IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 36 OF 2022

(Originating from Criminal Case No. 132 of 2021 of the District Court of Same at Same)

ELITUMAINI JOHN ELITUMAINI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

30/01/2023 & 03/02/2023

SIMFUKWE J.

Before the District Court of Same, the Appellant was charged with the offence of rape contrary to **section 130(1)(2) (e)** and **section 131(1) of the Penal Code, Cap 16 [R.E 2019].**

The particulars of offence were that Elitumaini s/o John Elitumaini (the appellant herein) on 27th, day of October, 2021 between morning to afternoon hours at Hedaru village within Same District in Kilimanjaro region had carnal knowledge of one AAA (not her real name) (the victim) a girl aged 12 years.

Before the trial court, it was alleged by the prosecution that the victim used to reside at the appellant's homestead as a baby sitter since the wife of the appellant was employed at the Petrol Station. It happened that on 27/10/2021 the wife of the appellant as usual left the victim with her child

at home alone and went to her work. It was alleged that the appellant used that opportunity raped the victim and left. It was also alleged that he even returned in the afternoon and raped the victim for the second time.

The victim reported the incident to her mother when they met at the church. The mother reported the matter to the police station and the victim was taken to hospital. The appellant was arraigned and charged as above.

The trial court was satisfied that the case was proved beyond reasonable doubts. It convicted the appellant and sentenced him to serve 30 years imprisonment. The trial court also ordered the appellant to pay compensation to the victim to the tune of Tshs 300,000/-

The appellant was aggrieved, he preferred this appeal on the following grounds:

1. *That the learned trial Magistrate strayed into error of law when he failed to note that he violated the principle stipulated under section 127(2) of the Evidence Act Cap 6 R.E 2019 as he was supposed to assess whether or not the child understood the nature of oath before receiving her evidence. Moreover, the child's voire dire was half complete as she did not promise "not to tell the lies."*
2. *That, the learned trial Magistrate grossly erred both law (sic) and fact in convicting and sentencing the Appellant basing on weak, tenuous, incredible, and wholly unreliable prosecution evidence from prosecution witnesses.*

3. *That the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt against the Appellant and to the required standard by the law.*

During the hearing of this appeal, the appellant was unrepresented while the respondent was represented by Ms. Mary Lucas, the learned State Attorney.

On the first ground of appeal, the appellant argued that evidence of PW2 (the victim) was taken contrary to **section 127(2) of the Evidence Act, Cap 6 R.E 2019**. He blamed the trial magistrate for failure to assess whether or not the child understood the nature of an oath, and also failed to grasp the fact that the child gave a half promise as she didn't promise not to tell lies to the court. He made reference to page 14 second line of the typed proceedings to support his argument.

The appellant continued to argue that the reception of evidence of a child of tender age is governed by **section 127(2) of the Evidence Act** (supra). Explaining this provision, the appellant submitted that the trial court before receiving the evidence of a child of tender age, was duty bound to ensure that the child had adhered to the mandatory provision of the said law. He referred to the case of **Rajabu Ngoma Msangi vs Republic, Criminal Appeal No 22 of 2019** in which Hon. Twaib J, (as he then was), at page 8 to 9 of the judgment had this say:

"As for the consequences for such irregularity, the Court of Appeal in Godfrey Wilson vs R, (supra) held further as follows:

In this case since PW1 gave evidence without making prior promise of telling the truth and not lies, there is no gain saying that the required procedure was not complied with before taking the evidence of the victim. In the absence of a promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No.4 of 2016. Hence the same has no evidential value."

On the basis of the above authority, the appellant was of the view that the omission done by the trial magistrate by failing to adhere to the laid legal requirements in treating the evidence of PW2 made such witness with no legs to stand. He prayed this court to expunge the said evidence from the record. To cement the point, he cited the case of **Godfrey Wilson Vs R, Criminal Appeal No. 168 of 2019** at Bukoba (unreported) which was cited by this court in the case of **Rajabu Ngoma Msangi** (supra) at page 8-9 that:

"Since the crucial evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of sustaining the conviction."

The appellant implored the court to decide as decided in the above cited case and expunge from the record evidence of PW2. He said that once the said evidence is expunged it is obvious that there will not be any evidence to be corroborated by the remaining evidence.

Furthermore, the appellant argued that because this is the first appeal then it is in the form of re-hearing. Hence, the appellant expected the re-evaluation of the entire evidence on record by this court and arrive at its

own decision thereon. He further prayed the court to see all the above elaborated short falls and resolve the same in favour of the appellant.

In conclusion, he urged the court to find merit in his appeal and allow it by quashing the conviction and setting aside the sentence and set him at liberty.

Responding to the 1st ground of appeal that there was non-compliance of **section 127(2) of the Evidence Act** (supra), the learned State Attorney argued that as per page 12 to 13 of the typed proceedings, the said argument is unfounded since the trial magistrate was mindful and complied to the said provision. That, the trial magistrate conducted a test to satisfy himself that the witness was able to tell the court nothing but the truth. She referred to the case of **Paul Dioniz vs R, Criminal Appeal No. 171 of 2018** (unreported) where the promise to tell the truth by the witness of tender age was not satisfactorily recorded. However, upon evaluating the sufficiency of prosecution evidence, the Court of Appeal upheld conviction and sentence based on **section 127(6) of the Evidence Act** (Supra). She insisted that the first ground of appeal lacks merit.

On the 2nd ground of appeal, the learned State Attorney referred to page 11 and 12 of the judgment and submitted that the trial magistrate concluded that PW2 was the witness of truth so her evidence could be relied upon to convict without corroboration. He argued that PW2 and PW4 Dr. Charles in their evidence gave an account of direct evidence as per the best evidence rule declared under **section 61 and 62 of the Evidence Act** (supra) that the victim was penetrated. He argued that

this rule was underscored in the case of **Athumani Rashidi vs Republic, Criminal Appeal No. 264 of 2016.**

The learned State Attorney continued to argue that the demeanour of all prosecution witnesses was also weighed by the trial magistrate and chose to trust them. She continued to state that PW2 was able to mention the appellant and narrated the circumstances of the incident to her mother PW1 at the earliest opportunity, which led to the arrest of the appellant. The appellant could not even cross examine the victim on any fact she asserted in respect of the incident during the trial which is assurance that evidence of PW2 was strong, credible, reliable and had credence.

It was further stated that it is the cardinal principle that true and best evidence of a sexual offence is that of the victim. Reference was made to the case of **Seleman Makumba vs Republic, [2006] TLR 384** to substantiate the argument.

In reply to the 3rd ground of appeal that the prosecution case was not proved beyond reasonable doubt, the learned State Attorney referred to page 12 and said that PW1 told the court that even the appellant confessed to had raped PW1 when they were at the police station.

Ms Mary contended that a child of tender years can prove a case as a single witness. That, according to **section 127(3)(6) of the Evidence Act**, the law considers evidence of the child as independent evidence capable of proving his own case and can also corroborate the evidence of other child or adult so long as the court believes she is telling the truth.

In the instant case, the learned State Attorney was of the view that the testimony of PW2 (the victim) was left unchallenged by the defence case.

Also, PW4 Dr. Charles tendered a PF3 (exhibit PE2) which confirmed that PW2 was penetrated. She cemented her argument with the case of **Goodluck Kyando vs Republic [2006] TLR 363** which is to the effect that *every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.*

It was emphasized that in line of the case of **Seleman Makumba** (supra) this ground has no merit since from the whole proceedings of this case there is no good and cogent reason for disbelieving the testimony given by all the prosecution witnesses. That, the case was proved beyond reasonable doubt.

In conclusion, it was stated that this appeal is devoid of merit and prayed the same to be dismissed in its entirety.

I have carefully considered the parties' submissions in relation to the trial court's records and grounds of appeal. The issue which covers all the grounds of appeal is *whether evidence adduced by the prosecution before the trial court proved the offence charged beyond reasonable doubts.*

On the first ground of appeal, the appellant questioned the evidence of PW2 the victim whose age is of tender age in two circumstances: First he said that the trial magistrate violated the provision of **section 127(2) of the Evidence Act** since he didn't assess whether or not the said child understood the nature of oath before receiving her evidence. Second, he said that the said child gave a half promise since she didn't promise not to tell lies. He was of the view that this omission is fatal which cannot leave the said evidence with legs to stand.

On the other hand, the learned State Attorney argued that at page 12 and 13

of the typed proceedings, the trial magistrate did comply with the law and the conviction was in accordance with **section 127(6) of the Evidence Act** (supra).

The second issue, as rightly stated by parties to this appeal, that the provision which delas with the evidence of the child of tender age is **section 127(2) of the Evidence Act** which is to the effect that:

> *"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 above provision was interpreted by the Court of Appeal in the case of **Stephen Emmanuel vs Republic (Criminal Appeal 303 of 2019) [2022] TZCA 704** which cited and appreciated its decision in the case of **Geoffrey Wilson vs Republic, Criminal Appeal No. 168 of 2018** in which it was held that:

> *"In the case of **Geoffrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) we lucidly expressed the import of the above section and we stated that:*
>
> > *"To our understanding, the ...provision as amended provides for two conditions. **One,** it allows the child of tender age to give evidence without oath or affirmation. **Two,** before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies. "*
>
> *In that case we went ahead and observed that the plain meaning of the provisions of sub-section (2) of section 127 of*

the Evidence Act is that, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In a situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies."

I fully subscribe to the above decision in dealing with the appellant's grievances. In the instant matter the trial magistrate before receiving evidence of a child of tender age, posed the following questions to PW2:

"Question	*answer*
1. Which did you finish	*I finished this year 2021 at Muungwana Primary school*
2. How old are you	*12 years*
3. Where do you live	*I am living at Hedaru*
4. Who are you living with at home father	*I am living with mother and*
5. What are the names of your parents	*My mother is Rose Johson my father Amani William Mrutu*
6. What do you promise the court	*I promise the court to tell the Truth*
7. If you don't tell the truth	*I know it is the crime and Also God will punish me on the last*

court: I am satisfied that the witness is capable of testifying and the provision of section 127(2) of the TEA has been complied but also, I think it is prudent the witness to take oath..."

The above quotation suggests that the witness gave evidence under oath. Therefore, I am of considered opinion that the issue that the promise given was not complete is misplaced since the said witness gave evidence under oath and not under the option of telling the truth and not lies.

The appellant also lamented that the trial court did not assess whether or not the said child knew the nature of oath before receiving her evidence. This issue will not consume the court's time. As reflected in the above quotation, the court posed the questions to the said witness and at the end, it formed an opinion that indeed the said witness understood the meaning of oath, thus she swore and testified under oath. In the case of **John Mkorongo James vs Republic (Criminal Appeal No. 498 of 2020) [2022] TZCA 111 [Tanzlii]** at page 12 to 13 of the judgment the Court had this to say:

"...The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and ***know whether he/she understands the meaning and nature of an oath,*** *to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is*

competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court tell the truth and not tell lies. ***It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief, to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court to tell the truth and not tell lies*** *as per section 127 (2) of the Evidence Act."* Emphasis added

Guided by the above authority, in the instant matter the trial magistrate through examination which was conducted to the child of tender age (PW2) did satisfy himself that she indeed understood the meaning and nature of oath and she swore before giving her evidence. Therefore, I am of considered opinion that the appellant's grievances that the court did not inquire if the said child knew the nature of oath is unfounded.

On the 2nd and 3rd grounds of appeal, the appellant complained that the prosecution evidence was weak and unreliable. Thus, the case was not proved beyond reasonable doubt. The learned State Attorney argued that through the evidence of PW2, the trial court satisfied itself that the same was strong, credible and reliable. She added that the victim (PW2) reported the matter to

her mother at the earliest opportunity.

I have studied the entire evidence before the trial court as well as the judgment and join hands with the learned State Attorney that the case was proved beyond reasonable doubts and these are my reasons: First, evidence of PW2 was credible. I have concluded as such having in mind that the best evidence in sexual offences comes from the victim and credibility of the witness is the monopoly of the trial court. In the case of **Shaban Daud v. The Republic, Criminal Appeal No. 28 of 2000 (unreported)** it was held that:

> *"... Credibility o f a witness is the monopoly of the trial court only in so far as demeanor is concerned, the credibility of a witness can be determined in two other ways: one, when assessing the coherence of the testimony of that witness."*

Therefore, since in the instant case the trial magistrate did assess the credibility of the witnesses, then I am of considered opinion that the same cannot be faulted at the appellate stage considering the fact that the appellant did not challenge the credibility of prosecution witnesses.

Also, the victim reported the incidence to her mother at the earliest stage which is assurance of her reliability. See the case of **Lameck Bazil & Another vs Republic,** (Criminal Appeal 479 of 2016) [2018] TZCA 191 **[Tanzlii]** at page 14.

In his defence before the trial court, the appellant started by stating that he found the girl at home when he returned from Makanya and that his wife refused to have sexual intercourse with him. Then, he was informed by the wife that the girl was taken by her mother. He alleged that the case was fabricated by his wife and her friend to make sure that he stays

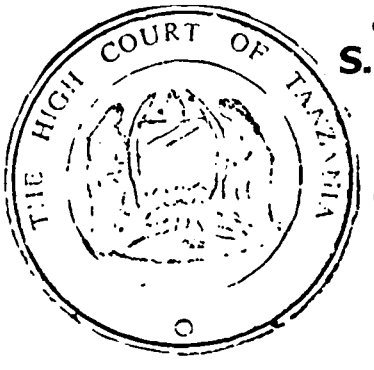
in prison.

It is trite law that the defence of the accused should raise reasonable doubts on part of the prosecution. In the instant matter, the defence of the appellant did not raise any doubt on part of the prosecution, rather I find it raising doubts on his part that possibly he raped the victim after his wife had refused to have love with him.

From the foregoing analysis, I am satisfied that this appeal has no merit. I dismiss it in its entirety.

Appeal dismissed.

Dated and delivered at Moshi this 3rd day of February, 2023



S. H. SIMFUKWE

JUDGE

03/02/2023