IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB- REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 69 OF 2023

(Arising from the District Court of Ilala, in Criminal Case No. 471 of 2021.)

MTEULE MROPE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

05th February & 07th May, 2024

BWEGOGE, J.

One Mteule Mrope, the appellant herein was charged and convicted of the offence of rape c/s 130 (1) (2) (e) and 131(1) of the Penal Code [Cap. 16 R.E.2002] in the District Court of Ilala. Consequently, the custodial sentence of 30 years and an order for payment of compensation to the victim were imposed on the appellant. Being aggrieved by the conviction and sentence entered by the trial court, the appellant appealed to this court on six grounds

of appeal which may be reduced to one and main ground as hereunder mentioned.

1. *That the prosecution case was not proved beyond reasonable doubt.*

The factual background of the case as depicted in the lower court record entails thus: The victim herein (PW1), a child of tender age, is a resident of the Segerea area herein Dar es Salaam. Likewise, the appellant herein lived in the same neighbourhood as the victim and the victim is well familiar with the appellant. It is the prosecution case that on the material date, sometime in June, 2021, the appellant lured the victim into his residence pretending that he wanted to send her to the shop. Then, the appellant threatened the victim with a knife and forced her to strip naked. Then he forcibly inserted his penis into her genitalia. Thereafter, the appellant warned the victim not to disclose the criminal act committed against her and gave her TZS 500/. It was likewise the prosecution case that the victim had committed sexual intercourse with the appellant in his residence. The victim had kept silent about her sexual encounter with the appellant until her friend one Salma Abdul (PW3) disclosed the secret to her mother who passed the information to the victim's mother one Fatuma Rajabu (PW2). PW2 had reported the crime at Stakishari Police Station. Consequently, the victim was supplied with

PF3 and attended at Kinyerezi Dispensary where she was examined by the medical practitioner one Ismail Athuman Ng'imba (PW4). The same found the victim's hymen not intact. The PF3 was tendered in the trial court and admitted in evidence as exhibit P1.

After a full trial, the trial court found that the charge of rape was proved beyond reasonable doubt and convicted the appellant forthwith. Hence, this appeal.

The appeal was heard by written submissions. The appellant fended by himself whereas the respondent republic was represented by Mr. Erick Kamala, the state attorney.

In substantiating the complaint that the prosecution case was insufficient to ground conviction, the appellant argued that he was convicted based on the evidence adduced by PW1 and PW3 who are children of tender age whose evidence was taken contrary to the provision of section 127(2) of the Evidence Act [Cap. 6 R.E. 2022]. That there is no record entered by the trial court indicating the nature of the questions put to the child witnesses to test their competence. Likewise, there is no finding entered by the trial court in that the respective witnesses understood the meaning and nature of an oath before they were allowed to adduce their evidence. In the same vein, the

appellant alleged that the witnesses of tender age were not led to state whether they promised to tell the truth and not to tell lies, which is fatal to the case. Hence, the appellant prayed this court to expunge the evidence of PW1 and PW2 from the record. The appellant cited the case of **John Mkorongo James vs. Republic** (Criminal Appeal No. 498 of 2020) [2022] TZCA 11 to buttress the point.

Further, the appellant argued that the evidence of PW1 and PW3 were unreliable and contradictory. That PW1 testified that the appellant gave her TZS 500/= after he sexually abused her. However, PW3 deponed that the victim was given TZS 5000/= by the appellant after he sexually abused her. Likewise, PW3 testified that the appellant had committed both vaginal and anal sexual intercourse with the victim contrary to the evidence adduced by the victim. Based on these contradictions, the appellant prayed this court to allow the appeal herein.

In tandem with the above, the appellant charged that the trial court based his conviction on the improbable and, or incredible testimonies of PW1, PW2 and PW3. Based on the above accounts, the appellant prayed this court to find the appeal herein meritorious, quash the conviction entered by the trial court and set aside the sentence imposed against him.

In reply, Mr. Kamala submitted that the PW1 (victim) and PW3 who are key witnesses promised to tell the truth prior to adducing evidence in accordance with the law That the trial Magistrate put the prerequisite questions to the child witnesses before the same promised to depone whole truth. Further, the attorney contended that the requirement to ask the witness whether he/she understood the nature of oath is only crucial if the witness testified on oath which is not the case in this case. The case of **Mathayo Laurance William Mollel vs Republic** (**Criminal Appeal No. 53 of 2020**) [2023] TZCA 5 was cited to reinforce the point.

In respect of the allegation that the charge was not proved beyond reasonable doubt, the attorney contended that in sexual offences, the best evidence comes from the victim. The case of **Selemani Makumba vs. Republic** [2006] TLR 379 was cited to buttress the point. The attorney opined that the evidence of PW1 was credible. Hence, the trial court was justified to rely on the evidence adduced by PW1 in convicting the appellant. Further, the attorney opined that the evidence of PW1 was augmented by the evidence of PW5 who deponed that on 15/06/2021 he examined PW1 and observed that her hymen was not intact. Based on the above observations, the respondent's attorney prayed this court to dismiss the

appeal herein.

In his rejoinder, the appellant reiterated his submission in chief.

I would discuss the ground of appeal raised herein by commencing with the charge that the evidence adduced by PW1 and PW3 who are children of tender age was taken contrary to the provision of section 127(2) of the Evidence Act [Cap. 6 R.E. 2022].

I find it pertinent to revisit the relevant provision in verbatim:

> *"Section 27;*
>
> *(2) A child of tender age may give evidence without taking oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."*

In expounding the above provision, the Apex Court in the case of **Godfrey Wilson vs. Republic** (Criminal Appeal 168 of 2018) [2019] TZCA 109 stated that:

> *"To our understanding, the above provision as amended, provides for two conditions. One, it allows the child of tender age to give evidence without oath or affirmation. Two, before giving evidence, such a child is mandatorily required to* ***promise to tell the truth to the court and not tell lies****."*

Further, the court observed:

> *"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 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."*

See also the cases; **Msiba Leonard Mchere Kumwanga vs Republic** (Criminal Appeal No 550 of 2018) [2018] TZCA 571 and **John Mkorongo James vs. Republic** (supra) in this respect.

Now, having revisited the law and the principle expounded thereon, I would revert to the charge made by the appellant herein in that the trial court

flawed the procedural law. I have gone through the record of the trial court. It is glaring on the record of the trial court that the trial magistrate having asked the victim her name, age and religion, recorded as follows:

> *"The child is of a tender age……she said she knows telling lies is a sin. The witness ….. promised to tell the court the truth."*

It goes without saying that the trial magistrate omitted to write exact questions put to the child witness. Likewise, he omitted to quote the statement made by the child witness in responding to the questions put to her. Be that as it may, at least it was required to be in record that the child witness in her own words, promised to speak the truth. I find it pertinent to reiterate what was instructed in the case of **Godfrey Wilson vs. Republic** (supra) that: before giving evidence, such a child is mandatorily required to "**promise to tell the truth to the court and not tell lies**." That *"a promise of telling the truth and not telling lies …is a condition precedent before reception of the evidence of a tender age*." The trial magistrate failed to discharge his obligation in this respect. Hence, I am constrained to agree with the appellant in that the omission vitiated the testimony of PW1. I find this complaint with substance.

The second charge made by the appellant is to the effect that the prosecution case was not proved beyond sane doubt. Having gone through the prosecution case at the trial court, I would pose a question: Assuming that the testimony of the victim was taken according to the procedure provided by the law, was it sufficient to ground conviction? Having scrutinized the prosecution case I have observed the following: The victim (PW1) alleged that on a fateful day, the appellant threatened her with a knife, and forced her to strip naked, then inserted his penis into her genitalia. Thereafter, he gave her TZS 500/= and warned her to shut her mouth. Indeed, the victim never disclosed the crime committed against her by the appellant. Not only that the victim opted to keep silent, which I find strange, but she deponed that after the first incident, the appellant raped her on several occasions in his residence which he shared with his mother and siblings. However, the victim didn't tell the trial court how she found herself in the trap of the appellant during the subsequent sexual acts.

The testimony of the victim was supported by her friend namely, Salma Abdul (PW3) herein. PW3 is older than the victim. She eloquently told the court that she had witnessed the appellant raping the victim after he drew a knife and threatened her to strip naked. PW3 had likewise deponed to have

witnessed the subsequent sexual assaults committed by the appellant against the victim. Further, PW3 told the trial court that she witnessed the appellant inserting his penis into the victim's vagina and anus before he gave her money to the tune of TZS 5,000/=; chips and ball cones. Likewise, PW3 kept silent for a long time about the crime committed against her friend before she narrated the incidents to her mother. The testimony of the victim's mother is nothing but hearsay. The last material witness is the medical practitioner (PW4) who examined the victim and found her hymen not intact. Nothing else was observed.

It suffices to point out that the testimony of PW3 who purported to have witnessed the alleged rape perpetrated by the appellant had so much information and details which were never deponed by the victim. For instance, the victim never deponed that she was sodomized by the appellant. Likewise, PW4 didn't make any finding in that the victim's anus was penetrated. I need not mention that the victim never told the trial court that she was given gifts mentioned by PW3. Likewise, the fact that PW3 having witnessed the alleged rape opted to keep silent for such a long period, further cast doubt on her credibility. I would opine that the circumstances of the case herein give rise to a host of questions which cannot be answered.

I have a considered opinion that reasonable doubt shadowed the prosecution case. Thus, I am of the settled view that even if the evidence of PW1 had been properly taken, yet sane doubt on the prosecution case would have remained.

In fine, I find the appeal herein meritorious. I would allow the appeal. The conviction and sentence entered by the lower court are hereby quashed and set aside. The appellant to be released from prison unless otherwise lawfully held.

So ordered.

DATED at **DAR ES SALAAM** this 07th day of May, 2024.

O.F. BWEGOGE

JUDGE