IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 164 OF 2022

(Arising from Criminal Case No. 47 of 2020 from

the Resident Magistrate Court of Arusha at Arusha)

MOHAMED HASSAN ______________________________ APPELLANT

VERSUS

REPUBLIC ______________________________________ RESPONDENT

JUDGMENT

05/03/2024 & 19/04/2024

BADE, J.

The Appellant herein was arraigned at the Resident Magistrate Court of Arusha at Arusha and charged with one count of grave sexual assault contrary to section 138 C (1), (2) (b) of the Penal Code, (Cap 16 R.E 2022). After a full hearing, the trial court found him guilty and sentenced him to twenty years in prison.

Aggrieved by the aforesaid conviction and sentence, the Appellant lodged this appeal on the following grounds:

i. That, the trial magistrate erred in law and in fact when held that, the charges against the Appellant were proved beyond a reasonable doubt.

ii. That, the trial magistrate erred in law and facts when sentencing the Appellant to life imprisonment while the sentence is not provided for the offence he was convicted for.

iii. That, the trial magistrate erred in law and fact by failing to evaluate and consider the evidence adduced by the Appellant during the trial and hence reached an erroneous decision.

Before going to the merit of this appeal a brief review of the facts leading to the appeal is necessary to give context to the background. It was the prosecution case that on 19/01/2020, in Sokon 1 area within the city, District, and Region of Arusha, the Appellant did a grave sexual assault to a girl of three and a half (3 1/2) years old, who will be referred as the "victim" or "PW4" in this judgment for purposes of concealing her identity.

It is also on the record that the Appellant and the victim are neighbors. On a fateful day, the victim together with other children were playing outside their houses, after a while a victim came out of the house where

the Appellant was living with his parent crying. PW2, the victim's mother asked her why she is crying, and she told her that "Kaka Mudy" who is the Appellant inserted his finger into her vagina and anus. She inspected her vaginal and anus and found blood. After such a finding, she went to the Appellant's house, asking the Appellant what he did to his daughter. The Appellant told her that a bicycle fell on her, after which he then opened the gate and left. PW2 reported the incident to the police, was issued a PF3, and took her daughter to the hospital, where she was attended by PW1, the medical doctor who examined the victim and found that her vaginal and anus had bruises and the victim had lost her virginity. PW1 concluded that the victim was sexually assaulted.

In PW4's testimony, she gave evidence that the Appellant inserted his fingers in her anus.

In his defense, the Appellant disassociated himself from the commission of this offence, stating that the case was framed against him due to grudges between his mother and the victim's mother arising from a longtime dispute between them. On the other hand, DW2, the Appellant's neighbor testified that on the fateful day, she saw the victim together with other children come out of the Appellant's house crying.

On being asked by PW2 the reason for their crying, they told her that the Appellant touched her on her back. They inspected the victim and saw red marks on her anus. That, the Appellant told them that a bicycle fell on them. She advised the victim's mother to send the victim to the hospital.

This appeal was disposed of by way of written submissions, with the Appellant represented by Ms. Fides Mwenda, learned advocate, while Respondent, the Republic was represented by Mr. Mahfudh Mbagwa, learned state attorney.

Counsel for the Appellant abandoned the second ground of appeal and submitted on the remaining grounds jointly. Ms. Mwenda put forward a submission that it is a cardinal principle of criminal law in our jurisdiction that in cases such as the one at hand, it is the prosecution that has the burden of proving its case beyond reasonable doubt. The burden never shifts to the accused as the accused only needs to raise some reasonable doubt on the prosecution case, and he need not prove his innocence. To support her position, she cited the cases of **Woodmington vs DPP** [1935] AC 462**, Magendo Paul & Another vs Republic** [1993] TLR 219 and Section 3 (2) (a) of the Evidence Act.

Ms. Mwenda argues that the conviction of the Appellant raised reasonable doubt especially when the court relied on the evidence of PW1 and PW4 to convict the Appellant. Her proposition was that the Appellant's first argument is related to how to record the evidence of the victim who is a child of a tender age, contending that PW4 was a child of tender age whose testimony falls under section 127 (2) of the Evidence Act, that prior to recording the testimonies of a child of tender age, the trial court is mandatorily required to ask simple questions with a view of testing the understanding/ intelligence of the said child. That, the required question and answers should be recorded verbatim by the trial court. To buttress her position, she cited the case of **Godfrey Wilson vs R,** Criminal Appeal No. 168 of 2018.

Further, she argues that in the recording of evidence of PW4, the Trial Magistrate did not follow the letters of the law and guidance provided by the Court of Appeal. In her opinion, it is mandatory that such a promise must be reflected in the record of the trial court, and if such a promise is not reflected in the record, then it is a big blow in the prosecution case as it was held in the case of **Seleman Bakari Makota vs R,** Criminal Appeal No. 269 of 2018. In her opinion, failure to comply with the mandatory requirement of section 127 (2) of the Evidence Act renders

the evidence of PW4 nugatory with no evidential value and becomes liable to be expunged from the records.

Moreover, she submitted that the Appellant contends further that medical reports are not a determinant factor in proving or disproving the offence before a court of law, arguing that medical doctors and other professionals give expert opinions to the court as the trial judge or magistrate may be lacking such medical knowledge, but those opinions remain persuasive and not binding to the court.

Ms. Mwenda further argues that PW1 testified that upon examining the victim he found bruises, and reddish marks around the vaginal opening with torn hymen, as well as bruises and lacerations around the anus, and according to him, there was a sign of penetration in both the vagina and the anus, arguing not a single witness testified to have witnessed the appellant sexually assaulting the victim, arguing that the prosecution ought to lead PW1 to testify more than what he adduced during trial.

It is Ms. Mwenda's contention that PW1 should have been required to testify on the medical report which he ought to have submitted to the court and not exhibit P1, discerning that exhibit P1 is not a medical report. In her opinion, a medical report is a comprehensive list of medical-related records that are kept by a medical facility or by an

attending physician. That, it is a vital document that can be used for various reasons, especially as a form of reference for a particular undertaking.

Furthermore, Ms. Mwenda argues that a medical report is a report that covers a person's clinical history. That, PF3 which is also known as Tanzania Police Medical Examination Form is simply a document that a victim of accident/bodily harm in assault cases is required to have before going to the hospital for treatment. Ms. Mwenda further argues that it is a cardinal rule that, the best evidence comes from the victim as was held in the case of **Seleman Makumba vs R,** [2006] TLR 379. However, nowadays such assumption is qualified in so many circumstances as it has been proved that some victims have misused that trust by telling lies in court, including some adults who misuse their trust position by training innocent children to tell lies in court with a view of victimizing some male persons with whom they are quarreling. She added that the court is thus placed to be able to verify and critically scrutinize the evidence of the victim of assault and rape cases. To support her argument, she cited the case of **Hamisi Halfan Dauda vs R,** Criminal Appeal No. 231 of 2019 (unreported). She insisted that the courts of law should be alerted when handling cases related to sexual

offenses, despite the settled rule that on sexual offences, the best evidence comes from the victim. The court must verify and is duty-bound to ensure that the victim is trustful and tells nothing but the truth, citing the case of **Pascal Sele vs R,** Criminal Appeal No. 23 of 2017 to fortify her stance.

She added that the rule of 'the best evidence comes from the victim' is only best if the witness is credible and testifies with reliable evidence, otherwise, the same cannot be relied upon if the witness is not credible and reliable in the eyes of the law. In her view, the trial court failed to direct its mind on the credibility of the victim's evidence and its reliability, and the court fell into being misled to the danger of untruthful evidence of victims utilizing the opportunity to unjustifiably incriminate innocent persons.

In opposition, the State Attorney fronted a spirited argument with regard to the first ground of appeal, defending the trial court's recording of the evidence of PW4. Mr. Mbagwa submitted that the counsel's argument that evidence is recorded in contravention of section 127 (2) of the Evidence Act, was misconceived because the Trial Magistrate did comply with the said provision. He referred to this court on pages 15 and 16 of the trial court's typed proceedings. He pointed out that on

Page 16 of the trial court's proceedings, it is clear that the witness did not understand the meaning of oath, she was therefore addressed in terms of section 127 (2) where she promised to tell the truth and she was cautioned not to tell lies.

Mr. Mbagwa argues in fact, that the case of **Godfrey Wilson** (supra) cited by the counsel for the Appellant supports what the Trial Magistrate did. He insists that there were three elements/questions emanating from the said case, and they are all found in the proceedings of the Trial Court. That, the said questions to be asked to the witness of tender age as per the cited case are; age of the child, the religion which the child professes, and whether the child promises to tell the truth or lies.in his view, and looking against proceedings in respect of the present appeal one will appreciate that the Trial Magistrate did comply with the requirement of section 127 (2) of the Evidence Act.

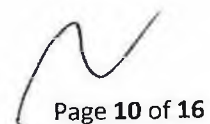
On the issue of expert opinion not being binding, he conceded with the counsel for the Appellant but was quick to qualify his concession that the same cannot be ignored without reason. He argues that while it is true that the doctor who examined the victim did not witness the victim being assaulted, he testified on the finding of the medical examination

that he conducted in respect of the victim, noting that he did not even mention the Appellant to have been the one who assaulted the victim.

His further contention was that the argument by the counsel for the Appellant that the principle that the best evidence on sexual offences comes from the victim is disqualified in the contemporary jurisprudence is misconceived as the said principle is still applicable in our jurisprudence as there is no any decision disqualifying the said principle, what is to be considered are other factors including the credence of the testimony of the victim. That, looking at the evidence of PW4 her evidence was credible for the trial court to rely on it and convict the Appellant.

On the argument that the Trial court did not evaluate and consider the evidence of the Appellant, Mr. Mbagwa submitted that the Trial Magistrate did in fact consider and evaluate the Appellant's evidence, except his evidence did not shake the prosecution's case. He referred to this court on page 3 of the Trial court's typed Judgment, adding that when DW2 was adducing her evidence, it did not support the Appellant's case, but rather, it was supporting the evidence of the prosecution.

Rejoining, Ms. Mwenda had nothing more useful to add other than reiterating her submission in chief.



After perusing the court's record, the grounds of appeal and the rival submission of parties, the task before this court is to determine, **one,** whether the evidence of PW4 was received in contravention of section 127 (2) of the Evidence Act and **two,** whether prosecution managed to prove the case against the Appellant beyond a reasonable doubt. It was argued by the Appellant's counsel that the Trial Magistrate received the evidence of PW4 who was a child of tender age in contravention of section 127 (2) of the Evidence Act due to the reason that the Trial Magistrate prior to recording her evidence did not ask the questions to determine the intelligence of the child. This issue does not need to detain this court much, as it is clear from the record on page 15 and 16 of the Trial court's typed proceedings that the Trial Magistrate did ask the questiona to determine the competence of the child witness. She was satisfied that PW4 did not know the nature and meaning of an oath, after which she proceeded to ask the witness to promise to tell the truth and not to tell lies, where PW4 promised to tell the truth not lies as captured on page 16 of the trial court's proceedings. Hence, the argument by the Appellant's counsel that the Trial Magistrate recorded the evidence of PW4 in contravention of section 127 (2) of the Evidence Act is without any merit.

Now, coming to the second issue, the Appellant's counsel argued that the prosecution failed to prove the case against the Appellant beyond a reasonable doubt as it relied on the evidence of PW1, PW4, and exhibit P1 which was not a medical report to convict the Appellant, arguing that there is no a single witness who testified to have seen the Appellant sexually assaulting the victim. I gave thorough perusal of the prosecution evidence and I am of the firm view that the evidence proved the case against the Appellant beyond the reasonable doubt.

My analysis of the evidence of the victim that the Appellant gravely assaulted her sexually in the house he was living with his parent by inserting his finger in her anus and vaginal was supported by the evidence of PW2 and PW3 who testified that immediately after seeing PW4 crying, and after she told them that the Appellant is the one who hurts her by inserting his fingers into her anus, they inspected her and found blood in her anus.

While at this evidence, it is key to note which I have done at this point, that, the fact that the witness mentioned the suspect at the earliest possible opportunity implies impeccable credibility of that witness. See the Court of Appeal in **Bakari Abdallah Masudi vs R,** Criminal Appeal

No. 126 of 2017 (unreported) and **Jaribu Abdallah vs R,** [2003] TLR 271 among many such decisions.

This fact apart, PW1 and PW2 evidence was further supported by that of PW1, a medical doctor who testified that after conducting a medical examination on the victim he found bruises in her vagina and anus and that he observed that the victim's hymen was ruptured concluding that in his expert opinion, the victim was sexually assaulted.

The evidence of the prosecution was even made stronger by that of the defense side, especially by the evidence of DW2 who testified that she saw the victim coming from the Appellant's house together with the other children crying where the victim was said to explain that the Appellant touched her on back; and they inspected the child and found reddish marks on her anus. In any case, the Appellant did not cross-examine the victim after her testimony. The argument by the Appellant's counsel that the Trial Magistrate relied on exhibit P1, which is a PF3 that is not a medical report is baseless as PF3 is a form not only requesting the Medical Examination, but the Report of the medical examination is also filled in it, and is usually used by the victims of crimes and it contains not only the names of the victim of the crime, the nature of the complaint, conditions, and appearance of the victim, physical state and

injuries if any and as observed, medical procedure administered to the victim if any, and the medical practitioner remarks.

Another, argument by the Appellant's counsel is that not a single witness testified that he/she saw the Appellant sexually assaulting the victim. This argument is also without merit, on the simple reason that in sexual offenses the best evidence comes from the victim, and agreeing with Mr Mbagwa, the jurisprudence still places victim evidence as the best evidence. This is because most of sexual-related offences usually occur on an environment where it is impossible for any other person to witness the crime being committed.

The Appellant's counsel also alleges that the Trial Magistrate did not consider and evaluate the Appellant's evidence. In checking whether or not the court took in consideration and analyzed a piece of evidence, the Court of Appeal in **Leonard S/O Sakata Vs DPP,** Criminal Appeal No. 235 of 2019, (TANZLII) the court guided:

> "...... *analysis of evidence entails summarizing it and objectively discussing its weight or credibility as opposed to its weaknesses and from then believe it and uphold the position it is supporting or disbelieve it and decline to accord it weight to the detriment of the position it is seeking to stand for or to support."*

Going through the judgment of the trial court at page 6 the Trial Magistrate evaluated and considered the evidence of the defense side and ruled out that the defense's evidence does not shake the strong evidence of the prosecution. The Trial Magistrate proceeded to hold that the evidence of DW2 did not support the Appellant but it helped to build the prosecution case. The Trial Magistrate proceeded to rule out that the allegation by the Appellant that the case was framed because of grudges between the Appellant's mother and the victim's mother is an afterthought as the Appellant did not cross-examine the victim's mother about the dispute when she testified. So obviously, the trial court did fulfill its duties to subject the evidence into an objective analysis and believed the prosecution side.

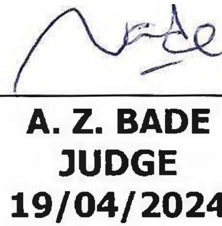
Having said so this appeal is dismissed for want of merits.

It is so ordered.

DATED at **ARUSHA** this **19th** day of **April 2024**

A. Z. Bade
Judge
19/04/2024

Judgment delivered virtually in the presence of the Parties and or their representatives in chambers on the **19th** day of **April 2024**



A. Z. BADE
JUDGE
19/04/2024