IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 87 OF 2023

(Originating from Criminal Case No 69 of 2021 of Kibaha District Court at Kibaha before Hon. F. E. NG'WELO- RM)

DAUDI WILSON MWIHAMBI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

8th May & 5th June 2024.

MWANGA, J.

Before the District Court of Kibaha sitting at Kibaha, the appellant, **DAUDI WILSON MWIHAMBI**, was arraigned for two counts. The first count was rape contrary to sections 130 (1) (2) (e) & 131 of the Penal Code, Cap 16 R.E 2019 [Currently R.E 2022]. The accusation against the appellant on this count was to the effect that, on diverse dates between December, 2020 and September, 2022 at Kidenge Msangani area within Kibaha District in Coast Region, the appellant had carnal knowledge of a girl aged 13 years, who, to conceal her identity and protect her dignity shall be referred to as "the victim." In the second count, the appellant

was accused of committing an unnatural offense c/s 154 (1) (a) and (2) [Cap. 16 R.E 2022]. It was alleged that on diverse dates between December, 2020 and September, 2022 in the same area, the appellant had carnal knowledge of the victim against the order of nature.

Briefly, the material facts gathered from the record show that the appellant is the victim's stepfather; they are living together and sharing one room and a bed, i.e., the appellant, the victim's mother, and the victim herself. It was recorded that in December, 2020 the appellant gave the victim and her mother alcohol, commonly known as Komoni. The victim was forced to drink that alcohol. After she drank, the victim felt dizzy and thus went to sleep. In the morning, the victim found herself naked and had pains in her vagina. She also saw blood on the bed where she was sleeping. She alleged that her stepfather raped her as they were living with only three people at their home, and there was only one man in their house, who is the appellant.

After the incident, the victim went out to bathe while her stepfather took the sheets and washed them. Meanwhile, her mother left for the well. It was further explained that the appellant proceeded to induce the victim to have sexual intercourse with him, but she refused. It is said that in 2021 while the victim's mother was not at home, the appellant grabbed

the victim and pushed her onto the bed, whereby he undressed the victim, unzipped his trouser, and raped the victim. After that, he committed an unnatural offense, and after that painful experience, the appellant warned the victim not to tell her mother. The record further reveals that, on 04/09/2022, when the victim's mother was absent, the appellant dragged the victim and raped her again. The victim reported to the deputy ten-cell leader, who promised to help her. On the following day, the police arrested the appellant. The victim was taken to the hospital, where the Dr. confirmed that the victim was penetrated both in her vagina and anus by a blunt objectlike penis. The appellant was interrogated and later prosecuted to the court, where he flatly denied his charge.

The trial ensued, and the appellant was convicted and awarded 30 years imprisonment for the first count and life imprisonment for the second count. Discontented and protesting his innocence against conviction and sentence meted on him, the appellant has come to this Court armed with five (5) grounds of appeal, which can be paraphrased as here:

1. *That the evidence of PW1 was taken in contravention of section 127 (2) of the Evidence Act.*

2. *The evidence of PW2 was wrongly relied on as she did not correctly establish her credentials/qualifications to ascertain that she was a professional doctor.*
3. *The trial magistrate wrongly relied on PW1's evidence, which was not corroborated by her mother, who shared one room and bed when the incident occurred.*
4. *The evidence of PW1 and PW4 was highly discrepant, incredible, unreliable with material inconsistencies, and*
5. *That the case was not proved beyond reasonable doubt.*

Based on those grounds, the appellant is praying this court to quash the conviction, set aside the sentence meted against him, and release the appellant from prison.

When the appeal was called for hearing, the appellant appeared in person, unrepresented, while Mr. Clarence Muhoja represented the respondent, the learned State Attorney. The appeal was disposed of by written submission.

In his submission, the appellant consolidated the third and fourth grounds of appeal while the rest were argued separately. On the other hand, the respondent's counsel argued each ground in seriatim. In determining the appeal, I wish to address the first ground of appeal first,

then the fourth ground of appeal, and if necessary, I will proceed with the determination of the remaining grounds of appeal.

Submitting on the first ground of appeal, the appellant submitted that section 127(2) of the Evidence Act was not complied with because before taking the evidence of PW1, the trial magistrate put no questions on PW1 to test if she was capable of comprehending questions put to her and also if she gives rational answers to the questions put to her. He believed that the law now permits a child to give evidence either under oath or affirmation or without oath and affirmation. Still, the trial court should first assess whether or not a child witness understands the nature of the oath. To fortify his argument, he cited the case of **Godfrey Wilson V. Republic,** Criminal Appeal No. 168 of 2018 (unreported), where the Court of Appeal stipulated the procedures to be followed before the evidence of a child witness is taken. For instance, simplified questions, which may not be exhaustive depending on the circumstances of the case, such as the age of the child, the religion which the child professes and whether they understand the nature of the oath, and whether or not the child promises to tell the truth and not tell lies.

He contended that, in the present appeal, the trial magistrate did not ask PW1 any questions. On the contrary, the trial court jumped to the

answers as shown. He referred the court to page 9 of the typed proceedings and submitted that the trial magistrate violated the principles stipulated under section 127(2) of the Evidence Act. He added that there was no question asked by the trial magistrate geared at obtaining answers as to whether PW1 promised to tell the truth and not to tell lies to justify the reception of her evidence, nor questions asked by the trial magistrate geared at obtaining answers regarding her age and the religion which PW1 professed. He believed that the answers recorded were contrary to the requirement of section 127(2) of the Evidence Act. He prayed the court to expunge from the record the evidence of PW1.

In his view, after the evidence of PW1 is expunged from the record, the remaining evidence suffices to warrant conviction of neither rape nor Unnatural Offence against the appellant, as none of the remaining witnesses saw the appellant committing the alleged offenses.

In rebuttal, Mr. Muhoja submitted that the provision governing the reception of evidence of a child offender's age is section 127(2) of the Evidence Act [Cap. 6 R.E. 2022]. The same permits the child of tender age to either testify on oath or affirmation or not on oath, provided that she promises to tell the truth. He argued that the law does not prescribe the procedure to be conducted before allowing the child of tender age to

testify; instead, the case laws have attempted to give directions on how the evidence of the said children should be received.

Regarding failure to ask and record questions, he cited the case of **John Ngonda vs. Republic** (Criminal Appeal No. 45 of 2020) [2023] TZCA 13 dated 15th February, 2023 (TanzLii), where the court interline stated that;

> ***"...It is common ground in the instant case that the complainant, who stated to be eight years old at the time she took the witness stand, was in the eyes of the law a child witness of tender years and, therefore, her evidence had to be given in compliance with the dictates of section 127 (2) of the Evidence Act. Although it is shown on page 8 of the record of appeal that the trial magistrate did not ask any preliminary questions to determine if the witness understood the nature of the oath for her to qualify to give evidence on oath, it is evident that he recorded her to have said, "I promise that I will speak the truth" before he allowed her to testify. Certainly, the trial court could not let her testify on oath since it had not established whether she understood what an oath entailed. Nonetheless, so long as the trial magistrate extracted the child witness' promise to speak the truth in compliance with the law, he***

rightly allowed her to give evidence on the strength of such a promise. The appellant's twofold complaint on this aspect is plainly unfounded. We dismiss it".

Based on the above authority, he concluded that the trial court did not ask preliminary questions but extracted the promise from the child. However, the Court of Appeal held that the provision of section 127(2) of TEA had been complied with.

He went on to submit that, in the instant appeal, on pages 9 - 12 of the typed proceedings of the trial court, it will be seen at page 9 that the trial magistrate asked the victim some questions in which she ended up promising to tell the truth and not lies. Again, having noted that the victim understood the nature of an oath, she was sworn before testifying. It would appear that the victim promised to tell the truth and also swore. According to him, though the provision permits either of the two, doing both cannot render the victim's evidence worthless. He further contended that it is now settled law that, in resolving procedural infractions, courts should always inquire if the accused has been prejudiced. To bolster his preposition, he cited the case of **Director of Public Prosecution vs Seleman Juma Nyigo @ Mwanyigo** (Criminal Appeal No. 363 of 2022) [2024] TZCA 232 (22nd March, 2024) on page 8.

In summary, the appellant maintained that the victim's promise to tell the truth, combined with her oath, does not demonstrate how the appellant was prejudiced. Therefore, the first ground of appeal, in his view, lacks merit.

In a brief response, the appellant argued that the law mandates a literal interpretation, allowing the trial magistrate or judge to ask a young witness simplified question. The extent of these questions may vary depending on the case's circumstances, but the child should be able to provide a rational answer. The appellant urged the court to consider this argument.

I have carefully considered the submission by both parties concerning this ground and am perusing the trial court's records concerning the complaint raised in this ground of appeal. To resolve this ground, I will start by quoting section 127 (2) of the Evidence Act, which provides that;

> ***"S.127(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 and not to tell any lies."***

A child of tender age under section 127 (4) of the Evidence Act is a child whose apparent age is not more than fourteen years since birth.

Therefore, if such a child is to give evidence in court, the above-quoted section of the law must be complied with.

It is also apparent that, as per the above section, the law requires and suggests that before the trial court concludes that the child witness has promised to tell the truth and not lie upon failure to testify on oath, some questions are to be put to him/her first and have the answers recorded in the proceedings as it was well articulated in the case of **Godfrey Wilson vs. R,** Criminal appeal No. 168 of 2018 (CAT-Unreported) the case which stress on the importance of compliance to section 127 (2) of TEA and give guidance on how to reach on the conclusion that the child has promised to speak the truth.

Therefore, the issue for resolution in this ground is that in taking the evidence of PW1, section 127 (2) of the Evidence Act was not complied with. Looking at the case at hand, especially on page 9 of the proceedings where the evidence of PW1 is found, it is apparent that some questions were put to the child, and she inquired and responded to the questions appropriately, including the question as to whether she knew the difference between truth and falsehood. The answers recorded in the proceedings prove that the trial court inquired about the victim, which led him to establish that the child understood the nature of the oath; thus,

the child's evidence was taken under oath. That being the position, the appellant's contention on the requirement to be followed before the child speaks the truth has no merit. If the first ground has no merit, the same is dismissed immediately.

In the fourth ground of appeal, the appellant lamented material contradictions and inconsistencies in the evidence of PW1 and PW4. He contended that the contradictions and inconsistencies are concerning the date when PW1 went to report to PW4 and whether, on the material date 04.09.2022, PW1 was raped. It was his submission that the trial court did not properly assess the evidence of PW1 and PW4 whether they were credible and truthful witnesses. He clarified that for the court to rely on the testimony of the victim of the sexual offenses, it must satisfy itself upon assessment of the credibility of such evidence that the witnesses are telling nothing but the truth, as per the requirement of section 127(6) of the Evidence Act, as amended. To bolster his position, he cited the case **Mathias Timothy V.R**, [1984] TLR 84 the court of Appeal of Tanzania held thus:-

> ***"Where a witness is lying on a material particular, it is dangerous to believe the same witness on the other particular."***

He referred the court to pages 11 - 12 and 20 - 21 of the typed

proceedings, which contained the evidence of PW4, a ten-cell leader, and submitted that PW1 and PW4 gave highly improbable and implausible Evidence. This is so because it was PW1 who verified before the trial court that after being raped by the appellant on 04.09.2022, she went straight to the Deputy ten-cell leader and informed him. On the contrary, a cell leader who appeared before the court as PW4, his testimony was to the effect that he met with the complainant at the shop on 26.08.2022 at about 21 hours' night and asked her if she said that she was scared to go home because the appellant wanted to have sexual intercourse with her, then on the following day meaning 27.08.2022 he went and asked PW1's mother. Still, she refused to be aware of that information.

According to him, those are two different testimonies, as PW4 did not states whether he received information from PW1 concerning with rape offense alleged to have occurred on 04.09.2022. He stressed that it is trite law that when the testimony by witnesses contains inconsistencies and contradictions, the court must address the inconsistencies, try to resolve them when possible, and decide whether the discrepancies and contradictions are only minor or go to the root of the matter. To buttress this point, he cited the case of **Matiku v. Republic**, [1995] TLR 3.

He went on to submit that the appellant ought to be given the

benefit of the doubt due to inconsistencies. He went on to submit that the inconsistencies on record prove that PW1 was not raped or sodomized, as She claimed that no offenses were committed. He believed that the evidence submitted in court by PW1 and PW4 was to be repudiated and considered a liar and not otherwise. It was his prayer that the said evidence be disqualified.

In response, Mr. Mhoja started by citing the case of **Nyakuboga Boniface vs. Republic** (Criminal Appeal No. 434 of 2016) [2019] TZCA 461 (TanzLii), on pages 5 - 6, where the court had the following to say about credibility and reliability of witnesses, that:

> ***"...we would wish to make it plain that any person, who is a competent witness in terms of the provisions of section 127 of the Law of Evidence Act, Cap. 6 R.E 2002 (the TEA), is entitled to be believed and hence, a credible and reliable witness unless there are compelling reasons as to why he/she should not. See Goodluck Kyando Vs. Republic [2006] T.L.R. 363...he trials Judge/magistrate is enjoined to correlate the witness's demeanor and the statements he/she makes during his/her Testimony in court. If they are not consistent, then the witness's credibility becomes***

questionable..."

He submitted that, in the present appeal, bearing in mind that the appellant was charged with a category of sexual offenses, it would have been expected that the best evidence came from the victim, as stated in the case of **Seleman Makumba vs. Republic [2006] TLR 379**. He went on to submit that the victim testified as PW1, and her evidence was received correctly; she narrated how the appellant used to lavish her frequently and threatened not to reveal the ordeal to her mother. In his view, nothing in the record would have suggested that she is incredible.

It was his further submission that the evidence of PW4, the ten-cell leader, revealed that the victim was scared to go home because her father wanted to have sexual intercourse with her. He contended that even though this evidence incriminated the appellant, he chose not to cross-examine him. Failure to cross-examine a witness is tantamount to acceptance of what the witness testified.

Mr. Mhoja further stated that, in weighing and assessing the evidence of PW1 and PW4, he failed to see the discrepancies and inconsistencies alleged by the appellant. Instead, PW4 gave another critical piece of evidence that incriminates the appellant, which was not disputed. He thus submitted that this ground lacks merits and should be

dismissed instantly.

In a short rejoinder, the Appellant reiterated his submission in chief and stressed that inconsistency going to the root of the case creates doubt about the evidence of the witnesses, and the doubt has to be resolved in favor of the appellant. He submitted that, in this case, the contradiction and inconsistency concern the date when PW1 went to report the incident to PW4 after being raped by the appellant on 04/09/2022. He was insistent that the victim of the said rape (PW1) lied to the court that she was raped on 04/09/2022 and, on the same date, went to PW4 to report, whereby PW4 helped them to arrest the appellant, and it was on the next day to mean on 5/09/2022 contrary to the evidence of PW4. He believed that the contradiction in the evidence of PW1 and PW4 is material and cannot warrant conviction.

I have dispassionately considered the parties' submissions. I have also extensively perused the available lower court records to satisfy myself with the appellant's complaint. In determining this issue, I wish to start with some criminal principles which will guide me in properly determining the matter. Firstly, it is a settled principle of law that every witness is entitled to faith and must be believed and his testimony accepted unless there are excellent and compelling reasons for not believing a witness.

See the case of **Goodluck Kyando vs Republic [2006] TLR 363**. Secondly, it is a settled principle of law in sexual offenses that the victim's evidence is the best. See the case Selemani Makumba (supra). It should also be underscored that the position in Selemani Makumba is to consider other essential points like the credibility of the prosecution witness, the reliability of their evidence, and the circumstances of the prosecution case in point. This position was enunciated in the case of **Pascal Yoya Maganga Vs. Republic**, Criminal Appeal No. 248 of 2017, and the case of **Mohamed Said Matula Vs. R [1995] T.L.R. 3**. In the latter case, the court had this to say;

> ***"We are aware that in our jurisdiction, it is settled law that the best evidence of sexual offense comes from the victim…….. However, we wish to emphasize the need to subject the evidence of such victims to scrutiny for courts to be satisfied that what they state contain nothing but the truth*." (Emphasis added).**

It is accurate as submitted by the appellant that the existence of contradictions and inconsistences in the evidence of a witness is the basis for finding such evidence incredible. Nevertheless, contradictions by any particular witness or among witnesses cannot be avoided in any specific case. Thus, the discrepancies must be sufficiently severe and touch on

matters relevant to the issue being adjudged to warrant an adverse finding. The reason is that there can be errors in memory due to lapse of time, different points of view, or mental disposition, such as shock and horror at the time of the incident. Unless the contradictions go to the root of the matter, the same cannot affect the witness's credibility. See the case of **Dickson Elia Nsamba Shapwata Vs. R**, Criminal Appeal No. 92 of 2007 (CAT-unreported). In this case, the Court had this to say on contradictions:

> ***"...minor contradictions, discrepancies or inconsistencies which do not go to the root of the case for the prosecution, cannot be a ground upon which the evidence can be discounted and that they do not affect the credibility of a party's case."***

See also the case of **Shukuru Tunugu Vs. R**, Criminal Appeal No. 243 of 2015 and the case **Said Ally Saif Vs. R**, Criminal Appeal No. 249 of 2008 (both CAT-unreported). In the latter's case, the Court of Appeal had this to say:

> ***"Not every discrepancy in a prosecution case will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory that the prosecution case will be dismantled.***

Minor contradictions and inconsistencies on trivial matters which do not affect the case of the prosecution should not be made a ground on which the evidence can be rejected on its entirety."

As can be depicted from the above authority, it is apparent that, minor contradictions and inconsistences in trivial matters which do not affect prosecution's case should not be made a ground of rejecting the evidence in its entirety. That being a position, and this being the first appellate court with the power to reevaluate the evidence, I will reevaluate the evidence of PW1 and PW4 to see whether the same was incredible, unreliable, and with material inconsistencies alleged by the appellant.

Starting with the appellant's evidence, found on pages 9 - 12 of the typed proceedings, the victim explained how the incident occurred on different occasions and in other years starting from December 2020. To me, her evidence left a lot to be desired. Firstly, whether the first incident occurred in December, 2020 or December, 2022 is unclear. This can be depicted from her evidence when she stated, and I wish to quote, "In *December, 2020 I was in STD III. In that December, 2022…."* The statement confuses me as to which year the victim is referring to.

Secondly, it appears impracticable for the appellant to rape the victim in the first incident. I so view it because, as depicted from the prosecution evidence, the victim, appellant, and victim's mother live in the same room, and the trio share the same bed. Now as to whether she was raped while her mother was lying on the same bed and did nothing, and left in the morning, leaving the victim raped lying in blood without assisting her leaves some doubts and makes this court believe that PW1's evidence was implausible. It is also questionable as to why after being raped, the victim did not report the incident to her mother or anyone around.

The second incident, which to me is the basis of the second count, is claimed to happen in 2021 when the victim was in standard four, where the appellant raped and sodomized the victim. In this incident, too, the victim never bothered to express the ordeal to anyone for the simple reason that she was told not to tell her mother. The victim never testified that the appellant threatened her not to reveal such immoral behavior committed to him. This also raises some doubt as to whether the victim was raped by her stepfather/appellant. Subjecting PW1 evidence to scrutiny will reveal that she was giving improbable evidence that eroded her credibility. See the case of **Beda Philipo vs Republic**, Criminal Appeal No. 114 of 2009 (Unreported) on page 16.

There is another incident of 04/09/2022, whereby the victim claimed that she was raped and, on the same date, reported the matter to the deputy ten cell leader, one Bakari PW4. However, in his evidence, Pw4 had another version of evidence concerning 26/08/2022, and he never mentioned that he knew about the incident of 04/09/2022. Observing all these inconsistencies, the trial court had a duty to address them and see whether the same goes to the root of the matter, as stated in the case of **Moshi Hamisi Kapwacha v. Republic**, Criminal Appeal No. 143 of 2015 (unreported), where the Court of Appeal held:

> "***Where the testimonies by witnesses contain inconsistencies and contradictions, the court must address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."***

In my profound view, the inconsistencies between the victim PW1 and PW4 go to the root of the matter, as it is uncertain as to whether the appellant raped the victim and when the incident occurred. All these untied loose ends must be resolved in the appellant's favor. It is worth noting that since sexual offenses attract heavy sentences, the same should be decided with the deserving sobriety.

In this case, although medical evidence suggests that PW1 was raped, there are doubts as to whether it was the appellant who raped her and when she was raped. In the absence of a precise date when the victim was allegedly penetrated, the findings of the PW2 medical doctor become unreliable. In the circumstances, there was no evidence that the appellant's conviction could validly be grounded.

In the end, I allow the appeal. The Conviction is hereby quashed, and the sentence set aside. The appellant shall be released from prison forthwith if not lawfully held for some other cause.

It is so ordered.

H. R. MWANGA

JUDGE

05/06/2024