IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 37 OF 2023

(*Arising from the Judgment Moshi District Court dated 12th day of September 202 in Criminal Case No. 16 of 2022)*

OMARY ATHUMANI MDEE @ SOJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

22nd August & 19th Sept. 2023

A.P.KILIMI, J.:

The appellant mentioned hereinabove was arraigned at Moshi District Court in Criminal Case no. 16 of 2022 for the offence of rape c/s 130(1) (2) (e) and 131(1) of the Penal Code [Cap 16 RE 2019]. Therein the prosecution alleged that in the month of December 2021 at Pumuani B area within Moshi District and Region of Kilimanjaro, accused did have sexual intercourse of "**WO"** (in pseudonym) a girl aged 10 years.

To prove the case the prosecution at the trial paraded five witnesses whom were attacked to disprove the same by two defence witnesses. In

conclusion of the trial court found the appellant guilty for the offence charged, consequently he was convicted and sentenced to serve 30 years imprisonment.

The appellant aggrieved by the said conviction and sentence has appealed to this court basing on the following grounds;

1. That, the learned trial Magistrate, grossly erred both in law and fact in convicting the Appellant basing on the Victim's (PW1) evidence despite the same being taken in contravention of section 127 (2) of the Evidence Act, Cap 6 R.E 2019.
2. That, the learned trial Magistrate grossly erred both in law and fact in not indicating the reasons as to why she believed the victim of the alleged offence (PWI) that, she is telling Nothing but the truth as enshrined under section 127(6) of the Evidence Act.
3. That, the Learned trial magistrate grossly erred both in law and fact in failing to note that, the PW1 Withheld the information of being ravished for quite a while and non-disclosing to anybody particularly her guardians at the earliest possible opportunity cannot attract the confidence of her testimony before the court of law.
4. That, the Learned Trial Magistrate grossly erred both in law and fact in finding corroboration in PW2's evidence despite the Same Being taken Contrary to Section 127(2) of the Evidence Act.
5. That, the learning Trial Magistrate grossly erred both in law and fact in convicting the Appellant on a charge which was not proved beyond reasonable doubt against the Appellant and to the required standard by the law.

Before I dwell into the merit of above grounds let me recapitulate the facts which gave rise to this appeal. **WO** lived with her grandmother, she

alleged that on December 2021 before closing school she was called by appellant who asked her to buy kerosine for him, he gave money for doing so, when she returned with the said item, the appellant ordered her to inter his house, is when the appellant joined her and raped her. After raping her he gave her Tsh. 200/=. PW2 who was also a prosecution witness testified she went thrice to the house of the appellant with the victim, one of those days she saw the appellant asking the victim to buy chapati mafuta and later went to appellant room, when the victim came out gave her Tsh 100/=. Later, the victim claims to have legs pain, it was when taken Mawenzi hospital for further treatment, thereat it was revealed that she was penetrated.

In his defence, the appellant merely stated how he was arrested and his witness, DW2 also said how she witnessed her father being arrested.

At the hearing of this appeal before me, appellant appeared in person unrepresented and the respondent was represented by Ms. Edith Masenga the learned state Attorney. The Appellant had nothing to say than to pray this court to adopt his grounds of appeal and pass through the records of

the trial court, then this court will find him not guilty with the offence charged.

Ms. Edith Msenga responding on the first ground of appeal contended that the trial court did properly follow the requirement provided under section 127(2) of Evidence Act Cap. 6 R.E.2022 (hereinafter "TEA"), that the witnesses PW1 and PW2 who were children, were tested and responded that they knew the meaning of oath and promised to tell the truth.

Responding on second ground, Ms. Edith Msenga contended that, in the sexual offence the evidence of child is the best evidence as per section 127(6) of TEA, that is subject to the credibility of the said witness which was done by the court to PW1 who managed to state the ingredients of the offence, occurrence of incident until how the offence was conducted. The learned State Attorney supported this argument by referring the case of **Seleiman Makunda vs. Republic** [2006] T.R.L. 379

In respect to third ground, the learned State Attorney responded that it is the principle that the suspect should be named at earliest possible opportunity as said in **Kadiri Ally vs, Republic** Appeal No 99 of 2020 CAT at Dar es salaam. She further said witness told her aunt (PW3) on 28/2/2022

and the incident happened on December 2021. In interpretation of the earliest opportunity and basing on the age of 10 years of the witness this is the earliest time and therefore the evidence of this witness is credible and pray this ground to be dismissed.

Lastly, on the last ground, she contended that, the prosecution proved this case beyond reasonable doubt as they managed to prove that the victim is a child, there was a prove of penetration from PW1 victim and PW4 Medical doctor, and the appellant was the one who did the offence.

Before analysis of the evidence tendered at the trial court, grounds of appeal in this matter and submissions in reply above, I am mindful this being the first appellate court has a duty to re-evaluate the evidence the first trial court in an objective manner and arrive at its own findings of fact, if necessary. Thus, it is in the form of a rehearing. See the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, and **Makubi Dogani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported). The Court of Appeal held in **Future Century Ltd v. TANESCO,** (supra) that-

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the*

entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

Starting with the first ground, the appellant is alleging victim's evidence was taken in contravention of section 127 (2) of the Evidence Act, Cap 6 R.E 2019. According to the record there were two witnesses of tender ages the victim and her fellow PW2 whom the record shows they were together. Now to see whether the said provision was complied with or not, I find for ease reference, let me reproduce what transpired in the trial court before recording the evidence of PW1 and PW2, both children of tender age, the same is found on page 6 and 8 respectively of the typed trial court record.

"Date: 4/3/2022
Coram: N. Mwerinde, SRM
Pros: Grace state attorney
B/C: Fatuma
Accused: Present
***State Attorney: I** have two witnesses I am ready.*
***Accused: I** am ready.*

PROSECUTION CASE OPENS
***PW 1: WO** (in pseudonym) 12 years I am schooling at Sago Primary school, standard five, I am Christian I know the meaning of oath, I promise to state truth.*
***Court:** The child possessed enough intelligence and promised to speak truth.*

XD STATE ATTORNEY:

At page 8 of typed trial court proceeding;

> *Date: 29/3/2022*
> *Coram: N. Mwerinde, SRM*
> *Pros: Nitike state attorney*
> *SIC: Fatuma*
> *Accused: Present*
> ***State Attorney:*** *I have two witness I am ready.*
> ***Accused:*** *I am ready.*
>
> ***State Attorney:*** *I have two witness I am ready.*
> ***Accused:*** *I am ready.*
> ***PW2:*** *Ester Oswald kimario, 8 years, standard iii at Sango primary school, class teacher is Mwalimu Neema,I promise to state truth.*
> ***Court:*** *She possessed enough intelligence and promised to state the truth. She swears and states.*

Having shown above, the next point is whether the requirement of law was adhered to, it is lucid clear this law was amended by the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 which came into operation on 7/7/2016 and provides:

> *"Section 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 to the court and not to tell any lies."*

In the case of **Omary Awami vs. Republic** Criminal Appeal No.335 of 2019 Court of Appeal of Tanzania at Moshi cited with approval the case of **Godfrey Wilson vs. Republic,** Criminal Appeal No. 168 of 2018 (unreported) and stated that:

> "... *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…"***
>
> [Emphasis supplied]

Furthermore, in the case of **John Mkorongo James vs. Republic** [2022] TZCA 111 (Tanzlii) the court elucidated the significance of the amendments to section 127(2) of the Evidence Act, by stating that:

> *"The import of section 127(2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court to tell the truth and not to tell lies."*

In view of the above law, back home to our case, the learned trial Magistrate did not indicate whether she did an inquiry and reached the said position of the children to promise to tell truth. Thus, it is clear that the trial court did not conduct a simple process to test the child's understanding of the nature and meaning of an oath to enable the judge or magistrate to make a finding on whether the evidence of a child of tender age can be taken upon a promise to the court to tell the truth, and not lies.

In the case of **Edmund John @ Shayo vs Republic** [2023] TZCA 17386 (Tanzlii) the court referred its earlier decision in **Godfrey Wilson v.**

Republic, (supra); **Hamisi Issa vs. Republic,** Criminal Appeal No. 274 of 2018 and **Issa Salum Nambaluka vs. Republic,** Criminal Appeal No. 272 of 2018 (all unreported) and observed that;

> *"Section 127 (2) of the Evidence Act requires that, where the evidence of a child of tender age is taken without oath, the intended witness must promise the court to tell the truth and not to tell lies. That, in the absence of any direction engrained in the provision of how the promise can be procured,* ***the court must prior to getting the said promise, ask few and simple questions to the said witness to determine, foremost, whether the child understands the nature of oath or affirmation.*** *When the answer is in the affirmative then receive the testimony under oath or affirmation. If not, then the child witness should be required to promise to tell the truth and not tell lies."*
>
> [Emphasis supplied]

Having observed the above and what transpired before the evidence of these two key witnesses testified, therefore in absence of any record of there being any test conducted by way of simple questions by the trial court. I am of

considered opinion the trial court was not proper to direct itself and apprehend that the two witnesses could tell only truth.

The next to consider thereafter, is what is the status of the above evidence, In **John Mkorongo James vs. Republic,** (supra) the Court held that:

> *"The omission to conduct a brief examination on a child witness of a tender ages to test his competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the court to tell the truth and not tell lies,* ***is fatal and renders the evidence valueless"***
>
> [Emphasis supplied]

Therefore, in that regard, I am settled the first ground is answered in affirmative, that there was contravention of section 127 (2) of the Evidence Act at the trial court, this renders the said evidence trivial. Consequently, I hereby expunge it from the record.

Before I proceed with the remaining grounds of appeal, I have asked myself whether the remaining evidence is sufficient to prove the case against the appellant and thus support his conviction and sentence.

Ms. Edith Msenga argued that PW1 was credible and a victim must be believed also according to her the time she mentioned the appellant should be taken as earliest possible opportunity, and further she added there was a prove of penetration to PW1 which was proved by PW4 a medical doctor practitioner.

I am aware it is a well-established principle by the Court that the best evidence of rape comes from the victim herself. (See: **Selemani Makumba vs. Republic** (supra). According to the evidence on record as tried to be enunciated by the learned State Attorney, PW1 the victim had the best evidence in this matter since she was the only eye witness. Thus, by considering that her evidence is expunged as said above, there are nothing to add. The remaining evidence, which I can term did not reach the stage of called circumstantial evidence are very scanty and inconsistence.

In above regard, I find compelled to consider, albeit in brief, the substance of the prosecution evidence which shows the above. At page 10 although her aunt attended her when she was sick on 17/12/2021 she did not disclose to her until PW4 a medical practitioner examined her on 29/02/2021 and said she was penetrated by blunt object. Also, PW1 did not disclose to her friend PW2 who was outside the evil room waiting for her. If she could not have taken to hospital no one could have known that she was raped.

In the circumstance, my findings hereinabove suffice to dispose of this appeal. Thus, I will not proceed with the determination of the remaining grounds of appeal since doing so will be an academic exercise since it will not change my findings aforesaid.

I hereby accordingly allow the appeal in its entirety, quash the appellant' conviction and set aside the sentence of thirty years imprisonment which was imposed on him. I order for his immediate release from prison if he is not otherwise held for some other lawful cause.

It is so ordered.

DATED at **MOSHI** this 19th day of September, 2023.

X

JUDGE
Signed by: A. P. KILIMI

Court: Judgment delivered today on 19th day of September 2023 in the presence of Ms. Edith Msenga, learned State Attorney for Respondent and also appellant present.

Sgd: A. P. KILIMI
JUDGE
19/09/2023

Court: Right of Appeal explained.

Sgd: A. P. KILIMI
JUDGE
19/09/2023