IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

CRIMINAL APPEAL NO. 93 OF 2022
(Originating from Case No. 33 of 2022 of Nyamagana District Court.)

SHABANI BUDEBA @ KASHONELE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

07th February & 13th February 2023

Kilekamajenga, J.

In the District Court of Nyamagana, the appellant was charged with the offence of rape contrary to sections **130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 RE 2019.** It is alleged that, on divers dates between January and February 2022 while at Mkolani area within Nyamagana District in Mwanza, the appellant raped a girl of 12 years old who was his step daughter. During the trial, the victim (PW1) testified that, in January 2022, she visited the appellant at Mkolani leaving her mother at Buhongwa in Mwanza. The victim, knew the appellant as her step father and she always visited him. On the first day, the victim spent her night in the bigger house with other children namely Fatu, Ziada and Swaum. On the next day, the appellant ordered the victim to sleep in a small house leaving the other children in the main house. At night, the victim went to sleep in the small house. The appellant went to the small house and locked the

door. Later, the appellant came back at midnight and raped the victim; he went away and closed the house door. The appellant came back the next morning and opened the door for the victim to come out. The appellant further warned the victim not to tell anybody about the incident. On the next day, the appellant repeated the same incident of locking the victim in the small house and rape her at mid night. He did so, for about eleven days until the victim's mother came looking for her. Later, the victim informed her mother about the rape incident and the matter was reported to the police.

PW2, who is the mother of the victim, testified that, the victim is 12 years old as she was born in February, 2010. She further informed the court that, in January 2022, she had a misunderstanding with her daughter after she came back late from a tuition centre. As a result, the victim went to the appellant's home. When PW2 followed her, she found her locked in the house though she finally managed to rescue her. But, it took just a short time before the victim relocated again to the appellant's home. PW2 wanted to know why the victim was so much attached to the appellant. It did not take time before PW2 was informed by the appellant's tenant that, the victim was having an affair with the appellant. PW2 finally reported the matter to the police.

PW3 was requested by the victim's mother to find the victim who had abandoned school and took refuge at the appellant's home. PW3 was among the people to

apprehend the victim and take her back to her mother's home. PW2 handcuffed the victim but still the victim escaped back to the appellant. PW2 and PW3 went back to the appellant's home searching for the victim. However, they talked to the appellant's tenant who divulged the reason for the victim's association with the appellant. They inquired to the victim about the alleged rape; despite a mild resistance, the victim later cooperated by revealing her relationship with the appellant.

PW4, being the police officer who investigated the case, interrogated witnesses including the victim and the medical doctor who all confirmed that the appellant raped the victim. PW5 who was the medical doctor further confirmed that the victim's private part was penetrated, though she was HIV negative. He filled-in the PF3 form which was tendered in court. PW6 was just called to witness the appellant's room after the arrest.

In his defence, the appellant (DW1) confirmed that he was arrested by the police on 13th February 2022 and taken to Igogo police station where he stayed for two days without recording his caution statement. He further blamed his wife for doctoring this case after he had nabbed her with another man in an adulterous association. Thereafter, he divorced the wife though continued to provide for maintenance to the new born. He consistently denied raping the victim though

he admitted that, the victim visited his house to collect some money for maintenance.

The evidence at hand finally led to the appellant's conviction and sentence; he was sentenced to serve life sentence. Being dissatisfied with the decision of the trial court, the appellant approached this court for justice. He advanced seven grounds of appeal thus:

1. *That, the trial magistrate erred in law and fact for convicting me while the prosecution side particularly PW1 failed to specify the light intensity.*
2. *That, the lower court grossly erred in law and fact to convict me while the prosecution side failed to tender the PF3 and summoning the Doctor for fearing that might had disclosed the truth that the PW1 vagina was still intact, means her virginity was not yet perforated.*
3. *That, the trial magistrate erred in law and fact for convicting me without considering that, the prosecution side failed to prove penetration as a crucial ingredient in a SOSPA.*
4. *That, the trial magistrate misdirected in law and fact for convicting me without considering this was a framed case and caused by matrimonial misunderstanding between PW1 biological mother and PW1, and at the same time I (DW1) and PW1 biological mother. The trial magistrate was supposed to caution himself before imposing the conviction considering I was in polygamy marriage of which a lot of misunderstanding always used to happen as what PW1 adduced.*
5. *That, the trial magistrate erred in law and fact to convict me by relying upon the evidence of PW1 without corroborative evidence, this left uncurable lacunae.*

6. *That, the lower court erred in law and fact for convicting me without considering that PW1 was not promised (sic) to tell the truth to meet the mandatory requirement prescribed under section 127(2) of TEA (Cap. 6 RE 2019).*
7. *That, I do not pen off without saying that the prosecution side failed to prove the alleged offence beyond all reasonable doubt considering he failed to assess my defence.*

When the appeal was called for hearing, the appellant appeared in person and without legal representation whereas the learned State Attorney, Ms. Revina Tibalengwa appeared for the respondent, the Republic. In his oral submission, the appellant simply blamed his wife for framing the case against him. He further insisted that, the matter was taken to the police without any information to the street leader. Even the medical doctor failed to tender the PF3 to prove the alleged rape and that, none of the prosecution witnesses saw the appellant raping the victim. The appellant insisted that, the grudges between him and his wife fuelled the instant case.

On the other hand, the learned State Attorney, objected the appeal by supporting the conviction and sentence against the appellant. When responding on the first ground of appeal, Ms. Tibalengwa argued that, the identification of the appellant by the victim did not need any light as he (appellant) was well known to the victim. On the second ground, the counsel was of the view that the

appellant's allegation lacked merit as the medical doctor testified and the PF3 was tendered and admitted as exhibit PE1. In his examination, the medical doctor found the victim's vagina to have been penetrated. Therefore, this ground is devoid of merit. On the third ground, Ms. Tibalengwa argued that, the victim's evidence may be applied without corroboration. The victim's evidence clearly narrates on how the appellant raped her. It is evident that the appellant frequently raped the victim; the victim's evidence was coupled with the Medical Doctor's testimony (PW5) who confirmed that, the victim's vagina was penetrated.

When responding on the fourth ground, the learned State Attorney objected the existence of grudges between the appellant and the victim's mother. In fact, the appellant and the victim's mother lived in harmony. During the trial, the appellant failed to challenge the testimony of PW1 and PW2 on the allegation of grudges between him and the victim's mother. On the fifth ground, the learned State Attorney argued that the evidence of PW1 was corroborated by PW2 and PW5. On the sixth ground, Ms. Tibalengwa was of the view that section 127 (2) was compiled in recording the victim's evidence. In general, the prosecution proved its case to the required standard and the defence failed to raise doubts. The counsel finally invited this court to evaluate the evidence and dismiss the appeal.

When rejoining, the appellant insisted that the case was doctored against him by the victim's mother.

It is apposite to consider the grounds of appeal as advanced by the appellant at this stage. On the first ground, the appellant argued that the intensity of light was not sufficient to identify him during the rape. On this ground, the learned State Attorney for the respondent argued that, as the appellant was well known to the victim, there was no need to identify him through light. I entirely subscribe to the learned State Attorney's view that the requirement to identify the appellant through light was not necessary to prove the offence. The appellant was the step father of the victim; they lived together before the appellant separated with the victim's mother. The victim returned back to the appellant after being sent by her mother to fetch money for maintenance. Thereafter, the victim never returned back until her mother found out that the appellant was raping the victim.

The prosecution evidence further suggests that, the appellant used to have sexual intercourse at night and locked the victim in the small room. Therefore, the victim suffered several incidences of rape from the appellant. It was therefore not a single act that could require the identification of the appellant through light. Under such circumstances, it is irrational to argue that, there was

need of intense light to identify the appellant. I find no merit in this ground and therefore dismiss it.

On the second ground, the appellant argued that, the prosecution failed to tender the PF3 form nor summon the medical doctor in fear of disclosing the contents of the form which showed that the victim's vagina was intact and therefore not perforated. This ground prompted my perusal of the proceedings of the trial court. The proceedings show that, the prosecution summoned a medical doctor (PW5) that examined the victim. In his oral testimony, PW5 confirmed that the victim's private part was penetrated. He also tendered the PF3 form which was not objected by the appellant. However, the trial court did not admit the same apart from simply recording that *"the PF3 bearing BHG/RB/293/2022 dated 15.02.2022 of the victim…is cleared for admission and marked PE1".* In my view, such words did not admit the PF3 as the trial court is supposed to clearly record that the PF3 is admitted instead of clearing the same for admission. Therefore, the said PF3 cannot be counted as part of the record of the trial court as it was not admitted.

Further perusal shows that, the medical doctor found the labia majora intact though there was no hymen. He finally concluded that, there was no hymen and probably a blunt object penetrated the victim's vagina. In other words, even if it could be admitted as exhibit, the form contains contradictory information hence

not clear whether the victim was penetration as absence of hymen may not suggest rape of the victim because even the labia majora seemed to be intact.

On the sixth ground, the appellant alleged that **section 127(2) of the Evidence Act, Cap. 6 RE 2022** was not complied when recording the victim's testimony. In response, the learned State Attorney argued that, the victim's evidence was recorded in compliance with the above provisions of the law. According to the trial court proceedings, the victim testified as the first prosecution witness (PW1). Before the trial court recorded the victim's testimony and after asking some few questions to establish whether the victim understands the questions, the court recorded the following words:

> *"This court after inquiry to the witness child aged 12 (sic) is satisfied that she is sufficiently intelligent (sic) to testify before this court".*

Thereafter, the trial court recorded the victim's testimony. Under the law, a child of tender age may give evidence without taking an oath or making an affirmation provided he/she promises to tell the truth and not lies. **Section 127(2) of the Evidence Act**, specifically provides that:

> *"(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".*

When I juxtapose the above recording of the victim's testimony vis-à-vis the above provision of the law, it is evident that the victim did not take an oath or affirmation and neither did she promise to tell the truth and not to tell lies as required by the law. In the case of **Oroko Wankuru @Mniko v. The Republic,** Criminal Appeal No. 514 of 2019, CAT at Musoma, the Court of Appeal of Tanzania decided that:

> *"…we entirely agree with the learned Senior State Attorney that there is no indication that the learned trial Resident Magistrate complied with the provisions of section 127(2) of the EA by requiring the victim (PW1), a witness of tender age, to promise to tell the court the truth before she adduced her evidence at the trial. Similarly, we are in agreement with the learned Senior State Attorney that the omission is fatal as propounded in several decisions of this Court."*

Furthermore, in the case of **Joseph Damian @ Savel v. The Republic,** Criminal Appeal No. 294 of 2018, CAT at Dar es salaam, the Court of Appeal Stressed further that:

> *"Before the amendment, in compliance with the subsection (2) of the 127 of the Evidence Act, the courts used to conduct voire dire examination to test; one, whether the witness whose age was tender understood the meaning of oath, two, if he had sufficient intelligence for the reception of his evidence and, three, if he understood the duty of speaking the truth. After the amendment already referred to hereinabove, what remained relevant was the child of tender years to swear or if not, only to tell the truth to the court and not to tell lies. The victim in the case at hand, as*

already reproduced above, did not, or was not led to, do that. That is, did neither swear nor promise to tell the truth to the court and not to tell lies. That aspect did also not come out in the voire dire conducted. Her testimony was therefore unqualified to mount a conviction; it ought to have been discarded. We have heard times without number that evidence of a child whose age is tender and which is received without complying with section 127(2) of the Evidence Act, lacks probative value and must be discounted."

To underline the above principle of the law, currently, there is no requirement to conduct voire dire test before a child of tender age testifies. However, if the child of tender age understands the reason for taking an oath, he/she may take an oath or affirmation before testifying. If the child does not take an oath or affirmation, he/she must promise to tell the truth and not lies before the evidence is recorded. If the above requirement of the law is not complied by the trial court, such evidence has no legal value and should be discarded. This stance has been clearly stated by the Court of Appeal in the case of **Habibu Mtilla v. The Republic,** Criminal Appeal No. 416 of 2018, CAT at Dar es salaam (unreported) thus:

'…a child of tender age is not barred from giving evidence on oath or affirmation. Apart from doing away with the requirement of conducting voire dire, in addition, the new section allows reception of evidence after a child witness has promised to tell the truth and after undertaken not to tell any lies.'

The Court of Appeal went on stating that:

'…even though the trial court received the evidence of PW1 after it had conducted voire dire test on him, his evidence did not become invalid because, as stated above, the amendment did not have the effect of barring a child of tender age from giving evidence on oath or affirmation.'

Furthermore, in the case of **Bashiru Salum Sudi v. Republic,** Criminal Appeal No. 379 of 2018 (unreported), the Court of Appeal stressed that:

'It is true that her (PW1) evidence was received on affirmation after the trial court had conducted a voire dire test despite the fact that it is no longer a requirement. However, we are settled in our mind that the fact that the trial court determined PW1's ability to give evidence on oath or affirmation on the basis of the practice obtained under the repealed law, did not invalidate that evidence. This is because, as observed in ***Godfrey Wilson v. R*** *[Criminal Appeal No. 168 of 2018] and later is* ***Issa Salum Nambabuka v. R.*** *[Criminal Appeal No. 272 of 2018] (both unreported), the law is silent on the method of determining whether such a child may be required to give evidence on oath or affirmation or not.'*

See also, the case of **Selemani Moses Sotel @White v. Republic,** Criminal Appeal No. 385 of 2018 (unreported).

In the case at hand, as long as the victim's evidence was recorded in contravention of section 127(2) of the Evidence Act, it ought to be expunged or discarded. In absence of the victim's evidence, this case lacks legs to stand.

I further examined the victim's evidence and found a statement suggesting that, the victim was possibly forced to name the appellant. During the trial, the victim informed the court that:

> *"My mother came after me and took me at home Kishila Buhongwa. My mother told me 'usipoongea ukweli nakupiga, ndio nikamwambia kweli, baba alikuwa ananibaka'"*

In a situation where the appellant alleged existence of matrimonial dispute between him and the victim's mother, the above statement may be supporting the appellant's defence that the case was framed due to matrimonial based grudges. Based on the reasons stated above, I find merit in the appeal and allow it. The appellant should be released from prison unless held for other lawful reasons. It is so ordered.

DATED at **Mwanza** this 13th day of February, 2023.

Ntemi N. Kilekamajenga.
JUDGE
13/02/2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY

Court:

Judgment delivered this 13th February 2023 in the presence of the appellant and the learned State Attorney, Ms. Sophia Mgassa. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga.
JUDGE
13/02/2023