IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

CRIMINAL APPEAL No. 127 OF 2023

(Originating from, the District Court of Chunya at Chunya in Criminal Case No. 170 of 2021)

GEORGE JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

25th & 31st October, 2023

MPAZE, J.:

On 1st March, 2023 the appellant George Joseph, was convicted of the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code [Cap 16 R.E. 2019, now R.E. 2022] *(the Code)* in Criminal Case No. 170 of Chunya District Court at Chunya (*the trial court*). He was sentenced to thirty (30) years imprisonment.

It was alleged that on 28th September 2021, at Godima village within Chunya district, the appellant was accused of having carnal knowledge of PW1 the victim (PW1). Out of the three witnesses who testified in support of the prosecution case namely; the victim (PW1), (name withheld to protect her identity) Frank Andogonile (PW2), a

medical doctor who examined PW1 and PW3 (Ngao Ngole), the victim's father. The prosecution case can be briefly summarized as follows;

On the fateful day when PW1 was asleep with her siblings at around 01:00hrs, (midnight) she noticed somebody on top of her. The said person inserted his penis into her vagina. She felt pain as a result. She raised an alarm and her father (PW3) came to the rescue. Unfortunately, the accused person managed to run away on the arrival of PW3 in the sitting room. PW1 was unable to recognize the assailant's face that night until the next morning.

PW3, with the aid of solar energy that was illuminating the area, managed to see the accused person who was in his efforts to run away from the sitting room to outside. PW3 chased him and managed to arrest him outside his premises. It was PW3 who told PW1 that it was the accused person who raped her that fateful night.

When the accused person was arrested, he was taken to the village office. That was with the help of the neighbours. The victim was taken to the police station where she was issued with PF3 (Exhibit P1) and then taken to Chunya District Hospital for medical examination and treatment.

At the hospital, the victim was examined by PW2. PW2 observed that the anus was intact, but there was whitish dust (*sic*), bruises and

reddish on the vagina labia majora and that the victim's hymen was not perorated. He concluded that there was no penetration.

In his defence, the appellant disassociated himself with the allegations. He denied the charge. After a full trial, the trial court reached its decision, the subject of this appeal.

Consequent to that decision, the appellant was dissatisfied with both the conviction and the sentence. He has now come before this court, by way of appeal, which includes six grounds. However, the grounds can be boiled into two major complaints,

(1) There are procedural flaws in taking the evidence of PW1.

(2) The offence of rape was not proved beyond a reasonable doubt.

Mr. Deusidedit Rwegira, the learned State Attorney, who appeared for the respondent, supported the appeal when the matter was called on for hearing whereas the appellant appeared in person, unrepresented.

The appellant, in support of the appeal, asked this court to adopt his grounds of appeal as listed in his petition of appeal he went on to urge the court to overturn the trial court's decision. He told this court that the evidence of PW1 and PW3, who were family members was incredible and

that it ought to be taken with caution, to him the evidence was incapable of proving the offence of rape beyond reasonable doubt. He faulted the procedure that was adopted in taking the testimony of PW1. He informed the court that PW1 took an oath without being questioned regarding her understanding of the nature of the oath.

It was a further submission by the appellant that some material witnesses were not called to prove the prosecution case. To him, a witness who would appeared to prove his arrest, a police officer who issued the PF3, the investigator of the case and the Village Executive Officer were material witnesses.

The appellant added that the trial court failed to evaluate and analyze the evidence of the doctor who appeared and testified that upon examination of PW1 he observed there was no penetration. He was of the view that if the said evidence would have been examined and analyzed carefully, the trial court would have found that the offence of rape was not proved.

Lastly, he faulted the trial court for failure to recognize his defence. As such, he prayed for his appeal to be allowed and be set free from custody.

In his brief but detailed reply, Mr. Rwegira supported the appeal, that the case against the appellant was not proved beyond a reasonable doubt for the following reasons;

In this case, penetration, a crucial element in the present charge of rape, was not proved as Exhibit P1 and PW2 say the opposite. Further to that, PW2 offers two contradictory testimonies. During examination-in-chief, he told the trial court that there was no penetration but when he was under cross-examination, he was positive that there was penetration. Mr Rwegira finds the inconsistency as fatal as it goes to the root of the case.

While highlighting the principle that the best evidence of rape should come from the victim herself and that evidence should be specific and state clearly what has transpired, he said the evidence of PW1 falls short of that. He told the court that, on page 11 of the typed court proceedings shows that PW1 did not state clearly what happened to her on that material date. She just said that she felt pain. That evidence does not feature in Exhibit P1.

Mr. Rwegira was convinced that the appearance of the investigator as a witness was crucial to testify about how the appellant was arrested

and his findings during the investigation. Through his appearance and testimony, the said investigator would have cleared some of the doubts in this case.

In support of the appeal, Mr. Rwegira was of the opinion that the offence of rape was not proved beyond a reasonable doubt. However, on the way forward, he left the court to decide.

In his brief rejoinder, the appellant had nothing useful to add, he just insisted this court consider his grounds of appeal and allow the same.

After considering the respective submissions by the parties and evidence on record, the following is the finding of this court. First, in cases where there is a misdirection and non-direction in the evidence or the lower court has misapprehended the substance, nature and quality of the evidence, this court, being the first appellate court, is entitled to look at the evidence and make its own findings of fact. (See, the case of **Deemay Daati and 2 Others v. Republic**, Criminal Appeal No. 80 of 1994, Court of Appeal of Tanzania at Arusha, (Unreported) where the Court went on stating further that: -

> *'In **Peters V. Sunday Post Ltd.** (1958) E.A. 424, the Court of Appeal for East Africa set out the principles in which an*

appellate court can act in appreciating and evaluating the evidence: Among other things, it was held: Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has gone wrong, the appellate court will not hesitate so to decide.'

Principally, in a criminal trial, the burden of proof always lies with the prosecution. The proof has to be beyond reasonable doubt. Further to that, the court is required by law to fairly and impartially consider any defence raised by the accused, however weak, foolish, unfounded or improbable, to vouch for a miscarriage of justice on the accused person.

It is enough to say that a person is not guilty of a criminal offence because his or her defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him or her which establishes his or her guilt beyond a reasonable doubt. (See the following cases; **Nathaniel Alphonce Mapunda & Benjamini Alphonce Mapunda v. Republic** (2006) TLR 395 (CA), **Oketh Okale v. Republic** (1955) EA 555, **Said Hemed v. Republic** (1987) TLR 117, **Mohamed Said Matula v.**

Republic [1995] TLR 3, Martin Swai v. Republic, Criminal Appeal No. 247 of 2013, Court of Appeal of Tanzania at Iringa (unreported) and **John s/o Makolobela Kulwa Makolobea and Etic Juma alias Tanganyika v. Republic** [2002] TLR 296.

It is common legal knowledge that for the offence of rape, according to section 130 (2) of the Code, to be established, there should be evidence of male organ/penis penetration, even the slightest, into a woman's vagina. If that is done to a girl/woman under eighteen (18) years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man, then consent is immaterial. That is called a statutory rape.

That is to say, the prosecution must establish both lacks of consent in case consent is crucial and penetration. See for instance the following cases; **Alfred Tedo v. Republic**, (2001) TLR 126, **Director of Public Prosecutions v. Jamal Waziri** [2003] TLR 324 and **Imani Charles Chimango v. Republic**, Criminal Appeal No. 382 of 2016, Court of Appeal of Tanzania at Mtwara (unreported).

It is my further observation that the legal tenet that was expounded in the case of **Selemani Makumba v. Republic** [2006] TLR 379 saves

as an authority in determining whether the charge of rape was proved or not. In that case, the Court of Appeal stated that: -

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in the case of any other women where consent is irrelevant there was penetration."*

In the present case, PW1 was aged 14 years old, as the fact was never disputed by the appellant during the trial. Besides that, there is ample evidence proving the same by PW3 the victim's father. That being a statutory rape, the prosecution had a burden of proving penetration and whether it was the appellant who raped the victim.

Before assessing the entire evidence on whether the charge was sufficiently proved, I will first assess whether the procedure on the admission of evidence of PW1 was flawed.

As I have indicated earlier, there is no dispute that the victim is under the age of 18, so her evidence ought to have been recorded in strict compliance with section 127 (2) of the Tanzania Evidence Act, Cap 6 R.E. 2019 (*the Act*), that requires a child of tender age to promise to tell the truth to the court before her evidence is taken The section reads;

'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'

Prior to this current position, a *voire dire* test ought to be conducted before the reception of the evidence of a tender age. The test aimed at testing the competence of a witness if she understands the nature of an oath and the duty of telling the truth, and if she possesses sufficient intelligence to justify the reception of her evidence. Compliance with these requirements must be recorded in the proceedings.

Conversely, following the amendment, what now the witness is required is just to make a promise of telling the truth, the issue is how to reach there. The case of **Godrfrey Wilson v. Republic, (**Criminal Appeal No. 168 of 2018), published on the website, www.tanzlii.org[2019]TZCA 109 stated;

'...The question however would be how to reach in that stage. We think the trial magistrate or a 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 understands the nature of oath.*
3. *Whether or not the child promises to tell the truth*

and not lies.

Thereafter, upon making the promise, such promise must be recorded before the evidence is taken.'

In another case of **Rashid Salehe Shaban v. Republic**, Criminal Appeal No. 163 of 2020 published www.tanzlii.org[2023]TZCA 17656, the Court said;

> *"...the trial court magistrate should have, before taking such evidence without oaths or affirmation, caused the child to promise to tell the truth and the word constituting the promise recorded."*

Again, in the case of **Mwalimu Jumanne v. Republic**, (Criminal Appeal No. 18 of 2019), published on the www.tanzlii.org[2021]TZCA 193

> *'We think even after doing away with the requirement of conducting a voire dire examination, trial magistrates retain the duty of assessing the witness of tender age before they allow them to testify with or without oath.'*

Guided by the cited authorities, it is clear that the trial court before taking the testimony of the child of tender age, should at least ask few questions so as to satisfy herself, as to whether or not the child witness understands the nature of oath. If he replies in affirmative then he or she can proceed to give evidence on oath or affirmation. If that child does not understand the nature of oath, he should before give evidence be required to promise to tell the truth and not to tell lies.

Was this procedure followed by the trial court before taking the evidence of PW1?

I have scanned the trial court proceeding both hands written and typed, when PW2 was called to testify on 7th February, 2022, this is what is reflected in the record;

PROSECUTION CASE HEARING OPENS

COURT IN CAMERA

*'**PW1:** Martha d/o Ngao, 14 years old, a standard 7 student, Godima primary school, Chunya. A Christian by faith.*

***Court**: I have addressed a witness PW1 in terms of section 127 (1) and (2) of the Evidence Act, Cap 6 R.E. 2019.*

***PW1:** I promise to tell the truth and nothing but the truth.*

Sgd. RM

7/2/2022

***Court**: Section 127 (1) and (2) of the Evidence Act (supra), complied with and PW1 shall testify under oath.*

Sgd. RM

7/2/2022

***Court:** PW1 sworn and stated as follows;'*

Indeed, I am left with no option but to agree with the appellant that the reception of the evidence of PW1 is tainted with gross procedural flaws. Immediately after PW1 promised to tell the truth and nothing but the truth her testimony should have been received. However, the

subsquent procedure was largely nonconformist. The records are silent on how the trial magistrate arrived to a conclusion that PW1 was required to testify under oath, despite having already promised to tell the truth.

The conclusion by the tial magistate to administer an oath to PW1 after she had promised to tell the truth was violative of section 127 (2) of the Act. Henceforth, the testimony of PW1 is hereby discounted as it is as good as no evidence at all in a criminal trial. The first leg of the appellant's appeal is thus found to have merit.

Is the remaining evidence adequate to support the charge against the appellant? Neither PW2 nor PW3 was able to establish penetration. Further, PW3 provided what appears to be hearsay evidence regarding what took place on the alleged date. Therefore, there is no evidence available to prove penetration.

From the foregoing discussion, I am settled in my mind that the remaining evidence, after discounting that of PW1, does neither irresistibly lead to the conclusion that PW1 was raped nor the culprit was the appellant. Confidently, the offence of rape, in this case, was not proved beyond reasonable doubt. Thus, the second ground of appeal has merits.

Given what I have discussed here above, I allow the appeal and proceed to quash the conviction and set aside the sentence imposed against the appellant. The appellant is to be released from prison forthwith unless he is otherwise lawfully detained.

It is so ordered.

Dated at **Mbeya** this 31st October, 2023.

M.B. MPAZE

JUDGE

Court: Judgment delivered in the presence of the appellant in person and Ms. Imelda Aliko learned state attorney this 31st day October, 2023.

Right of Appeal fully explained.

M.B. MPAZE

JUDGE

31/10/2023