IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 178 OF 2023

(Appeal from the decision of the District Court of Ilala at Kinyerezi in Criminal Case No. 686 of 2021 dated 23rd June 2023 as per Hon.G.E.Nkwera, SRM)

JOHN FRANCIS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 23/10/2023
Date of Judgment: 06/11/ 2023

GONZI,J.;

In the District Court of Ilala District at Kinyerezi, the Appellant was arraigned on the 24th day of December 2021 and charged with one count of rape contrary to section 130(1)(2)(e) and Section 131(1)(3) of the Penal Code, Cap 16 of the Laws of Tanzania (RE 2019). The particulars of the offence alleged that on 26th day of November 2021 at Bombambili area within Ilala District in Dar es Salaam Region, the accused person (now the appellant) had carnal knowledge of one AAA a girl of 9 years old.

The Appellant denied the charge against him and on 18th January 2022 a Preliminary hearing was conducted in the trial Court so as to determine matters not in dispute. During the preliminary hearing, the Appellant denied most of the facts of the case read over to him except for personal particulars; his being arrested and charged; as well as the fact that on 26th November 2021 he was at Bombambili area within Ilala District in Dar es Salaam region.

The Prosecution opened their case and called 5 witnesses that is to say PW1 Elias Amon Bunduguru who is the father of the victim girl; PW 2 named by the pseudo name of AAA who is a 9-years girl and victim of the offence; PW3 Detective Sergeant Fulgence who was the Police Investigator in the case; PW 4 Lukaiya Omar who was a Medical Practitioner at Pugu Kajiungeni Dispensary; and PW 5 Jackline Herman Dugo a Nursery School Teacher in the premises of which the offence was committed. The prosecution also tendered in court two exhibits namely Exhibit P1 being the victim's Birth Certificate which was tendered by PW 1 and Exhibit P2 which was a PF3 prepared by a medical practitioner which was tendered by PW 4.

Upon closure of the prosecution case, the Court found that the Appellant (then accused) had a case to answer and therefore the Defence case opened after informing the accused his trial rights. The Defence called three witnesses being DW 1 the accused (now appellant); DW 2 Mussa Lucas- a tenant at the Appellant's house at Bombambili Kivule area; and DW 3 Penina Thomas Pius who is also a tenant at the Appellant's house at Bombambili Kivule area. No exhibit was tendered by the Defence side.

From the Proceedings of the trial Court, the prosecution case is brought into picture as follows: that the Appellant owns a piece of land at Bombambili area, Ilala District, Dar es Salaam Region where there are several adjoining buildings in one compound owned by the appellant. He makes mixed use of the compound for his own residence; rented out dwelling places for his tenants; premises for his church and classrooms leased for use as a nursery school. The Appellant is also a Christian Pastor heading his congregation called Nyota Njema Bombambili TAG Church which is also situated in his premises at Bombambili Nyota Njema, Kivule area, in Ilala District, Dar es Salaam Region.

The Appellant's rented out school buildings, are used as a Nursery school called AMBE Nursery School where PW 5 and other teachers run the

nursery school. The school is used for regular studies for nursery school pupils aged from 2 to 5 years old. But during holiday seasons, it is used as a tuition center for Primary school pupils as well. It is the case for prosecution that the victim was attending tuition classes at the AMBE Nursery School in the premises of the Appellant.

It was further the Prosecution's case that the victim and her parents were believers and followers of the Appellant's church for about one year and hence they all know each other whereby the Victim AAA used to call the Appellant, a 62 years old man, as "Babu" to mean grandfather. The Appellant having earlier divorced his wife, was living alone, in a self-contained single room building which had a bedroom and living room. His room was adjoining the church and the nursery school classrooms. The distance from the Appellant's house to the classrooms was described by PW 1 who said that he knows the place very well after having made several visits to the Appellant as his spiritual father. PW1 said that the distance is about 10 meters. The Appellant on the other hand said that the distance from his dwelling house to the classrooms is 2 steps. It is not disputed also that the Appellant's residential house has no ceiling board. Further that according to PW 1, the distance from PW1's house to that of

the Appellant is a 30-minutes walking distance. It was testified by PW1 that the parents of the victim had instructed the victim that whenever she goes to tuition studies, she should firstly go to greet the appellant as her grandfather and spiritual leader before going to class.

It was in this setting that, on the fateful date, the alleged offence of rape was committed by the Appellant over the victim girl child in the bedroom of the Appellant while the victim was attending tuition classes at AMBE Nursery School, Bombambili, Ilala District, Dar es Salaam.

It is the prosecution's case that the bombshell dropped on the 26th November 2021 at about 8:00 a.m when the victim arrived at the Appellant's place for tuition classes. That the victim entered the living room of the Appellant who greeted her and thereafter the Appellant gave her Ths.1000/=, held her hand and led her to his bedroom. Upon reaching the bedroom, the Appellant removed the victim's underwear by force, laid her on his bed facing upwards, removed his boxers, lied on top of her and had carnal knowledge of her until he ejaculated. The prosecution witnesses, in particular PW 5, stated that as there was loud volume from the TV set in the appellant's bedroom, the victim's cries during the sexual act were muffled and mistaken by her teachers, who were in the nearby classrooms,

to be a noise coming from the television. Therefore, they could not intervene. It was shown by the prosecution through the testimony of PW2 that (the victim), that after the sexual act, the victim went to a toilet located inside the Appellant's self-contained room and washed her private parts. PW 2 (the victim) testified that she saw on the bed of the Appellant some mucus which was watery in nature "kitu kinateleza kama mlenda". It was testified further that the victim then went to the classroom where she found a teacher teaching, she did not get in but returned to the house of the Appellant and threatened that she would tell her father of what had happened. The Appellant gave her Tshs.1000/= so that she could not tell her father of what had happened. The victim then went behind Appellant's car and was found there first by her teacher (PW 5) who inquired on what had happened. Upon being asked by PW 5, the victim narrated the rape incident to PW 5 saying that Babu John had raped her and had given her Tshs.1000/= for her not to tell her father of what had happened. PW 5 took the victim to the Headteacher where the Appellant joined them too. Later PW 5 was directed by the headteacher to examine the victim and hence PW5 told PW 2 to remove her underwear and insert her (the victim's) fingers into her vagina for self-inspection and that her finger came

out with blood. At that juncture PW 5 told the victim to provide mobile phone numbers of her parents and go back to class.

The victim's father (PW1) allegedly was called directly by the Appellant himself via his phone, according to the testimony of PW5. According to the testimony of PW1 himself, he was called by the Appellant but not directly; rather through the mobile phone of PW1's wife who is also the mother of PW 2 . PW 1 was at home that day and at 10:00 a.m. PW1 arrived at the school and took PW2 to Mazizini Police station where the duo were given a PF 3 and proceeded to the dispensary at Pugu Kajiungeni where on the same day that is 26th November 2021, PW 4 -a medical practitioner, examined the victim child in her private parts and found bruises and lack of hymen in her vagina which were indicative of vaginal penetration by a blunt object. PW 4 also stated that she had found in PW2's vagina white mucus "ute mweupe". In the PF 3, PW 4 wrote that the symptoms suggested penetration of the victim's vagina by a blunt object. PW 3, the Police Investigator testified that he was assigned to investigate the case on 29th November 2021 whereupon he interrogated the appellant, the victim, the teacher (PW 5) and one member of the peoples' militia at the school at Bombambili but who was not called as a witness. PW3 testified that despite

recording the statement of the Appellant at the Police Station, the recorded statement of the appellant was not tendered by the Prosecution as evidence in Court.

Upon conclusion of the Prosecution's case, the Court found the appellant with a case to another. The Defence side testified firstly through DW1 who is the appellant himself. DW 1 testified to the effect that essentially the entire case is fabricated against him due to his enmity with his ex-wife who has joined forces with the father and mother of PW 2 against him. The said mother of PW 2 did not testify in the trial while her father testified as PW1. The Appellant narrated that just two days before the incident of the alleged rape, at 23:00 hrs, PW2's mother had gone to his house at Bombambili and knocked on the Appellant's door. The Appellant upon seeing the mother of the victim knocking repeatedly at his door, did not open the door but firstly decided to take precautionary measures by looking out through the window where at a near distance he saw that the victim's mother was not alone; rather her husband namely PW1 was standing at a short distance away with two motorcycles. The appellant stated that he ran away from his house to hide in the bananas farm nearby. The Appellant testified further that he saw PW2's mother and PW1 (the victim's father) and other persons

enter his house and take away his shirt and mobile phone. The Appellant testified that he had reported this incident of unwelcomed visitation and the taking of his properties, to Sitaki Shari Police station where he was given an RB. At pages 37 and 38 of the proceedings the Appellant's narrative of the alleged dispute with his ex-wife who allegedly had teamed-up with the father and mother of the victim (PW 2), is explained in detail thus:

> ***"They started with the case of divorce, mifugo (livestock) and opened this case. It is a cooked case, even the Head Teacher wanted to come to testify the truth of this case...my wife robbed (sic) my bag which was having the title deeds, IDs etc...I was not in conflict with AAA, but her parents... all these are my ex-wife's arrangements. I saw AAA's mother and father two days before the material date. I was in conflict with them because of my ex-wife. I have an RB here with me. The RB was given from Sitakishari Police. If you go to Sitaki Shari Police you will confirm. They wanted to harm me that is why they came at my place at 23:00pm (sic)....I opened the case, I am waiting for this to end so that I went (sic) to attend the case I opened. The conflicts between me and my wife started in 2019".***

The Appellant concluded that on 26th November 2021 there were several people at his home namely his daughter Christina John Francis; his tenant Mpesa and his wife; the Head Teacher and about 50 students. The Appellant concluded that it was not possible for him to commit the alleged rape without being seen by all those people, given that his house was only 2 steps from the classroom and it had no ceiling boards. He testified that all that happened on the material day was that in the morning he went to the Head Teacher of the Nursery school to claim his rent and thereafter he left for a birthday party at his in-law's place. He denied to have raped the victim and further that he was not the one who notified the victim's father (PW 1) of the alleged rape of her daughter.

DW 2 Mussa Lucas testified as per page 41 of the proceedings that he was a tenant in the house of the Appellant. He testified that on 26th November 2021 at 8:00 a.m he was inside the living room of the appellant and that they were talking as it was DW2's daily routine to go to the Appellant's house every morning and have talks with him. He testified that while he was still there, PW2 a grand-daughter of the Appellant, entered and asked for drinking water. That PW 2 was given the water, drank it and went to class within two minutes since she had entered the house of the Appellant.

I reproduce verbatim the rest of the testimony of DW 2 as per the proceedings of the trial court that:

> ***"The complainant and the Accused were close and they worship at the same church. They came to a conflict when the complainant interfered the marriage conflict between the accused and his wife. I remember one day mama AAA came and was calling the accused person. I heard the voice of AAA's mother and after that, accused came and told me that they took his phone and some of his properties. Accused went to report this issue at Police. I did not evidence rape on that date and I was at the accused's house."***

DW3 testified as it can be seen at page 45 of the trial Court's proceedings which I reproduce verbatim, that:

> ***"On this day at around 8:30am I was at the house carrying on with my house activities. She came a woman, she is our fellow believer, she came to ask for music instruments, pastor John agreed and asked us to help him pack the instruments so that to take them to that woman. We were 4 in numbers, two believers and my fellow tenant. She came one student AAA and asked for drinking water from the accused person. The accused was sitting in his living room and he was talking to my fellow tenant.***

After she finished drinking water, she went to the classroom. AAA's father came with a crowd of people and he told us that AAA was raped with Mzee John (accused). These accusations are not true, I did not evidence this act and I was there all that time. The door was opened and the accused was with another person inside his living room. AAA entered inside to drink water, she took less than 2 minutes."

After the closure of the defence case, the trial Court proceeded to deliver its Judgment where it summed the evidence for both sides, raised a single issue for determination and made analysis of the prosecution evidence on how it was sufficient and had proved the two elements of statutory rape namely proof of penetration and proof that the victim was below 18 years old. At page 10 of the Judgment, the trial Court concluded that the prosecution had proved its case beyond any reasonable doubt. At page 11 of the Judgment, the trial Court made reference to the Defence evidence in the case thus:

"I also made due consideration of the accused person's evidence who denied the allegation against him. Since the duty of the defence is only to raise doubts, I have considered the evidence as part of the totality of the whole evidence presented in court and I am satisfied that

defence of the accused person does not hold water in presence of strong evidence of the prosecution. All said, the prosecution side has managed to prove the offence of rape beyond reasonable doubt".

After convicting the appellant, the trial Court gave chances to the prosecution for aggravating factors or previous records, if any. There was none. For mitigating factors, the appellant pleaded leniency in sentencing in the following words:

"I do pray for leniency of the court as I am a Pastor, and I never committed this offence. It is a conspiracy of my ex-wife whom we divorced, to take my property. That is all"

The trial Court passed a sentence of 30 years imprisonment against the Appellant. The appellant being aggrieved with both conviction and sentence, has lodged the present appeal before the High Court against the conviction and sentence imposed on him by the District court. The appellant in his memorandum of appeal raised 5 grounds of appeal attacking the following areas of the judgment namely:

1. That the evidence of PW2 (Victim) was illegally and unprocedurally received.
2. That the testimonies of PW 1, PW2 and PW5 were contradictory.

3. That the defence evidence was neither evaluated nor analysed before conclusion.
4. That the Prosecution did not give plausible explanation why the Appellant was not arrested on the spot but until after 3 days.
5. That the Prosecution did not prove its case beyond reasonable doubt as per section 3(2)(a), 110(1)(2) of the Evidence Act Cap 6 of the Laws of Tanzania.

The Appellant therefore prayed for this honourable court to quash the appellant's conviction, set aside the sentence and release him from prison.

When the appeal came for hearing, the parties were directed to argue it by way of written submissions and were given a schedule of filing their respective submissions. The parties complied with the schedule. The Appellant was unrepresented while Ms Rose Makupa learned State Attorney represented the Respondent Republic. I commend both sides for advancing timely good arguments, and substantiating them with relevant authorities.

In the Appellant's written submissions, he opted to cluster his arguments into three major categories thereby combining some of the grounds of appeal. The first category was on improper reception of evidence of PW 2. The second category of appellant's written submissions was in respect of failure by the prosecution to prove their case beyond any reasonable

doubt. The third category of appellant's submissions was on the defence evidence not being analysed objectively before conclusion thereby occasioning serious miscarriage of justice.

The Appellant submitted with respect to unprocedural reception of evidence of PW2. It was the appellant's submissions that PW 2 was a child of tender age being only 9 years old at the time of testifying in court. As such, it was mandatory for the trial court to conduct voire dire test to ascertain if PW2 understood the meaning and nature of an oath or affirmation and promised to tell the truth. The appellant submitted that this was the legal requirement under section 127(2) of the Evidence Act Cap 6 of the Laws of Tanzania. The appellant submitted that in a present case, the legal requirement was not fully complied with and therefore the evidence of PW 2 was improperly received in, and acted upon by, the court. He cited the cases of ***Omari Salum @Mjusi versus R,*** Crim.Appeal No.125 of 2020 at page 10 thereof and the case of ***John Mkorongo versus R,*** Crim. Appeal No.498 of 2020 at pages 8 to 15 thereof. The appellant insisted that in the present case the principles of receiving evidence of a child of tender age were violated during the trial.

On the second category of his submissions, the appellant submitted that the prosecution side had not proved its case beyond any reasonable doubt. To substantiate this argument, the Appellant pointed three areas of contradictions. The first was on the delay to arrest the appellant for three days from 26th November 2021 to 29th November 2021 although the alleged rape was reported on the same date and a PF3 was given by the Police. The second area of contradiction was with respect to what was seen in the vagina of PW2 upon being inspected. The Appellant argued that PW1 said at page 15 of the proceedings that it was blood; but at page 27 of the proceedings PW5 said no sperms were found, while at pages 29 and 30 of the Proceedings PW 4 said it was whitish mucus or ute mweupe. The third area of contradictions, the appellant submitted, was at page 15 of the proceedings where PW2 is not clear at what time she was crying and was found crying by PW5; was it during the alleged rape, or after? This is because it is stated that allegedly after the act she had gone away to classroom. Also it is not clear about the moment she was paid the alleged Tshs.1000/= whether after or before the alleged rape. In this regard the appellant argued that PW1, PW2 and PW5 gave contradictory testimonies and as such their evidence should not be believed as they lied in some

aspects and they might have lied on other aspects as well. The appellant relied on the cases of ***Shaban Daudi V R*** Crim.Appeal No.28/2000 and ***Mohamed Said Versus R,*** Criminal Appeal No.145/2017. The appellant argued that where witnesses give contradictory evidence they should not be believed in respect of what they contradicted each other as well as in respect of other pieces of evidence where they might have lied as well.

The third category of submissions by the appellant centered upon the failure by the court to evaluate and analyse defence evidence before coming to conclusion. The appellant submitted that there is nowhere in the judgment that the Court considered his defence at all, especially in respect of his allegation that the case was ploted against him due to his conflict with his ex-wife who had teamed-up with the parents of the victim. The Appellant submitted that this resulted into miscarriage of justice on his part. The appellant referred the court to the case of ***Hussein Idd and another versus R*** (1986) TLR 166 where the Court of Appeal insisted on the trial court's needs to consider the evidence of the defence in analysing the prosecution evidence.

In the reply submissions, the Respondent resisted the appeal strongly by submitting in response to each of the 5 grounds of appeal. With respect to

the first ground, on un-procedural reception of PW2's evidence without there being conducted a voire dire test, the Respondent submitted that section 127(2) of the Evidence Act was fully complied with. The respondent's counsel referred this court to pages 13 and 14 of the proceedings where the trial court asked PW2, the child witness, if she was promising to tell the truth; and she promised so before receiving her evidence. The learned counsel further submitted in alternative that the requirement of voire dire would be there if the witness was testifying under an oath which was not the case in the case at hand where the witness of tender age testified without an oath. The respondent referred the court to the decision in **Mathayo Lawrence William Mollel versus R**, Crim. Appeal No 53 of 2020 to back up her argument.

With respect to the allegation of contradictory testimonies of PW1, PW2 and PW5, the Respondent submitted that the discrepancies did not negatively impact the prosecution case as it was proved beyond any reasonable doubt that PW 2 was raped and that the perpetrator of the crime is the appellant. The learned counsel for the Respondent submitted that not every discrepancy or contradiction will cause the prosecution case to flop. Where there are contradictions, the court should look at them and

see whether they go to the root of the matter or not. The Respondent's counsel cited the cases of ***Vuyo Jack versus DPP*** Criminal Appeal No.334/2016 and ***Marando Slaa Hofu and 3 others versus R***, Criminal Appeal No.246/2011 to buttress her arguments that contradictions between or among witnesses are not always fatal to the prosecution's case. Also, she cited the case of ***Dickson Elia Nsamba versus R***, Crim Appeal No.92/2007; as well as the case of ***Goodluck Kyando versus R*** (2006) TLR 363. The effect of these cases is that every witness is entitled to credence unless there are good reasons for not believing the witness ; and that minor contradictions among witnesses are immaterial.

On the third ground of appeal that is failure by the Trial Court to analyse defence evidence before reaching its conclusion, the Respondent submitted that an analysis of defence evidence was properly done by the trial Court. The respondent's counsel referred the Court to pages 6 and 11 of the Judgment of the trial Court and said that in those places the defence evidence was mentioned and explained. The respondent's counsel quoted the 2nd paragraph at page 11 of the Judgment where the trial Court clearly stated that:

"I also made due consideration of the accused person's evidence who denied the allegation against him. Since the duty of the defence is only to raise doubts, I have considered the evidence as part of the totality of the whole evidence presented in court and I am satisfied that defence of the accused person does not hold water in presence of strong evidence of the prosecution. All said, the prosecution side has managed to prove the offence of rape beyond reasonable doubt".

The learned counsel therefore concluded that the ground of appeal is unfounded.

On the fourth ground of appeal which questioned the delay by prosecution to arrest the accused on the spot, the Respondent's Counsel submitted that this is immaterial. The respondent submitted that the delay to arrest the appellant for three days did not occasion any injustice to the Appellant. Further the Respondent's counsel submitted that all that mattered was the timing for reporting the crime. The crime was reported immediately to the police. The respondent submitted further that the Appellant had an opportunity to raise the issue of his delayed arrest during the cross examination of prosecution witnesses but that he opted not to do so. The Respondent's Counsel submitted that in the case of **Nyerere Nyague**

versus R, Criminal Appeal No.67/2010 the court laid a rule that failure to cross examine on a crucial point, amounts to an admission thereof. Hence when the appellant did not cross examine the issue of delay of his arrest, then he cannot be heard to complain about it now.

On the fifth ground of appeal, which alleged failure by the prosecution to prove their case beyond reasonable doubt, the Respondent submitted that the case was proved beyond reasonable doubt. The Respondent submitted that to prove the offence of rape of a girl below the age of 18 years, the prosecution is required only to prove two elements namely that there was penile penetration of the vagina of the girl by the accused person and that the girl was below 18 years old at the time. The Respondent submitted that at pages 14 and 26 of the proceedings the victim (PW2) mentions the act of the appellant inserting his penis into the vagina of the victim and therefore that constituted the penetration required in law. Also, the Respondent argued, through PW1's testimony and Exhibit P1- the birth certificate of PW2, that the prosecution proved the age of the victim girl was 9 years old. This means that she was a girl below 18 years.

The Respondent's counsel relied on the cases of ***Kayoka Charles versus R,*** (2007) by the Court of Appeal as well as the case of ***Isaya Renatus***

versus R, Crim.Appeal No. 542/2015. The respondent submitted that in those two cases, the elements of statutory rape namely penile penetration of the victim's vagina by the accused and the victim being under 18 years old were stipulated. Therefore, the Respondent submitted that the Prosecution had proved its case beyond any reasonable doubt in terms of section 3(2)(a) and section 110(1)(2) of the Evidence Act. The Respondent prayed for this appeal to be dismissed in its entirety.

That was the end of the submissions by the parties as the Appellant had opted not to file any rejoinder submissions.

After going through the records of the lower court, the grounds of appeal and the submissions made by both sides in this appeal, I am now in a position to determine the appeal before me.

In the first ground of appeal, the Appellant has submitted that the evidence of PW2 (Victim) was illegally and un-procedurally received. To be in a better place to appreciate this ground of appeal, I have decided to reproduce the said section 127(2) of the Evidence Act, Cap 6 of the laws of Tanzania (R.E 2019) which provides as follows:

(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.

It is clear that the above provision does not mandatorily require a child of tender age to take an oath or affirmation before giving evidence in court. A child of tender age has two options. The first is to give evidence under an oath or affirmation depending on his faith. In that oath or affirmation, in practice, there is embedded in it the promise to tell the court the whole truth nothing but the truth. The second option is to give evidence without an oath or affirmation. Where the second option is exercised, however, the child witness shall firstly promise to tell the truth to the court and not to tell any lies. In essence the second option is a simplified oath or affirmation in a language which is child-friendly. The oath, affirmation or promise to tell the truth and not lies, acts as a sieve to filter the evidence so as to make sure that under any circumstances the court receives the best evidence. But in devising the mechanism to filter the truth from lies, the law has taken into account the peculiar circumstances which face children of tender age and in particular when they are themselves the victims of the crimes. It is said that children are not miniature adults. Their physical, mental and psychological abilities are still developing. Recognizing this

peculiar situation as regards child witnesses, the Law of Evidence Act is a bit flexible for children witnesses under section 127(2). A child witness may or may not give evidence under an oath or affirmation. Also, the provision does not any longer require the child witness to be examined by the court as to whether or not she understands the nature of an oath or the duty of telling the truth. Where a child witness testifies without an oath or affirmation, the only requirement is for him/her to firstly promise to tell the court the truth and not to tell any lies. In short, the section has scrapped off the hither to need for the court to conduct a strict voire dire test upon a child witness. I find that both the appellant and the Respondent in their submissions on this ground were mainly dealing with the old position of the law as it used to stand before the new position was introduced in 2016.

The requirement on competency and admissibility of the evidence of a child of tender age, which is being received without an oath or affirmation, is for the child witness to promise two things to the court. The first is to promise that she will tell the court the truth. The second promise is that she shall not tell the court any lies. That is all that is required under the current position of the law.

The pertinent question is whether or not the legal requirement for receiving evidence of a child of tender age was complied with before PW 2 testified in the trial court? Looking at the proceedings of the trial Court, to be precise at pages 13 and 14 thereof, it is on record that before the child witness-PW 2 testified in the trial court, the following dialogue was conducted by the court and it is reproduced verbatim:

"Court: when you tell lies what happened at school?

PW2: we usually punished.

Court: What hapened if you tell the lies to Sunday school teacher?

PW2: If you tell untruth you are committing sin.

Court: What is the name of your class teacher?

PW2: Batuli.

Court: Are promise to tell the truth before this court?

PW2: I promise to tell the truth before this court."

From that dialogue examination in chief of PW2 started. It was proved by the prosecution vide Exhibit P1 the Birth Certificate of PW2 and through the testimony of PW1 the father of the victim child that, the age of PW2 was only 9 years old. It follows therefore that PW2 was a child of tender age in terms of section 127(4) of the Evidence Act Cap 6 of the Laws of

Tanzania (R.E 2019) where any child whose apparent age is not more than fourteen years, is a child of tender age. Being 9 years old, PW2's evidence was supposed to be received in court only once the trial Court had satisfied itself that section 127(2) of the Evidence Act had been fully complied with.

The question under the first ground of appeal is whether or not in the circumstances of the case at hand, the requirements of section 127(2) of the Evidence Act Cap 6 were complied with in full? It is on record as shown above that before giving her testimony, PW2 stated that: "***I promise to tell the truth before this court.***" It is clear in that statement that **PW2 did not make the second promise of not to tell lies in court.** Section 127(2) of the Evidence Act Cap 6 imposes two independent and cumulative requirements that a child of tender age before giving evidence, shall promise to tell the truth to the court **and** not to tell any lies. It really tasked my mind to think as to whether under section 127(2) of the Evidence Act, Cap.6 (RE 2019), it is enough for a child witness to only make one promise that is to tell the truth without also promising not to tell the court any lies? One would reason that by promising to tell the court the truth, inevitably, it implies that the child witness would, in effect thereby also, be promising not to tell the court any lies. This is because lies and

the truth are incompatible like day and night; hence once the truth is told, automatically lies are not told. However, from another angle one would also logically ask himself that if that were the case then why did the legislature put the two requirements together and cumulatively rather than in the alternative? The word "and" was used instead of the word "or". This means that the two promises must go together and not in the alternative to each other. I am of the view that the use of the phrase "***promise to tell the truth to the court and not to tell any lies***" was not a mere decoration in the law nor an unnecessary repetition of the same concept. In my view, a mere promise to tell the truth does not automatically and necessarily constitute a promise not to tell lies. One may tell the truth while at the same time he/she may tell lies alongside the truth. Therefore, promising to tell the truth and promising not to tell lies, in my view are two different things. For evidence of a child of tender age to be admissible, the child must make both promises namely the promise to tell the truth and the promise not to tell lies, before the child becomes competent witness to testify without an oath or affirmation.

It must be remembered that the provision of section 127(2) in our Evidence Act was introduced in 2016 vide section 26 of the Written Laws

(Miscellaneous Amendments) (No.2) Act of 2016. This was a new addition to the law to substitute the rules of "voire dire test" which were in existence prior to that time. Since its introduction in the Evidence Act in 2016, the new provision of section 127(2) of the Evidence Act has been tested in a number of cases which have reached the High Court and the Court of Appeal of Tanzania. The jurisprudential trend discerned from judicial decisions in respect of that provision has been towards requiring its strict and full observance by the trial Court. In the case of ***Bujigwa John @Juma Kijiko versus R***, Criminal Appeal No.427 of 2018, the Court of Appeal had the following to say:

> ***"according to the amendment, a witness of tender age may give evidence without taking an oath or affirmation but before giving evidence he/she shall promise to tell the truth to the court and not to tell lies".***

Also in ***Godfrey Wilson versus R*** Criminal Appeal No.168 of 2018 once again the Court of Appeal observed and held:

> ***"Section 127(2) as amended imperatively requires a child of 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 tender age."

Both binding decisions above insisted on the mandatory full conformity to section 127(2) of the Evidence Act before receiving evidence of children of tender age like the PW 2 in the case at hand without an oath or affirmation.

On whether or not partial conformity with section 127(2) of the Evidence Act is enough, I stand guided, further, by a very persuasive decision of the High Court of Tanzania in **Nasri Ahmed Hassan versus R,** Criminal Appeal No.243 of 2020, High Court of Tanzania, Dar es Salaam, as per Hon. Masabo, J. In that case which involved a sexual offence, the victim was a boy child aged 5 years old and who was a victim of sodomy. The child testified as PW2. The trial Court before receiving his evidence recorded the following words:

"Court: After an interview with the witness as per section 127 of the CPA, I found that the witness knows not the nature of an oath though he promises to speak the truth".

I take note that the trial Magistrate in the above case had intended to cite Section 127(2) of the Evidence Act, and that writing CPA, was just a slip of the pen.

From there, the 5-year old child testified against the accused person who was ultimately convicted. On an appeal to the High Court, Hon.Masabo,J., faulted the trial court and stated that :

> ***"The trial court's omission to record the answers in PW2's direct words is, in my view, fatal. Besides, even if I were to align my finding with the learned State Attorney's view, the promise cited by the Trial Magistrate would still be incompetent as it is incomplete. Whereas the law mandatorily requires the child witness to promise to tell the truth and not to tell any lies, the promise cited by the Trial Magistrate only covers the first aspect of the promise, that is the promise to tell the truth. As the second aspect of the promise, that is the promise not to tell lies, is not reflected, the Magistrate's citation of the promise is incomplete hence legally untenable".***

Therefore, in my finding, I follow-suit to what my Sister Judge Masabo had reasoned that the promise under section 127(2) of the Evidence Act has two cumulative limbs; and that a child witness of tender age must stand

on both, before she can competently testify without oath or affirmation in Court. I therefore find that during the trial in the District Court, the requirements of section 127(2) of the Evidence Act, Cap 6 of the Laws of Tanzania (R.E 2019) were not fully complied with. The child witness of tender age made half of the promise required by the law. Her evidence was received illegally.

I would add a word on the requirement for strict compliance with section 127(2) of the Evidence Act, Cap 6.(R.E.2019). It is clear that the requirement for dual promises for a child of tender age who wants to testify without an oath or affirmation, that is the promise to tell the court the truth and the promise not to tell lies to the court, is a necessary safeguard to ensure that only the best evidence reaches the court for the purpose of making its decision. Evidence law is exclusionary in nature. It excludes lies and all irrelevant and inadmissible evidence. Parties to the case know the facts but the court does not, and it wants to. It however, should know but to know the truth. Basically, evidence is used in court to prove an argument made by an individual who believes that something is true. On the other hand it is evidence that can be used to disprove or refute a fact or argument. Evidence is the tool for the court to reach a fair

and just decision. It cannot be taken lightly even with children witnesses where the stakes are even higher, given their immaturity to comprehend the magnitude of their acts or words. Children are also under control of adults, as their parents or guardians, and who may harbour some prejudices and grudges against others. The parents or guardians may use the innocent children under their control. Just as love is learned when children are cherished and nurtured, hate can also be learned. The safeguard under section 127(2) of the Evidence Act is necessary.

The consequences of non-compliance with section 127(2) of the Evidence Act were stipulated in the case of **Masoud Mgosi Versus R**, Criminal Appeal No.195 of 2018 by the Court of Appeal of Tanzania **that evidence taken in violation of section 127(2) of the Evidence Act is invalid and with no evidential value hence should be disregarded**. To this end, I allow the first ground of appeal. I find that the evidence of PW2, a child of tender age, was received in the trial court in violation of section 127(2) of the Evidence Act, Cap 6 (RE 2019). I expunge it from records as the same should not have been considered.

Moving on with the grounds of appeal, the Appellant submitted together under one category the 2nd , 4th and 5th grounds of appeal. The second

ground of appeal was that the testimonies of PW 1, PW2 and PW5 were contradictory. The 4th ground of appeal was that the Prosecution did not give plausible explanation why the Appellant was not arrested on the spot but until after 3 days. The fifth ground of appeal was that the Prosecution did not prove its case beyond reasonable doubt as per section 3(2)(a), 110(1)(2) of the Evidence Act Cap 6 of the Laws of Tanzania. The Appellant generalized all these grounds under one main theme that the prosecution case was not proved beyond reasonable doubt.

I have considered the submissions of both parties on the consolidated grounds of appeal. In essence the Respondent does not dispute that there exist contradictions among the prosecution witnesses as argued by the Appellant. The Respondent Republic has argued that the contradictions are minor and do not go to the root as to make prosecution case flop. On my part I have considered the contradictions alleged by the Appellant. Apart from the victim that is PW 2, and whose evidence has been excluded in my determination of the first ground of appeal, the other prosecution witnesses especially PW 4 the Medical Practitioner and PW5 the Teacher, relied on their inspection of the victim to prove that she had been penetrated in her vagina. At page 27 of the proceedings PW5 said no

sperms were found and at pages 29 and 30 of the Proceedings PW 4 said that she had seen white mucus or ute mweupe implying sperms. PW2, whose evidence has been discarded, had said that she had washed her private parts in the toilet before going outside the bedroom of the appellant and thus before being inspected by anyone. This contradiction is material because PW 2 had testified that the Appellant had ejaculated and that she had seen some sperms on the bed of the appellant too. If PW 5 the teacher had seen no sperms on inspecting PW2 in her vagina at school compounds shortly after the alleged sexual act, and PW4 the doctor said that she had seen sperms on examining the same PW 2 some time later, it casts some doubts as to at what time were the sperms seen by PW 4 inserted in the private parts of PW 2 and by whom one; after leaving the school and premises of the Appellant? Were the alleged sperms still present in PW2's vagina even after she had washed her private parts? This is a reasonable doubt. Contradictions among witnesses on this issue are not minor. The witnesses ought not be believed. I accept the arguments by the appellant on this.

On late arresting of the Appellant, I am in agreement with the Respondent that the same was not material in the case at hand. The offence was

reported promptly and a PF3 was given by the police. If the Police took time to investigate before arresting, they cannot be faulted for that. At any rate, there is no time limit after which a person cannot be arrested for a crime. I find this point to be devoid of merits.

On proof beyond reasonable doubt, needless to say that upon evidence of PW2 collapsing in ground 1 above, the prosecution case hangs with no support. The best evidence in sexual offences comes from the victim. Here the victim's evidence has been expunged for being received illegally. All other prosecution witnesses in particular PW1 the victim's father, PW 3 the Investigator, PW 4 the doctor and PW 5 the teacher, did not witness the alleged rape incidence of the appellant having carnal knowledge of the victim. Their evidence at best is hearsay. They heard from the victim whose evidence is not on record. PW4 discovered that the victim had been penetrated by a blunt object but she could not identify who might have penetrated the victim. In this case, the prosecution case cannot be said to have been proved beyond any reasonable doubt. I accept the appellant's arguments on this.

The last limb of the appellant's complaint was that the defence evidence was neither evaluated nor analysed before conclusion. In particular, the

appellant argued that his defence of having a conflict with the parents of the complainant child and their conspiracy with his ex-wife to fabricate the case against him, was not analysed at all. The Respondent referred this court to pages 6 and 11 of the Judgment and submitted that the trial court considered the defence evidence and analysed it before reaching its decision.

In considering the arguments by both parties on this ground, I revisited the Judgment of the trial Court so as to see, in view of the evidence which unfolded during the trial, if the trial court indeed analysed and considered it in its judgment? I have already reproduced briefly in this judgment the evidence which was produced by both sides during the trial. In the judgment, the learned trial Magistrate also summarized well the evidence for each witness who testified in the trial.

Reading through the Judgment of the trial Court, the only place that defence evidence was "analysed" and "considered" is at page 11 of the Judgment. The whole analysis of defence evidence is contained in one paragraph thus:

"I also made due consideration of the accused person's evidence who denied the allegation against him. Since the

duty of the defence is only to raise doubts, I have considered the evidence as part of the totality of the whole evidence presented in court and I am satisfied that defence of the accused person does not hold water in presence of strong evidence of the prosecution. All said, the prosecution side has managed to prove the offence of rape beyond reasonable doubt".

The Appellant complains that this was not enough consideration or analysis of the evidence given by the defence during the trial. With respect, I agree with the Appellant's complaints on this ground. The trial court did not fairly analyse the defence evidence before reaching its conclusion. Evidence does not speak for itself. The decision maker is supposed to evaluate the evidence in line with the applicable law and make the necessary inferences, deductions, observations and conclusions derived from the several pieces of evidence before him. That analysis, being an objective exercise, should be shown in the judgment. It should not be a subjective analysis taking place in the mind of the decision maker and who then pastes the conclusion in the judgment without showing how logically he reasoned through it towards that conclusion. It is the logical analysis that justifies the decision arrived at. I would like to subscribe to the words attributed to the famous American Jurist Oliver Wendell Holmes who once stated:

"The training of lawyers is training in logic.....the language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind."

I cannot stress more the fact that it is through logical analysis of the evidence in a case that the parties' mind can be flattered hence bring certainty and repose. A person is entitled to know why his evidence or argument was or was not accepted by the decision maker. This can be done only where the presiding judicial officer makes an evaluation or analysis of evidence for both sides before reaching the conclusion. And what does analysis essentially entail? It is all about deduction and induction. In the book **"Analysis of Evidence"** by Terrence Anderson and others, published in 2005 by Cambridge University Press, the learned authors have explained simply that the process of analyzing evidence is the process of drawing an inferences and they put it at page 80 that:

"Everyone draws inferences from evidence. The dog barks, you infer that someone is approaching the house; a loud horn sounds behind me, I infer that the driver behind me is impatient or angry; there are dark clouds over head, foot prints in the sand, lipstick on the shirt, fingerprints

on the steering wheels of a stolen car. All tell tales. Inferential reasoning is a basic human skill."

In the present case, the evidence for defence was not analyzed by trial court properly. No inferences were made from the evidence given by the Appellant to support or defeat his case. In case the expected inferences were refused, no reasons were given as to why they were not accepted. At least the trial Court did not make it plain in its decision. This left the Appellant's mind still craving for certainty and repose and therefore the appellant appealed so as to hear something being said about his evidence and its implications to his case. Perhaps, the Appellant's quest would have been satisfied by knowing how the court treated his evidence.

I should hasten to point out here that, I have observed the rationale given by the trial Magistrate in the judgment of the trial court for not analyzing much the defence case. The problem started where the trial Court at the stage of making its final judgment relied much the principle in **Jonas Nkize Versus R** (1992)TLR that it is the duty of the prosecution to prove the case beyond reasonable doubt and thereby the trial court analysed solely the prosecution's evidence and ended with conviction. In my view, it is during the ruling of whether or not the accused has a case to answer

that only the prosecution case should be exclusively evaluated. During final judgment, where the judgment ends with acquittal of the accused person, it is also possible to consider the prosecution evidence only. But when after considering the prosecution evidence, the same points towards guilty of the accused, and there is defence evidence on record which tries to exonerate the accused, the court should also sufficiently consider the defence evidence. At the end in case of conviction, it should be solely based on strength of the prosecution case and not the weakness of the defence. I find that the trial Magistrate erred in analysing exclusively the prosecution case while the outcome of the case was pointing towards convicting the accused. I hold the view that for the purpose of establishing whether or not the prosecution has proved its case beyond any reasonable doubt, the trial court should consider the prosecution evidence alongside that of the defence. It is only by considering the defence evidence that the trial court can be able to see if there are any holes in the prosecution case poked by the defence; and then continue to conclude if, despite those holes shown by the defence, still the prosecution evidence overcomes the said holes and thus the prosecution succeeds to establish its case beyond any reasonable doubt. In ***Hussein Idd and another versus R*** (1986)

TLR 166 the trial court had convicted the appellant of murder by only evaluating and considering the prosecution's evidence. On an appeal, the Court of Appeal faulted the trial Judge and insisted on the requirement for the trial court to consider the evidence of the defence while analysing the prosecution evidence before making its decision. This was not done by the trial court in the case at hand. Therefore, I hold that this ground succeeds.

In ***Masanja Maliasanga Masunga and 2 others Versus The Republic***, Crim.Appeal No.328 of 2021 decided by the Court of Appeal at Dodoma, the Court of Appeal of Tanzania pointed out that where the trial court fails to analyse evidence, it is not a fatal irregularity. Instead, the appellate court can step in the shoes of the Trial court and analyse the evidence and come to its own conclusions.

In the case at hand, it can be inferred reasonably that the appellant in his defence before the trial court, was establishing an argument that there was an ill-will or bad motive between the parents of the victim and him and that the victim was just being used by her parents to fix him. All the defence witnesses raised this fact. The Appellant even came to court with an RB that he had reported to Police an incident which had happened 2 days before the alleged rape where the parents of the victim had invaded

his house at 23:00 hrs so as to harm him and they made away with his properties. Secondly, the appellant was raising an inference that the alleged rape was all planted by PW 1 who planted his daughter in the same way like he had planted his wife two days earlier to go alone to the house of the Appellant close to midnight while PW1 himself with 2 motorcycles riders were looming around keeping watch. Thirdly, the appellant was trying to raise an inference that he had no opportunity to commit the said rape on the material date as there were people all around in his house and premises at the same time. He brought DW2 and DW3 to corroborate his story. Fourth, the appellant was trying to make an inference that the headteacher of the school knew the truth as he was incharge of the school premises where the alleged rape occurred and indeed it was firstly reported to him. Thus, the headteacher was a material prosecution witness but he was deliberately not called to testify. The Appellant was thereby calling upon the court to draw an adverse inference to the prosecution that had they called the headteacher he would have testified against the prosecution. Further, the appellant was trying to draw an inference that the Police arrested him after lapse of 3 days although he was available at home and although the rape incident was reported just a few hours after

its commission. The appellant was raising an inference that, may be, at first the Police knew that there was no offence committed and they did not take action until may be later they acted under pressure from PW1. These are among the pertinent questions which the evidence for defence was glaringly posing for consideration and determination by the trial court.

However, the trial Court made a generalized and subjective analysis of them all and rejected them in a single paragraph without any reasons or explanation. In my view, the defence evidence consistently pointed towards raging family dispute between the appellant on one hand and his ex-wife who was being supported by the father and mother of the victim on the other hand. This line of defence was conspicuous, persistent and consistent from the word go up to the time of mitigation. It deserved specific consideration and analysis by the trial court. The Appellant was invaded at late night hours at his home by the parents of the victim child just 2 days before the alleged rape incident. The appellant reported the incident to Sitakishari Police station and told his tenant DW 2 about it. In court during the trial, the appellant came with the alleged Police RB and was showing it to the trial court while he was testifying.

The fact that the alleged raped child was a girl aged 9 years old, one would have expected her mother to be involved more than that it appears in this case. During the trial, the prosecution side did not call the wife of PW 1 and mother of PW2 as a witness while it is testified by PW 1 that he was informed of the rape of her daughter by his wife who had in turn been phoned by the Appellant. Prior to the alleged family dispute PW1, his wife, the victim, and the appellant are shown that they were living in good terms, worshipping in the same church led by the appellant. They treated the appellant as their spiritual father. Yet when the daughter of PW 1 was raped, the appellant was comfortable only to call the wife of PW1 by phone and not PW 1 himself. This setting raises reasonable doubts that probably there was another story that stirred bad blood between the appellant and PW1 the father of the victim; and which story the court was not being told. The bad blood between PW 1 and the Appellant supplies the motive for PW 1 to set-up his innocent daughter (PW2) to pose as having been raped by the Appellant. Hate can be taught to children. It makes the defence theory plausible. Had the trial court analysed the defence evidence sufficiently, it could have arrived at the finding that some of the doubts raised by the Defence were not overcome by the strength of the Prosecution evidence.

But, like it has been said above, there was no analysis of defence evidence in the case at hand. I am not saying that the trial Magistrate should have agreed with the inferences raised or suggested by the defence, but I am saying that the trial court should have openly and objectively dealt with them and determined them one way or the other. This ground of appeal succeeds too.

All in all, I hold that the appeal has merits. I allow the appeal. I do hereby quash the Judgment and set aside the conviction and sentence imposed upon the appellant by the District Court of Ilala at Kinyerezi in Criminal Case No. 686 of 2021 dated 23rd June 2023 as per Hon. G. E. Nkwera, SRM. I order the immediate release of the appellant from Prison unless held otherwise lawfully therein. Right of appeal explained.

It is so ordered.

A. H. Gonzi
JUDGE
06/11/2023

The Judgment is delivered in court this 6th day of November 2023 in the presence of the Appellant in person and Ms. Rose Makupa and Mr. Mhoja State Attorneys for the Republic.

A. H. Gonzi

JUDGE

06/11/2023