IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT KARATU

CRIMINAL APPEAL NO. 56 OF 2023

(Originating from Criminal Case No. 156/2022 Karatu District Court)

SALIM IDD@ OMARY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

22nd & 24th November, 2023

TIGANGA, J.

In this appeal, the appellant was dissatisfied with the decision of the District Court of Karatu (trial court) in Criminal Case No. 156 of 2022 (E.E. Mbonamasabo, (PRM) dated 15th December, 2022 in which he was charged with and convicted of an offence of grave sexual abuse, contrary to section 138 (1) (c) (1) (d) and (2) (b) of the **Penal Code**, [Cap 16 R.E. 2022].

According to the prosecution evidence, on 6th August, 2022 at Mong'ola Juu Village within Karatu District in Arusha Region, the appellant, for sexual gratification did rub his penis over the vagina of **CM**'s (name withheld), girl aged twelve years.

The accused, now the appellant, pleaded not guilty to the charge. According to the prosecution evidence, the victim was sent to the farm by her mother to collect some maize. While there, the appellant approached her asking for directions of certain areas. He then started condemning her to have beaten a person named Happy. The victim denied the allegation and while still standing the appellant went closer and started undressing her. He ordered her to sit down else he will stab her using a knife, she sat down. He also undressed himself, knelt down and attempted to penetrate her, but she was adamant as she pulled her thighs and legs together, thus the appellant failed to penetrate her.

Since it was night hours, the victim asked him to escort her home. They both got dressed, and the appellant escorted the victim towards her but run away before they reached the victim's home. The latter told her mother what befell her and that although she did not know the appellant, she identified his wearing a red jeans trousers, a t-shirt or rather a sweater with a hood and she observed his shoe which prints had marks.

From such shoeprints/mark, the appellant was tracked, arrested and charged with this offence. In his defence, the appellant told the trial court that, he travelled to Dar es Salaam on 02nd July, 2022 thus, he was not

present when the offence is alleged to have been committed. The trial court was satisfied that, the case against the appellant was proved at the required standard hence found him guilty, convicted and sentenced him to twenty years imprisonment.

Aggrieved by the decision, he preferred this appeal on the following ten (10) grounds;

1. That, the trial court erred in law and fact in not finding that, the charge sheet was defective in form of failure to cite proper section creating the offence and it varied with evidence.
2. That, the conviction was wrongly grounded and sustained on the count of improper identification.
3. That, the trial court erred in law and fact when recording the evidence of PW4, the victim, while her evidence was recorded in contravention of section 127 (2) of the **Evidence Act**, Cap 6 R.E. 2022.
4. That, the trial court erred in law and fact in convicting and sentencing the appellant on the grave sexual abuse offence while there was contradictory evidence of PW1, PW2, PW3, PW4, PW5, and PW6.

5. That, the trial court erred in law and fact when it failed to see glaring contradictions and discrepancies on prosecution evidence which should have been resolved in favour of the appellant.
6. That, the trial court erred in law and fact in holding that PW4 was a credible witness while her evidence was full of contradictions, uncertainty and incoherent hence, ought not to have been relied by the trial court.
7. That, the trial court erred in law and fact in convicting the appellant without observing that, there was non-compliance od section 231 (1) of the **Criminal Procedure Act**, Cap 20 R.E. 2022 (CPA).
8. That, the trial court erred in law and fact in failing to comply with mandatory requirement of section 9 (3) of the CPA as he was not supplied with witness statements.
9. That, the trial court erred in law and fact in convicting and sentencing the appellant on the grave sexual abuse offence while there was contradictory evidence of PW1,PW2,PW3,PW4,PW5, and PW6.

10. That, the trial court failed to notice that, the case against the appellant was not proved beyond reasonable doubt as the evidence leaves more doubt that proof.

During hearing the appellant appeared in person and unrepresented whereas the respondent was represented by Ms. Adelaide Kasara, State Attorney.

Supporting the appeal, the appellant prayed that the Court receive and adopt a handwritten submission elaborating on the grounds filed. He rather insisted on the 3rd ground and supported it by relying on the case of **John Mkorongo James vs. The Republic**, Criminal Appeal No. 498 of 2020. He argued that, the victim's testimony was taken contrary to section 127 (2) of the Evidence Act, as she was neither sworn nor her intelligence inquired to see if she possessed enough knowledge to tell the truth. In his view, the only remedy is for the same to be expunged from the record.

This ground was supported by the respondent in exclusion of all others. Learned State Attorney conceded to the fact that, there was non-compliance of section 127 (2) of the Evidence Act. According to her, the provision gives a mandatory requirement that the witness of tender age, when giving evidence must as a matter of law promise to speak the truth and not lies.

She contended that, in the appeal at hand, it is vivid at page 10 of the typed proceedings that, the victim (PW4) was 12 years when she testified. However, the record does not show that she spoke or promised to speak the truth and not lies failure of which renders the evidence to have no evidential value in the eyes of the law and before the court. She also referred the cases of **John Mkorongo James** (supra) and **Emmanuel Sumwi @ Emma vs. The Republic**, Criminal Appeal No. 284 of 2020 at CAT Moshi where Court of appeal emphasized that non-compliance of section 127(2) of the Evidence Act is a fatal omission which render the evidence tendered valueless and deserves to be expunged from the records.

In the circumstances, and without submitting on other grounds of appeal, Ms. Kasara prayed for this court to disregard the evidence of PW4. She further submitted that, after disregarding such evidence, the remaining evidence remains a hearsay and cannot prove the offence charged. She prayed that this Court allow the appeal. In rejoinder, the appellant had nothing to add.

Having gone through the trial court's records as well as the parties' submissions, I now proceed to determine as to whether the case against the appellant was proved at the required standard. I will start with the 3rd ground

which the respondent conceded with in which the appellant challenges the trial court for relying on the evidence of a child of tender age without fully complying with Section 127 (2) of the Evidence Act. This section reads;

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

Looking at page 10 of the trial court's proceedings before testifying, the trial magistrate recorded that;

> *"PW4, CM, 12 yrs, Rel, Christian*
> *Court: Witness have an ability to testify*
> ***SGD; MBONAMASABO-PRM***
> ***20/10/2022"***

From thereon, the victim went on testifying without oath. It is unfortunate that the trial magistrate did not show how he arrived to the conclusion that, the witnesses had ability to testify without inquiring more to know whether she possessed enough knowledge to understood the meaning of oath or the difference between telling truth and lies. The law is now settled and there is a plethora of Court of Appeal decisions which underscores the importance of asking simple questions to a child of tender years so as to ascertain his or her competence before giving evidence. One of them is the case of **Edmund John @ Shayo vs. The Republic**, Criminal Appeal No.

336 of 2019, CAT at Moshi where the Court of Appeal had this to say regarding what to do before taking a testimony of a child of a tender years;

> *"... We have observed that there is an absence of any record of there being any test conducted by way of simple questions from the trial court to PW4 in line with what was expounded in the cases cited above,* ***Geofrey Wilson*** *(supra) or* ***Issa Salum Nambaluka*** *(supra). In* ***John Mkorongo James v. Republic,*** *Criminal Appeal No. 498 of 2020 (unreported), the Court held:*
>
> > *"The omission to conduct a brief examination on a child witness of a tender ages to test his competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the court to tell the truth and not tell lies, is fatal and renders the evidence valueless"*
>
> *That being the position, having found that there was contravention of section 127 (2) of the Evidence Act in the instant appeal with regard to recording PW4's evidence, undoubtedly, renders the said evidence inconsequential. The consequence is to expunge the said evidence from the record (See,* ***John Mkorongo James*** *(supra)). Therefore, the evidence of PW4 is hereby expunged from the record."*

I fully subscribe to the position above, that a testimony of child of tender years being taken without compliance to section 127 (2) of the Evidence Act renders it valueless. In the appeal at hand, the testimony of the victim, PW4 was taken without compliance to the above section and the

respondent conceded for it to be expunged from the records as I hereby do. This ground has merit and the same is allowed.

Having disregarded PW4's evidence, now the issue is whether in its absence, the case against the appellant can be said to have been proved beyond reasonable doubt. From the outset my answer is NO for the following reasons;

First, with exception of PW4's testimony the evidence of other five prosecution witnesses remains a hearsay because none of them saw or caught the appellant in the action of trying to penetrating the victim. It was PW4 who told them that, it was the appellant who was responsible for the attempt of raping her.

Second, the charge sheet shows that, the appellant was charged with the offence of grave sexual abuse contrary to section 138 (C) (1)(d) and (2)(b) of the Penal Code. The latter provision provides for punishment whereas the former provides with offence. The same reads;

> ***138C****.-(1) Any person who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument or any orifice or part of the body of another person, being an act which does not amount to rape under section 130, commits the offence of grave sexual abuse if he does so in*

circumstances falling under any of the following descriptions, that is to say-

(a) n/a

(b) n/a

(c) n/a

(d) with or without the consent of a person who is under the age of eighteen years.

Looking at the evidence of prosecution witnesses, they told the trial court that, the victim told them that, the appellant raped her. However in her own testimony as briefly narrated above, the appellant tried to rape her but he failed because she tightened her thighs and legs. In the circumstances, none of the ingredients of the above provision were proved but rather that of the attempted rape contrary to section 132 (1) and (2) of the same law as it is clear that, there was an attempt to rape her but the same did not succeed.

Third, the appellant's identification is wanting. The evidence in record shows that, the victim never knew the appellant before and the incident happened around 19:00hrs. The appellant was tracked down following his shoe prints tracks and the clothes he was wearing during the commission of the crime. It is not certain if the day he was arrested he still had the outfits and shoes mentioned by the victim. More so, other features like his physique,

body structure, height, skin colour and the like were not mentioned. In the case of **Godlisten Kimaro & Another Vs. The Republic**, Criminal Appeal No. 363 of 2014 CAT at Dodoma (unreported) the Court of Appeal had this to say regarding identification;

> *"It is now settled that when a court of law relies on visual identification one of the important aspects to be considered is to give enough description of a culprit in terms of body build, complexion, size, attire, or any other peculiar body features to make the next person that comes across such a culprit to repeat those descriptions at his first report to the police on the crime."*

Considering the fact that the victim, never knew the appellant before, and without an identification parade, it is my considered opinion that, using a shoe print tracking as the only element for identifying the appellant was not enough

This brings me to the conclusion that, as conceded by the respondent who support the appeal, the case against the appellant was not proved at the required standard of proof. With the above analysis and without belaboring on other grounds of appeal, I allow the appeal, quash the conviction and set aside the sentence passed against the appellant. That said and done, I proceed to order the immediate release of the appellant unless held for other offence.

It is so ordered

DATED and delivered at **KARATU** this 24th day of November, 2023

J. C. TIGANGA

JUDGE