IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 20 OF 2023

(*Appeal from the decision of Moshi District Court at Moshi dated 5th December,2023 in Criminal Case No. 428 of 2021)*

NICKAS EVARIST LYIMO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

12th Sept. & 10th October 2023.

A.P.KILIMI, J.:

The appellant was arraigned before District Court of Moshi for the offence of attempt rape contrary to section 132(1)(2)(b) of the penal Code Cap 16 R.E 2019. It was alleged that the appellant on 16th day of November 2021 at Kilema area within the District of Moshi in Kilimanjaro region, the appellant being the uncle of one LR (in pseudonym) who is 13 years old did manifest his intention by dragging her in the toilet and undressed her clothes for sexual purposes. The appellant pleaded not guilty.

Consequently, to prove the case, the prosecution at the trial court paraded two witnesses whom were counter attacked by two defence

witnesses. Having considered their evidence the trial court found the appellant guilty for the offence charged, consequently convicted the appellant and proceeded to sentence him to serve 30 years imprisonment.

Being aggrieved with conviction and sentence the appellant has knocked the door this court this court by way of appeal basing on the following grounds;

1. That, the learned trial magistrate grossly erred both in law and fact in relying upon evidence of PW2 (prosecutrix) to convict the appellant, despite the same being taken in contravention of section 127(2) of the Tanzania Evidence Act, Cap 6 R.E 2019.

2. That the learned trial magistrate grossly erred both in law and fact in failing to note that, there were variation between the charge sheet and the evidence on record. Since, the charge sheet displays that, the alleged offence occurred at "Kilema area" while PW1 stated that she resides at "Posho Kilema" with her grandchild (PW2), and PW2 herself stated that, she is living at "Posho Village". Further the charge displays of the offence of attempt rape while the PW1 gave evidence in respect of attempt sodomizing. Therefore, the above shown variance rendered the charge to be fatally and incurably defective.

3. That, the learned trial magistrate grossly erred both in law and fact in failing to be scrupulous to note that, the prosecution witnesses (PW1 and PW2) gave very highly improbable evidence which was supposed to be approached with great caution as it demonstrates a manifest intention or desire to lie in order to achieve or attain a certain end. As PW1 testified that the appellant used to

rape children in the village. Therefore, this obvious connotes that there were grudges between the appellant and PW1 and PW2.

4. That the learned trial magistrate grossly erred both in law and in fact in convicting the appellant basing on weak, tenuous, contradictory, inconsistency, uncorroborated, incredible and wholly unreliable evidence from prosecution witness.

5. That, the learned trial magistrate grossly erred both in law and in fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt against the appellant and to the required standard by the law.

Before I proceed with the merit of these grounds, I find pertinent to recap facts gave rise to this appeal. The victim LR is living with her grandmother. It happened on 16/11/2022 LR's grandmother went to the funeral at Kimaroni village and left the victim alone at home. The accused person went to PW1 house and took the victim to the toilet and undress her under pant with intent to commit the offence, the victim shouted and the accused run away.

In his defence the accused person together with his witness alleged that the accused was not present at the material time and place stated above, because he also attended the funeral at Kilema.

When this appeal came for hearing before this court, the accused person was unrepresented while the respondent was represented by Ms Edith Msenga learned state attorney.

The appellant submitted in respect to first ground that, the evidence of the victim was taken in contradiction with section 127(2) of the evidence Act Cap 6 R.E 2019 (hereinafter "TEA"). That the victim was a child of tender age, she was below 14 years age, and the trial magistrate took her evidence as if the victim was an adult. He further argued that her evidence was taken under oath and without first satisfying whether the child understand the nature of oath or whether she knows the duty of speaking the truth. To buttress his argument cited the case of **Yusufu Molo vs Republic**, Criminal Appeal no. 343 of 2017 (Unreported).

The appellant also submitted that there was variance between the charge sheet and the evidence. The charge on particulars of offence said the offence was occurred on Kilema area while the prosecution evidence said the victim resides at Posho village. These are two different place and the trial magistrate failed to pay attention on it. Another discrepancy of the charge is, it shows that the accused was charged with offence of attempted

rape but the evidence of the prosecution narrated that the victim was about to be sodomized therefore it was not clear that the accused intended to rape or sodomize the victim. this variance makes the charge incurably defective. He cited the case of **Pastory Gervas vs Republic** (1978) LRT No.63. Hence, the appellant prays before this court to allowed the appeal, quash the conviction and set aside the sentence.

On reply Ms. Msenga learned State Attorney supported this appeal and submitted that, it is true that prosecution failed to prove the offence of attempt rape because the evidence failed to show the elements of the offence. She insisted for the offence of attempt rape contrary 132(1)(2)(b) of the Penal Code Cap.16 R.E.2019 "penal code" to sustain, the prosecution evidence could have explained that the act of the accused if was not intervened the offence of rape could have occurred. The evidence of prosecution on trial court reflects another offence like sexual abuse or sexual exploitation.

Further section 127(2) of TEA requires the child witness before narrating the evidence have to promise to say the truth and that promise must be recorded by the court. At the trial court the magistrate failed to

follow the requirements set in the case of **Wambura Kiginga vs Republic** Criminal Appeal No 301 of 2018. Also, the magistrate never tested the intelligence of the witness as stated in the case of **Shabani Lubalisa vs Republic,** Criminal Appeal No 88 of 2018 CAT. Furthermore, she said the prosecution failed to prove the age of the victim. It was only said the victim is 14 years but this alone is not enough it must be accompanied with evidence.

Having going through the submission of both sides and the records of the trial court, I wish to respond starting with the second ground of appeal as follows.

In this ground of appeal, the appellant alleged that there was a variation between the charge and the evidence adduced. The charge constitutes the offence of attempt rape contrary to section 132(1)(2)(b) of the Penal Code Cap 16 R.E 2019. While the evidence shows the accused tried to sodomize the victim. Precisely PW2 said on her evidence that, the appellant held her and took her to the toilet, and wanted to sodomize her.

In my view, attempt to sodomize a person does not relate with an attempt of rape c/s 132(1)(2)(b) of the penal code. According to section

132(1) of the penal code the offence of attempted rape occurred when a mission of conducting rape failed. For the evidence of prosecutrix saying that the victim wanted to be sodomized does not amount to the offence of rape. The prosecution had duty bound to prove the offence of attempted rape and not otherwise. What was evidenced in the trial make the charge at variance between the offence charged and the evidence adduced.

For above I am persuaded by the case of **Sultan Omary Kipenzi & 6 Others vs Republic** [2018] TZHC 2431 (TANZLII) when this court, addressing on content of a charge sheet and evidence tendered had this to say:

> *"It must be underscored that the complaint is which lays the foundation of a formal charge. Subsequently, the entire evidence paraded by the prosecution must in its totality point to the guilt of the accused person beyond reasonable doubt. Where the evidence is not in support of the charge that clouds the prosecution case with a doubt and the benefit must be given to the accused person"*

In view of the above variance shown ought for the prosecution to amend the charge upon noting above, continuing with the case under the said circumstances renders the non-proving of the charge and is not curable under section 388 of CPA. Therefore, I am settled the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard.

Back to the first ground of appeal, the appellant alleged that the evidence of the victim was taken in contradiction with section 127(2) of the evidence Act. I have scanned the charge; it shows the victim is aged 13 years and the evidence shows the victim on commission of the offence she was aged 13 years hence it is undisputable that the victim is a child of tender age basing on the meaning portrayed under section 127(4) of TEA.

The question now is whether the evidence of the victim complied with section 127(2) of Evidence Act. The records at page 12 of proceedings shows that,

> *"**PW2:** Lilian Rashidi, 12 years, Form one, Christian and promised to speak truth.*
>
> ***Court:** the child promised to speak truth.*
>
> *Sgd: N.E. Mwerinde-PRM*

30/9/2022

PW2: *Lilian Rashidi, 14 years, sworn and states."*

Now, the issue is whether the trial court observed the law by above doing. According to Section 127(2) of the TEA provides as that;

> *"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."*

The above law was recently interpreted by the court in **Omary Awami vs. Republic** Criminal Appeal No.335 of 2019 Court of Appeal of Tanzania at Moshi which 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 added]

In view of the above, the learned Senior Resident Magistrate was duty bound to examine the child witness as to whether she understand the meaning of oath. If the child shows to understand the meaning of oath, then her evidence be taken under oath. And if does not understand the oath she could have testified without oath but promise to tell the truth.

According to the above, the Trial Magistrate mixed the procedure in taking the evidence of the PW2, as shown above, first she promised to tell the truth and later she swears and narrate her evidence. The records formerly show the child promised to speak the truth. But the records are silent on how the Magistrate took a promise of the child to speak the truth. Later on, the records shows that the child sworn and adduce her evidence. but the records are also silent as to how he shifted to take the evidence of the child under oath. Either the records are silent that the child was tested to see whether she understand the nature of oath.

In the case of **Wambura Kiginga vs Republic,** Criminal Appeal No 301 of 2018 the court held that;

> *"This court has interpreted the section to mean that, a child tender age, which means a child of an apparent age of not more than 14 years provided under section 127(4) of the Evidence Act, may legally give evidence if one of the two conditions is fulfilled. One, if before testifying the child swears or affirms; and two, if he/she promises to tell the truth and not lies in the course of giving evidence. accordingly, if none of the two conditions is fulfilled and the evidence of the child is taken, such evidence is deemed to have no evidential value and must be expunged from record."*

For the foregoing above, I am settled the first ground of appeal is answered in affirmative, that the trial court did not adhere to the requirements of section 127 (2) of the Evidence Act. Failure to comply with that provision renders the evidence of the child worthless and expunged from the records, which I hereby do.

Now, having expunged the above evidence of child, the next question I should ask in this matter is whether the remaining evidence can prove the

offence charged. In my view they are not but continue to slay respondent case.

I also agree with Ms. Msenga learned State Attorney when she alleged that the aged of the victim was not proved, according to the charge sheet shows she was aged 13 years, PW1 her grandmother said is 14 years. In my view this discrepancy, created doubts as to the correct age of the victims and therefore making the case being proved below the standard put by the law of beyond reasonable doubt. (See **Arap Kalil vs Reginam** [1959] EA 92).

In the circumstances, from the above analysis, I am fully satisfied that conclude the prosecution failed to prove their case beyond reasonable doubt and I take this to be advantageous to the appellant. Consequently, I proceed to quash the appellant conviction and set aside the sentence imposed by the trial court. I thus allow this appeal accordingly. The appellant should be released from custody forthwith, unless held for other lawful cause.

It is so ordered.

DATED and delivered at **MOSHI** this 10th day of October 2023.

X

JUDGE
Signed by: A. P. KILIMI

Court: - Judgment delivered today on 10/10/2023 in the presence of Ms. Edith Msenga learned State Attorney and Appellant also present.

Sgd: A. P. KILIMI
JUDGE
10/10/2023