IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB-REGISTRY
AT MOROGORO

CRIMINAL APPEAL NO. 40070 OF 2023

(*Arising from the Judgement of the District Court of Morogoro in Criminal Case No. 89/2023 before Hon. T.A. Kaniki – SRM dated on 02/11/2023*)

HILARY KISINGA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

13/02/2024 & 29/02/2024

KINYAKA, J.:

On 02/11/2023, the District Court of Morogoro convicted the Appellant of the offence of rape contrary to section 130 (1) (2) (e) and 131(1) of the Penal Code Cap. 16 R.E. 2019. The Appellant was sentenced to serve thirty years imprisonment in jail. It was alleged before the trial court that on several occasions between October 2022 and 12/02/2023 at Bigwa area, within Morogoro District in Morogoro, the appellant had a carnal knowledge with a girl of 11 years old. The appellant pleaded not guilty to the charges. Upon hearing the 5 prosecution witnesses and 3 defence witnesses, the trial court found the appellant guilty as charged.

Aggrieved by the decision of the trial court, the appellant preferred an appeal before this Court containing seven grounds of appeal as follows:

1. That the learned trial magistrate erred in law and fact by failing to notice the credibility of PW1 were undermined by the delaying to report immediately this abhorrent crime to the authority since the offence occurred in October 2022 and 12/02/2023 and the medical (PW4) doctor received the victim (PW1) for medical examination on 16/02/2024.
2. That the learned trial magistrate grossly erred in law by offending the dictates of section 127(2) of the Tanzania Evidence Act, Cap. 6 R.E. 2022, since PW1 is a child of tender age.
3. That the learned trial magistrate did not consider and analyze the appellant's defense case i.e. DW3 one Frank Kivugo hence the appellant was condemned unheard and also there was no fair trial.
4. That the appellant during defense hearing was never accorded with the right to make re-examination hence there was no fair hearing on his side.
5. That the appellant was not furnished with the complaints statement contrary to section 9(3) of the Criminal Procedure Act, Cap. 20 R.E. 2022 thus there was no fair trial.

6. That the appellant was convicted and sentenced without being cautioned contrary to section 131 of the Criminal Procedure Act, Cap. 20 R.E. 2022.
7. That the prosecution did not prove its case beyond reasonable doubt.

On 13/02/2024 when the appeal came for hearing, the appellant was represented by Mr. Jackson Thomas Mashankara, learned advocate and the respondent enjoyed representation of Mr. Shabani Kabelwa, learned State Attorney.

When the parties were called to take the floor, Mr. Mashankara started by abandoning the 6th ground of appeal and retained the remaining grounds of appeal. He submitted in respect of the 1st ground of appeal that according to the trial court records, the incident of rape was not reported timely. It took the victim more than three months from October, 2022 to 12/02/2023 and up to 16/02/2023 when the incidence was reported to police. He contended that there is no evidence or reason for delay in reporting the incidence. He submitted that the delay to report the incident without reasons casted doubt and diminished credibility of PW1. He argued that although the best evidence in criminal cases comes from the victim as held in the case of **Selemani Makumba v. R. (TLR) 2006 379**, the position depends on the credibility of the witness, PW1, on the facts of the incident

and the connection of the accused to the offence. To buttress his argument, he cited the case of **DPP v. Juma Chuwa Abdallah & Another, Criminal Appeal No. 85 of 2018**, where on page 14, the Court of Appeal held that delayed reporting dents the credibility of the evidence of the victim.

Mr. Mashankara observed that the evidence of PW1 is that when she was asked for the first time if she had slept with a man, PW1 denied, but she named the appellant after she was beaten by her mother, PW2. He observed that it is unknown whether or not the victim would have mentioned the appellant if she was not beaten by her mother. He wondered the reason for the victim to deny sleeping with a man when she was asked for the first time on 15/02/2023. He referred to the position in the case of **Goodluck Kyando v. R. (2006) TLR 363** where it was stated that a witness is entitled to credence unless there is a good and cogent reason for not believing him or her. He argued that the issue in the present matter is the unexplained delay to report the crime for more than 3 months which diminished and undermined the credibility of PW1.

On the second ground, Mr. Mashankara submitted that PW1 aged 12 years, was a child of tender age. He assumed PW1 to have understood the meaning of oath that is why she testified under oath. He contended that

there is nowhere on page 6 and 7 of the proceedings, the trial magistrate asked PW1 if she understood the meaning of an oath and her response to such question. He argued that PW1 did not understand the meaning of an oath as the tests that the trial magistrate used, do not suggest if PW1 understood the meaning of the same, which is contrary to the dictates of section 127(2) of the Evidence Act Cap. 6 R.E. 2022 (hereinafter, the "Evidence Act"). He added that PW1 was required to promise to tell the truth. Counsel prayed for the evidence of PW1 to be expunged from the court's record. He contended that if the evidence of PW1 is expunged, the evidence of PW2, PW3, PW4 and PW5 are corroborative evidence which cannot ground conviction.

Mr. Mashankara faulted the decision of the trial court in the third ground for its failure to consider and analyze the defence evidence of DW3, Frank Kivuyo. He contended that only the evidence of DW1 and DW2 was considered and analyzed. He viewed the omission as prejudicial to the appellant as he was condemned unheard and was not accorded a fair trial.

In the third ground, Mr. Mashankara attacked the trial magistrate for not according the appellant a right to make re-examination after he was cross-examined by the state attorney as reflected on page 20 of the typed trial

court proceedings. He contended that although re-examination as provided for under section 147(3) of the Evidence Act is optional, it was the duty of the trial court to ask the appellant if he opted to make re-examination. He relied on the case of **Victor Mutasi v. CRDB Bank PLC, Civil Appeal No. 96 of 2021**, where the High Court on page 11, second paragraph through to page 12 of the decision held that the denial is tantamount to denial of the right to be heard. He argued that failure to give the appellant right to re-examination, is tantamount to denial of the appellant's right to be heard which vitiates the entire proceedings.

On the fifth ground, Mr. Mashankara complained of failure by the prosecution to furnish the appellant with the complainant's statement, mandatorily required under section 9(3) of the Criminal Procedure Act Cap. 20 R.E. 2022 (hereinafter, the "CPA"). He submitted that the law requires the trial magistrate to demand the prosecution to supply the accused with complainant's statement in order to inform the accused of the accusations against him, to ascertain whether the evidence given by the witness in court tallies with his statement given before the police, and to give the accused an opportunity to prepare for his defence upon being required to answer

the charges. He argued that there was no fair trial as the denial prejudiced the appellant.

Mr. Mashankara submitted on the seventh ground that based on his submissions in the preceding grounds of appeal, the prosecution failed to prove the offence against the Appellant beyond reasonable doubt as required by section 3(2)(a) of the Evidence Act. He contended that there were gaps and doubts that the Respondent failed to fill. He argued that the accused is convicted and sentenced based on the strength of the prosecution case and not based on defence's weak evidence. He referred to the case of **Mohamed Jabir v. R., Criminal Appeal No. 357 of 2017**, where the Court of Appeal on page 15 held that 'criminal justice is required to be administered not as a game of football but as a serious business of acquitting the innocent and convicting the guilty in reasonable and sensible manner according to law.'

Mr. Mashankara prayed for the appeal to be allowed by quashing the conviction, set aside the sentence and set the appellant free.

Mr. Shabani Kabelwa, learned State Attorney vigorously opposed the appeal. In opposition to the first ground, he contended that from what had transpired during preliminary hearing, and from the charge sheet, and the

evidence of PW1, it is clear that the incidents occurred between October 2022 and 12/02/2023. He submitted that the evidence of PW2, the mother of the victim, is corroborated with evidence of PW1 on page 7 of the proceedings, that on 15/02/2023, she went to wash clothes at the river where her mother saw some differences in her and named the appellant to have raped her after she was beaten by her mother. He contended that the reason PW1 did not report the incidence is because she was warned by the appellant not to tell anyone about the incident.

Mr. Kabelwa added that PW1 is a credible witness as immediately after being noticed by her mother, she named the appellant to be the person who raped her. He referred to the case of **DPP v. Juma Chuwa Abdallah (supra)**, on page 14, where the Court of Appeal cited with approval the case of **Marwa Wangiti Mwita and Another v. R., (TLR) 2002** on page 32, and held that the ability of a witness to name the suspect at the earliest opportunity is an all-important assurance of his reliability. He prayed for dismissal of the first ground for lack of merit.

Mr. Kabelwa admitted that reading the proceedings on page 6, it does not contain sufficient questions which would lead to ascertain if PW1 understood the nature of oath. But he averred that PW1 gave his testimony under oath,

and within the oath, there was a promise to speak the truth. He argued that even if there was an omission by the trial magistrate to comply with section 127(2) of the Evidence Act, the evidence of PW1 can still be used in evidence and be found to have merit. He referred to the case of **Felick Kilipasi v. R., Criminal Appeal No. 260 of 2021**, the Court of Appeal on page 10 to 12, explained the circumstances where the evidence of a child of tender age can be used even if the same was taken contrary to section 127(2) of the Evidence Act. He prayed for dismissal of the ground of appeal as the evidence of PW1 was credible and with no doubt.

Mr. Kabelwa conceded that the evidence of DW3 was not analyzed in the judgement of the trial court. However, he argued that the evidences of DW2 and DW3 are similar as reflected on page 20 of the proceedings. He added that on page 7 of the judgement, the trial magistrate well analyzed the evidence of the appellant and that of DW2 which is similar to the evidence of DW3. He contended that based on the similarities in the evidence of DW2 and DW3, the appellant was not prejudiced and was given the right to a fair trial. He argued in the alternative that if the Court finds that DW3's evidence was not analyzed, it be pleased to analyze the evidence of DW3 and come

out with its findings, being the first appellate court. He prayed for dismissal of the ground of appeal.

In respect of the fourth ground, Mr. Kabelwa admitted that on page 20 of proceedings, it is not indicated that DW1 was given the right of re-examination. However, he viewed such failure not to be tantamount to denial of a fair hearing to the appellant. He viewed that the right was a constitutional one. He submitted that if the Court finds the proceedings a nullity, he prayed for the Court to order retrial as it was done in the case of **Victor Mutasi** (supra) as according to him, the prosecution proved the offence against the appellant beyond reasonable doubt.

Mr. Kabelwa opposed the fifth ground of appeal on the basis that according to PGO, each police case file must have a complainant, and that a complainant is any person who reports an incident. He submitted that the complainant in the present matter was PW2, the mother of the victim, together with her daughter, PW1. He contended that in criminal cases, criminal proceedings cannot commence until the accused person has been given a charge sheet, facts of the case in accordance with section 192 of the CPA, and complainant's statement. He argued that the fact that the case was heard by the trial court, means that the Appellant was given the

complainant statements. He argued that all prosecution and defence witnesses were called to testify and the appellant was given right to cross examine the witnesses. He submitted that the trial was fair, and the appellant was not prejudiced, and thus, the ground of appeal was unmerited.

In opposing the seventh ground, Mr. Kabelwa averred that the offence against the Appellant was proved beyond reasonable doubt as the prosecution managed to prove the four ingredients of the offence of rape due to the nature of the offence committed against the child of tender age. He contended that PW2 proved, as reflected on page 9 of the proceedings that her daughter was 12 years by tendering birth certificate which was not objected to by the appellant. He submitted further that the prosecution established penetration through the evidence of PW1 on page 7 of the proceedings that the appellant raped her thrice, the manner the appellant raped her, and the places and the circumstances of the rape. He added that PW4 testified to have examined the victim on page 13 of the proceedings where she found the victim to have no hymen and tendered PF3 which was not objected to. He averred that PW1 testified to have been raped by the appellant by directly naming the appellant as the person who raped her in

October 2022 and on 12/02/2023. He prayed for dismissal of the seventh ground of appeal and the entire appeal for lack of merit.

Mr. Mashankara did not rejoin as according to him, the reply submissions did not affect or shake the appellant's submissions in support of the grounds of appeal before the Court.

Having heard the contesting submissions of the parties, my role is to determine whether the trial court's conviction and sentence against the appellant was incorrect both at fact and law. I find it crucial to begin with determination of the fourth ground of appeal as it goes to the root of the proceedings of the trial court.

It is true as contended by Mr. Mashankara, learned counsel for the appellant and admitted by Mr. Kabelwa, learned state attorney, and as reflected on page 20 of the typed proceedings and the hand written proceedings of the trial court, that the appellant (DW1) was not accorded with right of re-examination upon being cross examined by the learned state attorney. I agree with Mr. Mashankara and Mr. Kabelwa that the appellant's denial to re-examination constitute a denial of the appellant's constitutional right of a fair hearing. I fully subscribe to the decision of the High Court in the case of **Victor Mutasi** (supra) where it was held on page 11 that:

".....I think this question need not keep this Court busy unnecessarily as it has already been established that, denial of such right is tantamount to denial of the right to a fair trial constituted under the right to be heard. It is trite law that, denial of the right to be heard vitiates the proceedings even in a situation where the same decision would have been arrived at by the court, had the party been heard on merits for the only one reason that, his natural right to be heard has been negated before his rights are taken away."

Guided by the authority above, since the appellant was denied a right to re-examination which is tantamount to denial of a right to fair hearing, the proceedings of the trial court are vitiated. I proceed to nullify the proceedings and resultant decision of the trial court.

Having nullified the proceedings of the trial court, I am bound to determine whether this is a fit case to order retrial as argued by Mr. Kabelwa, the learned State Attorney. Based on the conditions set out in the case of **Fatehali Manji v. Republic (1966) E.A 343,** my role is to analyze and reevaluate the entire evidence of the prosecution before the trial court, in order to ascertain whether an order for retrial will or will not enable the prosecution side to fill gaps in its case at the trial.

I will start with the evidence of PW1, the victim, and a child of tender age which according to the appellant, the same was taken, admitted and relied upon despite being received contrary to section 127(2) of the Evidence Act. The said section reads:

> *"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 to the court and not to tell any lies."*

From the above stated provision of the law, it is clear that the law demands the child of a tender age to give her evidence after making prior promise of telling the truth and not lies. It has been emphasized often that in reaching into that stage, the trial magistrate is required to ask the child witness some questions so as to test whether he/she understands the nature of an oath. This has been the position in numerous authorities of this court as well as the Court of Appeal. For instance in the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018, (unreported)** on page 13 through to 14, the Apex Court gave a broader interpretation of section 127 (2) and observed as follows:

"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..."

The court went on further and underlined that:

"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"*

In the case at hand, it is obvious from page 6 of the proceedings that the trial magistrate did not record the questions it asked and responses of PW1

to prove whether she understood the nature of the oath or promised to tell the truth. The extract of the proceedings on page 6 reads:

- *"I am 12 x 5 old*
- *I am a student of Bigwa Primary School – STD VII*

But yesterday I did not go to church. I was on the way back from Kisaki to my aunt. We have been taught in church that telling lies is sin.

***Court**: Having that test I find that PW1 understand the nature of oath, her evidence will be taken under oath.*

***PW1**: Aneth Nestory, 12 years, sworn and state as follows....."*

As clearly as it appears, the above extract of the trial court's proceedings indicates that the trial magistrate departed from the guidelines laid down by the Court of Appeal in the case of **Godfrey Wilson v. Republic** (supra). However, I am confident that as PW1 gave evidence on oath, the oath which she took before testifying carried a promise to tell the truth and not lies. It means that PW1's testimony had evidential value [**see the case of Ally Ngozi v. Republic, Criminal Appeal 216 of 2018** (unreported) on page 19].

Additionally, in the case of **Wambura Kiginga v. Republic, Criminal Appeal 301 of 2018** (unreported), the Court of Appeal insisted that in the circumstances where a *voire dire* test is improperly or mistakenly conducted, section 126 (6) of the Evidence Act can salvage the situation provided that certain conditions are met. Section 126(6) provides:

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender age or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth."*

In **Wambura Kiginga's case** (supra), the Court of Appeal took the position that the phrase 'notwithstanding the preceding provisions of this section' used in section 127(6) of the Evidence Act, meant that a conviction could base only on subsection (6) of section 127 of the Evidence Act even if other subsections in that section including subsection (2) is not complied with. On page 15, the Court stated:

"Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are; ***first, that there must be clear assessment of the victim's credibility on record and; second, the court must record reasons that notwithstanding non-compliance with section 127(2), a person of tender age still told the truth.***" [Emphasis added]

Applying the principles elucidated by the Court of Appeal in the authorities above, I safely hold that PW1's testimony was authentic as I view the contested oath she took before giving out her testimony in it carried a promise to tell the court the truth and not to tell lies as envisaged under section 127(2) of the Evidence Act.

However, in my careful scrutiny of the trial court's records, I have noted some shortfalls in the evidence of PW1 that have watered down the credibility of her evidence. I will begin with the delay in reporting the incident. As per records, the incident took place since October 2022 when PW1 was raped for the first time by the appellant to 12/12/2023 when she was raped by the appellant for another time until 15/02/2023 when it came into the knowledge of PW2, the victim's mother. The appellant complained

that PW1 named him after she was beaten by her mother. On the part of the respondent, he contended that PW1's silence about the incident was occasioned by the appellant's warning to PW1 not to disclose to anyone about the incident.

In my observation of the trial court's records, there were no explanation as to what kind of warning that the PW1 was given that made her not to disclose the incident to anyone, including her mother. I have asked myself, was it an oral warning or a warning accompanied by threats? How frightening the appellant was? How frightened PW1 became of the appellant? In the absence of answers to the above posed questions, it is safe to conclude that the prosecution evidence in that regard was wanting. In line with the above questions, I have assessed the connection between the warning and the manner in which the incidents of rape were happening. On page 7 of the proceedings, PW1 testified that the first time she was raped, she was coming from the shop, the appellant told her to wait for him but she did not. She testified that the appellant ran after her and when she reached the river she fell down and that is when the appellant raped her. The pertinent question is why didn't the appellant shout when the appellant was chasing her before she reached the river? The record is silent if PW1

was warned by the appellant not to disclose to anyone on the incident committed to her for the first time. It was expected for PW1 to inform at least her mother or anyone close to her. But she did not.

The other piece of PW1's evidence was that the incident took place at Mzee Mogela's farm on 12/02/2023. PW1 testified that the appellant went to that farm, called her and forced her into a certain house (*boma*) and thereafter raped her. According to the record, that is when the appellant warned her not to disclose the incident to anyone. Again, the question that bothers me is why didn't she shout for help when she saw the appellant coming and calling her? In my opinion, being a child of the age of 11 years, PW1 was capable of shouting for help in such a dangerous situation especially after the appellant had raped her before.

I have further noted that the incident occurred at Bigwa where there are residential houses. But neither the charge sheet nor the record of the trial court reveal the time within which the incidents took place, whether it was a day time or at night that would assist the court to assess the circumstances surrounding the incidences in which the offence was committed.

I have also noted that PW1 named the appellant as the person who raped her after she was beaten. This could be because of the warning which in my considered opinion, and in the circumstance of the case, was not proved to be sufficient to frighten or scare PW1 not to report the incident to her mother, or any close relative, including her aunt. It is my considered position that irrespective of the fact that PW1 named the appellant for first time after she was beaten by her mother, the delay in reporting has not been sufficiently justified to establish the credibility of PW1's evidence.

Based on my observations above, I fully subscribe to the principle stated in the case of **DPP v. Juma Chuwa Abdallah & Another** (supra) that delayed reporting dents the credibility of the evidence of the victims. In that case, the Court held that the victim's delay in reporting the incidents until when they were quizzed by the school administration, dented their credibility and reliability of their evidence to prove the charged offences.

In **Marwa Wangiti Mwita** (supra), it was held that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as the unexplained delay or complete failure to do so should put a prudent court to inquiry. In this case, the

reliability and credibility of the evidence of PW1 to prove rape was impaired by her delay in reporting the incident.

I find the case of **Felick Kilipasi** (supra) distinguishable from the present case. In that case, like in present appeal the *voire dire* test was mistakenly conducted. But in that case, the same was conducted 'off record'. The Court of Appeal held that irrespective of the mistaken conduct of *voire dire* test, section 127(6) can salvage the situation since the evidence of the victim was credible and true. In the present appeal, the evidence of PW1 was doubtful and therefore incredible.

Having so found, that alone suffices to resolve the doubts to the advantage of the accused person. I am saying so because, PW1 being the only eye witness in the incident of rape, the proof that the offence was committed against her by the appellant highly depended on her testimony.

Further, as the conviction and sentence of the appellant was found on PW1's evidence, if her evidence was unreliable and incredible, the remaining evidence of PW2, PW3, PW4 and PW5 cannot sustain the appellant's conviction. I am of a settled opinion that the evidence of PW4 and Exhibit PE2 only proved that PW1's vagina was penetrated and loose, but couldn't establish that it was the appellant who raped her.

Upon the above findings, I am satisfied that the prosecution evidence relied upon by the trial court to ground the appellant's conviction was weak and doubtful to prove the charge of rape levelled against the appellant. The unreliability and incredibility of the evidence of PW1 to whom the best evidence in rape cases comes from, diminished the prosecution case against the appellant. I hold that the prosecution failed to prove the offence of rape against the appellant beyond reasonable doubt.

In the circumstance, I find that an order for retrial will be improper under the circumstances where the prosecution failed to prove the offence against the appellant on the required standard. I find merit in the appeal and proceed to quash the trial court's conviction against the appellant, set aside the sentence and order his immediate release from prison, unless he is held therein for other lawful cause.

It is so ordered.

DATED at **MOROGORO** this 29th day of February 2024.

H. A. KINYAKA

JUDGE

29/02/2024