IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 191 OF 2022

(Arising from the District Court of Kibaha, in the Criminal Case No. 46 of 2022)

STEVENE GEORGE LIHANJALA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

28th November 2023 & 28th February, 2024

BWEGOGE, J.

One Stevene George Lihanjala, the appellant herein, is a convict behind bars serving a custodial sentence of 30 years. The same was arraigned in the District Court of Kibaha ("the trial Court") on a charge of rape contrary to section 130 (1), (2) (e) and section 131 (3) of the Penal Code [Cap 16 R.E 2019] and convicted forthwith. Aggrieved by the conviction and sentence, the appellant appealed to this court on seven (7) grounds of appeal which, in substance, boils down to the 7th ground of appeal which avers that:

1. The prosecution failed to prove its case beyond reasonable doubt.

A short resume of the prosecution case in the trial court is thus: The victim (PW1) herein is a child of tender age. On 1st June, 2022, one Revina David (PW1), the close relative/guardian of the victim, observed that the victim herein (PW2) returned from school looking distressed and, or unhappy. She was walking in pain. PW1 asked the victim to explain what disturbed her. The victim, having pleaded PW1 not to tell her narrative to the appellant herein who is her step-father, disclosed the reason for her agony. The victim narrated that she was experiencing pain in her genitalia. Specifically, she alleged that her stepfather, the appellant herein, used to pick her up from school when her mother is at work whereas he sexually abused her by inserting his penis ("*dudu*") into her genitalia and threatened to kill her if she ever disclosed the incident. Being alarmed, the following morning of 2nd June, 2022, PW1 escorted the victim to Kongowe Police Station and lodged the complaint and she was issued with PF3 for medical examination of the victim. PW1 took the victim to Kongowe Health Center where the same was examined by Juma Yahaya (PW3), the medical practitioner. The medical practitioner examined the victim's genitalia and passed the blood-chilling information to PW2 in that the victim's genitalia had been penetrated and her hymen perforated. Likewise, the medical practitioner had informed PW2

that the victim was infected with syphilis, a sexually transmitted disease. The medical practitioner filled the PF3 which was tendered and admitted in evidence as exhibit P1.

Consequent to the allegation made by the victim and findings made by the medical practitioner (PW3), the appellant was arrested on the same day 2nd June, 2022. In his defence, the appellant made a general denial, alleging that he was at loggerheads with PW1 who had concocted this case for revenge.

Based on the incriminating testimonies of PW1, PW2 and PW3, the trial court found that the prosecution had proved beyond sane doubt that the accused had ravished a child of tender age, convicted the same forthwith and imposed the heinous sentence against him. Hence, this appeal.

The appellant fended for himself; for this very reason, this court allowed the appellant's prayer to argue his appeal by written submissions. Ms. Amina Macha, the learned state attorney, represented the respondent Republic.

In substantiating the allegation that the prosecution case was not proved according to the standard set in criminal proceedings, the appellant argued as follows: **First,** that section 229(1) of [Cap. 20 R.E. 2019] (hence force

CPA) requires the prosecution side to call witnesses and adduce evidence in support of the charge. That in this case, the prosecution failed to discharge its duty for the reason that while the particulars of the offence indicate that the crime was committed on diverse dates in May, 2022 no evidence established the exact date, month and year upon which the alleged rape incidents were committed. The case of **DPP vs. Yusufu Mohamed Yusufu**, Criminal Appeal No.331 of 2014, CA (unreported) was cited to fortify the argument. **Secondly,** the *voire dire* test was improperly conducted. That PW2 was not examined to test her competence whether she understood the meaning and nature of oath before recording her evidence pursuant to section 127(2) of the Evidence Act; hence, PW2's testimony was improperly taken. The case of **John Mkorongo James vs. Republic** (Criminal Appeal No. 498 of 2020) [2022] TZCA 111, among others, was cited to validate the argument. **Thirdly**, there are contradictions and inconsistencies in the testimonies of PW1, PW2 and PW3 which caused the prosecution case to flop. The case of **Selemani Yahaya @ Zinga vs Republic** (Criminal Appeal No. 533 of 2019) [2021] TZCA 568 was cited to make the point. **Fourthly**, no evidence on record indicating that PW2 positively identified the appellant by either pointing or touching him in court.

Fifthly, the trial magistrate failed to evaluate the evidence of the appellant and simply rejected it.

In reply, Ms. Macha submitted that the charge on which the appellant was arraigned was drafted in terms of sections 132 and 135 of the CPA. That the appellant wrongly construed the provision of section 229 (1) of the Act as the prosecution summoned its material witnesses including PW2 (victim) herein who narrated what had transpired between her and the appellant. That the charge disclosed the act allegedly committed by the appellant on diverse dates and not a specific date as deponed by PW2. And the testimonies of PW1 and PW3 don't reflect the specific or actual dates. Hence, the appellant's complaint is unfounded.

Further, the counsel asserted that the trial court had taken into consideration the settled law that in sexual offences the best evidence emanates from the victim. The case of **Seleman Makumba vs. Republic** [2006] TLR 379 was cited to bolster the point.

Concerning the allegation that *voire dire* was not properly made, the respondent's counsel responded that the requirement was removed by the amendment made in 2016 by Act No. 4 of 2016. That the current position is

to the effect that a child of tender age can testify without an oath provided she promise to tell the truth, the condition which the trial court complied with. The case of **John Ngonda vs Republic** (Criminal Appeal 45 of 2020) [2023] TZCA 13 was cited to fortify the point.

Regarding the alleged material contradictions in the testimonies of the prosecution witnesses, the respondent's counsel argued that the allegation is a mere afterthought. The counsel opined that the prosecution established that the victim (who was not of the age to consent to the sexual act) was sexually assaulted and infected with venereal disease. That the testimonies of PW1, PW2 and PW3 herein, who are key witnesses, well corroborated each other.

Pertaining to the alleged failure of PW2 to identify her assailant in court, the respondent's counsel contended that the victim was familiar and well-acquainted with the appellant; therefore, the identification of the same in court was not mandatory.

And in responding to the allegation that the trial court failed to consider the defence case properly, the respondent's counsel argued that the trial court properly considered the defence case and found that it didn't shake the prosecution case. Hence, the counsel opined that the prosecution proved its case beyond sane doubt.

In rejoinder, the appellant reiterated his submission in chief, I need not replicate the same herein.

Now, the question for determination before this court is whether the prosecution proved the case beyond sane doubt.

From the outset, I find it pertinent to respond to the appellant's allegation that the prosecution case didn't support the charge. That the particulars furnished in the charge sheet pertaining to the time upon which the alleged rape was committed were not proved. In substance, the appellant contended that the prosecution was obliged to prove the specific time and place upon which the crime was committed in compliance with the provision of section 229 (1) of the CPA. Unarguably, the provision of section 229 (1) of the Act instructs that where the accused person does not admit the truth of the charge, the prosecution is obliged to call witnesses and adduce the evidence in support of the charge. This provision is amplified by the Apex court in the case of **DPP vs. Yusuf Mohamed Yusuf,** Criminal Appeal No. 331 of 2014 (unreported) in that:

> *"It is always the duty of the prosecution to make sure that, what is contained in the particulars or statement of offence including the dates when the offence was committed is proved and supported by the evidence and not otherwise."*

Likewise, in the case of **Salum Rashid Chitende vs. The Republic,** Criminal Appeal No. 204 of 2015, CA (unreported) the Court aptly held:

> "*When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place…..*" See also the case of **Furaha Alick Edwin vs. Republic** Criminal Appeal No. 410 of 2020 CA, (unreported).

However, upon scrutiny of the record of this case, I observed that the particulars of the offence allege that the appellant herein:

> "*…on diverse dates of May, 2022 at Misugusugu area within Kibaha District in Coast Region, unlawfully, had sexual intercourse with one Amina Mustafa, a girl of 5 years old.*"

Therefore, based on the wording of particulars pertaining to the time of the commission of the alleged rape, I subscribe to the submission of the respondent's counsel in that the charge sheet levelled against the appellant indicates that the offence was committed in diverse dates, not specific dates. It was on 01st June, 2022 when the victim disclosed the fact that she had been sexually abused on several occasions by the appellant. Hence, the prosecution rationally apprehended that the alleged offence might have been

committed on diverse dates of May, 2022. Therefore, it was not necessary for the prosecution witness to prove the actual date and, or time upon which the offence was committed. It follows that the cases cited by the appellant to support his argument in this respect are distinguished from the circumstances of this case as in the respective cases the charge sheet contained particulars pertaining to the specific time, date and place which the prosecution was bound to prove.

In the same vein, the appellant alleged that the trial court failed to conduct *voire dire* on the child of tender age to ascertain whether the child understood the nature of oath and possessed sufficient intelligence to justify the reception of her testimony. Likewise, the appellant alleged that the victim who is a child of tender age didn't promise to tell the truth before she testified in court and her evidence concidered. As rightly contended by the respondent's counsel, the requirement to conduct *voire dire* to the witnesses of tender age has been done away by Miscellaneous Amendment (No. 04) of 2016.

Admittedly, preceding the amendment of section 127 (2) of the Evidence Act, the provision of subsection 2 made it mandatory to the magistrate before whom the child of tender age appeared to adduce evidence, to conduct

voire dire test to indicate whether or not the child understands the nature of oath and the duty of telling the truth and, whether the same is possessed of sufficient intelligence to justify the reception of his/her evidence. See also, the cases of **Sainyeye vs. Republic**, Criminal Appeal No. 57 of 2010, CA (unreported); **Hassan Hatibu vs. Republic**, Criminal Appeal No. 71 of 2002 CA (unreported). **Godfrey Wilson vs. Republic**, Criminal Appeal No. 168 of 2018 CA (unreported).

The Act No. 4 amended the provisions of subsections (2) and (3) of section 127 of the Evidence Act which were deleted and substituted with subsection (2) which aptly provides:

> *"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 lies."*

The clarification on the provision reproduced above was given by the Apex Court in the case of **John Ngoda vs. Republic** (supra) whereas the Court expounded:

> *"It is for this reason that in the case of Godfrey Wilson vs. Republic Criminal Appeal No. 168 of 2018 (unreported) we stated that where a witness is a child of tender age, a trial court should at foremost, 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 tell lies. See also in this respect the case of **Nambaluka vs. Republic,** Criminal Appeal No. 272 of 2018, CA (unreported).

That said, I now revert to canvass the ground of appeal advanced by the appellant herein. It is settled law that the best evidence of rape comes from the victim. The principle was expounded in the case of **Selemani Makumba vs. Republic (**Criminal Appeal 94 of 1999) [2006] TZCA 96 in that:

> *"……. True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration."*

The above principle is amplified in the case of **John Ngoda vs. Republic** (supra) that:

> *"Indeed, as we held, for instance, in* ***Selemani Makumba vs. Republic*** *…the best proof of rape (or any other sexual offence) must come from the complainant. Consequently, the complainant's credibility becomes the most important consideration such as if his or her evidence is believable, persuasive and consistent with human nature*

as well as the normal course of things, it can be acted upon as the sole basis of conviction – see section 127 (6) of the Evidence Act."

In the same vein, it is settled law that 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. See the case of **Aloyce Maridadi vs.** Republic (Criminal Appeal 208 of 2016) [2017] TZCA 244, among others.

Being guided by the above principle, I would now scrutinize the evidence of the victim herein. It is the testimony of victim (PW2) herein that previously, before being placed under the custody of PW1, she was under the custody of the appellant (stepfather) whom she referred to as "*Baba Steve*" and her mother. She told the court that when his mother would be absent from home, the appellant used to insert his penis *("mdudu")* into her private parts. PW2 had touched her genitalia showing the trial magistrate the exact private parts she alleged his stepfather (appellant) to have penetrated. Likewise, the victim alleged that the appellant threatened to kill her. The record has it that the child burst into crying when the appellant put the question to her during the cross-examination, though she responded to the question.

The testimony of the victim is corroborated by her guardian (PW1) who told the trial court that she discovered the victim in a discomfort state when she returned from school on 01st June, 2022 around 04; 00 pm. Likewise, it was deponed by PW1 that the victim had not eaten well that fateful evening. And during the night, PW1 had asked the victim to explain what was bothering her. It was then that the appalling information was revealed by the child who had at first instance pleaded with his guardian to keep it secret as the appellant threatened to kill her if she would disclose the incriminating information.

It is likewise, the testimony of PW1 that the victim alleged the appellant for penetrating her genitalia by hand and what she described as *"mdudu"* meaning the penis. The appalling information drove PW1 to report to the police station early the following morning where she lodged her complaint and was given PF3 for medical examination of the victim. PW1 enlightened this court that the medical examination revealed that the victims' genitalia were penetrated, among others, confirming the narrative given by the victim.

PW3 is the medical practitioner from Kongowe Health Centre. This key witness deponed that he attended the victim on 02nd June, 2022 when she was

brought to the hospital for medical examination following the allegation of rape. Upon examination, PW3 found that the victim's genitalia exhibited signs of penetration in that the hymen had been perforated, the urethra tract destroyed, and a laboratory test of vaginal fluid revealed the victim had contaminated sexually transmitted disease. Undoubtedly, the PF3 (exhibit P1) reveals that the victim was found infected with syphilis and urinary tract infection (UTI). Therefore, it is my settled opinion that contrary to the allegations made by the appellant herein, the testimonies of PW1, PW2 and PW3 corroborate each other.

It suffices to point out that I find the testimony of the victim credible. The victim of five years old, in my opinion, could not concoct a case against the appellant, her stepfather. Moreso, the findings of the medical practitioner, further add credibility to the testimony of the victim and eradicate any assumption that the victim was coached to implicate the appellant. The appellant didn't register any complaint to the effect that he was in dispute with the victim's mother either. Likewise, I find the corroborating evidence emanating from PW1 and PW3 credible as well. I find no cogent ground(s) to

discredit the same. Therefore, I refuse to purchase the appellant's submission in that the prosecution case was marred by discrepancies. The alleged discrepancies, if any, do not go to the root of the case.

I am alive that the appellant alleged to have been at loggerhead with PW1. As to the source of dispute, the appellant explains that he refused to purchase food from PW1 who was the food vendor, for reason of inflated price; and enmity ensued between them inclined her to concoct criminal charge against him. I find the cause of the alleged misunderstanding trifling for the PW1 to concoct a heinous charge of like nature against the appellant. Likewise, I have observed that the appellant didn't cross-examine the PW1 in this respect, though he raised the same allegation during his defence which the trial court rejected. Thus, the defence case was considered by the trial court and found to be an afterthought. Likewise, I find the defence made by the appellant herein manifestly irrelevant.

In tandem with the above, it was alleged by the appellant that the victim failed to identify him in court during the hearing session of the case. I subscribe to the argument of the respondent's counsel in that the appellant herein was familiar to the victim (her stepfather) and her previous caretaker;

hence, identification in court during the trial was not necessary. The appellant admits the fact that the child was previously under his custody. Likewise, the child refers to the appellant as her stepfather.

Conclusively, I find it pertinent to highlight that the trial court is enjoined with the power to convict the accused based on the evidence of the child of tender age if the court is satisfied that the testimony given is credible. The trial court was satisfied that the testimony of the victim herein, a child of tender age, which was corroborated by testimonies of remaining witnesses, was truthful and sufficient to ground conviction. I find no cogent ground to interfere with the finding of the trial court.

Given the foregoing reasons, I find the appeal herein bereft of merit. Accordingly, I hereby dismiss the appeal herein. The conviction and sentence entered by the trial court are hereby upheld. So ordered.

DATED at **DAR ES SALAAM** this 28th February, 2023

O. F. BWEGOGE

JUDGE