IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 44 OF 2023

(Originating from Mwanga District Court in Criminal Case No. 132 of 2022)

SAKAJA IDDI SAKAJA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

21/11/2023 & 11/12/2023

SIMFUKWE, J:

This is the first appeal in which the appellant is challenging conviction and sentence of life imprisonment meted to him by the District Court of Mwanga at Mwanga, in Criminal Case No. 132 of 2022. The appellant was charged with the offence of Rape contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2022**. It was the

prosecution's case that on 25th of October 2022 at or 13:00hrs at Sereni Lomwe village within Mwanga District in Kilimanjaro Region, the appellant did have carnal knowledge of a girl aged 7 years (whose name is withheld).

When the charge was placed before him to plea, the appellant flatly denied any involvement, as the result the prosecution paraded five (5) witnesses in court and relied on two (2) exhibits in a bid to establish the guilt of the accused. On his part, the appellant relied on his own testimony and tendered no exhibit. After full trial the court was convinced that, the prosecution had proved its case beyond reasonable doubt, henceforth found the appellant guilty and convicted him as charged before he was sentenced to serve the mandatory sentence of life imprisonment as the raped girl was below ten years old. It is the said decision that discontented the appellant and prompted him to prefer this appeal equipped with three grounds of appeal but later on abandoned the second ground and remains with the 1st and 3nd grounds as produced hereunder:

1. *That the learned trial Magistrate erred in both law and fact by totally misapprehending, and analyzing the nature and quality of*

prosecution witnesses' evidence whilst was a flicker of doubt against the appellant which did not prove the charge beyond reasonable doubt.

2. *That the learned trial Magistrate erred in fact and law in holding that the prosecution had proved its case beyond reasonable doubt henceforth held that, the appellant was guilty of the offence without considering the mental health of the appellant.*

On account of the above grounds of appeal, the appellant is praying this court to allow the appeal, quash the conviction, set aside the sentence meted on him.

Hearing of this appeal proceeded orally, whereas the appellant was represented by Mr. Othman Kalulu, learned Counsel while Mr. John Mgave, learned State Attorney represented the respondent Republic.

I'm going to consider submissions in respect of the 1st ground of appeal only due to the fact that in his rejoinder, Mr. Othman Kalulu conceded with the learned State Attorney that the 3rd ground was unfounded as it was not raised during the trial.

On the 1st ground of appeal, the appellant's counsel strongly submitted that evidence tendered by the prosecution was insufficient to convict the appellant because all witnesses brought by the prosecution except PW2 the victim, did not witness the incidence of rape. He further contended that, the trial court convicted the appellant based on the evidence PW2 as seen at page 4 of the judgment where the court relied on **section 127 (6) of Evidence Act Cap 6 R.E 2022** which provides that the best evidence in sexual offences comes from the victim. Mr. Kalulu continued to aver that when the offence was committed, the victim was 8 years old and her evidence was taken without an oath. The trial court relied on **section 127 (2) of the Evidence Act** (supra) which requires that evidence of a child should be recorded on condition that; the child must possess sufficient intelligence and must understand the duty of speaking the truth. The learned counsel stated that, the trial court did not comply with those requirements. The requirement of sufficient intelligence can be proved through the questions of the court to the child victim. That, nowhere in the proceedings of the trial it is shown that the court asked questions to the victim in order to ascertain her duty to speak the truth. The asked questions must be reflected/recorded in the proceedings.

Mr. Kalulu continued to argue that, the promise to tell the truth by the victim was incompetent because PW2 did not promise to tell the truth as required by the law which render her evidence inadmissible and unreliable under **section 198 (4) of the Criminal Procedure Act**. To strengthen his argument, Mr. Kalulu referred the case of **Mohamed Ramadhan V.R. Criminal Appeal No. 396 of 2021,** CAT at Dar-es-salaam and the case of **God Kasenegela v. R, Criminal Appeal No.10 of 2008 CAT at Iringa** (unreported). Both authorities insisted that, the contravention of section 127(2) (supra) renders the evidence of the prosecution witnesses to be of no evidential value.

Concerning the element of penetration; Mr. Kalulu asserted that evidence of a medical doctor lays foundation in proof of penetration. He stressed that, evidence of PW4 ought to be taken with care because it is an expert opinion. He stated further that, evidence of PW4 did not prove penetration at all. Reference was made to page 15 of the trial court typed proceedings where PW4 stated that:

"There was no hymen, bruises, or discharge, her vagina was opened compared to her age, and that the victim started practicing intercourse for a long time."

According to Mr. Kalulu, the above statement does not prove penetration to have been inflicted by the appellant. In that regard, he was of the view that prosecution evidence was weak to convict the appellant.

In reply Mr. Mgave the learned State Attorney among other things, he conceded that the requirement under **section 127(2) of the Evidence Act** was not complied with in taking evidence of PW2. He supported the assertion that evidence of the said child witness has no evidential value. He prayed this court to allow this appeal and release the appellant.

Having considered submissions of the learned counsels, although the respondent has conceded this appeal to be allowed, I will consider whether, in the circumstances, evidence of PW2 was correctly received in evidence and properly relied upon by the trial court in convicting the appellant.

In determining this issue, I will start with **section 127 (2) of the Evidence Act** which provides that:

> "(2) *A child of tender age may give evidence without taking oath or making affirmation* ***but shall, before giving evidence, promise to tell the truth to the court and not to tell lies"***

Following the amendment of **section 127 (2) of the Evidence Act** through **Misc. Amendment No. 4 of 2016** which brought into place the above-quoted changes in the law and simultaneously did away with the requirement to conduct ***voire-dire*** test before receiving evidence of a child witness; a number of cases have discussed non- compliance with the new requirement of the law. I wish to refer the case of **Yusufu Molo v. Republic, Criminal Appeal No. 343 of 2017** (unreported) which held that:

> *"What is paramount in the new amendment, is for the child witness before giving evidence to promise to tell the truth to the court and not to tell lies. That is what is required. It is mandatory that such a promise must be reflected on the*

record of the trial court. If such a promise is not reflected on the record, then it is a big blow in the prosecution case."

With regard to the pertinent question as to how the trial court can lead a child witness to that stage, I subscribe to the case of **Godfrey Wilson V. Republic**, **Criminal Appeal No. 168 of 2018** (unreported) which held that:

"We think, the trial Magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case as follows;

1. *The age of the child.*
2. *The religion which the child professes and whether she/he understand the nature of oath.*
3. *Whether or not the child promises to tell the truth and not to tell lies."*

On the basis of the two cited case laws herein above, in the case at hand, in absence of pertinent questions asked to the child witness or such promise to tell the truth, the evidence of the child witness

will not be properly admitted in terms of **section 127 (2) of the Evidence Act**. Consequently, it will have no evidential value.

At page 10 of the typed proceedings of the trial court, the following words were recorded:

> *"PW2: Name Nasra Adam, 8-year-old. Student, Muslim.*
>
> ***Court:*** *Witness is a child of a tender years is hereby addressed as per section 127 (2) of Tanzania Evidence Act R.E 2022 as amended by Misc. Amendment No.4 of 2016.*
>
> ***Court:*** *Witness promised to speak the truth without oath; she doesn't know the nature of oath. Therefore, the witness will testify without oath.*
>
> *Sdg M.D. Mfanga PRM*
> *22/02/2023*
>
> ***PW2 Examination in Chief by Prosecutor***
>
> *I am living at Usangi with my mother namely Rehema (PW1) I am Standard two at Kivindu Primary School. I am 8 years old now last year I was 7 years old. ……"*

It may be noted from the above quoted excerpt that, apart from the fact that *voire dire* test is no longer a requirement of the law but the record of the trial court was supposed to reflect that the trial Magistrate tested the knowledge of a child witness. There is nothing on record showing that, the child witness was led by the trial magistrate to make a promise to tell the truth and not to tell lies before she started testifying as required by law.

The records of the trial court referred herein above clearly show that the promise was recorded in reported speech. The proceedings were supposed to reflect the questions which were posed to the child witness and how she responded to those questions.

Upon the above omission by the trial court, it follows that, as correctly submitted by the counsel for the appellant and readily conceded by Mr. Mgave the learned State Attorney, the testimony of the child victim in this case has no evidential value as it was improperly admitted into evidence contrary to **section 127(2) of the Evidence Act.**

In the case of **Issa Salum Nambaluka v. Republic, Criminal Appeal No. 272 of 2018**, at page 11 it was observed that:

> *"Where a witness is a child of tender age a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child understands the nature of oath if he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness.* ***If such child does not understand the nature of oath, he or she should, before giving evidence be required to promise to tell the truth and not tell lies.****" Emphasis added*

The omission to conduct a brief examination on a child of tender age is fatal which renders such evidence valueless and hence should be expunged from the record. Thus, since there is such omission, evidence of PW2 is hereby expunged from the record.

The next question for determination is *whether the conviction can be sustained in absence of the victim's evidence*. The learned counsel for

appellant was of the view that evidence of the rest of prosecution witnesses was hearsay. Having expunged evidence of the victim, I am convinced that it is not safe to find conviction on the basis of evidence of the rest of the witnesses. I could do so if they were eye witnesses of the incidence of rape. It is a considered opinion of this court that, evidence of PW1, PW3, PW4 and PW5 is corroborative in nature, meaning that the same corroborates evidence of PW2 (the victim) which has been expunged from the record for noncompliance of **section 127(2) of the Evidence Act** (supra). Even the learned state attorney supported this appeal to be allowed based on the omission to comply to section 127(2) (supra).

I have not discussed other issues discussed by the learned counsels of both parties in order to avoid academic exercise.

In the upshot, on the basis of the findings on the first ground of appeal, I am of strong opinion that this appeal has merit. I therefore quash the conviction against the appellant, set aside the sentence of life imprisonment and order his immediate release, unless he is held for other lawful reasons.

Order accordingly.

Dated and delivered at Moshi this 11th day of December 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

11/12/2023