THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 69 OF 2023

KM [Name withheld] ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the District Court of Iringa at Iringa)

(Hon. E.A. Nsangalufu - SRM)

dated the 21st day of June, 2022

in

Criminal Case No. 144 of 2021

JUDGMENT

Date of Last Order: 18/03/2024 &
Date of Judgment: 10/05/2024

S. M. Kalunde, J.:

On December 10, 2020, at the District Court of Iringa sitting at Iringa ("the trial court"), the appellant was charged with rape. The particulars of the offence alleged that on the 19th day of November 2020, the appellant had unlawful sexual intercourse with his daughter EK ("the victim"), a girl her being 7 years of age, contrary to sections 158(1)(a) and 161 of **the Penal Code [Cap. 16 R.E. 2019]** now **[Cap. 16 R.E. 2022]**. The appellant denied the charges and trial ensued. After full trial, the trial court convicted the appellant and sentence him to save the reminder of his life in prison.

The facts of the case as gathered from the records of appeal are as follows: The appellant and ST (**Pw2**) were married. They were blessed, in matrimony, with two children, one of them being the victim (**Pw1**). The allegation is that on the 19th day of November 2020, whilst Pw2 was laying on bed sick, the appellant penetrated the victim at their sitting room. It is contended that whilst the incident was happening Pw2 peeped through a hole on the door and saw the appellant raping the victim. She raised an alarm.

After the alarm, the appellant stopped and confronted Pw2 threatening to kill her if she said anything. Pw2 inspected the victims' private parts and noticed some bruises. The next morning, Pw2 took the victim to Kitwiru Health Centre where she was examined, and a conclusion was made that she had been penetrated. Thereafter, Pw2 reported the matter at the police station where she was given a Medical Examination Report (Police form No. 3 (PF3)) so that the victim can be medically examined. On the same day (20th day of November 2020) the victim was examined for a second time by Dr. Martina Mdendemi (**Pw4**), a medical doctor from Iringa Referral Hospital. In his examination, Pw4 observed that the victim had no hymen and had bruises around her private parts and indication that she had been penetrated. The result of the examination was reflected in the Medical Examination Report which was admitted in evidence as **Exhibit P2**.

With the matter reported to the police, an investigation was launched leading to the arrest of the appellant. After his arrest, on the 23rd day of November 2020, his cautioned statement was recorded by G.3710 CPL Kelvin (**Pw3**). During interview, the appellant admitted having penetrated his own daughter. Despite an objection from the appellant, the confessional statement was admitted in evidence as **Exhibit P1**.

The appellant defended himself under oath. He hurriedly denied the allegations. He contended that he was arrested on the 19th day of November 2020, at around 23:00Hrs, whilst asleep and taken to the police station. It was at the police station that he was told that he was being arrested for rape. He alleged that the suit was fabricated by the relatives of his wife (Pw2) who hated him for no reason. The relatives specifically mentioned were Pw2's brother and uncle.

I have pointed out above that, despite his protestation, the appellant was convicted and sentenced to life imprisonment. Aggrieved by that decision, the appellant has approached the court on appeal. His petition of appeal lists seven grounds of appeal as follows (in his own words):

> "*1. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant based on the contradictory evidence adduced by PW1 & PW2.*

2. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant relying on the unreliable evidence of PW2.*
3. *That, the learned trial Magistrate wrongly convicted and sentenced the appellant based on exhibit PI without conducting a trial within a trial when the exhibit was retracted by the appellant.*
4. *That, the trial court wrongly convicted and sentenced the appellant without to considering that conducting the voir dire test for PW1 was prohibited by law hence the whole proceedings are nullity.*
5. *That, the learned trial Magistrate erred both in law and fact to convict and sentencing the appellant without to consider that the prosecution side failed totally to bring the independent witness to corroborates the evidence of PW4 (a doctor).*
6. *That, the learned trial Magistrate wrongly to convict and sentence the appellant without considering the defence side evidence.*
7. *That, the prosecution side failed totally to prove this case against the appellant beyond reasonable doubt.*

To prosecute the appeal, the appellant enjoyed the representation of Mr. Emmanuel Kalikenya Chengula learned advocate while the respondent Republic was represented by Mr. Vincent Makori, learned State Attorney.

I have carefully read the records and considered the submissions of the parties, having done so I think my duty now is ascertain the merits or otherwise of the appeal. While parties submitted on each of the grounds of appeal, for my part I propose to approach the appeal generally by answering the question whether the prosecution establish the case against the appellant beyond reasonable doubt. In doing so, I shall be specifically responding to the last ground appeal while, in the process, addressing the appellant's complaints in the other grounds of appeal.

In his submissions, Mr. Makori submitted that the appellant was inter alia convicted on the strength of the evidence of the prosecutrix. He argued that, considering the circumstances of the case, the evidence of the prosecutrix was sufficient to ground conviction against the appellant. The learned counsel argued that, since the testimony of the prosecutrix complied with the section 127(2) of t**he Evidence Act [Cap 6 R.E. 2022]** regaining evidence of a child, the trial court was right in basing its conviction on the evidence of the prosecutrix. In support of his position, the learned state counsel placed reliance in the decision of the Court of Appeal in the case of **Charles Haule vs Republic** (Criminal Appeal 250 of 2018) [2021] TZCA 147 (30 April 2021) TANZLII, which cited the case of **Selemani Makumba v. R.** [2006] TLR 379. Mr. Makori was responding to the appellants complaint in the fourth ground of appeal.

Since the evidence of the prosecutrix was essential in ground conviction against the appellant at the trial court, I propose to start my decision by examine the legality of the procedure for recording the testimony of the victim (Pw1). Her evidence was recorded on the 23rd day of July 2021, as reflected on pages 11 to 12 of typed proceedings. There is no dispute that the prosecutrix was child of tender age. She was seven years when the incident happened and eight years when she testified in court. Her evidence was therefore required to comply with the provisions of section 127(2) of the Evidence Act. The respective section reads:

> *"(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 to the court and not to tell any ties."*

It is worth noting that, the provision of section 127(2) quoted above, is an exception to the general rule stipulated under section 198 (1) of **the Criminal Procedure Act [CAP 20 R.E. 2022]** which obliges every witness in a criminal trial, subject to the provisions of any other written law to the contrary, must give evidence upon oath or affirmation in accordance with the provisions of **the Oaths and Statutory Declarations Act [CAP 34 R.E. 2019]**.

Reverting to the applicability of section 127(2) of the Evidence Act, it is plainly clear that the section is coached in permissive terms in that where a child of tender age

understands the nature and meaning of an oath, she should give evidence on oath or affirmation depending on the religion she professes. However, if she does not, then her evidence will be taken upon promise to the court to tell the truth and not to tell lies. The procedure to be adopted in recording evidence of a child of tender years was articulated by the Court of Appeal in the case of **John Mkorongo James vs Republic** [2022] TZCA 111 (11 March 2022) TANZLII, stated, at page 13, thus:

> ***"The import of section 127 (2) of the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court tell the truth and not tell lies.*** *It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court tell the truth and not tell lies before they testify.* ***This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief, to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court tell the truth and***

not tell lies *as per section 127 (2) of the Evidence Act."*

[Emphasis is mine]

In the case under scrutiny, the victim (Pw1) did not testify on oath, she gave her testimony on a promise not to tell lies. As to what transpired, I will let the records speak for themselves. At page 11 and 12 of proceeding the witness is recorded to have stated the following:

*"**PW1**: A child of 7 years*
***Court**: A test in conducted.*
S.g.d: E. Nsangalufu – RM
23/07/2021
Court: What is your name.
PW1: My name is Ester Kumbuka Mhotelwa
Court: Where do you reside
PW1: I reside at Kitwiru
Court: Whom do you stay with
PW1: I stay with my mother and father
Court: Do you go to church
Court: Does a good kid speak truth or lies
PW1: Good kids speak truth no lies
Court: What do you promise?
PW1: I promise to tell the truth.
***Court**: Witness understand the nature of oath and she has promised to tell the truth.*
***Court**: section 127(1) of the evidence Act C/W*
S.g.d: E. Nsangalufu – RM
23/07/2021

From the above quoted excerpt of the proceedings, it may be observed that the trial court conducted a simple

exercise to test the competence of victim to whether she understands the meaning and nature of an oath, before her evidence was recorded on a promise to the court tell the truth and not to tell lies. Thereafter, the court concluded that the witness understood the meaning of an oath. However, the trial court did not administer an oath to the witness, instead it proceeded to record her evidence on a promise to tell the truth. This was a wrong approach by the learned trial magistrate. In my considered opinion, upon making a finding that the victim understood the nature of an oath, the presiding magistrate should have administered an oath and proceed to record the evidence of the victim on oath.

As was stated in **John Mkorongo James case** (supra), it cannot be taken for granted that every child of tender age who comes before the court as a witness does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court tell the truth and not tell lies. If the court makes a finding that a child understands the meaning of an oath, then the court should administer an oath to her before her evidence is recorded as required by section 198 of the CPA. Failure to do so violates the provisions of section 147(2) of the Evidence Act and renders that evidence illegal.

However, it is on record that the victim promised to tell the truth. As a result, the court proceeded to record her evidence on the strength of that promise. This was again a

contravention of the mandatory provisions of section 147(2) of the Evidence Act. That section requires a child to testify upon a promise to tell the truth and not lies, and not a promise to tell the truth only. For this, I find solace in the case of **John Mkorongo James case** (supra) where the Court examined the completeness of testimony given on the basis of a promise **"to tell the truth",** but without a promise **"not to tell lies"** and made the following remarks:

> *"It was incomplete because while section 127 (2) of the Evidence Act, require that the promise should be in telling the truth and not telling any lies,* ***what PW1 is said to have promised is only to tell the truth. He did not promise not to tell any lies.*** *It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete."*
>
> [Emphasis is mine]

I am aware of the stance taken by the Court of Appeal in the case of **Wambura Kiginga vs Republic** [2022] TZCA 283 (13 May 2022) TANZLII where it was held *inter alia* that:

> *"The major point is to ensure that an offender is not proclaimed innocent, just because the trial court did not follow rules of evidence or procedure, in taking the evidence of the victim. In any event, non-compliance with subsection (2) of section 127, in no circumstance can it be a blame on the victim, but on the courts."*

Equally, I am aware that the application of **Wambura Kiginga** (supra) was qualified by the Court in the case of

Ramson Peter Ondile vs Republic [2022] TZCA 608 (6 October 2022) TANZLII where the Court, have observed the decision in **Wambura Kiginga** (supra), remarked that in the said decision the Court appreciated the conditions obtaining under section 127 (2) of the Evidence Act and admitted that there was an omission when the child witness did not promise to tell the truth and not to tell lies before its evidence was taken. Having said that, the Court explained the application in **Wambura Kiginga** (supra) in the following terms:

> *"Therefore, since in that decision, we did not exclude the provisions of section 127 (2) of the Evidence Act, we still find that the trial court in the instant case erred to receive the evidence of PW2 in violation of that provision of the law."*

In arriving at that decision, the Court relied in its previous decision in the case of **Emmanuel Masanja vs Republic** [2022] TZCA 443 (15 July 2022) TANZLII, where the court (Maige, J.A) stated:

> *"In **Wambura Kiginga v. R**, (supra), we did not construe subsection (6) of section 127 as to exclude the precondition under subsection (2). Instead, guided by the principle that "each case must be decided largely on its own facts" and that "the core function of courts is to ensure that justice is done by whatever means", we gave the provision a broader conceptualization to mean that; where the only independent evidence is that of a child of tender age, it may be used to sustain conviction notwithstanding the provision of subsection (2)."*

In both, **Emmanuel Masanja** (supra) and **Ramson Peter Ondile** (supra) the Court expunged the testimony of a child of tender age for non-compliance with provisions section 127(2) of the Evidence Act. Since each case has to be determined on its own merits, I have examined the records, and I am satisfied that circumstances in **Wambura Kiginga** (supra) are different to those obtained in the present case.

Thus, having made a finding that the testimony of the victim (Pw1) was recorded in violation of section 147(2) of the Evidence Act, I have no hesitation in holding that the said evidence ought to have been excluded from the records.

The question that follows, after expunging the evidence of the victim, Pw1, is whether the remaining evidence is sufficient to support the appellant's conviction. I have dispassionately examined the remaining evidence and observed that the said evidence is insufficient and cannot warrant the appellant's conviction. I say so because the remaining evidence is essentially that of Pw2 and Pw4, and exhibit P2. The evidence of Pw2 that she saw the victim through a hole in the door is questionable and raises doubts. It defeats logic that even after the incident she continued sleeping until the next morning or that no one heard her alarm that night. He informed the court that he was once informed by their son that the appellant had raped the victim, yet she did not take any measure to address the issue or report it anywhere. Her evidence raises doubts amidst allegations by

the appellant that there was a dispute between him and her uncle and brother that fueled the grudges between them leading to the fabrication of the case. I am confident that if the trial had considered the evidence of Pw2 in light of the appellant defence, it would have found, as I have, that Pw2 was not a reliable witness.

The other incriminating evidence relied by the trial court was evidence of Pw4 and a confessional statement which he recorded. However, before its admission in evidence, the appellant raised an objection that the contents of the document were not correct. In his defence, the appellant retracted the statement alleging that he had been tortured by the police to extract his confession. I have carefully examined the records and noted that the prosecution case did not lead any evidence indicating when and how the appellant was arrested. It is trite that confessional statements must be recorded within four hours of the suspect's arrest. This is pursuant to section 50(1)(a) of **the Criminal Procedure Act [Cap. 20 R.E. 2022]**. The section reads:

> *"50.- (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended."

In terms of the above section, the basic period available to the police for interviewing a person under restraint in respect of an offence is the period of four hours commencing at the time he was taken under restraint in respect of that offence, unless that period is extended under section 51 of the CPA.

In the instant case, the incident happened on the 19th day of November 2020. In his evidence, at page 24 of typed proceedings Pw4 stated that he recorded the appellants' confessional statement, between 12:00Hrs, to around 12:40Hrs, on the 23rd day of December 2021. However, he did not state the date and time when the appellant was arrested. in fact, throughout the prosecution case, none of the prosecution witnesses stated the date and time when the appellant was arrested. In absence of any evidence of the appellants arrest, his uncontroverted evidence that he was arrested on the 19th day of November 2020, at around 23:00Hrs, remains the only evidence on record regarding his arrest. Since the only evidence on record indicates that the appellant was arrested on the 19th day of November 2020, at around 23:00Hrs, a statement recorded on 23rd day of December, 2021, was clearly recorded outside the four hours as directed under section 50(1)(a) of the CPA. The prosecution did not lead any evidence indicating that an extension was

sought and granted or that there were any special circumstances warranting the delay.

The requirement to have the statements of accused person recorded within four hours from their arrest is not cosmetic. It was intended to protect their civil liberties. The rationale to this requirement was highlighted by the Court of Appeal in the case of **Mashaka Pastory Paulo Mahengi @ Uhuru & Others vs Republic** [2015] TZCA 52 (TANZLII) where the Court (Juma, CJ) cited its previous decision in the case of **Emmanuel Malahya v. R**, Criminal Appeal No. 212 of 2004, (unreported) where the Court stressed that:

> *"The violation of section 50 is fatal and we are of the opinion that ss.53 and 58 are of the same plane. These provisions safeguard the human rights of suspects and they should, therefore, not be taken lightly or as mere technicalities (See, also, **Janta Joseph Komba and 3 Others v. R**, Criminal Appeal No. 95 of 2006, (unreported)."*

In the case under scrutiny, since the confessional statement of the appellant (Exh. P2) was recorded in violation of the mandatory requirements of section 50(1)(a) of the CPA, the court ought to, as I hereby do, expunged it from the records.

From the above analysis of the available evidence, it is clear that, in absence of the testimony of the victim (Pw1), Pw2, Pw4 and exhibit P2, the remaining evidence is insufficient to ground conviction against the appellant. The fact of the

matter is that the charges against the appellant were not proved to the required standard, that is beyond reasonable doubts. I therefore sustain the seventh ground of appeal.

For the foregoing reasons I find merits in the appeal. As stated earlier, I see no reason to examine the remaining grounds as listed by the appeal. The appeal is allowed. Accordingly, I quash the appellants conviction and set aside the jail sentence meted on him by the trial court. I also order that he be released from prison forthwith unless held for other lawfully cause.

The appeal is disposed in aforesaid terms.

DATED at **IRINGA** this **10TH** day of **MAY 2024**.

S.M. KALUNDE

JUDGE