IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 42 OF 2023

(Originating from Criminal Case No. 263 of 2019)

TWAHA ALFAN KULAGWA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

5th & 26th July 2023

MWANGA, J.

The appellant, **TWAHA ALFAN KULAGWA,** appeared before the District Court of Mkurunga at Mkuranga on 5th October 2021 to answer two counts of charges. The first count was rape, contrary to Section 130(1), (2) (e), and 131(1), and the second count of Unnatural offense, contrary to Section 154(1) (a) and (2) both preferred under the Penal Code, Cap. 16 R.E 2019.

It was alleged that on the stated date at about 16: 30 hrs at Mpera Kisemvule Village within Mkuranga District in Coastal Region, the appellant did have both sexual intercourse and carnal knowledge against the order of nature with the victim of 11 years, whose identity should be concealed.

He denied the charges. After his trial, he was found guilty as charged and convicted accordingly. Therefore, he was sentenced to thirty (30) years imprisonment in each count and ordered to run concurrently. Being aggrieved, the appellant appealed against the conviction and sentence to this court.

Believing innocent, he lodged this appeal against that District Court decision on the following grounds:

1. That the learned trial court magistrate erred in law and fact in convicting the appellant when the appellant objected to an unfair trial/ hearing by granting the prosecutors prayer of an exparte hearing while the coram on 20/o1/2020 shows that the appellant was present (see at pages 20,21 and 25 of the type proceedings) the omission which prejudiced the appellant's constitutional right of fair hearing.

2. That the learned trial court magistrate erred in law and fact in convicting the appellant based on the evidence of PW2 (victim and PW3, whose evidence was received in contravention of the provisions of section 127(2) of the Evidence Act, Cap. 6 R.E 2019 as there was no any procedural voire dire examination and or questions put to PW2 and PW3 to ascertain whether or not they understood the nature of an oath/affirmation the omission which renders their evidence lack evidence value and a nullity.
3. That the learned trial court magistrate erred in law and fact in convicting the appellant based on the evidence of PW2(Victim) when the prosecution did not prove the victim's (PW2's) age to establish the statutory rape against the appellant.
4. That the learned trial court magistrate erred in law and fact in convicting the appellant based on the evidence of PW2, PW3, PW4, W5, and PW6, which is barely improbable, insufficient, contradictory, and unreliable to establish the guilty of the appellant beyond reasonable doubt as charged.
5. That the learned trial court magistrate erred in law and fact in convicting the appellant without tracing and or feedback from the appellant securities for the appellant's whereabouts, the omission which infringed the appellant's natural justice.

6. That the learned trial court magistrate erred in law and fact in convicting the appellant in a case where the prosecution failed to prove its charge against the appellant beyond doubt as mandatorily required by law.

The Appeal was argued by way of written submission. Mr. Emmanuel Maleko learned Senior State Attorney represented the Respondent; on the other hand, the Appellant appeared in person.

Looking at the 1st, 2nd, and 5th grounds of appeal, it can be seen that all are about violating the fundamental principle of natural justice that the appellant was not given the right to a fair trial, alleging that he was not given the right to be heard—also, the procedure of taking evidence of a child of tender age needed to be followed. In the 3rd ground, he contends that the prosecution did not prove the victim's age. More or less, in the 4th and 6th grounds of appeal, the appellant asserts that the case was not proved to the required standard.

For obvious reasons, let me start with the 2nd ground of appeal that the evidence of the victim was received in contravention of Section 127(2) of the Law of Evidence Act, Cap. 6 R.E 2019. The appellant is arguing that the proceedings do not show `if the victim was asked whether or not they understood the meaning and nature of oaths, the court could determine

whether or not their evidence could be taken under oath or affirmation. Therefore, promises recorded by PW2 and PW3 needed to be completed as they never promised to tell any lies. The appellant cited the cases of **Mkorongo James** and **Godfrey Wilson**.

Per contra, Mr. Maleko argued that on pages 14, 15, 17, and 18 of the trial court proceedings, PW2 and PW3 promised to tell the truth, not lies.

I have seriously considered the evidence on records and the submission of both parties. Pages 12-14 reflect the evidence of the victim's mother (PW1); indeed, she said nothing about the victim's age. Nevertheless, the victim themselves mentioned their age when they were giving their evidence. On page 14, the victim told the court that she was 11. The controversial part of the proceedings is on page 15. PW2 Stated:-

"Your honor, *I know the meaning of telling the truth, to lie is a sin.* ***I promise this court that I will tell the truth****.*

Court*: As the witness has promised to tell the truth, this court will receive her evidence with no oath."*

Moreover, on page 17 of the proceedings, PW3 states;-

"your honor, *I know to tell the truth as to lie is a sin.* ***I, therefore, promise to tell the truth.***

Court: Section 127 of TEA, as amended by S. 26 of Act 2/2016, is at this moment C/W. Hence, the witness will testify without taking an oath or affirmation."

The issue for determination by this Court is whether PW2's evidence was recorded in compliance with the provisions of section 127(2) of the Evidence Act. The relevant Section 127(2) of Evidence Act reads:-

> ***"S.127(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 and not to tell any lies."***

The law above clearly states that the promise to tell the truth and not lies for a child of tender age is mandatory before receiving their evidence. The requirement of the promise to the Court to tell the truth and not tell lies comes in after the Court is satisfied that being a child of tender age does not understand the nature of an oath and the duty of telling the truth. As rightly submitted by the Appellant in the case of **Godfrey Wilson Versus R,** Criminal appeal No. 168 of 2018 (Unreported), where it was held that:

"The trial magistrate ought to have required PW1 to promise Whether or not ***she would tell the truth and not lie.*** *We say so because, section 127(2) as amended imperatively requires* ***a child of a tender age to give a promise of telling the truth and***

Not telling lies *before he/ she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. 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 understand the nature of oath.

3. Whether or not the child promises to tell the truth and not to tell lies. Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

Without a doubt, the trial court still meets the law requirements above, regardless of incomplete promise. The victims were not only asked questions as proposed, but also they never promised **not to tell lies**. The Court of Appeal in the case of **Mathayo Laurence William Mollel vs. The Republic**, Criminal Appeal No. 53 of 2020 (unreported), the court had this to say;

"The appellant also argued that the child witnesses' promise was incomplete for promising only to tell the truth and omitted to undertake

not to tell lies. ***We find difficulties in agreeing with him. We understand the legislature used the words "promise to tell the truth to the court and not to tell lies." We think tautology is evident in the phrase, for, in our view, 'to tell the truth" means "not to tell lies." So, a person who promises to tell the truth is, in effect, promising not to tell lies.*** *The tautology in the subsection is, in our opinion, a drafting inadvertency. We thus find no substance in the first ground of appeal and dismiss it".(emphasis is mine).*

Given the above, the provision of section 127(2) of the Evidence Act has been complied with. Therefore, this ground of appeal lacks merit.

The law is also clear; the best evidence in a sexual offense comes from the victim. See the case of **Hamis Halfan Dauda vs. R,** Criminal Appeal No. 231 of 2009(unreported), **Mbarouk Deogratias Verus Republic,** Criminal Appeal No. 229 of 2019 TZCA 1896 [2020] quoted in the case of **Seleman Makumba Verus R** [2000] TLR 384.

Given the above, the victims here were PW2 and PW3. They both contended that the appellant had sexual intercourse with the appellant many times. However, the number of incidents and time of commission was not stated. PW5, the medical doctor, told the trial court that PW2 said he was not raped. But when he inserted the fingers into her vaginal, all passed through, showing consistent penetration. If they told the court that they did not disclose the occurrence of the incident because of the

threat posed by the appellant, why then was she not able to tell PW5 the truth she was raped and sodomized by the appellant. Again, if there was a threat or complaint, if the appellant was laying down PW3 and lying on top of her, was it not possible that the danger of the appellant would apprehend the victim, PW2? The law is also clear that, In **Goodluck Kyando Versus R (2006) TLR, 363,** the court held that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and compelling reasons for not considering a witness.

The gap in the prosecution case raised doubt, and it was the prosecution's duty to clear it. It is settled law that the witness's credibility may be determined by assessing the coherence of his testimony or by comparing it with evidence of other witnesses. See the cases of **Shaban Daud Vs Republic**, Criminal Appeal No. 334 of 201(unreported).

Subsequently, the fourth ground of appeal has sailed through enough to dispose of the appeal. Because such inconsistency and contradictions are a clear note, the case was not proved beyond a reasonable doubt. See the cases of **Mgenda Paul and Another Versus Republic (1993TLR 219, Sadath Musa @ Ibrahim @ Kabuzi Versus Republic** (Criminal Appeal No.94 [2020] (Reported) page five where the court adopted the

principle in the landmark case of **Jonas Nkize vs Republic [1992] TLR 2013.**

As a result, I now allow this appeal, quash the conviction, and set aside the sentence. The appellant shall immediately be set free unless he is otherwise lawfully in prison.

Order accordingly.

H. R. MWANGA

JUDGE

26/07/2023

COURT: Judgment delivered in Chambers this 26th day of July 2023 in the presence of Emmanuel Maleko, learned Senior State Attorney, and the Appellant in person.

H. R. MWANGA

JUDGE

26/07/2023