IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA SUB-REGISTRY]
AT ARUSHA

CRIMINAL APPEAL NO. 39 OF 2020
(Originating from the District Court of Hanang' at Katesh, Criminal Case No. 31 of 2019)

FREDY MWANGA ..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

13th December 2022 & 10th February 2023

Masara, J

The Appellant herein preferred this Appeal in the quest to have his conviction and sentence imposed by the District Court of Hanang' ("the trial court") overturned. The trial court sentenced him to serve thirty years imprisonment on the offence of rape, contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 [R.E 2002]. He has preferred this appeal on the grounds hereunder, reproduced verbatim:

a) ***That, the learned Resident Magistrate who presided over the matter erred both in law and fact in convicting and sentencing the Appellant by erroneously condemning Appellant committing offence under non-existent provision of the law;***
b) ***That, the learned Resident Magistrate who presided over the matter erred both in law and fact in sentencing under non-existent provision of law;***

c) ***That, the learned Resident Magistrate who presided over the matter erred both in law and fact in convicting and sentencing the Appellant by violating principles governing criminal trials;***

d) ***That, the learned Resident Magistrate who presided over the matter convicted and sentenced the Appellant without adherence to principles governing the same;***

e) ***That, the learned Resident Magistrate who presided over the matter erred both in law and fact in convicting and sentencing the Appellant as the prosecution case was not proved beyond reasonable doubts; and***

f) ***That, the learned Resident Magistrate who presided over the matter erred both in law and in fact in convicting and sentencing the Appellant by relying and erroneously importing new testimonies that was not even adduced, tendered and examined during trial.***

On 25/10/2022, the Appellant filed nine additional grounds of appeal, which I will not reproduce but I shall consider them in tandem with the original ones in the determination of the appeal. In short, the Appellant prays that his appeal be allowed by quashing the conviction and setting aside the sentence met on him, thereby setting him free.

The background leading to this appeal can be summed up as follows: Agnes Awii (PW1), the mother of the victim, accounted that on 19/01/2018, she went to her business and the victim (PW3) went to

school, at Daniel Noud Secondary School, where she was studying in Form Two. PW1 returned home at 2000hrs, but did not find PW3 at home. She tried to find her whereabouts without success. She went at Katesh Police Station to make a report whereby she was issued with an RB number. One day she met the Appellant who promised to assist in tracing the whereabouts of PW3. After sometimes, the Appellant told her that PW3 was in Dar es Salaam. The Appellant asked for fare from PW1 so as to go and bring PW3 from Dar es Salaam. PW1 complied. The Appellant went to Dar es Salaam where he found PW3. The Appellant connected PW1 and PW3 over phone. Incidentally, the Appellant was not able to bring back the victim. On 10/09/2018, the Appellant was arrested and was forced to accompany police officers and PW1 to Dar es Salaam so as to show them the whereabouts of PW3. On 14/09/2018, they managed to arrest PW3 at Praygod Mushi's saloon and took her back to Katesh. Praygod Mushi was also arrested.

It was the Prosecution's version at the trial court that the victim (PW3) was a standard seven student at Mogitu Primary School in 2016 when she met the Appellant, who was a barber, having his own hair cutting saloon in Katesh town. That the Appellant lured her by taking her to his room and had carnal knowledge of her. The sexual relationship persisted till the

end of 2017 when she was in form one at Daniel Noud Secondary School. One day, in 2018, when she was in form two, she met the Appellant on her way back from school. The Appellant demanded to have sex with her. She first went home where she changed from her school uniform and returned back to the Appellant's house. That on that day they had sexual intercourse until late at night. The Appellant escorted PW3 back home, but when they reached there, they heard her mother loudly lamenting on her being late at home. PW3 feared that if she enters their house her mother will beat her. They took a car and headed to Endasaki where they spent that night before they left for Arusha the next morning. At Arusha, they slept in a guest house, The next day they boarded a bus to Dar es salaam where they spent a week in one guest house. Thereafter they shifted to another guest house, before the Appellant returned to Katesh leaving PW3 at his friend, Praygod Mushi, who also had a saloon in Dar es Salaam. PW3 continued living at Godfrey Mushi's room where she used to sleep with his child, while Mr Mushi was sleeping in the studio.

After returning to Katesh, PW3 was taken to the hospital for examination on 17/09/2018. PW3 was examined by one Paulo Sarwat (PW2), who confirmed that PW3 had no bruises but she had no hymen as she proved

to have had sexual intercourse regularly. PW2 filled in the PF3 which was admitted as exhibit P1.

The Appellant denied all the allegations against him. After hearing the evidence of both the prosecution and defence, the trial magistrate was convinced that the charge of rape against the Appellant was proved beyond reasonable doubts as earlier stated.

At the hearing of the appeal, the Appellant appeared in person unrepresented while the Respondent Republic was represented by Ms. Akisa Mhando, learned Senior State Attorney. The appeal was heard orally.

Submitting in support of the 1st ground of appeal, the Appellant contended that the charge was defective as it referred to Katesh town as the scene of crime while the victim (PW3) stated that the crime was taking place at the Appellant's room at Qidang'onyi. He insisted that these are two different places, hence the prosecution was supposed to amend the charge under section 234(1) of the Criminal Procedure Act (CPA). To reinforce his contention, he relied on decisions of the Court of Appeal in **Godfrey Simon & Another vs Republic, Criminal Appeal No. 296 of 2018** and **John Julius Martin & Another vs Republic, Criminal Appeal No. 42 of 2020** (both unreported).

On the 2nd ground, the Appellant submitted that the trial court erred in law and fact in relying on the evidence of PW3 (the victim) while the witness was not truthful. That PW3 was recorded to have said that the events started in May 2016 to March 2018, which is a year and ten months. That the said witness did not report the events to anyone. Failure to report the events while she was living with her mother and sister, shows that she was not a trustworthy witness. He made reference to the case of **Yust Lala vs Republic, Criminal Appeal No. 337 of 2015** (unreported), where duty to report was upheld.

Substantiating the 3rd ground of appeal, the Appellant stated that in addition to not reporting, PW3 accounted that the Appellant used to lie at the tuition centre that he was her brother, but still she remained silent about it. That at page 13 of the typed proceedings, she stated that the Appellant left her at Praygod Mushi in March 2018, but that at page 7, PW1 testified that PW3 left home in January 2018. Thus, PW3 was not a truthful witness. Furthermore, that PW3 stated that she did not inform her mother of her whereabouts as she did not have her phone number, but at page 8, during cross examination, PW1 said that PW3 was communicating with other people by phone. The Appellant insisted that a testimony of a witness has to pass the test of truthfulness. To support

this contention, he referred to the case of **Abiola Mohamed @Simba vs Republic, Criminal Appeal No. 291 of 2017** (unreported).

Regarding the 4th ground of Appeal, the Appellant submitted that the age of the victim was not proved beyond doubts. That her age appears in the charge sheet which cannot be part of the evidence. Also, it was mentioned before she was sworn, therefore it was not proved to qualify as a statutory rape offence under section 130(1) and (2)(e) of the Penal Code. To bolster this argument, the Appellant relied on the decisions in **Andrea Francis vs Republic, Criminal Appeal No. 173 of 2014** and **Geofrey David vs Republic, Criminal Appeal No. 50 of 2020** (both unreported).

Submitting on the 5th ground, the Appellant accounted that failure by the prosecution to call vital witnesses such as Praygod Mushi in whose house PW3 was found and the co-tenants of the Appellant, who allegedly witnessed when PW3 was taken to the Appellant's room, it implies that the prosecution feared negative responses from those witnesses. The Appellant also faulted the prosecution for failure to summon attendants of the guests in Katesh, Arusha and Dar es Salaam where the Appellant slept with PW3. Further, he faulted failure to bring any of the guest book registers from the said guest houses.

Expounding on the 6th ground of appeal, it was the Appellant's submission that the trial magistrate fabricated evidence which did not feature in the proceedings. He said this referring to page 2 of the judgment, where the trial court magistrate stated that the Appellant lived with the victim in Dar es Salaam for two weeks. Also, the judgment has a statement to the effect that PW1 was taking her children to the Appellant's saloon. In the Appellant's view, those are some of the trial magistrate's own inventions. The Appellant also made reference to what was recorded at page 15, where the trial magistrate recorded that PW3 was in Form 1 in 2016 and in the judgment the trial magistrate stated that the Appellant was arrested on 14/09/2018. Another misstatement allegedly made by the trial magistrate is where he stated that PW3 was raped for the first time in 2017. The Appellant relied on the decision in **Athanas Julius vs Republic, Criminal Appeal No. 498 of 2015** (unreported) where the Appellant was acquitted due to the use of own evidence by the magistrate.

On the 7th ground of Appeal, the Appellant fortified that it is not apparent whether PW3's evidence was recorded under oath or whether *voire dire* test was conducted. According to the Appellant, it was wrong for the trial magistrate to lead the witness to confirm whether she was going to tell the truth. He made reference to section 198(1) of the CPA which requires

any witness who is above 15 years to testify under oath and section 127 of the Evidence Act which require a child of tender age to promise to tell the truth. In the Appellant's view, the two cannot go in tandem.

Elaborating the 8th ground, the Appellant contended that the trial magistrate did not consider his defence nor did he analyse it. He insisted that his evidence casted doubt on the prosecution's case. For example, he stated that at page 4 of the typed judgment, the trial magistrate blamed him for failure to bring Clara and the boys to testify. In his view, weakness of the defence cannot form a basis for conviction, rather it was the prosecution's duty to prove the case against him beyond the shadow of doubts. The Appellant added that his evidence on how he got to know that PW3 was in Dar es Salaam was not considered. He relied on the case of **Farida Abdul Ismail vs Republic, Criminal Appeal No. 83 of 2017** (unreported) to underscore this assertion.

Regarding the last ground of appeal, it was the Appellant's submission that the prosecution did not prove the case against him. He pointed out some lapses showing that the case was not proved to the hilt. He used the example of what is stated at page 7 of the proceedings where PW1 stated that she reported the incident at police on 19/01/2018 but on cross examination she changed the story stating that she did not report the

incident. Also, that PW1 at page 8 stated that she had conflict with the Appellant but she did not elaborate on it. Further, the Doctor, who tendered the PF3 did not follow the procedure as he had the exhibit in his pocket. Furthermore, at page 12 of the proceedings, PW3 stated that in 2018 she was in Form II while she lied as she had escaped school since January 2018. He insisted that the case was framed up against him. He added that he is a cancer victim who could not do what was alleged, maintaining that it was Praygod Mushi who was with the victim but he bribed the victim's mother and the police, which explains why the case against him was opened six months after the victim was handed over to her mother.

Resisting the appeal, the learned Senior State Attorney, in response to the 1st ground appeal, conceded that it was true that PW3 stated that the Appellant was living at Qidang'onyi area, and that evidence was not challenged. She added that it was not disputed anywhere that the area is not in Katesh town. She insisted that failure to cross examine, is tantamount to acceptance of the alleged fact, relying on the Court of Appeal decision in **Samson Kejo vs Republic, Criminal Appeal No. 302 of 2018** (unreported). According to Ms Mhando, for a charge to be amended, the variance must be apparent, but in the matter at hand, the

Appellant did not state how he was prejudiced. In her view, the defect is one curable under section 388 of the CPA.

The learned Senior State Attorney combined the 2nd and 8th grounds of appeal submitting that at page 15 of the proceedings, PW3 stated that she could not report the incident as she was lured by gifts and money from the Appellant. She relied on the cited case of **Samson Kejo vs Republic** (supra) which made reference to the decision in the the case of **Marwa Wangiti Mwita & Another vs Republic [1982] TLR 39-43** which decided that each case has its peculiar circumstances. She maintained that the gifts and money can make a victim fail to report. Regarding re-evaluation of evidence, Ms Mhando supported the trial court's findings insisting that the trial magistrate considered the defence evidence by raising questions including on how the Appellant was able to know of the whereabouts of the victim. She referred to page 5 of the judgment where the trial magistrate raised issues of people mentioned by the Appellant and page 6 where it was concluded that the defence evidence was lacking. It was her view that the defence evidence was given deserving consideration.

Responding to the 3rd ground, Ms Mhando fortified that by communicating with her friends, cannot be a basis for concluding that PW3 had her

mother's phone numbers. Again, that the Appellant did not cross examine the victim on this issue. She restated the enshrined position of the law that credibility of a witness is entirely on the trial court. To support this view, she referred to the decision in **Shaban Rulabisa vs Republic, Criminal Appeal No. 88 of 2018** (unreported) where the issue of credibility of witnesses was amplified. According to Ms Mhando, there is nowhere in the judgment that the trial magistrate discredited the evidence of PW3. She insisted that PW3's evidence was trustworthy.

Submitting on the 4th and 9th grounds combined, the learned Senior State Attorney fortified that people who can prove the age of the victim include the Doctor (in this case PW2 stated that the age of the victim was 15 years). On the authority of people who can prove the age, Ms Mhando referred to the case of **Bore Cliff vs Republic, Criminal Appeal No. 193 of 2017** (unreported). She maintained that in such cases, three things need to be proved, including penetration, age and culprit. To support such averment, she placed reliance on the case of **Joseph Kanankira vs Republic, Criminal Appeal No. 240 of 2019** (unreported). According to the learned Senior State Attorney, the above elements were proved. That PW3 confirmed in her evidence that she was raped by the Appellant and lost her virginity and that happened between

May 2016 to 2018. She further insisted that the evidence of the victim is the best evidence relying on **Shaban Runabisa** (supra). That the victim's evidence was well corroborated by that of the Doctor (PW2) that she was raped and lost her virginity. He tendered exhibit P1 which also confirms the same. According to the learned Senior State Attorney, the complaint that the Doctor had the PF3 in his pocket is not reflected anywhere in the proceedings nor was PW2 cross examined on the same. Whether it was the Appellant who committed the offence, she relied on the uncontroverted evidence of PW3, who properly identified the Appellant at Praygod Mushi's saloon.

Responding to the 5th ground, the learned Senior State Attorney accounted that the number of witnesses to prove a particular fact is immaterial. What is important is the weight accorded to the evidence. To reinforce her argument, she referred to the Court of Appeal decision in **Halifan Ndubashe vs Republic, Criminal Appeal no. 493 of 2017** (unreported). She contended that failure to summon Praygod Mushi to testify does not mean that the offence was not proved. According to her, the evidence of PW3 alongside the evidence of the other witnesses who testified, proved that it was the Appellant who raped the victim. Ms Mhando also intimated that the Appellant had also an opportunity to

summon such witnesses to exonerate himself, but he did not do so. In her view, this allegation was an afterthought.

Regarding the 6th ground, Ms Mhando admitted that PW1 said that she used to go at the saloon and that she did not say that she used to take her children there. She added that whether PW3 was in pre-form I in 2016, that was an error because she stated that she was in pre-form I in 2017. On the alleged rape, Ms Mhando submitted that it started in May 2016, stating that the contradiction in the judgment is a minor one which cannot be a reason to doubt the evidence of rape tendered by the prosecution.

Responding to the 7th ground of Appeal, Ms Mhando admitted that it is true that PW3 took oath and later promised to tell the truth. She was quick to add that as long as she took oath, which is a requirement of the law, the procedure of taking her evidence was adhered to. According to the learned Senior State Attorney, there is no contradiction on evidence as the Appellant purported. She added that regarding the conflict stated by PW1, the Appellant did not cross examine on it. Regarding the Appellant's sickness, she insisted that there is no record whether the Appellant requested to be examined but all in all since he raised it in his defence, he ought to have proved it in court. She added that there was

no evidence as to when the Appellant was operated, leading to the alleged impotence. In her view, it was an afterthought. On the totality of her submission, the learned Senior State Attorney prayed that the appeal be dismissed in its entirety.

In his rejoinder submission, the Appellant maintained that Qidang'onyi is not in Katesh town, insisting that there was no need of cross examining, because by cross examining it means that one knows where the rape took place. Regarding the case of **Kejo** (supra), the Appellant submitted that it is distinguishable since in that case the victim was found 800 km away from the alleged crime scene. He maintained his submission that PW3 was not trustworthy. Regarding the victim's age, the Appellant insisted that the age was not proved because PW2 did not state who informed him of PW3's age. According to the Appellant, PW2 was not given the exhibit by the prosecutor, he already had it. He insisted that presence of conflict as stated by PW1 justifies framing a case against him. He reiterated the prayers made in the submission in chief.

I have thoroughly considered the record of the trial court, the grounds of appeal and submissions by the Appellant and the learned Senior State Attorney. Four issues arise from all the grounds of appeal. *One,* whether the charge against the Appellant at the trial was defective; *two,* whether

The case of **Godfrey Simon and Another** (supra) relied upon by the Appellant is distinguishable since in that case it was not stated whether Matofarini and Dofa Village were one and the same place. Therefore, the first ground of appeal, constituting the first issue, lacks merits.

On the second issue, which challenges the procedure adopted in recording PW3's evidence, it was the Appellant's submission that since the victim took oath and at the same time was led to promise to tell the truth, that was in contravention of the law because she was not a child of tender age. On her part, the learned Senior State Attorney submitted that since PW3 testified under oath, section 198 of the CPA was complied with. For better appreciation of what transpired on 05/09/2021 when PW3 gave her evidence, I will reproduce the record as depicted in the proceedings:

"5/9/2021
Coram: Before A. P. Shao RM
PP Msemo J. for the Prosecution
Accused: Present
B/C B. K Simwanza
Prosecution: Your honour the matter is coming for hearing, I have one witness.
Accused: I am ready for hearing
Court: Prosecution case continues
PW3: Marlin Sylivester, age 16 years old, Christian, ***sworn and state as follows****:*

Court: The witness is below eighteen years she asked (sic) as to whether she promise to tell the truth;

SGD: A. P. Shao

Resident Magistrate

PW3: I promise to tell the truth before the Court.

Court: PW3 promised to tell the truth in her testimony ***though she took an oath****."*(Emphasis added)

The law, specifically, Section 198(1) of the Criminal Procedure Act, Cap. 20 [R.E 2022] puts a mandatory procedure that every witness in any criminal case shall be examined on oath or affirmation. The provision provides:

"198.- (1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."

The significance of complying with the above provision was established by the Court of Appeal in the case of **Menald Wenela vs Republic, Criminal Appeal No. 336 of 2018** (unreported) where it was held:

"Being sworn before giving evidence is a mandatory requirement under section 198 of the Criminal Procedure Act, Cap. 20 R.E. 2019."

In the case at hand, it is apparent on record that immediately after taking down particulars of PW3, she was sworn in. That can be gleaned from the bolded expressions above. The record further shows that the trial

magistrate asked PW3 if she promised to tell the truth, a procedure that is applicable to children of tender age as per section 127 of the Evidence Act, Cap. 6 [R.E 2019]. Why the trial magistrate decided to do this remains paradoxical. Be that as it may, at the end of the preliminary records, the Magistrate reiterated the fact that the witness had been sworn. It is therefore my considered view that the dictates of section198(1) of the CPA were complied with as PW3 gave her evidence under oath. The mere fact that she promised to tell the truth while she was not of a tender age, cannot be taken to vitiate her evidence. The second issue is resolved in the affirmative.

The second issue relates to the age of the victim. This covers the 4th ground of appeal. According to the Appellant, since he was charged with statutory rape, the age of the victim ought to have been proved beyond doubts. On her part, the learned Senior State Attorney was of the view that the victim's age was proved by PW2 who confirmed that the victim was 15 years old. Undoubtedly, proof of age is a mandatory requirement for the offence under Section 130(1) (2)(e) of the Criminal Procedure Act, which the Appellant stood charged with. It was, thus, incumbent upon the Prosecution to lead evidence to that effect. Did the Prosecution discharge this duty? That is the core question to be determine in this issue.

The age of a victim in statutory rape cases can be ascertained in a variety of ways. These include birth records captured in a birth certificate or any other trusted document. It may also be from evidence of a parent or close relative. On that note, in the case of **Idd Mohamed vs Republic, Criminal Appeal No. 376 of 2018** (unreported), it was underscored that: *"Conclusion that a particular victim is of a certain age may be drawn from factors other than birth certificate or evidence from parents."*

In the case of **Bore Cliff vs Republic** (supra) cited to me by Ms Mhando, it was stated that: *"The age of a child can be proved not only by a parent but also by, among other persons, a doctor or a guardian."*

I have perused the records of the trial court; specifically, the evidence of the mother of the victim and that of the victim. I agree with the Appellant that no evidence was led by the two to prove the *age* of the victim. The trial Magistrate merely recorded the age of the victim before she took an oath. Such record cannot be proof of the age of the child. This was stated in the Court of Appeal decision in ***Andrea Francis vs Republic*, Criminal Appeal No. 173 of 2014** (unreported) thus:

> *"In this case, the particulars of offence in the charge sheet indicated that PW1 was 16 years old. When she testified on 14/2/2006 the Principal District Magistrate, before putting her on oath, also indicated that she was 16 years.* ***With respect, it is trite law that the citation***

in a charge sheet relating to the age of an accused person is not evidence. Likewise, the citation of age by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age. *It follows that the evidence in a trial must disclose the person's age."* (Emphasis added)

Likewise in the case of ***Projestus Zacharia vs Republic*****, Criminal Appeal No. 162 of 2019** (unreported), the Court of Appeal held:

"In the case at hand, as ***earlier*** *indicated in the particulars of the offence, the age of the victim was not stated and* ***neither was it said in the evidence of the victim or her parent as reflected at page 8 to 11 of the record of appeal*** *...* ***This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim.***" (Emphasis added)

It is on record that PW2, the Doctor who examined the victim, stated the age of the victim. He stated that the victim was 15 years. This is what he said: *"On 17/09/2018 we* ***received a girl of 15 years one Marlin Sylivester.***" He also recorded in exhibit P1 (PF3) that she was 15 years old. The question remains whether that sufficiently proved the age of the victim in line with the decision in **Bore Cliff vs Republic** (supra) I think not. Much as the evidence of a doctor can be admissible regarding age, such evidence must be accompanied by credible information on how the said doctor arrived at the stated age. Determination of the age of a victim

is a clinical exercise beyond the age stated in the opening paragraphs of a PF3 as it was in this case. It is possible that the Doctor merely recorded what he was informed by the victim or whoever accompanied her to the hospital. In his rejoinder, the Appellant submitted that the Doctor did not state who informed him about the victim's age. I agree with him. In the absence of a clinical analysis regarding the age, the evidence of a doctor on the age of the person taken before him remains to be hearsay and unworthy of belief. Why the mother of the victim or the victim herself did not state the age, remains to be a paradox to me. The authoritative decisions above stated implores upon me to conclude that the charge against the Appellant, in so far as it related to statutory rape, was not proved to the tilt, for lack of evidence of the victim's age. The third issue is resolved in the negative; that is, in favour of the Appellant.

Having determined the third issue in favour of the Appellant, determination of the last issue, which relates to evidence and whether the Prosecution discharged its onus of proving the offence, rather pedantic. The issue relates to the 2nd, 3rd, 5th, 6th, 8th and 9th grounds of appeal. Once a Court determines that the age of the victim was not proved, a conviction on a charge of statutory rape cannot be sustained. I have no intention to depart from this legal position. By way of what others would

regard to be obiter dicta, I feel obligated to comment on some of the issues raised by the Appellant on those grounds.

Firstly, the Appellant contended that PW3's evidence was not trustworthy considering the time she was allegedly raped for the first time, how it persisted for over a year, still she did not report to anyone. On her part, the learned Senior State Attorney submitted that she failed to report the matter since the Appellant lured her with gifts and money.

It is trite law that every witness is credible witness unless it is proved that the witness is not telling the truth. Credibility of a witness can best be assessed in the trial court by testing the demeanour. However, credibility of a witness can also be assessed through other ways as it was found in **Shabani Daud vs Republic, Criminal Appeal No. 28 of 2001** (unreported) where it was held that:

> *"The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses..."*

Notably, the victim (PW3) narrated extensively on how the rape incidences took place from May 2016 to January 2018. She accounted that the Appellant was giving her gifts and money. That, he bought her an itel phone and according to her evidence at page 14, the Appellant promised

to marry her. She added that even in 2017 when she was in pre form one at Delta, the Appellant used to visit her there and he used to lie to the school staff that he was her brother. A day before she left home, PW3 narrated how she met the Appellant when she was coming from school, how the Appellant asked for sex prompting her to go home so as to change from the school uniform and went back to the Appellant's house. She narrated further that the Appellant took her home late but when she heard her mother talking to her sister, she got afraid that she would be beaten. She also narrated how they made a decision to run away to Arusha and then to Dar es Salaam.

All things being equal one may be prompted to believe her stories and term her a credible witness. Did this credibility grow with age or was it a rehearsed narration of events? If at the time of testimony, the victim was in fact 15 years of age, one wonders how she managed to withhold the pain she might have sustained by having sex at the age of 13 in 2016. Further, at that age, would lodges and guest houses allow them to get a room together? If so, then our society and people are oblivious about moral issues and sexual crimes. I do not find the narration of the events credible nor do I take PW3 as a credible witness. PW3 was allegedly a secondary school pupil, why was this evidence not pursued by bringing a

witness from her school to explain her change of character perpetuated by the Appellant or other men? Why were the persons she was communicating with while living in Dar es Salaam not called to testify?

Another complaint by the Appellant is that the prosecution failed to summon key witnesses such as Praygod Mushi, the tenants where the Appellant lived and attendants in the guest houses where the Appellant and the victim slept. I do agree with the learned Senior State Attorney that there is no particular number of witnesses required to prove a particular fact. What is important is the quality and relevance of the evidence given. Section 143 of the Evidence Act is clear in this. I am, however in agreement that leaving out Praygod Mushi from the list of prosecution witnesses, if not from the charge sheet, leaves a big hole in the credibility of the evidence against the Appellant. This is the person who was found living with the victim. She had stayed there for about 9 months and was probably working in his saloon. Was he not a necessary witness in this case? The Appellant alleges that Praygod Mushi bought out his freedom through bribes, which the Appellant was not prepared to offer. On the look of things, I have no reasons to doubt this allegation!

The Appellant also complained, and rightly so, that the trial magistrate fabricated evidence. It is true that in the judgment the trial magistrate

stated that in 2016 PW3 was in Form II. He also stated that the Appellant was arrested on 13/09/2018. At page 2 of the judgment, the trial court magistrate stated that the Appellant lived with the victim in Dar es Salaam for two weeks, which statement is not backed by any prosecution or defence evidence. Also, the judgment has a statement to the effect that PW1 was taking her children to the Appellant's saloon. These discrepancies may be said to be a mere slip of the pen as Counsel for the Respondent stated; but, why on earth would they be made? Rather, why are they so many? If it was one or two, one would be justified to hold so. Magistrates and judges should as much as possible desist from inventing evidence, material or otherwise. Such inventions may lead to allegations of negligence, unseriousness, bias, corruption or ill will towards a losing party in the case.

In conclusion, from what I have endeavoured to state with respect to the third issue hitherto above, the Appeal has merits. I allow it accordingly. The conviction against the Appellant is hereby quashed and the sentence set aside. The Appellant should be released from prison forthwith, unless he is held for another lawful cause.

Y.B. Masara

JUDGE

10th February 2023.