstances prevailing the whole claim of rape, I have no iota of doubt, the question of whether the victim was ever raped is answered in negative that she was not raped. Rather her evidence was fabricated with a view to victimize the

appellant. This conclusion negates this court from engaging into consideration of other grounds of appeal. If the offence was not committed, it goes like a flow of water from top mountain to the valley that considering other grounds of appeal will be for academic purposes contrary to the typical purpose of this court.

May be at this juncture I may air my advice as I did in some previous cases of similar nature to prosecutions that they have dual purpose in prosecuting offenders in a court of law; first is to net the true offenders and let the court punish them properly with a view to protecting innocent persons and deter whoever intended to commit similar offences. Second to establish and prove innocence of an accused person. In so doing, the prosecution ought to muzzle all evidences to prove the offences according to the established and proved evidences. Third, the prosecution and investigators, whenever possible to use scientific instruments to unearth the truth of the allegations before subjecting innocent persons into rigours of court proceedings and may be up to imprisonment, just to be found innocent on appeal. In many countries nowadays they use science to investigate and prosecute cases in court of law.

Having so reasoned and in totality, I find enough merits in this appeal; hence I allow it. The conviction is quashed, life imprisonment sentence is set aside. Consequently, the appellant be released immediately, unless held for any lawful cause.

Dated at Morogoro in chambers this 14st day of August, 2023

P.J. NGWEMBE

JUDGE

14/08/2023

Court: Judgement delivered at Morogoro in Chambers on this 14st August, 2023 in the presence of the appellant, and Mr. Josbert Kitale, lerned State Attorney for the Republic.

Right to appeal to the Court of Appeal explained.

P.J. NGWEMBE

JUDGE

14/08/2023