IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 63 OF 2023

(Originating from Criminal Case No. 01 of 2023 of Same District Court at Same)

MUHIDINI KASIMU @ MSUYA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

15/01/2024 & 31/01/2024

SIMFUKWE, J.

Before the District Court of Same at Same (the trial court), the appellant Muhidini s/o Kasimu @ Msuya stood charged with the offence of Rape contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2022** on which he was convicted to serve life imprisonment.

According to the charge sheet, the particulars of the offence were that on 03/01/2023 at about day time at Ruvu Muungano village within the

District of Same in Kilimanjaro region, the appellant raped one QT, a girl of 4 years old (name concealed).

During the trial, the prosecution case was to the effect that; on the fateful day, PW3 the victim who according to the birth certificate was 4 years, went to play with her fellow children. However, after sometimes she was returned by PW2 while very sad and crying. Upon inquiry, the victim narrated to her mother that the appellant had raped her. Her mother inspected her vagina only to find that it had bruises. The victim narrated that the appellant held her hands and took her inside his house, undressed her and raped her.

The matter was communicated to a militia man who arrested the appellant. Then, the matter was reported to the police station. Thereafter, the victim was taken to hospital. The doctor who examined the victim narrated to the trial court that he found bruises which had blood in the vagina and labia majora and there was severe tender which meant that the girl was feeling very painful if you touched her. Thus, the victim was penetrated by a blunt object.

Although the appellant admitted that the victim was at his house on the fateful date, he denied to have raped her. He said that the victim's mother was his girlfriend and his parents wanted him to marry her.

After full trial, the trial court was satisfied that the case against the appellant was proved beyond reasonable doubt. The appellant was therefore convicted and sentenced to life imprisonment.

The appellant was aggrieved, he appealed to this court on the following grounds of appeal:

1. *That the learned trial magistrate grossly erred both in law and fact in failing to note that the victim's (PW3) evidence was taken in contravention of section 127(2) of the Evidence Act, since the promise by PW3 under the above-mentioned section of law was half incomplete as the child witness did not promise not tell the lies to the court as stipulated under the above cited section of law.*
2. *That, the learned trial magistrate grossly erred both in law and fact in finding that, PW2's evidence corroborated that of the PW3's evidence, despite the same being taken in contravention of section 127(2) of the Evidence Act. (sic)*

3. *That, the learned trial magistrate grossly erred both in law and fact in wrongly admitting the Birth certificate (Exhibit PE2) of the PW3 in evidence as exhibit but failed to note that the procedure was flawed. (sic)*
4. *That, the learned trial Magistrate grossly erred in both law and fact in using weak tenuous, contradictory, inconsistent, incredible and wholly unreliable prosecution evidence as a basis of the Appellant's conviction and sentence.*
5. *That, the learned trial Magistrate grossly erred in law and fact in imposing a harsh, severe and mandatory life sentence upon the appellant despite the charge being not framed in that manner.*
6. *That the learned trial Magistrate grossly erred in 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.*

The appellant prayed that the conviction be quashed, sentence be set aside and set him at liberty.

During the hearing of the appeal which was conducted through filing written submissions, the appellant was represented by Mr. Pius Ndanu, the learned advocate while the Republic was represented by Ms. Bora Mfinanga, the learned State Attorney.

Before submitting on the grounds of appeal, Mr. Ndanu, raised new issues. First, that the appellant was convicted and sentenced without his evidence being taken into account. Second, evidence of the victim who was a child of tender age was not corroborated with other evidence and there was no proper voire dire. Also, he condemned the trial court for failure to assert the legal theory and importance of identification parade. He was of the view that the nature and circumstances surrounding the alleged incident call for proper and undoubtful identification of the culprit. That, evidence on record does not support such identification.

Submitting on the first ground of appeal, Mr. Ndanu complained that the trial Court erred in law and fact by according weight to the testimony of the victim who was a child of tender age without corroboration with other evidence and or conducting a proper voire dire test.

He explained that, it is on record that the Victim (PW3) was a child of tender age. Thus, before taking and giving weight to her testimony, the trial court

had to conduct the voire dire examination as per the guidance provided by the Court of Appeal in the Case of **Mohamed Sainyene V. Republic, Criminal Appeal No. 457 of 2010** (Unreported) as quoted at page 8-10 in the case of **Edward Nyegela Vs the Republic, Criminal Appeal No. 321 of 2019** (unreported). He commented that the trial magistrate took the evidence of the victim in contravention of the laws.

The learned advocate referred to page 8 of the typed trial court proceedings and argued that the trial court did not ask the victim her name, her religious beliefs, whether the victim understood the nature of oath and its obligations, based on her religious beliefs, and determine whether the victim understood the nature and obligations of an oath and note on the record.

Further, the learned advocate said that the trial court did not record how it was satisfied that the victim understood the nature of an oath and its obligations. He said, the fact that the victim said that at church they are taught not to tell lies thereby promised to tell the truth and not lies is not sufficient and does not cover all the requirements as per direction of the case of **Mohamed Sainyenye's** (Supra) as well as **section 127 of the Evidence Act**. Also, he noted that the trial court did not record the reason

for not administering oath to the victim. According to Mr. Ndanu, based on that violation/contravention, the victim was incompetent, her evidence was with no evidential value and the same should be expunged from the record. Thus, after being expunged nothing remains in record to support the prosecution's case. He urged the court to find and rule that the prosecution case was not proved to the required standard of the law. Also, he urged this court to find that the trial Magistrate did not perform a just and fair trial, as required to justify the conviction because penetration was not proved.

On the fourth ground of appeal, Mr. Ndanu blamed the trial court for failure to observe and rule on the contradictory testimonies of the prosecution's witnesses. He elaborated that, the testimony of the victim and PW4 contradict and their contradiction goes to the root of the case. The noted contradiction was that the victim explained that "Uncle Muhidin did urinate into my 'kidudu' and I felt very painful" while PW4 stated that "I found that the girl was penetrated by blunt object." It was the observation of Mr. Ndanu that the victim told the court that the appellant urinated into her vagina while the Clinical Officer did not find sperms therein.

The learned counsel submitted further that, with exception to the testimony of PW2 Aisha Nuru, the rest of the witnesses' testimonies were purely hearsay evidence which have no evidential value. He referred to the case of **Selemani Makumba Vs. Republic [2006] TLR 379** which held *that the best evidence in sexual offences is that of the victim.* Mr. Ndanu submitted further that the Court of Appeal in its numerous decisions held that such evidence must be impeccable and properly taken. He pointed out that, the testimony of the victim is short of being impeccable as the same is contradictory and further, the voire dire conducted did not comply with **section 127(6) of the Evidence Act**. No reason was recorded as to why the court believed that the child of four (4) years of age was telling nothing but the truth as the law requires.

He prayed the court to allow this appeal, quash the conviction, set aside the sentence, and release the Appellant forthwith.

In reply, the Republic opposed the appeal and prayed the court to dismiss it for lack of merit.

On the first ground of appeal that the victim's evidence was taken in contravention of **section 127 (2) of the Evidence Act CAP 6 R.E 2022**, Ms. Mfinanga explained that the jurisprudence of the above cited provision

of the law is that evidence by a child of a tender age can be sworn or unsworn. However, it is mandatory for the court to make findings on whether before giving evidence, the victim made a promise to tell the truth. In the instant case, Ms. Mfinanga referred to page 14 and 15 of the proceedings of the trial court which shows that after recording the simplified questions posed towards the victim, the trial court made a finding that a child possessed intelligence to speak the truth, hence asked her on what she promised the court and at page 15 she promised to tell the truth. Ms Bora supported her argument with the case of **Geofrey Wilson vs Republic**, Criminal Appeal No.168 of 2018 (Tanzlii) at page 11 which held that:

> *"Where a witness is a child of tender age, a trial court should at the foremost,* ***ask few pertinent questions so as to determine whether or not the child witness understand the nature of oath.*** *If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness.* ***If such child does not understand the nature of oath, he or she should, before giving***

evidence, be required to promise to tell the truth not to tell lies*..." (Emphasis added)*

In respect of what transpired in the trial court, the learned State Attorney was of the view that the questions put to the victim were sufficient to extract her awareness with the effect of not telling the truth. That, on her own words she promised to tell the truth before the court and there was no any procedural irregularity incurred to lower down the victim's credibility. She supported her opinion by citing the case of **Robert Francis Mwankenja vs Republic** Criminal Appeal Case No. 335 of 2018 [Tanzlii] at page 11 where the Court of Appeal held that:

"Given that the witness gave promise to tell the truth, it did not matter whether or not he knew the meaning of oath. In the premises we find no basis to fault the trial court."

The learned State Attorney insisted that, since the child promised to tell the truth there is no doubt that the said evidence was properly received and scrutinized. Thus, the first ground of appeal lacks merit.

Responding to the second ground of appeal where the trial court was blamed for finding that evidence of PW2 corroborated with the evidence of PW3 despite the fact that the same was taken in contravention of **section**

127 (2) of the Evidence Act; Ms. Mfinanga reiterated his submission on the first ground of appeal. She added that, the victim was a child of tender age and her evidence must align with the requirement under **section 127 (2) of the Evidence Act.** That, at page 11 and page 12, the trial court after recording the simplified questions posed towards PW3, it made a finding that a child possessed intelligence to speak the truth. Hence, asked PW3 on what she promised the court and she stated as shown at page 15 of the court proceeding that "She promise to tell the truth and all the truth before the GOD". That, this suffice to show that the law was complied with. She cited the case of **Robert Francis Mwankenja vs Republic,** Criminal Appeal No. 335 of 2018 (supra), to that effect.

Further to that, Ms. Mfinanga noted that evidence of the victim in this case did not require corroboration as per **section 126 (6) of the Evidence Act,** and as per the case of **Selemani Makumba vs Republic** (supra). That, the best evidence in sexual offences must come from the victim. She pointed out that the victim's evidence was corroborated by the evidence of PW3 as both testified that the victim was at the Appellant's home that day. Also, she argued that the victim deserved further credit for naming the

Appellant to her mother as the pepetrator of the crime at earliest opportunity after she came back from the scene of crime.

On the third ground of appeal that the trial magistrate erred both in law and fact by wrongly admitting the birth certificate (Exhibit PE2) of PW3; it was Ms. Mfinanga's argument that the appellant failed to show that the procedure was flawed. She referred the court to page 22 and 23 of the trial court proceedings where PW5 tendered the birth certificate of PW3 and all the procedure of tendering exhibit were adhered. She explained that, the basic prerequisites of admissibility of evidence in a court of law are relevance, materiality, and competence as stated in the case of **The Director of Public Prosecutions vs Sharif S/o Mohamed @ Athumani and 6 Others** (Tanzlii) Criminal Appeal No. 74 of 2016 at page 7 that:

> *"Briefly, evidence is relevant if it tends to make any fact that it is offered to prove, or disprove, either more or less probable. Evidence is material if it is offered to prove a fact that is at issue in the case, and lastly, evidence is competent if it meets certain requirements of reliability. Reliability may be established by first adducing foundation evidence. So,*

when evidence is objected to for want of foundation, it means its competence, is called into question. Under section 140 of the Tanzania Evidence Act, Cap 6 R.E. 2002 (the Evidence Act) it is the trial court which has the discretion to decide on the admissibility of any evidence, guided by the various provisions of the Evidence Act and other relevant statutes, such as the Criminal Procedure Act, Cap 20 R. E. 2002 (the CPA) in criminal trials..."

She insisted that as per page 22 and 23 of the trial Court Proceeding, PW5 was a competent witness since he was a custodian of Exhibit PE2 as laid down in the foundation. She commented that, Exhibit PE2 which was tendered by PW5 is relevant to the case since it tends to prove the age of the victim PW3, there was no any irregularity which occurred or objections that were raised by the Appellant against tendering of exhibit PE2.

On the fourth ground of appeal that the prosecution evidence was weak, tenuous, contradictory, inconsistent, incurable and wholly unreliable, Ms. Mfinanga revisited the principles guiding courts in determining credibility of witnesses, including the evidence of the victim in the context of the second

ingredient of statutory rape which is penetration of the suspect's sexual organ into the victim's organ. She expounded that, evidence of all prosecution witnesses bore coherence with each other and cannot easily be faulted. In addition, their evidence corroborated evidence of the victim who alleged to have been raped by the Appellant as the best evidence in rape cases comes from the victim as per the case of **Seleman Makumba.** (supra)

The learned State Attorney elaborated further that, at page 15 and 16 of the trial court proceedings, the Victim started by mentioning her age the fact that was never disputed by the Appellant and on the second element the victim proved that there was a penetration of the male sexual organ into her private part, regardless of its extent, as required by **section 130(4) of the Penal Code**. That, on the issue of penetration, the victim testified that the she went to the Appellant's house and the Appellant took her inside her house where he undressed her and raped her. She later disclosed what had happened, to her mother from whom the story spread leading to the appellant's arrest and ultimately arraignment and other orders including conviction and sentence as stated earlier. Basing on these

narrations, the learned advocate opposed the contention that evidence of PW1, PW2, PW3, PW4, and PW5 was not worthy of belief.

Replying the fifth ground of appeal that the sentence imposed was harsh and severe as the charge was not framed in that manner; the learned State Attorney referred to page 1 of the typed judgment of the trial court where it was stated that the Appellant was charged with the offence of Rape contrary to **section 130 (1) (2) (e) and 131 of the Penal Code** (supra). She pointed out that the Appellant was properly charged with the offence of statutory rape as provided under **section 130 (1) (2) (e) of the Penal Code** and after the age of the victim and the elements of rape were proved, the Appellant was sentenced to life imprisonment as prescribed under **section 131 of the Penal Code**.

Countering the sixth ground of appeal that the charge was not proved beyond reasonable doubt against the Appellant and to the required standard of proof, the learned State attorney insisted that all the two ingredients of the offence of statutory rape were proved including the victim's age and penetration. Evidence against the Appellant was overwhelmingly watertight to sustain the conviction against him. She described that, during the trial, the prosecution paraded five witnesses and

two (2) exhibits to prove the charge against the Appellant. That, the victim narrated what happened by mention her age the fact which was never disputed by the Appellant. Also, the victim testified that she went to the Appellant's house and the Appellant took her inside her house where he undressed her and insert his "dudu" inside the victim's "kidudu." The victim showed her private part and testified that she felt pain. Thus, the victim's testimony established penetration. However, evidence of PW2 was corroborated by the evidence of PW1, (Victim's mother) who took the victim to Hospital after a PF3 was issued. Furthermore, the Doctor who attended PW3 filled and tendered PE1 at page 18 of the trial court proceedings and she clearly stated that there was penetration of blunt object.

In her conclusion, Ms. Mfinanga submitted that it is a cardinal principle that who alleges must prove and it is a duty of prosecution side to prove a case beyond reasonable doubt. In this case, the prosecution was able to prove all the elements of the offence of rape as provided under **section 130 (1) (2) (e) and 131 (1) of the Penal Code** by parading five witnesses who managed to prove all elements of statutory rape. She prayed the court to dismiss this ground as it lacks merit.

Having summarised what was argued for and against the appeal, the trial court records and the grounds of appeal, I now turn to the merit or otherwise of this appeal. I will argue the grounds of appeals seriatim. However, the appellant's concerns raised by his learned advocate in his submission in chief, that is failure to consider the appellant's evidence and the issue of identification will not be discussed as the same are new issues.

On the first ground of appeal, Mr. Ndanu pointed out that there was contravention of **section 127(2) of the Evidence Act** (supra) since the victim did not promise not to tell lies. This goes along with the second ground of appeal that the trial court erred to find that evidence of PW2 corroborated that of PW3 despite the same being taken in contravention of **section 127(2) of the Evidence Act** (supra).

However, in his submissions, he referred to the dead law that the voire dire was not conducted. The requirement of conducting voire dire has been replaced by the requirement under **section 127(2)** of the Act which requires the child of tender age before giving evidence to promise to tell the truth and not lies.

As rightly submitted by Ms. Mfinanga, what transpired before the trial court as per page 14 to 15 of the proceedings shows that the proper application

of **section 127(2) of the Evidence Act** was complied with as the victim promised the court to tell the truth. However, before stating her promise to tell the truth, the trial magistrate asked her simple questions as directed in the case of **Issa Salum Nambaluka vs Republic, Criminal Appeal No.272 of 2018** (unreported) and the case of **Godfrey Wilson vs Republic, Criminal Appeal No. 168 of 2018** (unreported) that:

> *"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. *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."*

The omission of the words 'not to tell lies' is not fatal as it was stated in the case of **Mathayo Laurence William Mollel vs Republic**, Criminal Appeal No. 53 of 2020 [2023] at page 12 where the Court of Appeal held that:

> *"We understand the legislature used the words "promise to tell the truth to the court and not to tell lies." We think tautology is evident in the phrase, for, in our view,* ***'to tell the truth" simply means "not to tell lies."*** *So, a person who promises to tell the truth is in effect promising not to tell lies. The tautology in the subsection is, in our opinion, a drafting inadvertency."* [Emphasis added]

On the basis of the above arguments, the first and second grounds of appeal are without merit and are dismissed accordingly.

Turning to the third ground of appeal, the appellant complained that the procedures of admitting the birth certificate (exhibit PE2) were flawed. This was constested by the learned State Attorney who argued that PW5 was a competent witness since he was the custodian of the exhibit.

This ground will not detain me. When the said birth certificate was tendered by PW5 H. 9961 D/CPL Elineema, the appellant did not have any objection to it. Thus, the law bars him from raising objection of the same at the appellate stage. In the case of **Abas Kondo Gede vs Republic, (Criminal Appeal No. 472 of 2017) [2020] TZCA 391** at page 20, the Court quoted with approval the Supreme Court of India in **Malanga Kumar**

Ganguly v. Sukumar Mukherjee, AIR 2010 SC 1162 in which it was held that:

> *"It is trite that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is however trite that a document becomes inadmissible in evidence unless the author thereof is examined, the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination..."*

Nevertheless, even if the procedures of admitting the said exhibit were flawed, still the argument could not hold water because the purpose of tendering the birth certificate is to ascertain the age of the victim which can be proved through birth certificate or evidence of her parent. In this case, the mother (PW1) proved that the victim was 4 years old.

Regarding the fourth ground of appeal that the trial magistrate relied on the contradictory evidence, according to Mr. Ndanu the contradiction is based on the evidence of the victim who said that the appellant urinated in

her private part and she felt pain while the doctor did not testify if the victim's private part contained sperms or not. The argument was disputed by the learned State Attorney who argued that the victim proved that she was penetrated and as per **section 130 (4) of the Penal Code** (supra).

I am aware that contradictory evidence sometimes dismantle the prosecution case. However, it is the material contradiction which dismantle the prosecution case. In the case of **EX. G. 2434 PC. George vs Republic (Criminal Appeal 8 of 2018) [2022] TZCA 609** at page 11 the Court of Appeal had this to say in respect of contradiction of evidence:

> *"We shall therefore bear in mind that not every contradiction and inconsistencies are fatal to the case* ***[Dickson Elia Nsamba Shapwata & Another v. Republic, Criminal Appeal No. 92 of 2007*** *(unreported)]. And that minor contradictions are a healthy indication that the witness did not have a rehearsed script of what to testify in court.* ***[Onesmo Laurent @ Saiikoki v. Republic, Criminal Appeal No. 458 of 2018*** *(unreported)]."*

From the noted contradiction, it is the considered opinion of this court that the same cannot dismantle the prosecution case due to the fact that the

same does not take away the fact that the victim was penetrated by the appellant as evidenced by the victim and the doctor who examined her.

On the fifth ground of appeal, the appellant submitted that the trial magistrate erred in law and fact in imposing a harsh, severe and mandatory life sentence upon the appellant despite the charge being not framed in that manner. This argument was contested by the learned State Attorney who referred to the judgment of the trial court at page 1 where it was stated that the appellant was charged with the offence of rape contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code** (supra).

I keenly examined the charge sheet and found that the argument by the appellant is without legal basis because the charge contains the provision which provides for the sentence of statutory rape. In the case of **Godfrey Simon and Another vs Republic**, Criminal Appeal No. 296 of 2018 the Court of Appeal at page 8, line 7 to 18 of its judgment elaborated that:

> *"It is thus settled law that, the punishment/sentence must be specified in the charge so as to enable an accused person to understand the nature of the charged offence and the requisite punishment."*

On the last ground of appeal, it was argued that the prosecution case was not proved beyond reasonable doubt. Mr. Ndanu explained that with the exception of the evidence of PW2, the rest of the prosecution evidence is hearsay. On the other hand, Ms. Mfinanga submitted that all the elements of rape were proved by the victim who was the best witness, and the doctor (PW4).

I agree with the learned State Attorney that where the victim of the offence of rape is below the age of majority, the prosecution must prove the age of the victim and penetration. In the present case, penetration was proved by victim herself whose evidence was the best. Her evidence was corroborated by the evidence of her mother who was the first to inspect the victim's private parts and the evidence of the Clinical Officer (PW4) who examined the victim and found that she was penetrated. The age of the victim was proved by PW1 the mother of the victim and exhibit PE2 the birth certificate.

Also, the incidence was reported at the earliest possible time which gives more credit to the prosecution case. In the case of **Lameck Bazil & Another vs Republic (Criminal Appeal 479 of 2016) [2018] TZCA 191 [Tanzlii]** at page 14 the Court of Appeal held that:

"...the ability of the witness to name the suspect at the earliest opportunity is an important assurance of his reliability; and in the same way unexplained delay or complete failure to report must put a prudent court to inquiry."

Having resolved all the grounds of appeal as such, in the final analysis, I hereby declare that this appeal is without merit and I accordingly dismiss it.

Order accordingly.

Dated and delivered at Moshi this 31st day of January 2024.

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

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S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

31/01/2024