IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY IN MANYARA

AT BABATI

CRIMINAL APPEAL NO 116 OF 2023/3398 OF 2024

(Originating from the District Court of Hanang' at Katesh in Criminal Case No. 63 of 2019)

MOHAMED JUMANNE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

20th May & 03rd June, 2024

KAMUZORA, J

Before the district court of Hanang' at Katesh the appellant herein was charged under the Penal Code, [Cap 16 RE 2002] for two counts; rape contrary to section 130(1), (2)(e) and 131(1) and unnatural offence contrary to section 154 (1)(a) and (2). He was convicted for both counts and sentenced to serve 30 years imprisonment for each count and the sentences were to run concurrently.

Briefly, the facts reveal that, on the material date of incident, the victim's mother travelled leaving behind the victim and her siblings together with other two children of their neighbour. In the middle of the night the victim realised that a man had entered into their room and

switched off the solar light. That, he forced her to undress her clothes before he started penetrating her vagina and then her anus. That, the incident was witnessed by other children who were in the room and after that man had quenched his thirst, he lighted the solar light and they all identified him as Mohamed Jumanne (the appellant herein) who is their neighbour. He was arrested, sent to the police station and then charged for the two counts, convicted and sentenced as above stated.

Being aggrieved with both conviction and sentence, the appellant preferred this appeal armed with six grounds and later filed 6 additional grounds. I intend not to reproduce the grounds for there were repetitions in some of the grounds, I will therefore capture issues arising from the grounds raised by the appellant save that the 1st, 4th and 6th grounds of appeal were abandoned by the appellant in his submission and will not be covered in the issues raised;

1. *Whether, the Appellant's cautioned statement was recorded within the prescribed time limit.*
2. *Whether there was contradiction and, or variance in prosecution evidence.*
3. *Whether, the victim's age was proved.*
4. *Whether, the trial court complied with section 127 (2) of the Evidence Act when recording the victim's evidence.*
5. *Whether there was proper evaluation and consideration of prosecution and defence evidence.*

6. *Whether the prosecution case was proved beyond reasonable doubt.*

When the matter was called for hearing, the appellant appeared in person while Ms. Anifa Ali and Ms Mwanaidi Chuma, State Attorneys appeared for the respondent, republic. On the appellant's prayer, this court adopted his swahili written submission and the learned state attorney made oral reply thereto.

On the 1st ground, the appellant argued that the law requires the accused's statement to be recorded within four hours of arrest but his cautioned statement was recorded out of time contrary to section 50 and 51 of the Criminal Procedure Act. He explained that his arrest was on 02/08/2019 but the statement was recorded on 03/08/2024. In her reply, Ms. Anifa Ali, learned state attorney submitted that the Appellant's statement was not part of exhibit tendered before the trial court thus, this ground is baseless.

Going through the records, I agree with the learned State Attorney that the Appellant's statement was never part evidence tendered by the prosecution during hearing and it was never used by the trial court in convicting the appellant. I therefore think that the appellant misconceived the whole purpose of challenging the statement before the court.

On the second issue referring contradiction and, or variance in prosecution evidence, the appellant referred pages 9 and 11 of the trial court's proceedings and submitted that the evidence by PW1 and PW2 contradicted each other on the people who witnessed the incident. He claimed that while PW1 claimed that children witnessed the incident, PW2 claimed one elder person witnessed the incident. In reply, the learned state attorney conceded but argued that the contradiction is minor which does not go to the root of the case.

I have perused the proceedings of the trial court and specifically the evidence of PW1 and PW2 which was referred to by the appellant. In fact I did not find any contradiction in relation of the person who witnessed the incident. It is true that PW1 claimed that he was informed by the PW2 that other children were present during the incident and in her testimony, PW2 mention his two brothers as the children who witnessed the incident. She never mentioned if an adult person was at the scene and witnessed the incident. I therefore find this argument baseless.

I will respond jointly to the 3rd issue on whether, the victim's age was proved and the 4th issue on whether, the trial court complied with section 127 (2) of the Evidence Act when recording the victim's evidence. The appellant argued that, there was no proof of the victim's age and

section 127 of Evidence Ac was not complied with in recording the victim's evidence.

Regarding the age of the victim, the appellant submitted that the victim mentioned her age to be 12 years but the charge sheet indicated the age of the victim as 10 years. That, neither of the prosecution witnesses was able to mention the age of the victim and no document was tendered in court to prove the age of the victim. He argued that, age can be proved by birth certificate, clinic card or evidence from parents or relatives but no such evidence was produced before the trial court. He urged this court to refer the case in **Andrea Francis Vs. the Republic,** Criminal Appeal No. 173 of 2014 (unreported) and acquit him of the charges.

In reply, the learned state attorney submitted that the age was well proved because the victim mentioned her age before testifying as 12 years and the PF3 exhibit P1 also indicated the age of the victim. She referred the case of **Saimon Malembeka Vs. Republic**, Criminal Appeal No 298 of 2020, [2023 TZCA 17705] to cement on the argument that the victim's age can be proved by the victim, parent, relative, doctor or birth certificate of the victim. She admitted contradiction in age for the victim mentioned 12 years while exhibit PE1 shows 13 years but argued that the contradiction is minor because, the evidence still proves that the victim

was below the age of 18 years. She referred the case of **Ado Aron @ Nziku Vs Republic**, Criminal Appeal No 449 of 2021 [2024 TZCA 220] to cement that the difference in age between the victim's testimony and the PF3 is not fatal and does not affect the case.

On argument that section 127(2) of the Evidence Act was not complied with, the appellant submitted that the record does not indicate if the child witness was addressed on the duty to tell the truth and promised to tell the truth. He prayed this court to be guided by the decision in **John Mkorongo James Vs. the Rupublic**, Criminal Appeal No. 498 of 2020 (unreported). On the respondent's side, the learned state attorney submitted that there was compliance to the above provision as shown at page 10 of the proceedings. That, the victim was not sworn because of her age but the trial court clearly recorded that the victim promised to tell the truth.

I have gone through the proceedings of the trial court and indeed, the charge sheet indicate that the victim was a girl aged 12 years. When testifying in court, the victim's age was recorded as 12 years but the PF3 indicated the age of the victim as 13 years. I agree with the learned state attorney that such contradiction is minor and does not vitiate the prosecution case. Whatever the conclusion, the fact remain that the victim was below the age of majority which is 18 years. In fact, the PF3 indicated

well that it was estimated age and not actual age. I therefore find this argument baseless.

On the argument based on section 127(2) of the Evidence Act, I have revisited the said section and it reads: -

> *"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." (Emphasis added) "*

The plain meaning of the above provision is that a child of tender age may either give evidence without taking oath or affirmation but upon promising to tell the truth and not lies. The position in the above provision was well explained by the Court of Appeal in **Hamisi Issa Vs. Republic,** Criminal Appeal No. 2.74 of 2018 (unreported). The circumstance under which a child may testify without oath or affirmation applies where a child witness does not understand nature and meaning of oath. The Court of Appeal in **Wambura Kiginga Vs. Republic**, Criminal Appeal No. 301 of 2018 (unreported), gave broader interpretation of section 127(2). It held:

> *"This Court has interpreted the section to mean that, a child of tender age, which means a child of an apparent age of not more than fourteen (14) years as provided under section 127(4) of the Evidence Act, may legally give evidence if one of the two conditions is fulfilled. One, if before testifying the child swears or affirms; and two, if he or she promises to tell the truth and not lies in the course of giving evidence. According to the position of this Court at the*

moment, if none of the two conditions is fulfilled and the evidence of the child is taken, such evidence is deemed to have no evidential value and it must be expunged from the record."

In a recent decision of the Court of Appeal in **Mathayo Lauranee William Mollel Vs. Republic**, Criminal Appeal No. 53 of 2020 (2023) TZCA 52, tanzlii, the court explained further the position of laying foundation for the child witness who is of tender age. It made it clear that by virtue of the provision of section 127 (2) of the Evidence Act, if a child of tender age cannot testify on oath or affirmation, a preliminary test on whether he knows and understands the meaning of oath may be dispensed with. That, a preliminary test will only be necessary if the child witness is to testify on oath. It however maintained a position that a child not testifying under oath must make a promise to tell the truth. It was held: -

*"As we held in **Issa Salem Nambaluka v. Republic**, Criminal Appeal No. 195 of2018 (unreported), the plain meaning of the provisions of subsection (2) of section 127 of the Evidence Act reproduced above, a child of tender age may give evidence on oath or affirmation or without oath or affirmation. Where a child of tender age is to give evidence without oath or affirmation, he must make a promise to tell the truth and undertake not to tell lies...."*

The procedures on how the evidence of child of tender age should be recorded was also well explained by the Court of Appeal in **Godfrey**

Wilson Vs. Republic, Criminal Appeal No. 168 of 2018 (unreported) where it was held;

> *"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127 (2) as amended imperatively require a child of 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 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 lies. Thereafter, upon making the promise, such promises must be recorded before evidence is taken."*

Turning to the matter at hand, I strongly differ from the submission by the learned state attorney on the compliance of legal requirement. Contrary to what was so directed in the above cases, the trial court just recorded that the child promised to tell the truth. At page 10 of the typed proceedings of the trial court, it recorded that PW2 who is a child aged 12 years was addressed and promised to tell the truth. He recorded,

> *"PW2 who is a child on12 years old addressed, and she promise to this court that she will tell the truth"*

After that statement, the trial magistrate continued recording the evidence of PW2. From the above record, there is no doubt that PW2 was a child of tender age within the meaning of the law. PW2's evidence was recorded without oath or affirmation thus a need for a promise to tell the truth. The above statement indicate that the trial court recorded that PW2 promised to tell the truth but nothing indicates PW2's promise in telling the truth. In the case of **Athman Ally Vs. Republic**, Criminal Appeal No. 61/2022, the Court of Appeal sitting at Tanga insisted on showing in the proceedings on how the court reached to a conclusion that the child promised to tell the truth. It was held: -

> *"The position is to the effect that the record of the trial court must show the words of a child of tender age promising to tell the truth before the trial court allows him to testify." (emphasis supplied)*

It is obvious that the trial magistrate failed to record the child's promise in her own words. Since the procedure was not followed, in the light of the decisions in **Athuman Ally** (supra) and **Wambura Kiginga** (supra) the consequence is for the evidence of the victim PW2 to be expunged from the record. I therefore find merit in the argument regarding non-compliance with section 127(2) of the Evidence Act and proceed to expunge the evidence of PW2.

After expunging the victim's evidence from record, I find the argument by the learned state attorney based on section 130 (4)(a) of the Penal Code Cap 16 RE 2022 irrelevant. That section is clear that penetration however slight it may be is sufficient to prove sexual intercourse thus, there is need for evidence of penetration. The doctor's evidence in penetration is not sufficient because, there is a need for evidence proving that the accused was responsible for penetrating the victim for the offence of rape to stand. It is true that the court can rely on the victim's evidence in sexual offences to convict the accused as it was so held number of cases. See, also the case of **Tungu Ngasa @ Mwashi Tungu Vs Republic**, Criminal Appeal No 291 of 2019, [2022] TZCA 664 page 12. But, since the evidence of PW2 who is the victim was expunged, it becomes important to access the remaining evidence if it proves the offence of rape against the Appellant. I doing so, I will also cover the remained issues on whether there was proper evaluation and consideration of prosecution and defence evidence and whether the prosecution case was proved beyond reasonable doubt.

It was argued by the appellant that the evidence in record was not properly evaluated. Referring page 11 of the proceedings, the appellant argued that the evidence reveals that the victim went to hospital even before the offence was committed and the report was made to her mother

(PW1) before the offence was committed. He added that there was also contradiction on how the appellant was arrested because, PW1 claimed that he was arrested by militiamen while other evidence shows that he was found sleeping in the kitchen and was arrested by neighbours. The appellant added that apart from weakness in prosecution evidence, his defence was not considered and no reason was advanced by the trial magistrate for disregarding his defence. He prayed for this court to refer the case of **Abeli Masikiti Vs. Republic**, Criminal Appeal No 24 of 2015, and find that the case was not proved beyond reasonable doubt and he be acquitted.

In reply, the learned state attorney submitted that the evidence was properly evaluated by the trial court. She however argued that, if this court is satisfied that the evidence was not well evaluated, it be pleased to step into the shoes of the trial court and evaluate the evidence.

I agree with the appellant's argument that the prosecution evidence was not water tight proving the offence beyond reasonable doubt. As captured earlier, in the absence of the victim's evidence, we remain with the evidence of PW1 who is the victim's mother, PW3 who is the investigator and PW4, the doctor who examined the victim.

From her testimony, PW1 was not at the scene as she was informed by Anthony Darabe that the appellant raped her daughter. There is no

evidence on how Antony Darabe got the information. PW1 also testified that after she was informed of the incident, she rushed home and found the victim in pain and victim narrated to her that the appellant raped and had canal knowledge of her by force. She did not tell the court if she examined the victim to see those signs of rape. She also testified that the victim also informed her that other children witnessed the incident but unfortunately those children or one of those children were not paraded in court to corroborate the story on what they saw that night.

In her evidence PW1 also claimed that the appellant was found sleeping in the kitchen. The appellant denied being at the scene on that date thus, it was expected for the prosecution side to bring witnesses who saw and arrested the appellant to corroborate the evidence that the appellant was found at the scene and the circumstances under which he was arrested suggest that he committed the offence. Despite the story that more than one person went at the scene, only the victim's mother testified in court. The witnesses to whom the offence was allegedly reported first and who were the first to go to the scene were not called to corroborate the story and this makes this court to find the prosecution evidence as weak.

In my view, the above evidence does not in any way prove that the appellant penetrated the victim. Similarly, the evidence of PW3 proves

nothing as he was just an investigator who gathered evidence and recorded statements of the witnesses. He also recorded the appellant's statement in which he admitted that the appellant denied being responsible for the offence. As well pointed out earlier, the doctor's evidence does not in any way prove the offence against the appellant because his examination was on the victim. Thus, even if proved that the victim was penetrated, there is need for evidence to prove that the appellant is responsible. The claim that the appellant was found sleeping in the kitchen is not strong enough to conclude that he is responsible for rape. I therefore find that the offence was not proved beyond reasonable doubt.

From the above arguments and reasons thereto, this court finds the appeal meritorious. The appeal is therefore allowed by quashing the and setting aside the judgment and sentence passed by the trial court. The appellant shall be released from custody immediately unless held for any other lawful cause.

DATED at **MANYARA** this 03rd Day of June, 2024

D.C. KAMUZORA

JUDGE