IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 89 OF 2022

(*Originating from the Judgment of the District Court of Morogoro, at Morogoro, in Criminal Case No. 139 of 2021 dated 5th Day of July, 2022)*

HALIFA HAMIDU ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

29th Sept, 2023 & 17th Jan, 2024

M.J. Chaba, J.

In the District Court of Morogoro, at Morogoro (the trial Court), the appellant, Halifa Hamidu was arraigned and charged with the offence of rape contrary to sections 130 (1) & (2) (e) and 131 (3) of the Penal Code [CAP. 16 R. E. 2022]. At the culmination of trial, the trial Court found the appellant guilty of the offence he stood charged, convicted and sentenced him to serve life time imprisonment. In addition, the trial Court ordered the appellant to pay the victim compensation amounting to TZS. 1,000,000/= (Tanzanian Shillings One Million Only).

Aggrieved by the decision of the trial Court, the appellant preferred the present appeal. In his petition of appeal, the appellant has raised six (6) grounds of appeal as quoted hereunder: -

1. That, the learned trial magistrate erred in law and fact in convicting the appellant basing on the evidence of PW1 (the victim) which was received in contravention of the provisions of section 127 (2) of the Evidence Act, (CAP. 6 R.E. 2019) by omitting to ask the PW1 on whether or not she understood the nature of an oath and the duty to tell the truth in court and not lies before taking her purported promise.

2. That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of PW1 (the victim) when the prosecution evidence was doubtful and/or ambiguous on whether or not the alleged rape was committed by the appellant as charged.

3. That, the learned trial magistrate erred in law and fact in convicting the appellant without drawing an inference adverse to the prosecution by failing to call the said Eliah who was with the appellant to strengthen their allegations.

4. That, the learned trial magistrate erred in law and fact in convicting the appellant without considering the doubts raised by the appellant in his defence evidence, the omission which resulted to a serious error or misdirection amounting to miscarriage of justice and constituted a mistrial.

5. That, the learned trial magistrate erred in law and fact in convicting the appellant basing on the circumstantial evidence which was broken, insufficient, and unreliable to ground the appellant's conviction as charged.

6. That, the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution has failed to prove its case against the appellant beyond reasonable doubt as mandatorily required by law.

At the hearing of the appeal, the appellant appeared in person, and unrepresented whereas the Respondent/Republic was represented by Mr. Shaban Abdallah Kabelwa, Learned State Attorney.

When the appellant was invited to kick the ball rolling, he briefly submitted that, due to a reason of being a layperson and that he doesn't know the law, he prayed the Court to assist and help him accordingly.

Responding to the appellant's submission, Mr. Kabelwa right away acceded to the appellant's grounds of appeal in particular grounds 1, 2 and 3 respectively, which all them cantered or revolves around the issue of compliance with the provision of section 127 (2) of the Evidence Act, [CAP. 6 R.E. 2022]. He contended that, section 127 (2) of the Evidence Act guides the trial Court on how to take and record the evidence of a child of tender age, and mentioned the crucial factors to be adhered to by the trial Court, namely: -

(1) If the Child understand the meaning of oath, his/her testimony must be taken or recorded upon taking oath, and

(2) If the Child appears not to understand the meaning of oath, then such a child is duty bound to promise to tell the Court the truth and not to tell any lies.

He submitted further that, according to the law and practice, the trial Magistrate was supposed to ask the victim some questions to test her intelligence as it was expounded by the Court of Appeal of Tanzania in the case of **Issa Salumu Nambaluka vs. Republic,** Criminal Appeal No 272 of 2018

(unreported), where at page 11 of the typed judgment the Court reiterated its holding in the case of **Godfrey Wilson vs. Republic (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019)** by highlighting the relevant questions to be asked by the trial Magistrate. He averred that, looking at page 7 of the trial Court proceedings, the trial Court did not comply with the requirement of the law and the questions that were put to the victim are not in line with the guidance of the CAT as hinted above.

He went on stating that, according to case laws, the effect of such anomaly is to expunge the evidence of the victim from the Court records. He stressed that, if the same will be expunged, the only evidences available in the records is the evidence of the victim's mother and the medical doctor herein (PW2 and PW4) which in his opinion, are insufficient to support and sustain conviction of the appellant as the same mutually oppose each other (inconsistent). He said, however, it is unknown whether the victim was raped by the said Eliah or Halifa (appellant). He added that, according to the records, the evidence given by the PW2 is too vague.

In view of the above submission, Mr. Kabelwa underlined that, the prosecution evidence left a lot to be desired, and that the same did not prove the case to the required standard.

In his brief rejoinder, the appellant joined hands with the submission made by the State Attorney and fully supported it to be the position of his appeal.

I have carefully examined the entire Court records, the grounds of appeal raised by the appellant and the submission made by the Learned State Attorney in support of the same. Without much ado, I agree with the submission advanced by the Learned State Attorney that, at the trial Court, the provision of section 127(2) of the Evidence Act, was not complied with. The records are to the effect that, on the 30thday of November, 2021, the Court received the evidence of PW1 (the victim). For easy of reference, I find it wise to reproduce an extract of the typed trial Court proceedings at page 8 as hereunder:

"PROSECUTION CASE OPENS:

PW1's Names: Fatuma Bakari, Age?, Tribe?, Residence?, Religion - Muslim:

Do you go to pray? Yes;

Where do you go to pray? At the Mosque;

The child seems to be of tender age, so she does not know the nature of an oath and the duty of telling the truth;

The Court has asked her to promise to tell the truth to the Court and not to tell any lies and she says;

Witness: I promise to tell the truth to the Court and not to tell any lies.

Court: S. 127 (2) of TEA, Cap 6, R. E. 2022 is complied with."

Signed: E. Ushaky, SRM

30/11/2021

As clearly demonstrated from the above extract, I agree with the Learned State Attorney that, the evidence of PW1 was improperly taken and recorded because the questions put forward to the victim could not in any way help the trial Court to ascertain as to whether PW1 exactly understood the nature of an oath or not.

As regards to the kind of questions which are supposed to be asked or put forward to a child of tender age, the Court of Appeal of Tanzania in the case of **Godfrey Wilson vs. Republic (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019)** (extracted from www.tanzlii.go.tz); citing with approval the case of **Msiba Leonard Mchere Kumwaga vs. Republic,** Criminal Appeal No. 550 of 2015 (unreported), had the following to state:

> *".....section 127 (2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. The question, however, would be on how to reach at that stage. 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. The 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.

Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

[Bold is mine].

Corresponding observations was made by the Apex Court of our Land in the case of **John Mkorongo James vs. Republic (Criminal Appeal 498 of 2020) [2022] TZCA 111 (11 March 2022)** (extracted from www.tanzlii.go.tz), where upon being faced with much akin situation, the Court observed that: -

"... The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court to tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court to tell the truth and not tell lies".

The Court went on stating that:

> *"It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief, to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court tell the truth and not tell lies as per section 127 (2) of the Evidence Act."*

From the foregoing excerpt of the decision of the Court of Appeal of Tanzania, it is apparent that the trial Magistrate did violate the principles laid down by the Apex Court before dealing with the reception of the evidence of tender age. The mere fact that, the trial Magistrate asked the victim of rape some questions to the effect that, I quote: Do you go to pray? Yes; Where do you go to pray? At the Mosque; and concluded that, since the child seems to be of tender age and so she doesn't know the nature of oath and the duty of telling the truth, and finally she said, I promise to tell the truth to the Court and not to tell any lies, such facts cannot hold water when gauged with the legal principles.

As to the way forward, in **John Mkorongo James's** case, the CAT upon being faced with a similar scenario, had the following to say: -

> *"In the instant case, as we have amply demonstrated above, PW1's evidence was taken in contravention of section 127 (2) of the Evidence Act. That being the case, the said evidence is valueless and it is accordingly expunged from the record. In the event, we find the first ground of appeal to be meritorious and we accordingly sustain it."*

In similar vein, I find and hold that, non-compliance with the provision of section 127 (2) of the Evidence Act and violation of the principles of law avowed by the Superior Court, it rendered the evidence adduced by the PW1 to have no evidential value, and the remedy of which is to expunge the same from the records, as I hereby do.

Now, upon expunging the evidence of PW1 from records, the next crucial question is whether or not the remaining evidences of PW2, PW3, and PW4 suffices to warrant this Court sustain the appellant's conviction and the sentence imposed by the trial Court against the appellant.

On reviewing the evidence adduced by the prosecution witnesses, I am of a settled mind that, in the absence of PW1's evidence, the remaining evidences from other prosecution witnesses cannot at any rate secure conviction of the appellant for a reason that, the same are full of hearsay evidence, hence

insufficient to prove the case to the hilt. I say so because, it is evident that, the testimonies of the PW2 and PW3 only referred to what they were told by PW1, and the evidence of PW4, the medical doctor who medically examined the victim (PW1), his testimony shows that, PW1's private parts had bruises and discharges (spermatozoa) and further that, there was a penetration of a blunt object in her vagina. In my view, the evidence of PW4 could not incriminate the appellant with the offence of rape as the same only proved that PW1 was raped but uncertain as to who did the act to her.

Moreover, as correctly submitted by the State Attorney, since the evidence of PW2 found to be unclear as to who really raped the victim between the appellant, Hanifa or Eliah, in the circumstance, I find it hard for the Court to bank on the evidence given by PW4 taking into account that, his evidence falls within the realm of being expert opinion, hence not binding to the Court.

In the premises, I find and hold that the prosecution case against the appellant was not proved beyond reasonable doubt. In the event, I allow the appeal, quash the appellant's conviction, set aside the sentence of life imprisonment and the order for compensation amounting TZS. 1,000,000/=. I order his release from prison with immediate effect, unless otherwise lawful held.

Order accordingly.

DATED at **MOROGORO** this 17th day of January, 2024.

M. J. CHABA

JUDGE

17/01/2024

Court:

Judgment delivered under my hand and the Seal of the Court in chambers this 17th day of January, 2024 in the presence of Mr. Josbert Kitale, Learned State Attorney and in the presence of the Appellant who appeared in person and unrepresented.

SUSAN P. KIHAWA

DEPUTY REGISTRAR

17/01/2024

Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.

SUSAN P. KIHAWA

DEPUTY REGISTRAR

17/01/2024