IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 55 OF 2023

(Arising from the decision of the District Court of Kishapu at kishapu before Hon. J.P.Rwehabula SRM, dated 7th February 2023 in Criminal Case No. 174 of 2022)

ARON MAGUZU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

5th October & 17th November 2023

MASSAM, J.

In the District Court of Kishapu at kishapu (trial court), the appellant, one Aron maguzu was charged and convicted of the offence of rape c/s 130(1), (2)(e) of the Penal Code Cap 16 R.E.

Upon conviction, the trial court sentenced him to 30 years imprisonment. The prosecution alleged that, on 4th days of October 2022 at kidukilo village within kishapu District in Shinyanga region did had a carnal knowledge of the victim one NN (name withheld) a girl of 14 years.

A brief fact of the case was 5/10/2022 at around 18.oohrs the victim was on the way to home from school she met accused person/appellant who seduced her to have love relationship but she refused, accused person insisted to visit her in the evening hours. At 21.00hrs she went outside near the bush for a short call where she met the appellant who dragged her, removed his trouser and the victims under wear and inserted his penis into her vagina.

She cried for help but the appellant stopped her by covering her mouth with his palm of his hand. Her phone which she was carrying had a light which helped to identify him. Also the act of rape lasted for almost 10 minutes, and that the appellant is familiar to her. When the appellant was continuing having sexual intercourse her mother came and the appellant did run away.

She narrated to her mother what happened and her mother went to report the matter to the ten cell leader and police station and she was taken to hospital for medical checkup and found her vagina with multiple abrasion and rush ration, her vagina was reddish this proved that she was penetrated. After the investigation the accused person was arrested, interrogated and on 11/10/20222 brought to the court. On the other hand,

the appellant entered his defense by denying committing the offence to the victim (PW1) but he admitted to be arrested and taken to the police station and connected with the offence of rape. He said that the said date at around 23.00hrs victim, her mother and brother went to his house and put him under arrest that he raped the victim who denied it. He was brought to court and denied the said charge too.

After the full trial the appellant was found guilty, convicted and sentenced to thirty years imprisonment.

Aggrieved by that decision, the Appellant preferred the instant appeal on six grounds which may be summarized as follows: **One**, it was wrong to enter conviction on the fabricated offence as it was not easy for a girl of 14 years to go out at that time of night (21.00hrs) to go to the bush for call of nature. **Two**, the court erred by its failure to consider that report of expert had no evidential value as it not discloses the necessary ingredient of rape. **Three,** the trial court erred in law and fact in holding that the appellant was positively identified on the scene of crime. **Four** the trial court proceedings vitiated with the serious irregularities such as summon a WEO to testify before the court which lead the miscarriage of justices**. Five** the

appellant was convicted on the weakness of his defense. **Six** the prosecution did not prove the charge beyond reasonable doubt.

When this appeal was called for hearing, the appellant appeared in person, unrepresented and Ms. Upendo Mwakimonga S/A, the learned State Attorney appeared for the respondent. The hearing of this appeal was done orally

Submitting in support of the appeal, the appellant argued all the grounds jointly. He stated that he prays this court to consider his grounds of appeal and left him free.

On his side, Ms. Upendo Mwakimonga told this court that in her side she did not support the appellant's appeal but she noticed that section 127(2) was not complied with when the evidence of the victim was recorded. She added that regardless of the said irregularities the evidence which brought by prosecution was heavy and strong to convict the appellant. Also she prayed that the evidence of the victim to be expunged. She added that after the same being expunged this court will remain with the evidence of PW2 and PW3. PW2 was the mother of the victim who testified that she knows the age of the victim as she was born on 20/6/2008. Again she said that on 5/10/2022 at 9.00pm she was inside

her house and PW1 went out to the bush for a short call but she took sometimes there so she decided to go out to look for her when she met her crying she asked her and she told her what happened at the bush, that he was raped by the appellant. PW1 in her evidence at page 16 of the court proceedings did prove her age and proof to had sexual intercourse with the appellant. PW3 did support the PW2's evidence by testifying that, on 7/10/2022 he was at work she received a patient PW1 she examined her and found some bruises in her vagina which was reddish that proof that she was penetrated. So because the PW1 evidence will be expunged she prayed the proceedings of the trial court to be nullified, conviction and sentence to be set aside and this court to order re trial.

In brief rejoinder, the appellant reiterated what he submitted in his submission in chief.

I have entirely gone through earnestly all the parties' submissions, authorities supplied and the available records. The issue for determination is **whether the appellant's appeal is meritorious.**

This court before attending appellant' s ground of appeal find it wise to attend the respondents submission which informed this court that the evidence of PW2 was not well recorded. In finding the same, I will start by

perusing the testimony of Pw2 which is in page 5 of court proceedings and see if it was recorded as per requirement of section 127(2) of TEA, as by looking to the evidence of which brought show that victim was 14 years old so she was a child of tender age so her evidence was required to be recorded as per Section 127(2) of Evidence Act 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".*

According to the said Section the court was required to conduct an inquiry to establish whether the witness was promising to say the truth before testifying or she knows the meaning of oath in order for her to swear or affirm before testifying.

By perusing to the page no 5 shows that the evidence of PW2 was recorded as of the adult nowhere shows that the witness is of the tender age who required to promise to say the truth or to tell the court that she knows the meaning of an oath.

This court is aware that this was a rape case and the case like this the best evidence comes from the victim as elaborated in the case of

Selemani Makumba vs, Republic, Criminal Appeal No. 94 of 1994 CAT, in this case insist that the victim of the offence is the one in a position to tell actually what happened at the scene of crime and by looking the same her evidence was not well recorded. This court is in support of the prayer prayed by the respondent that PW1 evidence to be expunged and it is hereby expunged and remain with the evidence of PW3 and Pw2. PW2 was the mother of PW1 who did not witness the commitment of the offence as she went to the scene and met the victim only crying she was just told by PW1 that she was raped and the one who raped her was the appellant, she went on and report the matter to the ten cell leader and later on to the police station. Another witness is PW3 who is the doctor who proved the age of the victim and to confirm that the said victim was penetrated but he knows nothing as to what victim was penetrated to and by whom.

It is common in criminal jurisprudence that in criminal matters the burden of proof always lies on the prosecution and it should be beyond reasonable doubt the said principle is clearly found in Section 3(2) of the Evidence Act Cap 6 R.E 2002.

In this case at hand the evidence of PW1 and PW2 does not testify as to whether they witnessed the commitment of the offence therefore this court is in view that their evidence was purely hearsay and it is contrary to the requirement of Section 62 (1) (a) of the Evidence Act, Cap 6 R.E 2019 provides that:

> "*1. Oral evidence must, in all cases whatever, be direct; that is to say—*
>
> *(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it*,"

By looking to the evidence of Pw2 and Pw3 as I said earlier no one said that she or he saw the commitment of the offence and the appellant was the one who committed the same and it is well know that whatever that is not direct is hearsay and thus the same is not admissible since direct evidence is the best evidence. See also the case of **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 (CAT-Unreported).

As it is clearly stated in the cited provision that oral evidence must in all cases be direct. Therefore, the evidence of PW2, and PW3 is indirect evidence, the same is required to be supported by other evidence

particularly the evidence of PW1 (the victim) and the same has already been expunged from the records. The same goes to the evidence of PW3 (the doctor) who only proved that the victim was penetrated but he was not aware as to who raped the victim. But this court has no objection and is in support of the respondents submission that the trial court proceedings was found with the procedural irregularities which the same required to be nullified as it is true that the trial court erred in recording the evidence of PW1 who was of the tender age without complying with section 127(2) of TEA and respondent prays for the re trial.

This court is aware of the circumstances on when the court to order re trial its when the trial was illegal or defective, the court cannot order re trial when the evidence was insufficient but when the conviction was vitiated by the mistake of the trial court for which the prosecution is not to blame, Also re retrial cannot be ordered for the purpose of enabling prosecution to fill up gaps in its evidence as well elaborated in the case of **Fatehali Manji v Republic** [1966]1E.A 343. In the present case the evidence of PW1 was not well recorded and that was the mistake which was done by the court the prosecution cannot be blamed on it, and nowhere this court find that re trial can enable prosecution to fill the gaps.

Therefore re trial order as prayed by the respondent can be appropriate in the circumstances like in this case.

In the event, on account of what I have explored to discuss herein above, this court is hereby quash the proceedings of the trial court, and set aside the sentence. It is ordered that, the appellant be tried de novo before another magistrate with competent jurisdiction. This appeal is allowed to the extent stated.

It is so ordered.

DATED and **DELIVERED** at **SHINYANGA** this 17th November, 2023.

R.B. Massam
JUDGE
17/11/2023