UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

CRIMINAL APPEAL NO. 42 OF 2023

(Arising from Criminal Case No. 240 of 2017; In the Resident Magistrate's Court of Morogoro, at Morogoro)

BETWEEN

SELEMANI BAKARI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last hearing: 9/10/2023

Date of Judgement: 23/10/2023

M.J. CHABA, J.

The Appellant, SELEMANI BAKARI was arraigned at the Resident Magistrate's Court of Morogoro, at Morogoro for the offence of rape contrary to sections 130 (1) & (2) and 131 (1) of the Penal Code, [CAP. 16 R. E. 2002], now [R. E. 2022].

The particulars of the offence are to the effect that, on 6th September, 2017 the accused / appellant at Lusanga Village within Mvomero District in Morogoro Region had carnal knowledge of one "SM" (her names withheld), the victim or PW1, a girl of 14 years old.

At the hearing of the appeal, the prosecution paraded a total of five (5) witnesses and tendered three exhibits to prove their case. On the other hand, the appellant (the only witness on defence) who featured as DW1, fended for himself. At the height of full trial, the learned trial Magistrate, Hon. M. J. Bankika, PRM having been convinced that the prosecution had proved their case beyond reasonable doubt, he proceeded to convict the appellant as charged and sentenced him to serve thirty (30) years imprisonment.

Dissatisfied with both conviction and sentence, the appellant preferred the instant appeal on the following grounds of appeal:

1. That, the learned trial Magistrate erred in law in holding to sworn evidence of the victim (a child of tender age) procured in violation of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016 as there was no finding on record to show whether PW1 understood the nature of oath.
2. That, the learned trial magistrate grossly erred in failing to assess the validity of the caution statement Exhibit P3 whereby PW4 who recorded the same had previously recorded complaints statement, hence impartial and could not be objective witness.
3. That, the learned trial magistrate grossly erred in holding to PF3 (Exhibit P1) admitted un-procedurally whereby its contents were not read in court loudly.
4. That, the learned trial magistrate erred in law and fact basing the appellant's conviction on prosecution evidence while failed to consider the defence evidence contrary to the procedure of law.

5. That, the learned trial magistrate erred in law in holding on the discredited oral evidence presented by PW2, PW4 and PW5 which was contradictory, incredible and with material inconsistencies whose stories failed to corroborate PW1's story whether on 06/09/2017 she was raped by the appellant.
6. That, the learned trial magistrate erred in holding on the contradictions evidence of PW1 and PW2 whether the appellant was neighbor with them and known each other.
7. That, the learned trial magistrate erred in law by failure to observe that caution statement (Exhibit P3) was irregularly admitted in evidence as PW5 was not summoned and allowed to tender the same as an exhibit contrary to the law.
8. That, the learned trial magistrate erred in law and fact by disregarding the evidence adduced by PW3 who examined PW1.
9. That, the learned trial magistrate erred in law by failure to resolve the material discrepancy and inconsistence on the evidence of PW2 and PW3 on whether PW1 was examined on 08/09/2017 or 11/09/2019, hence renders PW2's and PW3's testimonies unbelievable.
10. The learned trial magistrate erred in law by holding that the prosecution proves its case against the appellant beyond reasonable doubt as charged.

Based on the above grounds of appeal, the appellant is now asking this Honorable Court to allow his appeal, quash conviction and set aside the sentence meted out on him and acquit him.

When the appeal was called on for hearing on 09/10/2023, the appellant appeared in person, and unrepresented whereas the Respondent / Republic enjoyed the legal services of Mr. Josberth Kitale, learned State Attorney.

When the appellant was invited to argue his appeal, he merely urged the court to adopt his grounds listed in the petition of appeal and prayed the court to consider them accordingly, and set him free.

Responding to the appellant's submission, Mr. Kitale right away acceded to the appellant's appeal. Essentially, his submission based on the first ground only. Thus, he went on highlighting that, the appellant's complaint is that the Hon. trial magistrate erred in law when he relied on the evidence of the victim who did not understand the nature of an oath. He averred that, looking on page 8 of the typed proceedings of the trial court, the court proceeded to record the testimony of the witness whose age is below 14 years old. However, the trial court did not ask the child any question as it was underscored by the Court of Appeal of Tanzania (the CAT) in the case of **Geofrey Wilson Vs. The Republic**, Criminal Appeal No. 168 of 2018 (unreported), where it was held that, it was contrary to the provision of section 127 (1) and (2) of the Evidence Act [CAP. 6 R. E. 2022] for the trial court to receive the evidence of the child whose age is below fourteen years.

Mr. Kitale submitted that, since the provision of section 127 (1) and (2) of the Evidence Act (supra) was not complied with, it means that such piece of evidence has no evidential value and the remedy thereof is to expunge it from the court record. He goes on stating that, the CAT in the case of **Godfrey**

Wilson (supra) interpreted the provision of section 127 (6) of the Evidence Act (supra) at page 15 of judgment and stated that, there must be a clear assessment of the victim's credibility on record and second, the court must record the reasons notwithstanding that non-compliance with the provision of section 127 (2) of the Evidence Act, a person of tender age still told the court the truth. He said, the CAT insisted that the conditions mentioned that case must be complied with.

It was the learned State Attorney's submission that, the assessment of the evidence should be clearly obtained into the court records as provided under section 212 of the Criminal Procedure Act, [CAP. 20 R.E. 2022] (the CPA). He emphasised that, the remarks were expected to be seen on record in evidence when the victim ended to testify. He said, failure to comply with the provision of section 212 of the CPA, it means that this court is precluded from seeking refuge under section 127 (6) of the Evidence Act due to the conditions set out in the case of **Wambura Kiginga Vs. The Republic**, Criminal Appeal No. 301 of 2018 (unreported).

Mr. Kitale underlined that, the only question which needs consideration, determination and decision thereon is whether or not, the evidence that have remained on the record, suffices to sustain conviction of the appellant. In his opinion however, the State Attorney was of the view that, the remaining testimonies are too weak to ground conviction of the appellant. He therefore prayed the court to find the appellant not guilty of the offence he stands charged and set him free.

By way of rejoinder, the appellant had nothing useful to add other than praying the court to find him not guilty of the offence and release him from prison.

Having summarised the uncontroverted arguments and upon considering the grounds of appeal in line with the trial court records and submission made by the State Attorney, it is now my turn to deal with the present appeal on merits. Although I have in mind that, the Respondent / Republic did not seek to challenge the appellant's appeal, but I am mindful that this court being the first appellate court, is duty bound to re-evaluate the entire evidence on record by reading together and subject the same to critical scrutiny. This position was enunciated in the case of **Faki Said Mtanda Vs. Republic (Criminal Appeal 249 of 2014) [2019] TZCA 126 (12 April 2019)** (extracted from www.tanzlii.org), where the CAT quoted with approval the decision of the defunct East African Court of Appeal in the case of **R. D. Pandya Vs. Republic [1957] E.A 336,** observed that: -

> *"It is a salutary principle of law that a first appeal is in the form re-hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion".*

In another case of **Siza Patrice Vs. Republic,** Criminal Appeal No. 19 of 2010, the CAT held that:

"We understand that it is a settled law that the first appeal is in the form of re hearing. The first appellate court has a duty to reevaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary."

Upon highlighting the guiding principle, I now turn to the matter under consideration. As hinted above, the State Attorney right away supported this appeal based on the first ground of appeal only, that is non-compliance with the provision of section 127 (2) of the Evidence Act. For ease of reference, the law provides 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 provision of the law was clearly interpreted by the Apex Court of our land in the case of **Geoffrey Wilson** (supra), where the Court clearly expressed the import of the above section when it uttered that:

"In that case we went ahead and observed that the plain meaning of the provisions of sub-section (2) of section 127 of the Evidence Act is that, a child of tender age may give evidence after ***taking oath or making affirmation*** *or without oath or affirmation.* ***This is because the section***

is couched in permissive terms as regards the manner in which a child witness may give evidence.

[Emphasis is added].

In the instant appeal, it is undisputable fact that at the time of giving her evidence, "SM" was a child aged fourteen (14) years and thus a child of tender age as provided under section 127 (4) of the Evidence Act. Again, it is also undisputable fact, as correctly submitted by the learned State Attorney that, although the trial magistrate stated that the evidence of "SM" was taken and recorded under oath, but in reality, the record is silent on how the trial magistrate reached to his conclusion. For better understanding, I wish to reproduce what transpired on 14th day of December, 2017 when the victim was called on to testify in court as reflected on page 8 of the typed trial court proceedings:

"PW1 "SM", 14 years a Zigua, of Turian Chakwanga village a Muslim she possesses sufficient intelligence and knowledge affirmed and states:

From the above excerpt of the trial court proceedings, no doubt that the court did not satisfy itself as to whether the child understand the importance of speaking the truth or meaning of oath. In the case of **Seleman Moses Sotel Vs. Republic**, Criminal Appeal No. 385 of 2018 (unreported), the CAT while accepting credence of the evidence of a child of tender age, was of the view

that, the child understands the nature of oath and that the trial court satisfy itself that a child knows the meaning of oath and it was on record. But in this case, as shown and quoted above, the trial court acted in the opposite and contrary to the law.

Moreover, the interpretation of section 127 (2) is to the effect that, the court must test whether the witness is competent to testify under oath or not. This can only be done by the court by imposing some questions to the witness as it was expounded by the CAT in the case of **Geoffrey Wilson Vs. Republic** (supra) where the Court laid some principles to the effect that:

> *"We think the trial Magistrate or Judge can ask the witness of 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." [Bold is mine].*

In this appeal, the learned trial magistrate did not bother to comply with the above principle when he take and recorded the testimony of the victim which vitiates her testimony. Failure to impose some questions to the victim as stated herein above, implies that the assessment of the credibility of the evidence of

the victim was not effectively done. The wording of section 127 (6) of the Evidence Act are clear on this point. It read:

> *"Section 127 (1) - NA*
>
> *(2) NA*
>
> *(3) NA*
>
> *(4) NA*
>
> *(5) NA*
>
> *(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings,* ***the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.*** *[Bold is mine].*

Reading the above provision of the law in line with the trial court record, it can be easily observed that this is a clear violation of the provision of section 127 (2) of the Evidence Act. As such, I full appreciate and agree with the

submission made by the State Attorney that the evidence of "SM" have no evidential value and the same ought to be expunged from the record, as I hereby do.

Further, Mr. Kitale linked his submission with the provision of section 212 of the CPA. With all due respect to the State Attorney, I think in my opinion, this provision of the law was misapplied in the circumstance of this case. Section 212 of the CPA read:

> *"When a magistrate has recorded the evidence of a witnesses, he shall also record such remarks, if any, as he thinks material respecting the demeanour of the witness whilst under examination".*

The above section of the law was well interpreted in the case of **Michael s/o Joseph Vs. Republic (Criminal Appeal 506 of 2016) [2019] TZCA 475 (12 December 2019)** (extracted from www.tanzlii.org), wherein the Court held *inter-alia* that:

> *"..... But before we do that, we wish to point out one more irregularity evident in the judgment of the trial magistrate. We have bolded part of the extract of the judgment to show that the trial magistrate, for the first time, introduced and made a remark of the appellant's demeanour which remark is no-where to be found in the proceedings. This is contrary to the dictates of section 212 of the CPA that requires for*

the trial magistrate to record the demeanour of a witness at the time when he was recording the evidence of that witness whilst still under examination. Since the remark was made during the composition of the judgment then it was a complete misapprehension and violation of the dictates of the law and it leads to the miscarriage of justice to the appellant....".

The above provision of the law requires, where necessary, a trial magistrate or judge has to enter written notes of his observations on the demeanour of a witness. The remarks under section 127 of the Evidence Act (supra) are for the purposes of ascertaining whether a child of tender age understands the nature of oath or importance of telling truth and not lies, and the relevant questions to arrive at that conclusion are also posed to the child before tendering his or her evidence to the court. That being the position, section 212 of the CPA referred to this court by the State Attorney is inapplicable in the circumstance of this case.

Before I conclude, my observation is that upon expunging the evidence of the victim (PW1) from the record, the rest of evidence are hearsay which is not admissible in court. The only available evidence indicating that the victim ("SM") was raped by the appellant is that of PW2 and PW3 (the doctor). The evidence of PW4, the police officer shows that he met the appellant and the victim at the police station and PW5 (Polisi Jamii). As the law stands, it is now settled that, the best evidence in cases of this nature comes from the victim and not

otherwise. See the cases of **Selemani Makumba Vs. Republic [2006] T. L. R 379, Shani Chamwela Suleiman Vs. Republic**, Criminal Appeal 481 of 2021 (unreported) and **Mohamed Said Vs. The Republic**, Criminal Appeal No. 145 of 2017 (unreported). On reviewing the evidence adduced by the PW2, PW3, PW4 and PW5 I have found that the same have no evidential value and so cannot hold water.

In the final analysis, and on the basis of my findings and observation that I have endeavoured to demonstrate herein above, it is my holding that this appeal has merit and it is hereby allowed. I therefore nullify the judgment of the trial court and the entire proceedings and proceed to quash and set aside together with the conviction and sentence meted out on the appellant. I order immediate release of the appellant unless otherwise he is lawfully held in prison. It is so ordered.

DATED at **MOROGORO** this 23rd day of October, 2023.

THE HIGH COURT OF TANZANIA

M. J. Chaba

JUDGE

23/10/2023

Court:

Judgement delivered under my hand and the Seal of the Court in Chamber's this 23rd day of October, 2023 in the presence of the Ms. Daria, learned State Attorney who entered appearance for the Respondent / Republic and in absence of the Appellant.

L. B. LYAKINANA

AG. DEPUTY REGISTRAR

23/10/2023

Court:

Rights of the parties to appeal to the CAT, is fully explained.

B. LYAKINANA

AG. DEPUTY REGISTRAR

23/10/2023