IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO.39546 OF 2023

(Originating from Criminal Case No.20 of 2022 from Kilosa District Court)

IDD HAMZA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of Last Order: 03.06.2024

Date of Judgement: 07.06.2024

JUDGEMENT

MAGOIGA, J.

The appellant, **IDD HAMZA** was arraigned before Kilosa district court (trial court) for one count of rape contrary to sections 130 (1), (2), (e) and 131 (1) of the Penal Code, [Cap 16 R.E.2019]. The appellant denied the charge.

The facts as per the charge sheet were that, on day of January, 2022 at Bwawani village within Kilosa District in Morogoro region did have sexual intercourse with one EAU a girl of 13 years old.

After full trial, the appellant was found guilty as charged, convicted and sentenced to serve custodial 30 years.

Aggrieved with both conviction and sentence, the appellant preferred this appeal faulting the trial court findings armed with 7 grounds of appeal couched in the following language: -

1. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without observing or abiding to procedure provided under section 127 (2) of the Evidence Act. (Cap 6 RE 2019).*

2. *That, the trial court erred in law and fact in convicting and sentencing the appellant without analysis of the actual date of which the alleged offence was committed.*

3. *That, the learned trial Magistrate erred in law and fact in not calling material witness including teachers to testify on the age of the victim and as it was true she was a primary school pupil.*

4. *That, the trial court erred in law and fact in convicting and sentencing the appellant basing on the evidence produced by PW1 as evidence on who committed such offence to the said child is hearsay evidence as she was told by the victim and PW1 did not witness the incident with her necked eyes.*

5. *That, the trial magistrate erred in law and fact in holding that, the age of the victim was proved beyond reasonable doubt without considering no birth certificate was tendered to prove such fact.*

6. *That, the trial court erred in law and fact in convict and sentence the appellant basing on weakness of defence rather than on the strength of the prosecution evidence.*

7. *That, the trial court erred in law and fact in convict and sentence the appellant holding that the prosecution case was not provided beyond reasonable doubt.*

When this appeal was called on for hearing, the appellant appeared in person and unrepresented and was ready for hearing. On the other hand, the Republic was represented by Mr. John Mkonyi and Ms. Monica Matwe, learned State Attorneys.

When this court invited the appellant to argue his appeal, he informed the court that based on his grounds of appeal will prefer to hear the learned State Attorneys first and will reply later on. I granted the prayer.

Mr. Mkonyi, learned Attorney readily told the court that they strongly oppose this appeal and prayed that this appeal be dismissed for want of merits on all seven grounds raised. However, upon being probed by the court on the substance of the first ground of appeal and shown the record of the trial Court and asked if the evidence of PW3 was taken in accordance with the provisions of section 127 (2) of the Tanzania Evidence Act [Cap 6 R.E 2029], Mr. Mkonyi readily admitted that the trial

court did not comply with the provisions of section 127(2) of Act. According to Mr. Mkonyi, much as the said provisions was not complied, it vitiated the evidence of PW3- the victim and went on telling the court that without the evidence of PW3, the case against the appellant cannot stand at all and as such the prosecution did not prove the case beyond reasonable doubt.

On that note, the learned Attorney supported the appeal on 1st and 7th grounds of appeal.

The appellant, being a layman had nothing to reply this point of law.

Having carefully considered the brief and focused oral submissions by the learned Attorney and guided by the trial court record, no doubt the provision of section 127(2) was not complied. The said sub section, for easy of reference provides as follows:

"Section 127 (1) NA

(2) A child of tender age may give evidence without taking oath or making affirmation, but shall, before giving evidence, promise to tell the truth to the court and not to tell lies. (Emphasis mine).

Guided by the literal wording of the above provisions, which pose no ambiguity, before the child of tender age gives evidence, must promise to the court to tell the truth and not lies and the promise must be recorded

in the language of the child. But in the instant appeal, no doubt the mandatory provision was not complied with and the record reads as follows:

"PW3: EAU 13 years upon examining an interrogating a child witness she has promised this court to say truth."

Reading between and along the lines of the above excerpt no one need legal lens to see that the above provisions was not complied. The way the above promise was written the trial magistrate reported and not the child as the law demands. Not only that but also that the child did not promise not to tell lies as required by law.

Further guided by the Court of Appeal sitting at Bukoba when faced with similar scenario in the case of **Godfrey Wilson Vs. The Republic, Criminal Appeal No 168 of 2018** at Tanzlii in interpreting the provisions of sub section (2) of section 127 had this to say that, the provision envisaged two things; **one,** *it allows the child of tender age to give evidence without oath or affirmation*, and **two,** *before giving evidence such a child is mandatorily required to give promise to tell the truth and not lies.*

In the above quoted case law, the Court of Appeal found as is in this appeal, the promise was there but was quite different from the requirement of the law and the Court of Appeal insisted that *"the trial*

court ought to have required the child to promise to tell the truth and not lies before recording her/his evidence." That was not done and the Court of Appeal found the evidence of victim with no evidential value.

In this appeal, therefore, as rightly submitted by the learned Attorney, and rightly so in my own opinion, I find that there was no promise known in law that can make the evidence of PW3 to stand in this appeal. Her evidence, as said by the Court of Appeal is with no evidential value and is disregarded or expunged in this appeal. Further, without evidence of PW3, the case for prosecution cannot be said to have legal legs to stand, and indeed, was not proved at all.

In the foregoing and above reasons, I agree with the learned Attorney that this appeal is merited and is hereby allowed based on grounds number 1 and 7. I proceed to quash the conviction and set aside the sentence meted out against him by the trial Court.

It is further ordered that the appellant be set free unless held for another lawful cause.

It is so ordered.

Dated at Morogoro this 7th day of June, 2024.

S.M. MAGOIGA
JUDGE
07/06/2024

Court: Judgement delivered in the presence of the appellant in person and in the presence of Mr. ~~John Mkonyi~~ Kabelwa, learned State Attorney for the Republic.

S.M. MAGOIGA
JUDGE
07/06/2024

Court: Right of appeal fully explained.

S.M. MAGOIGA
JUDGE
07/06/2024