IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA SUB – REGISTRY)

AT MBEYA

CRIMINAL APPEAL No. 82 OF 2023

(Originating from the District Court of Mbozi at at Chapwa, Criminal Case No. 66 of 2021 before Hon. N.L. Chami, RM dated 26.5.2022)

ELISHA KASHIRIKA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

4th March & 10th June, 2024

POMO, J.

Before the District Court of Mbozi at Vwawa in Criminal Case No. 66 of 2022, the appellant was charged with the offence of rape contrary to Section 130 (1) (2) (e) and Section 131 (1) of the Penal Code [Cap 16, Revised Edition 2019]. The charge was read to him, and he pleaded not guilty. After a full trial, he was convicted and sentenced to life imprisonment. Dissatisfied with the decision, he is now appealing on the following grounds:

1. *That the trial court erred in law when convicted and sentenced the appellant without taking into account that no any voire dire tests is conducted to PW1 to proof her intelligence.*

2. *That the trial court erred in law when convicted and sentenced the appellant without regarding that when the appellant objected the said caution statement exhibit PE1 was the duty of the trial court to conduct enquiry to proof its correctness of this document.*

3. *That the trial court erred in law when convicted and sentenced the appellant without taking into account that PW4 observed only when PW1 limping on 15.1.2021 and observe that this one was raped but PW3 in her examination she did not say any penetration but only perforated hymen as hymen perforation is not penetration as section 130 (4) (a) of the Penal Code.*

4. *That the trial court erred in law when convicted and sentenced the appellant without regarding that PW1 to be found with HIV positive as the appellant, this cannot be taken as the warrant of provident of such allegations there was many things which can cause some one including PW1 to be infected by HIV.*

5. *That the trial court erred in law when convicted and sentenced the appellant to life imprisonment regarding the age of the victim PW1 as the sentence was very excessive as per MSA, Cap 90 revised edition 2022 as this one failed to mention the true date of occurring such rape.*

16.

6. *That the trial court erred in law when convicted and sentenced the appellant without taking into consideration that failure of PW1 to report the said allegation to PW4 her evidence was to be viewed with a high care by the trial magistrate since PW1 was a liar.*
7. *That the prosecution failed to proof its case and the defence of the appellant was not considered deeply by the trial court including the whole prosecution case.*

It was alleged by the prosecution that on diverse dates between 2019 to November 2021 at Masangula village within Mbozi District and Songwe region, the appellant did have unlawful sexual intercourse with one, PW1 (name withheld), a girl aged eleven years old.

The appeal was argued through written submissions. The appellant's one-page submission largely reiterated the points made in his petition of appeal.

In response to the appellant's written submissions, Mr. Ignas Urban, a learned state attorney for the respondent republic, asserted that the appellant's claim that the trial court failed to conduct a voire dire examination of PW1 as per Section 127(2) of the Tanzania Evidence Act, [Cap 6 Revised Edition 2022] was unfounded. That, a closer scrutiny of the trial court proceedings on page five reveals that the trial magistrate

complied with the dictates of the law. He quoted page five of the proceedings, which states:

> *"PW1: Abigael Nyelwike Kamwela, 12 years, student, Christian. To tell lie is a sin, I will tell the truth.*
>
> *Court: Because the witness is a child and she promised to tell the truth I will proceed to take her evidence."*

Mr. Urban argued that a similar position was discussed in the case of **Godfrey Wilson vs. Republic,** Criminal Appeal No. 168 of 2018 CAT at Bukoba (Unreported), at page 13, where the court observed thus: -

> *'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 requires a child of a tender age to give a promise of telling the truth and not lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age."*

He further contended that in the current case, the trial magistrate complied with legal requirements, as PW1 promised to tell the truth, a pledge recorded before her testimony. He emphasized that the appellant misunderstood the facts; the trial magistrate adhered to the law and did not make the alleged comments attributed to him by the appellant. To

him, consequently, the appellant's complaint lacks legal foundation, considering the accurate depiction of events during the court proceedings.

He argued that the appellant's claim in his written submission regarding the trial court's failure to assess the credibility of PW1, specifically her delay in notifying her mother about the time, date, and years of the crime/offence, lacks merit. He contended that PW1's evidence is credible, as she clearly stated at pages 6 and 7 of the trial court proceedings that the accused had engaged in unlawful sexual intercourse with her on three occasions between 2019 and November 2021, providing details about the locations of these incidents. Furthermore, PW1 explained her familiarity with the appellant, as they had lived in the same premises and he had worked for them a fact supported by PW4, the victim's mother. In support of his argument, he referenced the case of **Goodluck Kyando vs. Republic** [2006] TLR 363, which emphasizes that each witness is entitled to credence and to be believed by the trial court unless there are cogent reasons for disbelief. Therefore, he asserted that the appellant has failed to establish any valid reasons for the trial court not to believe PW1's testimony, rendering the appellant's argument legally unsound.

Regarding the delay in reporting the crime, he asserted that the law explicitly stipulates that such reporting should occur at the earliest opportunity. However, he argued that this situation differs from the case

at hand. In this instance, the victim testified that she delayed reporting due to threats from the appellant, as stated at pages 6 and 7 of the trial court proceedings:

> *"For all that times I did not tell any person as he threatened me that he could kill me".*

He argued that the victim, being a child of tender age, had her mind overwhelmed by the situation within the same household. To strengthen his argument, he cited the case of **Seleman Hassan vs. Republic,** Criminal **Appeal No. 203 of 2021,** CAT at Mtwara (unreported) at page 17, where the court stated:

> *"We think that while it can apply fairly unrestrictedly in respect of, say cases involving property offences, it will not apply with equal force in cases concerning sexual offences where immaturity of the victim, death threats or shame associated with such offences may dissuade the victim from reporting the matter with promptitude".*

He asserted that the appellant's claim that the trial court erred in conducting an inquiry on exhibit P2, which is the PF3, is unfounded. He referenced the case of **Saganda Sanganda Kasanzu vs Republic,** Criminal Appeal No. 53 of 2019 CAT at Dodoma (unreported), highlighting that exhibit P2 does not relate to a confession, thus rendering an inquiry

inapplicable. Contrary to the appellant's assertion, what occurred before the trial court, as per page 13 of the trial court proceedings, was an objection to the PF3 by the appellant. The objection was based on uncertainty regarding whether the girl was raped or not. He emphasized that this objection was overruled, as it required evidence and did not meet the standard set out in the case of **Mukisa Biscuits Manufacturing Limited Vs. West End Distribution Limited** [1969] EA 696.

Regarding the appellant's argument that the evidence of PW3, a doctor, did not establish the offence of rape because hymen perforation does not constitute penetration as per Section 130(4)(a) of the Penal Code, Cap 16, Revised Edition 2022, Mr. Paul submitted that regarding this argument, the alleged section cited is very clear that penetration, however slight, is sufficient to constitute the offence. The testimony of medical evidence adduced by PW3 and documented in exhibit P1 indicates that her vagina had no hymen indicating that her vagina was penetrated, also the victim had genital warts which cannot be transmitted without having sexual intercourse with a man who carried a virus responsible for transmitting such a sexual disease. PW3 explained these facts on page 12 of the trial court proceedings, and technically, her evidence as an expert witness is consistent with that of PW1. This corroborates the evidence adduced by PW1, which is in accordance with Section 127(6) of the

Tanzania Evidence Act. Therefore, Mr. Urban argued that the evidence presented by PW3, as detailed on pages 12-13 of the trial court proceedings, establishes vaginal penetration by a blunt object, as the victim had no hymen. This conforms to Section 130(4)(a) of the Penal Code.

Regarding the appellant's final argument that the prosecution failed to prove the charge against the appellant and instead relied on the appellant's health, Mr. Paul asserted that this claim is baseless and unfounded. He argued that the prosecution successfully proved the case beyond doubt. The victim testified about her rape and tendered PF3 in court, which confirmed the rape, supported by medical evidence indicating the absence of the victim's hymen. Therefore, Mr. Paul urged the court to dismiss the appeal.

On my part, I have read the entire proceedings along with the judgment of the trial court and I do appreciate the submissions filed in this court for and against the appeal.

The first, second, third, fourth, sixth, and seventh grounds of appeal can be determined together. The appellant claimed that a voire dire examination was not conducted for PW1. However, this is no longer a requirement following the amendment of the Evidence Act through the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4

of 2016), which came into effect on July 8, 2016. According to the amendment to section 127 (2), as cited in the case of **Geofrey Wilson vs. Republic,** Criminal Appeal No. 168 of 2018 CAT at Bukoba (Unreported):

> *"**One**, it allows the child of a tender age to give evidence without oath or affirmation. **Two**, before giving evidence, **such child is mandatorily required to promise to tell the truth to the court and not to tell lies**. In emphasizing this position, the Court in the case of **Msiba Leonard Mchere Kumwaga vs. Republic**, Criminal Appeal No. 550 of 2015 (unreported) observed as follows:*
>
> *" ... Before dealing with the matter before us, we have deemed it crucial to paint out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No.4 of 2016 (Amendment Act). Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies".*

In the instant case, PW1, who is the victim, according to page 5 of the proceedings, is on record thus:

> *"PW1: 12 years, student, Christian. To tell lie is a sin, I will tell the truth.*

Court: Because the witness is a child and she promised to tell the truth I will proceed to take her evidence."

It appears that from the above passage, the only condition which was fulfilled was one of the conditions of telling the truth. However, the second condition of a child promising to tell the truth was not fulfilled. In most cases, the evidence of PW1 could not be of any effect. See, among other cases, **Seleman Moses Sotel @ White vs. Republic**, Criminal Appeal No. 385 of 2018, **Faraja Said vs. Republic**, Criminal Appeal No. 172 of 2018, and **John Mkorongo James vs. Republic**, Criminal Appeal No. 498 of 2020, CAT (all reported).

However, every case should be determined according to its own circumstances. In the case of **Wambura Kiginga vs Republic,** Criminal Appeal No. 301 of 2018 CAT (Unreported), it was held that although the child did not explicitly promise to tell the truth, her narration was original, true, and authentic. The Court further maintained that despite the absence of a promise, the evidence provided by PW5, the victim, was credible for several reasons. **First**, in her evidence-in-chief, the victim was sincere and clearly identified the appellant as responsible. **Second**, PW1 remained consistent during cross-examination, maintaining that it was the appellant who raped her. **Third,** the appellant did not dispute any part of the victim's testimony on the date his evidence was taken. **Fourth,** the

appellant's defense complemented the victim's account, as he admitted to sleeping in the same room as the victim.

In the present case, it is clear from the evidence of PW1 that the appellant raped her three times. PW1 explained this well to the court, and her testimony remained unshaken during cross-examination. Furthermore, PW1 tested positive for HIV and another venereal disease, which she attributed to the appellant. During the trial, the appellant was tested for HIV, and PW5, a nurse, confirmed that he willingly provided a blood sample, which tested positive for HIV.

While the appellant claims that HIV can be transmitted through other means, he chose to remain silent in his defense and did not cross-examine the victim when she testified that he raped her. Consequently, the appellant cannot argue that the victim was infected with HIV through another source. Additionally, the appellant's cautioned statement, in which he admitted to the offence, was admitted in court as Exhibit PE1. This statement corroborates PW1's testimony.

Regarding the appellant's claim that his defense was not considered, the record shows that he chose to remain silent when given the opportunity to defend himself. Therefore, there was no defense to consider.

16.

Having narrated the above, it addresses all the grounds of appeal except for ground five, where the appellant is complaining about being sentenced to life imprisonment. PW1 testified that she was raped between 2019 and 2022, and at the time she testified in court, she was 12 years old. Therefore, it is possible that she was under the age of 10 at the time of the offences, which mandates a life sentence under Section 131(3) of the Penal Code. This is supported by the case of **Pius Felix Mawala vs. Republic**, Criminal Appeal No. 284 of 2010 CAT at Arusha (Unreported).

In the upshot, I find the appeal is devoid of merit and hereby dismiss it for want of merit.

It is so ordered

Right of appeal explained

DATED AT MBEYA this **10th** day of **JUNE, 2024**

MUSA K. POMO
JUDGE
10/06/2024

Judgment delivered on this 10th June, 2024 in chamber in presence of the Appellant who is unrepresented and Mr. Emmanuel Bashombe, learned state attorney appeared for the Respondent republic.

MUSA K. POMO
JUDGE
10/06/2024