IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO 33 OF 2023

(Originating from the decision of the Resident Magistrate Court of Arusha at Arusha in Criminal Case No 23 of 202)

ABEDINEGO LOITOVUAKI LAIZER ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

20th September & 19th December 2023.

KAMUZORA, J.

The Appellant, Abedinego Loitovuaki Laizer was charged and convicted by the Resident Magistrate Court of Arusha at Arusha (the trial court) for the offence of rape contrary to sections 130(1)(2)(e) and 131(3) of the Penal Code, Cap. 16 R.E. 2019. It was alleged that he raped A.Y (name of the victim withheld) who was aged nine(9) years old. He was sentenced to life imprisonment. Aggrieved by the decision of the trial court, he appealed to this court on the following grounds: -

1) *That, the learned trial magistrate erred both in law and fact when relied upon the testimony of PW1 in convicting and*

sentencing the Appellant without assessing and ascertaining the credibility of the said PW1.

2) *That the learned trial magistrate erred both in law and fact when heard, convicted and sentenced the accused based on irregular proceedings.*

Before embarking into the merits of appeal, I will give a brief background of the case which led to the Appellant's conviction before the trial court. The incident took place at Olkereian area within the city, District and Region of Arusha. It was alleged that, on the fateful date of 08th day of January, 2021 the Appellant went to the house of the parents of the victim (PW1). The victim's mother went to collect firewood leaving victim at home to take care of her young sibling. That, the Appellant appeared and started touching the victim and when she resisted, he grabbed her neck covered her mouth and raped her. The victim's mother returned and saw them *in flagranto delicto* as he was on top of the victim. She pulled the Appellant off the victim and called the victim's father for help. The Appellant was immediately arrested at the scene and sent to the police station and later arraigned before the court and convicted as earlier stated.

When the appeal came for hearing, Mr. Mahuna, learned advocate appeared for the Appellant while Mr. Alawi, learned State Attorney appeared for the Respondent, Republic.

prejudiced by that non-compliance. He therefore supported the conviction referring the decision in the case of **Jewels & Antigues T Ltd Vs National Shipping Agency Co. Ltd,** [1994].

On the argument based on section 127 (2) of TEA, Mr. Alawi conceded to the fact that the requirement under section 127 (2) was not met. He however pointed out that the proceedings shows that the child witness promised to tell the truth. He was of the view that despite the omission should not be the reason to abrogate the right as the omission can be cured under section 127 (6) of the Act.

On the submission regarding the case of **Seleman Makumba** he responded that despite the omission under section 127(2), still the principle on best evidence rule stands to protect the evidence of the child of tender age.

On the argument that people can be framed in rape cases, he submitted that the Appellant did not state if he had any conflict with anyone for him to be framed with criminal case. On the argument the prosecution side failed to call material witnesses, he submited that the witnesses who testified in this case were material in proving the case. He cemented his submission with the case of **Goodluck Kyando Vs. Republic,** [2006] 367.

I will start my deliberation by assessing compliance to section 127 (2) since the same was used to fault the victim's evidence which is

crucial evidence in proving rape case. After perusal to the lower court proceedings, I am satisfied that there was non-compliance to the provision of section 127 (2) as also conceded by the learned State Attorney. For easy of reference the part of the proceedings of the trial court before recording evidence of child witness at page 9 reads: -

> ***"PROSECUTION CASE OPEN***
>
> ***PW1:*** *AY, Olkerian primary school, standard two pupil, nine years*
>
> *(9) The victim does not know the meaning of oath, but promise to say the truth,*
>
> ***XD by State Attorney****....."*

From the above extract, nothing shows that the witness was asked by the trial magistrate to promise to tell the truth and not lies. In similar circumstance in Criminal Appeal No. 168 Of 2018, **Godfrey Wilson Vs. the Republic,** the court of appeal stressed on the compliance to the requirement under section 127(2) as amended. That, the law imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. In that case the court gave directives on the assessment to be done by the trial court before recording the child promise. It was held at page 13 to 14 that;

> *"We say so because, section 127(2) as amended imperatively requires a child of a 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 a*

Arguing in support of Appeal, Mr. Mahuna started with the 2nd ground of appeal and submitted that, the proceedings of the trial court was irregular in contravention of section 214 of the Criminal Procedure Act (CPA) and 127(2) of the Tanzania Evidence Act (TEA).

On the argument based on section 214 of the CPA, he explained that on 29/06/2021 S.A. Mshasha recorded the evidence of PW1 who is the victim and on 26/05/2022, E.K Mutasi recorded the evidence of PW2 who is the doctor and admitted exhibit PEI (the PF3). That, on 24/08/2022, another magistrate A.R. Ndosi recorded the evidence of PW3 and PW4 and composed the judgment.

The Appellant's counsel contended that there was a non-compliance of section 214 (1) of the CPA because, when taking over the proceedings Hon. Mutasi only stated that the accused was addressed in terms of section 214 that the case was re-assigned to her since it was a backlog. That, the magistrate did not give chance to the accused to recall a witness who had already testified before Hon. Mshasha. The Appellants counsel referred this court to the case of **Kapama Hamis Juma and 3 other Vs Republic,** Criminal Appeal No 591 of 2020 where the court insisted on compliance of the law. He added that even when Hon. Ndosi took over the proceedings from Hon. Mutasi on 11/07/2022, indicated section 214 of the CPA was complied with but nothing shows that the accused was accorded right to re-call witnesses.

To him, failure to comply to the provision of section 214 of the CPA renders the proceedings from 26/05/2022 to be nullity together with the subsequent proceedings related to the evidence of PW2, PW3 and PW4.

The Appellants further submitted that, if the evidence by other prosecution witness is nullified this court will remain only with the evidence of the victim PW1 which also contain procedural irregularity as it was recoded without compliance to section 127 (2) of the Tanzania Evidence Act. That the law requires a child witness of tender age to give evidence without oath but before tendering evidence the child must promise to tell the truth to the court and not to tell lies.

Pointing at page 9 of the trial court proceedings, the counsel for the Appellant submitted that PW1 being a child of tender age her evidence was recorded on promise to tell the truth did not promise not to tell lies. He was therefore of the view that the provision of section 127 (2) was not complied with and it rendered the evidence of PW1 to have no evidential value. Reference was made to the case of **Godfrey Wilson Vs. Republic,** Criminal Appeal No. 168 of 2018, **Wambura Kiginga Vs. Republic,** Criminal Appeal No. 310 of 2018,

Responding on this ground, Mr. Alawi conceded that there was non-compliance to the requirement for section 214 despite Hon. Ndosi pointing out that section 214 was complied with. He however argued that the Appellant's submission does not show if the Appellant was

tender age. The question, however, would be on how to reach at that stage. 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 he/she understands the nature of oath.

3. Whether or not the child promises to tell the truth and not to tell lies.

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

In that case, the court concluded that since section 127(2) of the Evidence Act as amended by Act No 4 of 2016 was not complied with in recording the evidence of a child witness, the evidence was found to have no evidential value.

It was however argued by the learned State Attorney that the omission could be cured under subsection (6) of section 127 of TEA to ensure right to the child victim. The said provision read: -

(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in

the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.

From the above provision the court can convict based on uncorroborated evidence of the child witness in sexual offence if satisfied that the child is telling nothing but the truth. I do not see how this provision can be used to cure omission under subsection (2) of section 127. Since the said provision was not complied with, it cannot be said that the court was satisfied that the child was telling nothing but the truth. Having concluded that section 127 (2) was not complied with, the evidence of PW1 suffer the consequence of being found to have no evidential value.

Having concluded that the evidence by PW1 have no evidential value, the Appellant's argument on the first ground that the trial court based on the evidence of PW1 without assessing and ascertaining the credibility of such witness is also answered. The said evidence could not be considered in determining this appeal.

In the absence of the evidence of the victim, we remain with the evidence by the victim's mother, the doctor and investigator. However, such evidence was challenged on account that they suffer irregularity on non-compliance to section 214 of the CPA. The said provision reads: -

"Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to

complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings."

From the above provision, it is within the magistrate's discretion to re-call the witness if he/she consider it necessary. Procedurally, the successor magistrate has to inform the accused that it can opt to re-call the witness who had already testified.

Going through the trial court proceedings, there is no doubt that the case file passed through the hands of three magistrates. The first magistrate Hon. Mshasha recorded the evidence of one witness PW1. When Hon. Mutasi took over the proceedings, she addressed the accused in terms of section 214 of the CPA that she was taking over the conduct of the case for backlog clearance. This can be found at page 19 of the typed proceedings.

It is in record that the accused responded that he had no objection meaning he was comfortable with the changes. He never raised any concern thus, impliedly he had no issue thus, the claim that he was not accorded chance to re-call the witness could not stand. Hon. Mutasi was able to record evidence of only one witness and the third magistrate

Hon. Ndossy took over the proceedings. Similarly, she recorded that the accused was addressed in terms of section 214 of the CPA. Nothing shows that the accused raised any concern over the change of magistrate. It was expected therefore for the counsel for the Appellant to demonstrate if the accused raised any concern over the change of magistrate or if he informed the court that he intended to re-call a witness and was denied that chance.

In my view, contrary to what was submitted by the learned State Attorney, there is no omission in complying to the requirement of section 214 of the CPA. I agree that the records of the trial court are silent on whether the Appellant was informed on the option to recall a witness. The successor magistrate failed to record the words she used to address the accused and the accused's response but, much as she has recorded that the accused was addressed in terms of section 214, it becomes obvious that the law was complied with as the said section is clear on what should be addressed to the accused. Thus, in my view, such omission could not be considered prejudicing the Appellant to the extent of invoking the provision of subsection 2 of section 214 of the CPA. The Appellant was present at all time the case was called in court and was given opportunity by both magistrates to cross-examine the witnesses paraded in court. He also had a chance to enter his defence thus, proving fair hearing before the trial court. In short, the Appellant

was unable to demonstrate how he was prejudiced by such omission thus, in the spirit of section 214 (2) I do not see how the Appellant was prejudiced by non-compliance of section 214 (1). It is therefore my considered view that the omission is curable under section 388(1) of the Criminal Procedure Code Cap 20 R.E 2019 as the omission did not result into miscarriage of justice. Having concluded so, I find the evidence by PW2, PW3 and PW4 to have evidential value.

The question that follows is whether, in the absence of the victim's evidence, the evidence of the remained witness can sustain conviction of the Appellant.

From the record, PW4, the victim's mother claimed that she found the Appellant on top of the victim while undressed his trousers and in fact he was having sex with the victim. She pulled the Appellant off the victim and raised alarm and the Appellant was arrested on the spot. That evidence was supported by the investigator who claimed that the victim was arrested at the scene. Although no other witness who came to verify the story by PW4, the trial court did not doubt her evidence and so, do I. There is no reason advance to make the court doubt the evidence by PW4. The Appellant's evidence is that, on the material date of the incident he was arrested at the victim's house after the victim's mother screamed. When he was cross examined, he explained that he went there asking for water and when the victim's mother appeared she

screamed that he was raping the child. The Appellant denied the allegation against him.

The evidence by the doctor confirmed the story from the victim's mother that the victim was penetrated as she had bruises and hymen was not intact. This could also be found from the PF3 tendered before the trial court. The doctor's conclusion after examining the victim was that the victim was penetrated by a blunt object and the penetration was the recent one. This collaborated the evidence by PW4 who claimed that she found the Appellant raping the child and he was immediately arrested at the scene. The child was also sent to hospital for examined and found with recent features of penetration. PW3 who is the investigator claimed to have found the Appellant at the police station after being arrested and interrogated him. In considering evidence from PW2, PW3 and PW4, this court is satisfied that even in the absence of victim's evidence, the evidence by the remained prosecution witnesses proves without doubt that the Appellant raped the victim.

I agree with the argument by Appellant's counsel on the principle that the best evidence in the case of rape is the victim's evidence as was held in the case of **Seleman Makumba Vs. Republic** [1992] TLR 379. However, that is more relevant where the child is the only eye witness to the incident but where there another witness to the incident, his/her evidence need be accorded value in assessing the matter. In the case at

hand, the victim's mother claimed to have found the Appellant in the midst of sexual activity *'in fragrento delicto'* thus, even in the absence of the victim's evidence, unless any other fact to the contrary is shown, her evidence is accorded evidential value to prove the case against the accused.

It was argued by the counsel for the Appellant that since PW4 claimed to have called the chairman leader and the husband who witnessed the Appellant being naked, those witnesses were to be summoned to collaborate that evidence. He was of the view that although there is no specific number of witnesses is required to prove a certain fact but the prosecution duty bound to call material witnesses especially those who claim to witness the accused in *fragrento delicto.* He referred this court to the case of **Mohamed Said Vs, Mohamed Mbilu,** [1084] TLR 113. Basing on that submission the Appellant prays for acquittal of the Appellant.

There is no doubt that after the evidence by PW1 was considered to have no evidential value the remained evidence of eye witness is that of PW4. It was argued by the counsel for the Appellant that the prosecution side failed to call other eye witnesses in court; the chairman and the victim's father. In the case of **Bakari Hamis Ling'ambe Vs. Republic,** Criminal Appeal No.161 of 2014 (unreported), the Court held that:

"It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (Section 143 of the Tanzania Evidence Act, Cap 6). A court of law could convict an accused person relying on the evidence of a single witness if it believes in his credibility, competence and demeanour."

Moreover, it is the prosecution that enjoys the discretion to choose which witness to call. In **Abdallah Kondo Vs. Republic,** Criminal Appeal No.322 of 2015 (unreported), the Court stated that: -

"...it is the prosecution which have the right to choose which witnesses to call so as to give evidence in support of the charge. Such witnesses must be those who are able to establish the responsibility of the Appellant in the commission of the offence..."

It is in record that PW4 witnessed the accused *in fragrento delicto.* The counsel for the Appellant did not explain if the evidence by PW4 raised any doubt to the extent of not proving what she saw and if it needed corroboration from those other witnesses. In my view, the trial court properly accorded weight to the evidence from PW4 as there is no any ground raised that could make court doubt her evidence.

In concluding, this court finds that the prosecution evidence in its totality made strong case against the Appellant and the trial court was correct and proper to convict the Appellant. The appeal is therefore dismissed for want of merit.

DATED at **ARUSHA** this 19th day of December, 2023.

D.C. KAMUZORA

JUDGE