IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 71 OF 2023

(C/F Criminal Case No. 40 of 2022 in the District Court of Siha at Siha, Hon. E. N. Petro, RM)

ELINEEMA OSCAR MWANDRY…… APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

JUDGEMENT

Date of Last Order:18.03.2024
Date of Judgment: 29.04.2024

MONGELLA, J.

The appellant herein was arraigned in the district court of Siha at Siha (henceforth, the trial court) for the offence of rape contrary to **Section 130 (1), (e) and 131 (1) (a) of the Penal Code** [Cap 16 R.E 2019.The particulars of the offence were that: on 14.05.2022 at Lomakaa village within Siha district in Kilimanjaro region, the appellant unlawfully had sexual intercourse with a 7 years old girl (hereinafter, the victim or PW1), a standard one student at Lomakaa primary school.

The appellant denied the charge against him leading the matter to proceeded to trial. To prove its case, the prosecution paraded 5 witnesses. The evidence presented revealed that the victim is the

appellant's daughter and a student at Lomakaa primary school. That the appellant had, at several times, within the guest bedroom of their home, carnally known the victim. That, on 16.05.2022 the victim revealed the information to PW2, her fellow student. PW2 advised her to report the incidents to their school head girl. The appellant was arrested on 23.05.2022, as week after PW2 had revealed the incidents. The head girl advised PW1 to inform her class teacher, PW3. PW1 did as she was advised.

PW3 informed the head teacher of the incidence and thereafter the head teacher informed PW4, a gender-based violence and women rights activist. PW4 advised them to report the incidence to the Gender Desk at Sanya Juu Police station. Upon reporting the matter, PW1, PW3, PW4 and another activist by name of Rose were accompanied by police to Siha District Hospital whereby PW1 was examined by PW5, a medical doctor.

PW5 testified that while she found PW1's anus intact, her vagina appeared to be reddish, her hymen was not intact, her vagina sphincter muscles were overstretched and her opening was an inch long. With those findings, PW5 concluded that PW1's vagina had been penetrated by a blunt object. PW5 further found a foul smell discharged by her vagina. Laboratory tests also showed puss in her vagina and an infection. PW5 prescribed medicine for the victim, filled and signed the PF3 form and handed the same to one WP Nemelwa. The PF3 was admitted as exhibit P1.

After receiving the prosecution evidence, the trial magistrate found that the prosecution had established a prima facie case against the appellant. He was thus required to enter his defence. In his defence, the appellant testified as DW1 and had one witness, DW2. He testified that he had separated with the victim's mother, who wanted custody over the victim. That, he denied her request for custody and she threatened to do something that he would never forget. He alleged he was framed by the school and PW4.

DW2 also testified that PW1's mother had sought custody of PW1 and when denied, she promised to do something bad to them. She alleged that she solely lived with PW1 and the appellant only came to bring necessities at home. That, on 14.06.2022 she noticed PW1 was late from school. Upon following up on her, she learnt she had been taken from class around 11hrs. When she went to school, she learnt that PW1 was raped and about 20hrs, the police took her home and arrested the appellant.

After observing the evidence of both parties, the trial court found the appellant guilty and convicted him of rape. He was sentenced to 30 years imprisonment term. Aggrieved, he has preferred this appeal on the following grounds:

1. *That, the trial Magistrate erred in law and fact to convict the appellant basing on the evidence of PW1 and PW2 while the same was taken contrary to* ***section 127 (2) of TEA CAP 6 R.E 2019****.*

2. *That, the trial Magistrate erred in law and fact to convict the appellant while there was no proof of age of the victim.*

3. *That, the trial Magistrate erred in law and fact to convict the appellant while the charge was not proved to the required standard needed by the law.*

4. *That, the trial Magistrate erred in law and fact to convict the appellant without considering the appellant's defence.*

The appeal was disposed by written submissions following a prayer by the appellant that was not objected by the respondent's counsel. The appellant fended for himself while the respondent was represented by Mr. Henry Kasiano Daudi, learned state Attorney.

The appellant argued on the grounds of appeal in seriatim. He however, did not argue on the 4th ground. Addressing the 1st ground, he faulted the trial magistrate for convicting him basing on the evidence of PW1 and PW2, while the same was recorded contrary to **Section 127 (2) of the Evidence Act [Cap 6 RE 2019]**. He alleged that as discussed in **Godfrey Wilson vs. Republic** (Criminal Appeal No. 168 of 2018) [2019] TZCA 109 TANZLII and in **Issa Salum Nambaluka vs. Republic** (Criminal Appeal 272 of 2018) [2020] TZCA 10 TANZLII, the court should ask a child of tender age a few pertinent questions so as to determine whether or not the child understands the nature of oath. That, if the child replies in the affirmative then he or she will give evidence on oath or affirmation,

but if she or he does not, she or he will be required to promise to tell the truth and not lies.

He alleged that such procedure was not observed by the trial magistrate prior to recording evidence of PW1 and PW2. That the trial magistrate did not record that the children understood the nature of oath and instead, only recorded that the children, PW1 and PW2 promised to tell the truth and not lies. He thus asked the court to expunge the evidence of the two witnesses. In his stance, if PW1 and PW2's testimony is expunged, the surviving evidence by PW3, PW4 and PW5 would not suffice to convict him as the same is hearsay, which should be disregarded.

Arguing on the 2nd ground, the appellant alleged that the victim's age was not proved. He reasoned so on the ground that while giving her testimony, PW1 did not state her age. Further that, while PW3, the victim's teacher attempted to state her age, she did not explain how she came to know her age. In that respect, he averred that the duty to prove the age of the victim lies on the prosecution, but in this case the prosecution failed to discharge such duty. He further challenged the prosecution evidence arguing that it was not enough to prove the victim's age. In support of his arguments, he made reference to the case of **Charles s/o Makapi vs. Republic** (Criminal Appeal 85 of 2012) [2014] TZCA 247 (19 June 2014). In addition, he held the view that the failure to prove the age of the victim raises doubts on the prosecution case and that in the premises, benefit of doubt should be given to him.

Expounding the 3rd ground, he alleged that PW1 was the only one that witnessed the crime. In that respect, he challenged the testimony of PW2 on the ground that she asserted facts she was told by PW1. Further, she challenged PW2' testimony for contradicting with that of PW1. Explaining the contradiction, he claimed that PW1 stated the he, the appellant, used to do bad habit to her and did so at home and at a guest house and that she would usually lid on her back while he inserted his penis into her vagina. With regard to the testimony of PW2, he said, she testified that PW1 informed her that he tied her on a tree and beat her and inserted a stick into her anus and raped her at night several times. He questioned why PW1 never disclosed such information while testifying.

The appellant stated that while the best evidence in sexual offences comes from the victim and the conviction may be solely based on uncorroborated evidence of the victim, the evidence of the victim should not be taken as a gospel truth. Considering that stance, he argued further that the court needs to warn itself while acting on it and satisfy itself that what is stated is true. He cemented his argument with the case of **Mohamed Said vs. Republic** (Criminal Appeal 145 of 2017) [2019] TZCA 252 TANZLII.

From the foregoing, he challenged the trial magistrate for not warning himself on the truthfulness of PW1's evidence prior to convicting him. He alleged that, as the record speaks for itself, the evidence of PW1 and PW2 was a total lie and did not prove the charge of rape against him. He asked the court to evaluate the

entire evidence on record and find merit in his appeal, quash the conviction, set aside his sentence and set him at liberty.

The appeal was opposed. Replying on the 1st ground, Mr. Daudi first admitted that, as reflected in the typed proceedings, the victim did not promise with her own words to tell the truth, but the court recorded that she promised to tell the truth. On the other hand, however, he contested that still, what was narrated by PW1 was original, true and authentic. In those bases he employed the court to consider substantive justice thereby referring the case of **Wambura Kiginga vs. Republic** (Criminal Appeal No 301 of 2018) [2022] TZCA 283 TANZLII.

Further, he referred to **Section 127 of the Evidence Act** as amended by the **Legal Sector Laws (Miscellaneous Amendments) Act, 2023** in which **Section 127 (7) of the Evidence Act** was introduced. He said that the provision states that the failure by a child of tender age to meet the requirement under **Section 127 (2)** would not render the evidence of such child inadmissible.

Addressing the 2nd ground, Mr. Daudi argued that DW2 who is PW1's grandmother, testified that she was her guardian since she was 7 months old and she was 7 years old at the time of trial. Further that, PW3, her teacher also testified that she was a grade one student and was 7 years old. Citing the case of **Andrea Francis vs. Republic**, Criminal Appeal No. 173 of 2014 (unreported) he averred that the age of the victim could be proved by the victim, both parents or one of them, guardian and by birth certificate. In that respect, he

had the view that the grandmother who was PW1's guardian rightly proved her age.

On the 3rd ground, Mr. Daudi held the stance that the case against the appellant was proved to the required standard. Referring the case of **Essau Samwel vs. Republic** (Criminal Appeal 227 of 2021) [2022] TZCA 358 TANZLII, he contended that the major factor in the offence of rape is. With regard to the case at hand, he submitted that PW1 testified how the appellant penetrated her. That her evidence was neither shaken nor broken by the appellant even during cross examination whereby she maintained that what she had testified was true rendering the trial court to believe her. He added that, as held in **Essau Samwel** (supra), the best proof of rape comes from the victim. Further, he referred to the testimony of PW5, a doctor that examined PW1, arguing that he testified that there was penetration by a blunt object. In that premise, he found the ground wanting in merit.

Mr. Daudi finalized his submission by requesting for the appeal to be dismissed. He further asked the court to revise the sentence of the trial court and sentence the appellant to life imprisonment as **Section 131(1) of the Penal Code** provides.

After considering the grounds of appeal, the submissions of both parties, and the trial court record, I shall address the same in seriatim. Though the appellant never argued on the 4th ground, I find it pertinent to address his defence, as well. This is because the question on whether the case was proved beyond reasonable

doubt by the prosecution cannot be effectively addressed without considering the defence evidence. As such, I shall examine and consider the defence evidence while addressing the 3rd ground of appeal as it is the legal obligation of the first appellate court. See: See: **Mkaima Mabagala vs. The Republic** (Criminal Appeal No. 267 of 2006) [2011] TZCA 181 (24 February 2011) TANZLII.

With respect to the 1st ground, the appellant challenged that the trial magistrate did not comply with the requirement under **Section 127(2) of the Evidence Act**. It is well settled under the said provision that a child of tender age may give evidence without oath or affirmation, but shall promise to tell the truth. The provision states:

> "(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."

What is gathered from the interpretation of **Section 127 (2) of the Evidence Act** is that, foremost, a child may give evidence on oath or instead promise to tell the truth. To testify on oath, the court must first test if such child understands the nature of oath and if so, allow the child to give his or evidence on oath. To get to the conclusion that such child understands the nature of oath it is recommended that the presiding magistrate or judge should ask the child several simple questions.

The application of **Section 127(2) of the Evidence Act** was expounded in the case of **George Lucas Marwa vs. Republic**

(Criminal Appeal No.382 of 2019) [2023] TZCA 17424 TANZLII whereby the Court held:

> "It is our conviction that where a witness is a child of tender age, a trial court should at the beginning ask a few pertinent questions, so as 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. If such child does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the truth and not to tell lies. The procedure explained should be reflected on the proceedings of the trial court.
> … none compliance on the two conditions above, renders the evidence of the child useless, liable to be expunged from the records."

See also; **Godfrey Wilson vs. Republic** (supra); **Issa Salum Nambaluka vs. Republic** (supra); **Shabani Said Likubu vs. Republic** (Criminal Appeal 228 of 2020) [2021] TZCA 251 TANZLII; and **Ahamad Salum Hassan @ Chinga vs. Republic** (Criminal Appeal No. 386 of 2021) [2023] TZCA 44 TANZLII.

In observing the trial court records, I agree with both parties that the trial magistrate did not comply with the requirement to ask pertinent questions to the child. He only stated in his words that PW1 and PW2 promised to tell the truth. This is seen at page 3 and 4 of the typed proceedings. At this point, the question therefore is whether such omission can be overlooked according to the case of **Wambura**

Kiginga vs. Republic (supra) and/or **Section 127(7) of the Evidence Act as amended**.

In **Wambura Kiginga** (supra), the Court of Appeal facing akin circumstance where the requirement under **Section 127 (2) of the Evidence Act** was not observed reasoned that what the child testified was original, true and authentic. The Court observed that each case must be determined based on surrounding circumstances. It stated:

> "In this case we are fully convinced, that although the child did not promise to tell the truth, what she narrated was original, true and authentic … In the circumstances of this case, we think, as indicated a while ago, that substantive justice needs to be done even in favour of children of tender age, who while giving evidence, every circumstance, like in this case, suggests that they told the truth and not lies, even if they might not have taken oath or affirmation or promised to tell the truth and not lies in compliance with subsection (2) of section 127 of the Evidence Act."

The apex Court further discussed the exception set under **Section 127 (6) of the Evidence Act** which allows the court to convict a suspect based uncorroborated evidence of the victim of sexual offence. It observed that what the provision was meant to prevent was to allow the court to navigate outside the constraints under **Section 127 (2) of the Evidence Act.**

The amendment that introduced **Section 127(7)** in **the Evidence Act** provides that the failure of a child of tender age to meet the requirement of **Section 127(2) of the Act** would not render the evidence inadmissible. The provision states:

> "**32**. The principal Act is amended in section 127, by-
> (a) adding immediately after subsection (6) the following:
> (7) Notwithstanding any other law to the contrary, failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child inadmissible."

When the evidence of PW1 and PW2 was recorded by the trial court on 23.05.2022, the amendment to **Section 127 (7)** had not been introduced. The amendment took effect on 01.12.2023. However, in **George Jonas Lesilwa vs. Republic** (Criminal Appeal No. 374 of 2020) [2024] TZCA 269 TANZLII, the apex Court, noting the essence behind the amended provision observed that the evidence of a child of tender age should not be discarded for flimsy reasons without proof that something is lacking that affects the quality and credibility of such evidence. The Court stated:

> "For the sake of completeness, we are constrained, before leaving this subject, to observe that, going by the above interpretation of the law, it must be clear that, the evidence of a child of tender age should not be discarded on flimsy reasons without proof on a balance of probabilities that there was something lacking that really affected the quality

> and credibility of such evidence. In other words, an appellate court should look at the substance of the complaint raised by the appellant and see whether the alleged non-compliance with section 127 (2) of the Evidence Act was of such a nature as to be said, in rational terms, to have produced a substantial defect upon such evidence. The above observation, no doubt is the reason behind the recent introduction of section 127 (7) of the Evidence Act as amended by the Legal Sector Laws (Miscellaneous Amendment) Act No.11 of 2023…"

The question in this case is thus whether there are reasons to doubt the quality and credibility of the evidence of PW1 and PW2.

PW1 testified that the appellant was her father and that he did do bad habit to her. In her own words she stated: "*Baba ananifanyiaga tabia mbaya"*. She stated that the appellant did such act to her multiple times. She elaborated that she usually laid on her back and the appellant came on top of her and penetrated her. She went further to illustrate where her female organ is located. All this is reflected in her evidence whereby she stated:

> "*baba ananifanyiaga tabia mbaya' my dad use to do bad habit to me; it is usually at home at the guest house he does that he does that bad habit to me many times. He usually lay in my back and he would come on top of me and penetrate me. 'Huwa akinilalia anatoa lidudu lake na kuningizia huku mbele' he sleep over me while I lay on my back and withdraw his penis and penetrate me from the front. This is the front where he penetrate me (pointing at her vagina)*." (sic)

On cross examination, PW1 insisted that the appellant was at home the night he penetrated her and insisted that she was telling the truth.

PW2, an 11-year-old girl, testified that she was told by PW1 that her father tied her on a tree and beat her and inserted a stick into her anus and that he would rape her at night and that he raped her many times. She also elaborated on what she understood rape to mean. She then told the head girl who told her to report the same to their class teacher, something which they did.

As it appears, PW1's evidence was straightforward, unclouded by any doubt. She as well maintained the same story throughout her evidence, including during cross-examination. In the circumstances, I find no reason to doubt her testimony and hold the view that non-compliance with **Section 127(2) of Evidence Act** did not render the evidence of PW1 incredible nor prejudice the appellant.

On the other hand, the evidence of PW2 regarding the rape incident is hearsay. The direct evidence she offered was in regard to telling the head girl of what happened to PW1 who told her to tell PW1 to report to her class teacher. There is no doubt that PW1 did inform the class teacher (PW3) on what had happened to her. In consideration of her direct evidence, I find no reason not to believe on the credibility of her testimony. In that respect, in view of the decision in **Wambura Kiginga** (supra), I am of the view that non-compliance with the requirement under **Section 127(2) of the**

Evidence Act can render her testimony inadmissible. The 1st ground is thus without merit.

On the 2nd ground, the appellant faulted the prosecution case on the ground that it failed to prove the age of the victim. His assertion was based on the fact that PW1 did not state her age and that PW3 did not prove PW1's age. On his part, Mr. Daudi's stance was that the victim's age was duly proved.

It is imperative to note that the matter at hand involves a 7-year-old girl rendering the rape statutory whereby consent is immaterial. In such cases, however, proof of age becomes paramount. See, **George Claud Kasanda vs, DPP** (Criminal Appeal 376 of 2017) [2020] TZCA 76 (27 March 2020) TANZLII, in which the Court of Appeal explained;

> "As highlighted above, the appellant was being accused of carnally knowing a girl aged 16 years. On account of that, the learned State Attorney was of the view that the offence section ought to have cited section 130(I)(2)(e). In essence that provision creates an offence now famously referred to as statutory rape. It is termed so for a simple reason that; it is an offence to have carnal knowledge of a girl who is below 18 years whether or not there is consent. **In that sense age is of great essence in proving such an offence.** The prosecution is duty bound to establish among other ingredients, that the victim is under the age of eighteen so as to secure a conviction."

It is well settled that evidence of age of the victim may be proved by the victim, her guardian, parents, relatives or medical practitioner. This position was well stated in **Issaya Renatus vs. Republic** (Criminal Appeal 542 of 2015) [2016] TZCA 218 (26 April 2016) TANZLII that:

> "We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate."

See also, **Shani Chamwela Suleiman vs. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022); **Iddi Omary vs. Republic** (Criminal Appeal No. 408 of 2021) [2023] TZCA 17699 (3 October 2023) and; **Mzee Ally Mwinyimkuu @ Babu Seya vs. Republic** (Criminal Appeal 499 of 2017) [2020] TZCA 1776 (17 September 2020), (All from TANZLII)

In the proceedings, it is apparent that PW1 did not state her age when giving her testimony. However, PW5 a medical doctor that examined PW1, did state in his evidence, that PW1 was 7-year-old girl. His exact words were:

> "*On 16/05/2022 at noon we received on pupil come to the Hospital with PW3, PW4 and W Nemelwa the Police Officer. Nemelwa had a PF3 which required me to examine whether the pupil*

> *had been penetrating or not. The pupil was a seven years old girl."* (sic)

Further, DW2, whom is not contested to being PW1's guardian from when she was abandoned by her mother at 7 months old, did state that PW1 was 7 years old. Her exact words were:

> *"I know the accused is my son, I received the victim when she was 7 months old. Her mother abandoned her and the Social Welfare Office gave her to me. Now she is 7yrs and her mom want her. She is now studying at Lomakaa primary school."*

The testimony of PW5, a medical doctor and DW2, a guardian of PW1, clearly shows that the age of PW1 was well proved. In addition, PW3 who was her class teacher did state that PW1 was a 7-year-old girl and a standard one student. None of the witnesses were challenged by the appellant in regard to the age of the victim. In fact, I find it absurd that the appellant, who is the biological father of the victim raised this ground. He never disputed being the biological father, and in fact, proved the same in his own testimony whereby he claimed to have been framed by the victim's mother who wanted custody of the child. Being the biological father, who took care of the victim since she was born, he is expected to know the exact age of the victim.

In the premises, if PW3, PW5 and DW2 had given wrong testimony of the age of the victim, he would have challenged the same and

cross examined the witness to contradict what they stated. The law is clear that failure to cross examine on an important fact renders acceptance of the asserted facts. See: **Martin Misara vs. The Republic** (Criminal Appeal No. 428 of 2016) [2018] TZCA 318 (13 December 2018). In the premises, this concern is found to have been raised as an afterthought. The ground is thus found to lack merit.

With regard to the 3rd ground, the appellant faulted the conviction against contending that the case was not proved against him. He further challenged the prosecution evidence for containing contradictions whereby he specifically referred to the testimonies of PW1 and PW2. Mr. Daudi, on the other hand, did not address the claim regarding contradictions. He rather held the stance that penetration was proved.

It is well settled that the best evidence in sexual offences comes from the victim. See, **Seleman Makumba vs. Republic** [2006] TLR 379; **Mohamed Said vs. Republic** (supra); and; **James Beda vs. The Director of Public Prosecutions** (Criminal Appeal 101 of 2019) [2022] TZCA 70 TANZLII. It is however warned that such evidence should not be taken as gospel truth, but should pass the test for truthfulness. This principle was well expounded in **Mohamed Said vs. Republic** (supra), in which the Court stated:

> "We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness."

See also; **Rehani Said Nyamila vs. Republic** (Criminal Appeal 222 of 2019) [2021] TZCA 301 TANZLII. It is well settled that the essence of rape is penetration. This was held in **Essau Samwel vs. Republic** (supra), whereby it was held:

> "We must emphasize that the essence of the offence of rape is penetration and this is what should be proved by the prosecution as required under section 130 (4) of the Penal Code."

In statutory rape, the prosecution has the duty not only to prove penetration, but also to prove the age of the victim and the culpability of the accused. These ingredients were well stated in the case of **Abel Changwe vs. Republic** (Criminal Appeal No.546 of 2019) [2023] TZCA 17537 (21 August 2023) TANZLII, in which the Court stated:

> "There is no gainsaying that, statutory rape is an offence which entails proof of three ingredients; penetration, age of the victim and the culprit."

As I have already resolved the question of age of the victim, I will address the other two ingredients in regard to the evidence presented at the trial court. No doubt, PW1's evidence was direct evidence. Her account was to the effect that the appellant, her father, penetrated her on several occasions whereby such incidents took place at their home in the guest room, although the record reads, guest house. On 14.06.2022, PW1 reported the matter to PW3, her class teacher, who reported the same to the head teacher.

Eventually PW4, a gender activist, was informed of the incidents and she advised the same to be reported to the gender desk at Sanya Police Station.

At the Police, one WP Nemelwa was appointed to escort PW1, PW3 and PW4 to Siha District Hospital. PW1 was medically examined by PW5 who found her anus intact, but her vagina was extra reddish in labia majora connoting friction or infection. PW5 found that her hymen was not intact, her vagina orifice was also open for about an inch signifying penetration by a blunt object. He as well found a foul smell coming out from her vagina and on laboratory examination puss was found. She was diagnosed with an infection and prescribed medication. With such medical findings, I am of the view that prosecution sufficiently proved that PW1 had been penetrated.

The remaining question is whether the appellant was the culprit. It is important to note that in this case, the victim and the appellant are daughter and father. The victim, as according to the evidence of the appellant and her grandmother (DW2) who is also the appellant's mother, was abandoned by her mother while she was 7 months old.

Although the appellant alleged that he did not live with them, DW2 stated that he used to come to bring necessities at their home. While I do not entirely buy the argument that the appellant did not reside in the said home, I still find truth in that the appellant used to go at home on various occasions. In fact, on the material day of

14.05.2022 when the incident was reported to PW3, the headteacher and eventually to PW4 and the Police, the appellant was at home.

The fact that the appellant went to visit at various instances, makes it more believable that indeed, he used the guest room in the home shared by PW1 and DW2. Noting the fact that the appellant visited the home at various instances, I am of the view that such circumstances were enough for him to rape PW1.

The appellant's main line of defence was that the case was fabricated against him by the victim's school teachers and the victim's wife who wanted custody of the child. I do not buy this assertion on main two grounds: one, the appellant never stated the motive behind the teachers framing him over such offence against his own daughter. Two, it was the defence evidence that the victim was abandoned by her mother when she was an infant of just 7 months, thereby being cared by her grandmother, DW2 and the appellant.

In the circumstances, I am of the view that the victim was very close to the appellant and DW2 than her alleged mother for her to be easily convinced to falsely go against her own father. In defence, it was also not explained as to how frequent the mother used to visit to get closer to the victim to the extent of convincing her to make up such terrible story against her own father who cared for her since she was abandoned by her mother at 7 months. The appellant as

well never cross-examined the victim regarding her relationship with her mother for her to be convinced to make up the story.

With regard to the statement of PW2 contradicting that of PW1, I wish foremost to note that not all contradictions can injure the evidence of a party. It is only material contradictions that get to the root of the case that can do so. In the matter at hand, PW2's statement was in relation to what PW1 had told her. Clearly, the same was hearsay. She was never present at any of the incidents where PW1 was penetrated by the appellant. In addition, I find immaterial to the offence facing the appellant the assertion by PW2 that the appellant inserted a stick into the victim's anus, beat and tied her on a tree. This is because the same is not related to the charge of rape. In fact, I find the alleged assertion not contradicting anything stated by the victim regarding the rape incidents committed to her by the appellant.

In the foregoing observation, I am of view that the trial court properly found the appellant guilty and convicted him for statutory rape. The appeal is therefore dismissed for lack of merit.

Before I pen down, I wish to address the issue regarding the sentence passed by the trial court. As addressed by Mr. Daudi, this sentence was wrong as according to **Section 131(3) of the Penal Code**, punishment for rape of a girl less than ten years is life imprisonment. The trial court, as evident on record, sentenced the appellant to thirty (30) years imprisonment.

In the premises, I hereby enhance the sentence to life imprisonment in terms of **Section 131(3) of the Penal Code**. It is so ordered.

Dated and delivered at Moshi on this 29th day of April, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA