IN THE HIGH COURT OF TANZANIA
AT MBEYA
CRIMINAL APPEAL NO. 121 OF 2023

(Originating from the District Court of Chunya at Chunya, in Criminal Case No. 174 of 2019)

WILLIAM DAUD .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 3 November 2023 & 17 November 2023

SINDA, J.:

The appellant William Daud was charged with and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code (Cap 16 R.E 2022) (the **Penal Code**). The District Court of Chunya at Chunya (the **Trial Court**) sentenced to thirty (30) years imprisonment.

The particulars of the offence are on 4 August 2019 at Maendeleo Hamlet Makongolosi village within Chunya District Mbeya Region, the appellant had carnal knowledge with the victim.

The facts of the case are that the victim is a standard two student at Makongolosi Primary School. On the said date she was sleeping with her younger brother in the sitting room. The accused was sleeping in the bedroom. Her mother had traveled. Her father slept in the main house.

While a sleep the appellant came undressed her skirt and pants. The accused undressed his shirt and pants as well. In the sitting room there are solar lights lighting she saw the accused vividly. The accused rubbed oil on her vagina and inserted pennis in his vagina. The victim felt pain. The accused covered her mouth with hand and the victim failed to shout. After finishing the at the accused told the victim not to tell his father or else he will beat her. The accused went to his room. The accused was their casual work. The victim told her aunty who phoned her father. Her father sent the victim to the Makongolosi police station and she was given PF3 and went to a dispensary. She was examined by a doctor and returned the PF3 to police.

Against that decision, the appellant appeals on a number of grounds which can be consolidate into the following:

1. That – the trial court erred in law when convicted and sentenced the appellant without taking into account that PW1 as a tender aged witness was sworn whenever no anywhere PW1 told the trial court if she knew the meaning of oath and telling the truth not lies.
2. That -the trial court erred in law when convicted and sentenced the appellant without taking into account that if PW1 was sleeping with her young brother by the name Keya and according to the testimony of PW she raised an alarm why this key witness who witnessed the said rape was not called to support the evidence of PW1.
3. That – the trial court erred in law when convicted and sentenced the appellant without evaluating the credibility of the evidence of PW1 that Papaa accused came to her and she witnessed all the

steps done to her by Papaa. Why she failed to raise an alarm before this one rubbing oil to her vagina and let free this one to penetrate his penis to her vagina. Infact PW1 is a liar no any court of justice can believe her story.

4. That the trial court erred in law when convicted and sentenced the appellant without regarding that the examination done by PW4 is very doubtful due to the facts that PW4 qualifications are not clear, he mentioned as a doctor and as assistant clinical officer of Mwananchi dispensary, and he failed to mention his instruments which enabled him to conduct a correct examination to PW1.
5. That the trial court erred in law when convicting and sentencing the appellant relying on cautioned statement exhibit PE3 without regarding that the same violated the law.
6. That the trial court erred in law when convicted and sentence the appellant relying on the contradictory evidence of PW2 and hearsay of PW3 and PW5 without a key witness who was together with PW1 inside the said room.
7. That the defence of the appellant was not considered and the prosecution failed to prove its charge as per the law.

At the hearing of the appeal on 3 November 2023, the appellant appeared in person, unrepresented. The respondent was represented by Mr. George Ngwembe, learned State Attorney.

The appellant requested the Court to consider his grounds in the petition of appeal as presented in the Court. He opted for Mr. Ngwembe to reply to them first so that he could rejoin in case any such need arose.

Mr. Ngwembe began by opposing the appeal. In relation to the first ground of appeal, Mr. Ngwembe referred to section 127 (2) of the Evidence Act Cap 6 R.E 2019 (the **EA**). He stated that it is not a requirement of the law it should be stated in the proceedings that the child understood the meaning of an oath. He further stated that in this matter the child did not promise to say the truth because she took an oath as shown on page 8 of the typed proceedings of the Trial Court (the **Proceedings**). He further submitted that what the child is supposed to do before giving an oath, is to give an oath if she understands. And she will not take an oath if she promises to say the truth.

He further submitted that in this case PW1 took an oath. If the court will observe that there is a need for questions to show in the court proceedings that the child understands the oath. The remedy the court should take is to order retrial, and not allow the appeal. He referred to the case of ***Chilu Mhundu vs. The Republic,*** Criminal Appeal No 143 of 2019 from page 12 to 13. The said case gives reasons for ordering retrial.

The respondent requested to submit grounds number two, six and seven together which deal with key witness not being called and appellant defence not considered.

Mr. Ngwembe stated that the element to be proved in rape cases are penetration and consent. Penetration even if is slight can prove the offence of rape. This is stated in the case of ***Tatizo Juma Vs. The***

Republic, Criminal Appeal No. 10 of 2013 on page 7 para 1. He further stated that section 130 (4) (a) of the Penal Code states that an essential ingredient of the offence of rape is penetration however slight. In relation to a child below the age of eighteen (18), consent is immaterial. Pw1 was below the age of eighteen (18). She was fourteen (14) years when the case was tried at the Trial Court.

Mr. Ngwembe argued that in any criminal case, for a person to be found guilty the offence must be proved beyond reasonable doubt. This is states in the case of ***Mosi Chacha Hanga and Another vs. Republic***, Criminal Appeal No. 108 of 2019. In which the Court cited the case of ***Andrew Lungine vs the Republic,*** Criminal Appeal No. 50 which cemented that in criminal cases elements of the offence must be proved beyond reasonable doubt.

In establishing penetration was proved by a medical doctor who issued a PF3, which was admitted in the Trial Court. Page eleven (11) of the Trial Court proceeding (the **Proceedings**) shows that PF3 was tendered in the Trial Court and admitted without any objections. Also, PW3, on page 10 of the Proceeding, stated that her daughter is 14 years old.

As a general principle in sexual offences, the best evidence is that which is given by the victim herself, as provided in the case of Selemani Makumba vs. Republic, Criminal Appeal No. 94 of 1999 on page eight (8) that the true evidence of rape has to come from the victim.

The appellant is complaining that the Trial Court did not consider his evidence. If you read the Trial Court judgment from page eight (8), it shows that the appellant's evidence was considered before the Trial Court reached its decision. Also, this is the first appellate court can reevaluate the evidence and come up with its decision.

He prayed that ground number two, six and seven be dismissed because elements for the offence of rape were established, and PW1, PW2, PW3, and PW4 were called and testified and proved on the offence. There was no need to call other witnesses.

The respondent argued that ground number three should be dismissed that when the appellant was rubbing oil to the victim vagina, she did not raise an alarm. On page eight (8) of the Trial Court proceeding, PW1 said that the accused covered the victim's mouth and failed to shout. After finishing the act, the appellant told the victim not to tell his dad, or he would beat her.

On ground number four, Mr. Ngwembe submitted that the doctor PW4 was to prove to the court if the victim was penetrated. To prove that the victim was penetrated, PW4 issued PF3, which was admitted in the Trial Court without any objection from the appellant. Failing to object to the exhibit means he agreed with the exhibit.

He also submitted that the appellant was given a chance to cross-examine PW4, but he did not do so. As a general principle, if you fail to cross-examine a certain matter in court, it means you agree with it. On page

eleven (11) of the Proceedings he was given a chance to cross examination, but he had no objection. He referred to the case of ***Paulo Antony vs The Republic***, Criminal Appeal No. 189 of 2014 on page 6 to support his argument.

As such the appellant saying that the instruments used by the doctor were not stated is not a requirement under the law. Also, the qualification of a doctor is not a requirement of the law. It was stated in the proceedings that PW4 was a clinical officer. Even if there was a difference, this couldn't invalidate what was said by PW4.

Submitting on the fifth ground, the appellant said that the cautioned statement, i.e., exhibit PF3, was relied on without following the law. The PF3 was submitted by PW5, as shown on page twelve (12) of the Proceeding. When the cautioned statement was tendered, it followed the procedure. The appellant did not object to it and was admitted as exhibit PF3.

He further submitted that on page thirteen (13) of the Proceeding, the prosecution prayed for the exhibit to be read, and the Trial Court granted the request. PW5 read the exhibit. The appellant was given a chance to cross-examine, and he did not do so. This means he agreed with what PW5 was saying. In this matter, the appellant admitted that he committed the offence of rape.

In the case of ***Nyerere Nyague vs. Republic***, Criminal Appeal No. 67 2010 Tanzalii at page 5 last 3 paragraphs confirms that to fail to ask or

question what a witness has said it means you agree with what the witness has said, and you will fail to convince the court not to agree with what the witness has said.

Also, in the above case, on page eight (8), the last paragraph says that the best evidence in a criminal trial is the evidence that the accused has confessed. In the Proceeding, it shows that the appellant's cautioned statement was presented in the Trial Court as an exhibit, and they were not objected, and he didn't ask questions to the witness who presented the exhibit, and this proved what he said to the police was clear. He prayed that the appeal be dismissed, and the conviction and sentence be upheld.

In rejoinder, the appellant did not have anything useful to add.

I have reviewed the court records and the submission by the parties. I will focus on the first ground of appeal. Section 127 (2) of the TEA states that

> *"127 (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."*

The requirement imposed by this section is a mandatory requirement. As held in ***Godfrey Wilson v Republic,*** Criminal Appeal No. 168 of 2018, CAT (unreported):

"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 tender age."

The wording of section 127 (2) requires a child of tender age to promise to the court to tell the truth and not any lies before giving his or her evidence.

The Trial Court records on page eight (8) of the Proceedings show that the trial Magistrate recorded PW1 particulars, and after that, PW1 was sworn in and gave her testimony.

On page eight (8) of the Proceedings, as complained by the appellant, there is nowhere indicating that the PW1 was asked to tell the truth to the court and promised to do so as required by section 127 (2) of the TEA.

The Court of Appeal in ***Godfrey Wilson v Republic*** (supra) gave an articulate guidance on what is expected of the court where it stated that:

"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."

Therefore, the Trial Court was duty bound to ask the child her age, the religion she prophesies, whether she understands the nature of the oath and whether or not she would tell the truth and lies on her own words.

The effect of evidence of a child of a tender age being received without taking his or her promise to tell the court the truth and not lies as required by the law is that the same has no evidential value. As such, the evidence of PW1, which was taken without recording her promise to tell the truth, as stated in the above case, has no evidential value.

It is also settled that the best evidence of sexual offence comes from the victim. See the case of ***Seleman Makumba vs. Republic***, 2006. Having disregarded PW1 evidence, I find that the remaining evidence cannot stand to find the appellant guilty of the offence of rape.

I also noted another anomaly in the proceedings that the PF3 (**Exhibit PE "2"**) was tendered by the father of the victim (**PW3**). The law is very clear on who should tender exhibits in court, it is the witness. In this case the clinical officer (**PW4**).

Also, the Exhibit PE "2", after being admitted was not read in court as required by the law. This omission is fatal. It has rendered the Exhibit PE "2", ineffective and liable for expungement as held inI the case of ***Rashid Kazimoto and Masoud Hamis vs. Republic***, Criminal Appeal No. 558/2016, Court of Appeal at Mwanza (unreported). Accordingly, they are expunged from the record.

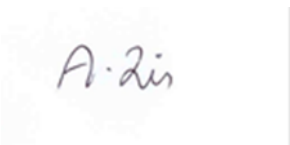
As such, I do not wish to determine the rest of the grounds as they all fall short at juncture. As a result, I allow the appeal. I quash the conviction and set aside the sentence. I order the appellant's immediate release unless he is being held for another lawful cause.

The right of appeal was explained.

DATED at MBEYA on this 17 day of November 2023.

A. A. SINDA
JUDGE

The Judgment is delivered on this 17 day of November 2023 in presence of the appellant who appeared in person and Ms. Lyimo for the respondent.



A. A. SINDA
JUDGE