IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 88 OF 2021

[Arising from Criminal Case No. 27 of 2021 Shinyanga District Court]

BARAKA MAYALA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

10th & 16th August, 2023.

S.M. KULITA, J.

The Appellant herein, namely **BARAKA MAYALA** was charged in the District Court of Shinyanga for "Rape" contrary to the provisions of section 130(1)(2)(e) and 131(1) of the Penal Code [Cap. 16 RE 2019]. It is in the particulars of offence that, on the 17th day of January, 2021 at Didia village within Shinyanga District in Shinyangs Region, the appellant had sexual intercourse with one "SP" (the real name hidden), a girl aged 11 (eleven) years old.

In a nutshell, facts of the case as per the record provides that, after taking dinner with her young brothers, Ally Peter and Salim Peter on the 17th day of January, 2021 at about 1900 hours, the said victim's brothers went to sleep, leaving her behind. Later on the Accused person who is their neighbor arrived and asked her to go to his residence. The victim actually went thereto and they had sexual intercourse. It was alleged that the victim was 11 years old by then. That, on 21/01/2021 at the evening hours the victim's sister arrived at home and found the Accused person (Appellant) leaving their house. When she entered the house she interrogated and examined the victim and noticed that her sexual organ has bruises. Upon further interrogating her, the victim told her that she had been raped by the Appellant but it was not on that day. Later, the victim's mother arrived, she was informed about the matter. Thereafter, the victim was taken to hospital for medical examination. That, the appellant was arrested on that same date and taken to police, then arraigned to court for Rape where he was convicted and sentenced to serve the imprisonment of 30 (thirty) years. That was 25th October, 2021.

Aggrieved with the decision, the appellant has now approached this court with 6 (six) grounds of appeal which can be summarized into 5 (five)

as follows; **first,** that at the trial court the case was not proved beyond all reasonable doubts; **secondly**, that trial Magistrate acted on the uncorroborated and unsworn evidence of the victim (PW1); **thirdly**, that the matter was not reported to the Street officials nor neighbors; **fourth,** that apart from the Doctor, most of the prosecution witnesses were the victim's relatives; **Fifth**, that the PF3 (Exh. P1) was filled out of the statutory time and the same do not reveal anything wrong.

In hearing the appeal the Appellant appeared in person while the Respondent (Republic) had the service of Ms. Caroline Mushi, learned State Attorney who resisted the appeal. In composing this judgment I will be taking and analyze the grounds of appeal in a random mode.

Submitting in support of the appeal, the appellant decided to adopt his grounds of appeal as the submission for his appeal case and prayed for the appeal to be allowed.

In her reply in respect of the **2nd ground** of appeal, the State Attorney, Ms. Caroline Mushi submitted that, it is not true that the evidence of the Victim (PW1) was uncorroborated and that it was wrongly taken without oath. The Counsel stated that section 27 of the Tanzania Evidence Act does not compel the witness of tender age to give evidence on oath. She said that

the section provides that he/she can just promise to tell the truth. Further submitting on that ground of appeal, the State Attorney stated that this can be seen in the trial court's record at page 10 of the typed proceedings which shows that the witness (PW1) who was of tender age promised to tell the truth before she testified.

My analysis on this ground of appeal which was not rejoined by the Appellant is that, it is undisputable fact that by the time the victim (PW1) was giving her evidence, she was 11 (eleven) years old. It means she was a child of tender age according to **section 127(4) of the Tanzania Evidence Act [Cap 6 RE 2019]** which provides;

> *"For the purposes of subsections (2) and (3), the expression* ***"child of tender age"*** *means a child whose apparent age is* ***not more than fourteen years"*** *(emphasis is mine)*

The mode of taking evidence of a child of tender age has been provided for under **Section 127(2) of the Evidence Act** which provides;

> *"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"*

Section 127(2) of the Evidence Act which has been reproduced above provides that a child of tender age may give evidence after taking oath or making affirmation, or without oath or affirmation. From this section therefore, in case the matter falls under the later situation, that is a child witness should testify without oath or affirmation, he/she must make a promise to tell the truth and undertake not to tell lies. But how can the trial court reach into that decision before taking the witness' evidence. **Section 127 of the Evidence Act** is however silent on the method of determining whether such a child witness should give evidence on oath/affirmation or not. The Court of Appeal in **ISSA SALUM NAMBALUKA V. R, Criminal Appeal No. 272 of 2018, CAT at Mtwara** while citing the case of **Geoffrey Wilson v. Republic, criminal Appeal No. 168 of 2018, CAT at Bukoba (unreported)** stated;

> *"where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should,*

before giving evidence, be required to promise to tell the truth and not to tell lies."

As stated above that, under the current position of the law, the child witness should give evidence without taking oath/affirmation, hence promise to tell the truth and not to tell lies, only if he/she does not understand the nature of oath. This is where the trial court was supposed to conduct an inquiry by asking her some few pertinent questions so as to determine whether or not the child witness understands the nature of oath. In the matter at hand the record is silent as to what made the trial Magistrate to conclude that the witness should not give sworn evidence but to promise to tell the truth. The record does not reflect that PW1 does not understand the nature of oath which could be the reason for the trial Magistrate to conclude that the victim (PW1) who is a child of tender age to promise to tell the truth, instead of giving evidence on oath/affirmation.

That being the case, the evidence of PW1 is declared unworthy of credit, hence expunged from the record.

In view thereof and in the light of what is stated above, that the evidence of PW1 who is the victim in this Rape case is expunged from the

record, it means the prosecution case (Respondent herein) remains with the testimonies of PW2, PW3 and PW4. Among them there is no best and reliable evidence like that of PW1 who is the victim. In **Selemani Makumba V. Republic [2006] TLR 379** it was held that the true and best evidence in sexual offences is that of a victim.

Before I wind up the matter on this, I went through the record of the trial court so as to find if I can make an order for re-trial, particularly the trial court to take afresh the testimony of PW1. Upon going through the record I have noticed that there is a question of variance on date for the commission of the offence on the prosecution case during trial. While PW2 (victim's sister), PW3 (victim's mother) and the charge sheet transpire that the crime was committed on 17/01/2021, PW1 (victim) said that it was 11/01/2021. Not only that but the Doctor (PW4) who alleged to have examined the victim and filled the PF3 (exhibit P1), while testifying on 22/01/2021 said that on that date she was told by the victim that she was raped 3 (three) days back, which means 19/01/2021.

In **Peter Ndiema and Nikas Ndiema V. Republic, Criminal Appeal No. 469 of 2015, High Court at Shinyanga** which referred the

case of **Leonard Raphael and Another V. Republic, Criminal Appeal No. 4 of 1992 (unreported)** it was held;

> *"Variance of dates between the charge and evidence tendered by the prosecution witnesses renders the acquittal of the Appellants."*

Having said all, I am of the view that, the evidence of the prosecution case at the trial court has some doubts which does not convince me to order for re-trial. In order to ascertain whether the appellate court should order re-trial, the guidance made in the case of **Fatehali Manji Vs. R [1966] E.A. 343** is to be regarded. The said case provides;

> *"In general, a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial. Each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it"*

As long as there are some doubts in the prosecution case as shown hereinabove, ordering re-trial will give chance for the prosecution side to fill

in the gaps, the act which will be against the dictates of the cited case of **Fatehali Manji (supra).** On that account, I refrain to order re-trial.

In view thereof, I find it unnecessary to deal with the remaining grounds of appeal as this one, the second ground, is sufficient to dispose of the appeal in its entirely.

In upshot, I **allow the appeal** with an order that the Appellant should be released from prison forthwith, unless he is held for any other lawful cause.

S.M. KULITA
JUDGE
16/08/2023