IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 104 OF 2023

(Originating from the District Court of Kilwa at Masoko, in Criminal Case No. 95/2023)

SEVELIN S/O SILVESTER KULINGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

19th February, & 26th March, 2024

MPAZE, J.:

Sevelin Silvester Kulinga was brought before the Kilwa District Court facing a charge of Rape under sections 130(1) (2) (e) and 131 of the Penal Code [CAP 16 R.E 2022]. It was alleged that on August 2022 at Nalung'ombe village within Kilwa District in Lindi Region, the appellant did have carnal knowledge of a girl aged 14 years. To hide her identity the girl shall be referred to as the victim or PW1 interchangeably.

During the trial, three prosecution witnesses were paraded to support the prosecution's case. In defence, the appellant testified under oath without

calling any witnesses. Consequently, the appellant was found guilty, convicted, and sentenced to 30 years' imprisonment. Additionally, he was ordered to compensate the victim with Tshs. 1,000,000/=.

Dissatisfied with the conviction and sentence, the appellant has come to this court by way of appeal. He has advanced eight grounds of appeal which have been condensed into two as follows;

1. That the prosecution failed to prove the case beyond reasonable doubt
2. That the evidence of PW1 was received contrary to the law that is without a prior promise to tell the truth.

The background facts of the case were brief; one day, while the victim (PW1) was on holiday at home while her father was away in Nanjilinji, her mother sent her to fetch water from the well. While at the well, the appellant followed her and began to proposition her. When she rejected his advances, the appellant kicked her, causing her to fall to the ground. The appellant then forcibly removed her underwear, tore it, and proceeded to remove his trousers, inserting his penis into the victim's vagina.

According to the victim, she experienced pain during the incident. She said that she couldn't scream because there were no neighbours nearby.

Furthermore, the accused threatened her not to disclose the incident to anyone.

The victim went further that on 8th September 2022, while on her way to her grandmother's house, the appellant followed her, persistently making advances and demanding to have sex. She refused, and they continued until they reached her grandfather's house.

The appellant, upon seeing the victim's grandfather, falsely claimed that he had come to pick passion fruits.

However, the victim decided to confide in her grandfather, informing him that the appellant's assertion was false and that he had followed her and not for picking passion fruits. She continued to explain to her grandfather about the appellant's previous sexual knowledge of her.

These details shared with her grandfather were later relayed to the victim's father after he returned from Nanjilinji, who then reported the matter to Somanga police station. They were provided with PF3 and proceeded to the hospital for examination.

PW2, the victim's father, testified that in August 2022, he went to prepare sesame farms in Nanjilinji, leaving his children and their mother at home. Upon his return from Nanjilinji on 20th October 2022, his mother informed

him about the incident involving the victim being raped by the appellant. Subsequently, he reported the matter to the police and was provided with PF3. PW1 underwent an examination, and later they returned the PF3 to the police.

PW3, the doctor who examined the victim on 24th October 2022, and filled out the PF3 testified that after the examination, he observed that the victim's hymen was perforated indicating sexual penetration. Additionally, tests for venereal diseases and HIV results were negative. The PF3 was admitted as Exhibit 'PE1' without any objection.

In his defence, the appellant denied raping the victim, he also refused to have been seducing the victim.

During the hearing of this appeal, the appellant appeared in person, unrepresented, whereas the respondent, the Republic was represented by Mr. Justus Zegge, the learned State Attorney. The State Attorney contested the appeal.

When the appellant was invited to argue his appeal, he prayed the court to adopt the grounds stated in his petition of appeal as his submission in chief and reserved his right to rejoin if any after the submission by the republic.

Contesting the appeal, Mr. Zegge the State Attorney argued together the 1st, 3rd,4th, 5th, 6th, 7th, and 8th grounds of appeal relating to proving the case beyond reasonable doubt. He submitted that the case was proved beyond reasonable doubt.

Mr. Zegge argued that to establish beyond reasonable doubt the offence with which the appellant was charged, it was the prosecution's duty, as per the section under which the appellant was charged, to prove that the appellant engaged in sexual intercourse with a girl under the age of 18. He claimed that they were able to prove this.

In showing that the case was proved beyond a reasonable doubt, Mr. Zegge pointed out the victim's testimony on pages 7 and 8 of the typed proceedings, which affirmed that she was 14 years old. He emphasized that this was corroborated by PW2, the victim's father, who also affirmed that the victim was 14 years old.

Mr Zegge contended that proving the age of the victim did not necessarily require a birth certificate. He argued that a parent or any other person with knowledge of the person's age could prove it. To support his stance, he cited the case of **Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported).

In addition to proving the age of the victim, the State Attorney argued that another element of the offence, which is penetration, was also established. Here, he asserted that true evidence of rape comes from the victim, citing the case of **Ally Mbozi v. Republic**, Criminal Appeal No. 216 of 2016 (unreported), where the court underscored the importance of the victim's evidence in proving the offence of rape.

The State Attorney contended that through the testimony of PW1 the victim, she explained how the appellant penetrated her. He referred to the court on page 8 of the typed proceedings. He further stated that this evidence was corroborated by PW3, the doctor who examined the victim. On page 19 of the typed proceedings, PW3 confirmed that PW1 was penetrated.

Mr. Zegge added that according to section 143 of the Evidence Act [CAP 6. R.E 2022] (the Evidence Act), no specific number of witnesses is required to prove an offence. Therefore, according to him the prosecution successfully proved its case by calling three crucial witnesses. He argued that the appellant's complaint regarding the prosecution's failure to call the police officer who interviewed the victim and prepared PF3 is baseless.

About the complaint that no evidence of DNA was brought, Mr Zegge contended that this complaint is also unfounded on the ground that medical

evidence does not prove the offence of rape, he supported this argument by referring to the case of **Ally Ngozi** (supra) on page 9 of the typed proceeding where it was stated;

> *'Medical evidence does not prove rape but the best evidence of rape comes from the victim.'*

Mr Zegge further argued that the issue of who raped the victim was also proved by the victim herself, who managed to explain in detail what happened on the day she went to the well to fetch water. He said without mincing words, the victim explicitly stated that no one else than the appellant who raped her. According to the State Attorney, this evidence conclusively proved who committed the offence of rape to the victim.

Regarding his submission on the complaint that the case was not proven beyond a reasonable doubt, Mr. Zegge requested the court to find that this complaint is unfounded and should be dismissed.

The appellant's complaint regarding the second ground of appeal was related to the admission of the victim's testimony, who according to him was a child of tender age. His complaint mainly focused on the assertion that the victim's evidence was received contrary to the law without a prior promise to tell the truth.

In response, Mr. Zegge argued that according to section 127(2) of the Evidence Act, a child of 14 years is required to give evidence with or without oath but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies. He added that section 198 of the Criminal Procedure Act [CAP, 20 R.E 2022] hereinafter the CPA specifies that every witness in a criminal case shall be examined under oath or affirmation.

Mr. Zegge contended that upon examining page 7 of the typed proceedings, it is evident that PW1 affirmed before giving her testimony, thereby complying with section 198 of the CPA. To bolster his argument, he cited the case of **Ally Ngozi** (supra), where the Court clarified on page 19 that while section 127(4) of the Evidence Act requires a witness under 14 years of age to promise to tell the truth before recording their evidence, section 198 of the CPA mandates that every witness be examined upon oath or affirmation.

He further argued that in this case PW1 being 14 years old, affirmed before testifying fulfilling the requirements of the law. In summary, Mr. Zegge contended that the evidence of PW1 was taken in compliance with the law and was flawless.

In conclusion, Mr. Zegge requested the court to consider that the appeal has no merit and should be dismissed.

In rejoinder, the appellant urged the court to consider that the incident reportedly took place in early August 2022, while the medical examinations were conducted in October 2022. He raised concerns about the significant lapse in time between the occurrence of the incident and the medical examinations.

The appellant questioned where the victim was during this entire period and why she failed to report the incident earlier. He concluded by stating that nonetheless, he leaves all these considerations to the court to assess and evaluate.

Having dispassionately analyzed the rival argument by the parties, the court will now proceed to evaluate the merit of the appeal. Beginning with the second ground of appeal revolves around procedural irregularity in taking the evidence of the victim, who is a child of tender age. The appellant in his petition of appeal stated;

> *' That the trial court erred in law and fact for convicting and sentencing the appellant based on the evidence of PW1 a child of tender age which the same was received contrary to the*

requirement of the law. The evidence of the victim(PW1) was taken in the absence of a prior promise, to tell the truth'.

On his part, the State Attorney, in response to this ground of appeal, acknowledged that the record does not indicate that PW1 explicitly promised to tell the truth and not lies. However, he argued that PW1 was able to provide testimony after being affirmed, thus complying with section 198 of the CPA.

Based on this submission, the question is whether PW1 was a child of tender age.

Section 127 (4) of the Evidence Act defines the child of a tender age as follows;

'For the purposes of subsections (2) and (3), the expression ***'child of tender age'*** *means a child whose apparent* ***age is not more than fourteen years'.*** [Emphasis added]

From the above definition, a child of tender age is a child whose apparent age is not more than 14 years. See also the case of **Issa Salumu Nambaluka v. Republic,** [2020] T.L.R. 379.

The trial court record on page 7 of the typed proceedings indicates that PW1 testimony was recorded after being affirmed. To appreciate

properly what was recorded by the trial magistrate the proceedings of the trial court read;

> ***'PROSECUTION CASE OPEN***
> *PW1 PL ABD KLNBC 14 YEARS AND ELEVEN MONTHS,*
> *PUPIL, MATUMBI, MINGUMBI, ISLAMIC*
> *Affirmed and states*
> *Examination in chief by Public Prosecutor DC Gasper...'*

From the provided excerpt, it is apparent that at the time PW1 gave her evidence she was 14 years and 11 months old. This fact was corroborated by her father, who affirmed that PW1 was 14 and 11 months.

The Court of Appeal in the case of **Issaya Renatus v. Republic**, (supra) held that proof of age of the victim depends on the evidence of the victim, relative, parent, medical practitioner, or, where available by the production of a birth certificate.

Again, in the case of **Salu Sosoma v. Republic**, Criminal Appeal No. 32 of 2006 (unreported) the Court of Appeal stated that the parent is in a better position to know the age of his child.

Given this circumstance and considering the definition of a child of tender age as indicated above, it is evident that PW1, at the time she gave her evidence was 14 years plus 11 months as such she cannot be considered

a child of tender age covered under section 127(4) of the Evidence Act. Therefore, her evidence was not subjected to the requirement of section 127(2) of the Evidence Act.

Upon careful examination of Mr. Zegge's submission, it appears that he acknowledges PW1 as a child of tender age. He argues that although her evidence was not taken by section 127(2) of the Evidence Act, it was still recorded under the provisions of section 198 of the CPA. Therefore, in his view, PW1's evidence was properly recorded with no irregularities. This view by Mr. Zegge is misplaced.

As previously stated, this court has found PW1 is not a child of tender age. However, if PW1 was indeed deemed a child of tender age, her evidence should have been taken in compliance with section 127(2) of the Evidence Act, which requires the child to promise to tell the truth and not lies before recording their evidence.

The applicability of section 198 of the CPA, as argued by Mr. Zegge, mandates that every witness in a criminal matter must give their evidence under oath or affirmation. However, in the case of a child of tender age, compliance with section 127(2) must precede the requirements of section 198 (1) which reads;

'(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 per the provisions of the Oaths and Statutory Declarations Act'.

In the case of **Mwami Ngura v. Republic**, Criminal Appeal No. 63 of 2014 (unreported) it was stated:

'...As a general rule, every witness who is competent to testify must do so under oath or affirmation unless she falls under exceptions provided in a written law. As demonstrated above one such exception is section 127 (2) of the Evidence Act. But once a trial court, upon inquiry under section 127(2) of the Evidence Act, finds that the witness understands the nature of an oath, the witness must take an oath or affirmation.'

Again, in the case of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), the Court of Appeal stated,

'where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions to determine whether or not the child witness understands 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.'

According to the cited authorities above, it is clear that the evidence of a child of tender age will be taken under affirmation or oath as per section

198(1) of the CPA only if the requirement of section 127(2) of the Evidence Act has been complied with and not otherwise.

Therefore, if the court would have found PW1 to be a child of tender age, then Mr. Zegge's submission regarding this ground would have no merit and instead, the appellant's complaints would have been found meritorious.

However, since the court has determined that PW1 was not a child of tender age, the court agrees with Mr. Zegge, albeit for a different reason that it was correct for the trial magistrate to record the evidence of PW1 as per section 198(1) of the CPA. Therefore, the appellant's complaint that PW1's evidence was taken before a promise to tell the truth and not lie is unfounded. Consequently, the 2nd ground of appeal lacks merit and is hereby dismissed.

Turning now to the 1st ground of appeal, which complains that the prosecution failed to prove the case beyond a reasonable doubt. It is settled law that, in criminal cases, the burden of proof lies on the prosecution, and the standard of proof is beyond a reasonable doubt. This principle was affirmed in the case of **Mohamed Said Matula v. Republic**, [1995] TLR 5.

Furthermore, the Court of Appeal in the case of **Maliki George Ngendakumana v. Republic**, Criminal Appeal No. 353 of 2014 (unreported), emphasized that:

> *'It is the principle of law that in criminal cases, the duty of the prosecution is twofold, one, to prove that the offence was committed and two, that it is the accused person who committed it'.*

For the offence with which the appellant stood charged, it was the duty of the prosecution to prove beyond a reasonable doubt that the appellant engaged in sexual intercourse with a girl below the age of eighteen years (statutory rape) and that there was penetration.

It has been established in various cases that even the slightest penetration of the penis into the vagina is sufficient to constitute the offence of rape. This principle was upheld in various cases such as **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008 and **Masomi Kibusi v. Republic**, Criminal Appeal No. 75 of 2005 (Both unreported).

It is now settled law that proof of rape comes from the prosecutrix herself. Other witnesses, such as doctors, may provide corroborative evidence if they did not directly witness the incident. This principle has been

affirmed in cases of **Selemani Makumba v. Republic** [2006] TLR 379, **Kayoka Charles v. Republic**, Criminal Appeal No. 325 of 2007, **Alfeo Valentino v. Republic**, Criminal Appeal No. 92 of 2006, and **Shimirimana Isaya & Another v. Republic**, Criminal Appeal No. 459 & 494 of 2002 (All unreported).

Regarding the issue of the victim's age, whether it has been proven or not, I will not dwell extensively on this matter as I have discussed it in detail while addressing the second ground of appeal. Suffice it to say, that the victim was below 18 years old, and in this regard, the prosecution successfully proved the same.

As for the issue of penetration, the court examined the evidence presented at the trial by PW1 and PW3, as they were the ones who could speak to the issue of penetration. PW1 testified that while she was fetching water from a well, she was followed by the appellant who then proceeded to assault her. She stated that he forcibly removed her clothes and inserted his penis into her vagina, causing her pain.

In his testimony, PW3 stated that upon examining PW1, she observed she was sexually penetrated and noted that PW1's hymen was perforated.

From this evidence, it can be concluded that there was indeed penetration. The crucial question then arises; who was responsible for the penetration?

PW1's testimony implicates the appellant as the perpetrator of the rape. She provided a detailed account of the incident that occurred at the well. For clarity, a portion of her testimony, as recorded on page 8 of the typed proceedings, is reproduced below:

> *'...One day when I came back home on vacation. My father travelled to Nanjilinji for work. My mother and wife of accused person went to the shop. My mother told me I should go to the well. The well is far from home. Nobody lives near the well.*
>
> *Accused followed me. When I reached the well, I didn't found (sic) anybody. Accused found me at the well, accused proposed me. Accused used to propose me, it was not the first time I denied. Accused said every time he is proposing me. I deny. Accused kicked me, I fell down. Accused undressed my pant and torn it. Accused undressed his trouser, accused inserted his penis on my vagina. I felt pain, but I failed to shout there was no neighbour around. Accused frightened me to tell anybody'.*

During cross-examination by the appellant on page 9 of the typed proceeding she responded;

> *'The same date when my mother and your wife went to the shop. Yes, it was my first time'.*

Upon careful examination of this evidence, it is apparent that while PW1 acknowledged the appellant as her assailant, she did not provide specific details regarding what time and when exactly the incident occurred. The charge sheet indicated that the offence occurred in August, 2022 yet PW1 did not mention anything regarding this specific month nor the date of commission of the offence.

In the case of **Mayala Njigailele v. Republic** Criminal Appeal No. 490 of 2015 (unreported) it was held that;

> *'The particulars of the offence do not indicate the dates the alleged rape was committed. The charge sheet should always indicate the date(s) on which the alleged offence was committed. The need to do so is not far to get- it will enable the accused to know the case he is going to face and prepare himself for his defence'.*

Furthermore, the delay in reporting adds doubts to the case. While the incident allegedly took place in August 2022, it was not reported until 8th September, 2022 when PW1 disclosed it to her grandfather. However, PW2, the victim's father, stated that he only learned about the incident on 20th October, 2022 from the victim's grandmother. The source of information for

the grandmother remains unclear, as PW1 testified that she disclosed the incident to her grandfather and not the grandmother.

It is noteworthy that on the day PW1 disclosed the incident to her grandfather, the appellant visited the grandfather's house, claiming to be there to pick passion fruits. However, PW1 negated this claim and informed her grandfather the appellant was following her while revealing the rape incident that had occurred.

The delay in taking action after the victim disclosed what had happened to her raises questions about why the grandfather did not immediately pursue legal action against the appellant. It is puzzling why no steps were taken to ensure the apprehension of the perpetrator and his subsequent prosecution until 24th October 2022, when the victim's father reported the matter to the police.

The victim's claim that she delayed disclosing what has been done to her due to threats from the appellant also raises questions as the evidence does not provide clarity on when the victim's fear subsided enough for her to confide in her grandfather. This uncertainty undermines the reliability of her testimony and weakens the prosecution's case.

As that is not enough the so-called grandfather who allegedly first received information about the commission of the offence and the identity of the perpetrator, failed to appear in court to provide his testimony. I am alive with the requirement of the law that there is no required number of witnesses to prove a fact. See the case of **Kennedy Owino Onyachi and others v. Republic**, [2009] T.L.R. 229.

However, in the context of this case, the victim's grandfather was a material witness, because he was the first person to be informed about the incident by the victim. Yet, the prosecution's evidence fails to address why the grandfather was not summoned to testify. This glaring absence raises serious doubts about the integrity and completeness of the evidence presented. As held in the case of **Aziz Abdallah v. Republic**, [1990] TLR 71, that;

> *'The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, can testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.*

Furthermore, the victim's father(PW2), not only relayed being informed about his daughter's being raped but also claimed to have been told that

PW1 was pregnant. This assertion contradicts PW1's testimony, as she never testified that she was pregnant as a result of rape.

Moreover, PW3 the doctor who examined the victim testified that on 24th October, 2022 while a Tingi Health College, he was assigned a duty to examine PW1, he said the request in PF3 was to examine PW1 if she had been sexually penetrated.

As indicated in the PF3 did not state in his testimony that he observed PW1 to be pregnant.

As a general rule, every witness is entitled to credence and must be believed and his testimony should be accepted unless there are good and cogent reasons for not believing a witness. See **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003 (unreported).

In the case of **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported) the Court of Appeal highlighted what could constitute good reasons for the court to disbelieve the witness testimony, it stated;

> *'Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses'.*

Guided by the authorities above, it becomes apparent that the victim's testimony lacked credibility and reliability due to several inconsistencies and gaps highlighted above. These defects have prompted this court to scrutinize the reliability of the prosecution's evidence more closely.

The identified flaws, as delineated above create a reasonable doubt regarding the prosecution's case, which must be decided in favour of the appellant. See the case of **Hemed v. Republic** [1987] T.L.R. 117.

Based on the reasons above and the analysis shown, the court agrees with the appellant's contention that the prosecution did not sufficiently establish the one who committed rape to PW1 beyond a reasonable doubt.

In light of the foregoing considerations, the court finds the appeal is meritorious. Consequently, the appeal is hereby allowed, quash the conviction, and set aside the imposed sentence. The appellant is to be promptly released from custody unless he is lawfully held with another cause.

It is so ordered.

Dated at Mtwara this 18th March 2024.

M.B. MPAZE

JUDGE

26/3/2024

COURT: Judgement delivered in Mtwara on this 26th day of March, 2024 in the presence of the appellant and Mr. Justus Zegge, the learned state attorney for the Republic.

M.B. MPAZE

JUDGE

26/03/2024