THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 03 OF 2023

BARAKA MWINUKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the District Court of Iringa at Iringa)

(Hon. E.A. Nsangalufu - SRM)

dated the 01st day of November, 2022

in

Criminal Case No. 20 of 2022

JUDGMENT

Date of Last Order: 12/02/2024 &
Date of Judgment: 08/03/2024

S. M. Kalunde, J.:

The appellant, BARAKA MWINUKA, was charged and convicted with an offence of rape contrary to sections 130(1) & (2)(e) and 131(1) of **the Penal Code [Cap. 16 R.E. 2019]** on the charge in the indictment that on the 10th day of August, 2021 at Mafifi Area within the District and Region of Iringa had carnal knowledge of ADM, (name and identity withheld in accordance with **Chief Justice's Circular No. 2 of 2018**), a girl of eleven (11) years.

In a nutshell, the prosecution case as obtained from the records of the appeal indicate that, at the time of the incident, ADM (hereinafter referred to as "the victim or **Pw1**") was staying with her aunt KEM (**Pw2**) at Mafifi Area within the District and Region of Iringa. She was a primary school student. Apparently, the appellant was their neighbor at the area. Pw1 narrated that on the day of the incident the appellant went to their house and offered her potato chips. Thereafter, the appellant took Pw1 into her room. Whilst in the room they all undressed and then the appellant inserted his penis into her private parts. Pw1 was in pain as the appellant was allegedly committing the monstruous act. All this time the victim's parents were not at home. Thereafter, the appellant threatened to beat her if she said anything to anybody including her parents.

In her further testimony, Pw1 narrated that the appellant raped her many times. She also recounted that on the fateful day, her mother went into her room a found wet mattresses and potato chips. On being interrogated, Pw1 informed Pw2 that she was raped by the appellant. Thereafter, the appellant was arrested whilst the victim was taken to the hospital for medical examination where it was discovered that she was raped.

The victim was cross-examined by the appellant and the trial court asked clarifying question. During clarification questions, the victim was asked about the fluid on the mattress, she replied that she never knew the source and never saw any fluid during the sexual encounter. In further questioning, the victim stated that initially she was raped by her father and the incident was reported to her mother and the Police Station in Dar es Salaam.

For her part, Pw2 testified that the victim was her niece. She stated that the victim was initially staying with her parents in Dar es Salaam. Later she moved in with her, following a request from her mother. The witness recounted that, on the 10th day of August, 2021, around evening hours, on her return from work, she inspected the victim's room and noted that she had changed her bedsheets. When she was further probed, the victim turned her previous bedsheets which were covered in sperms. In further interrogation, the victim confessed that she was raped by the appellant and that the appellant has carnally known her for a long time. She reported the matter to the ten-cell leader. When they confronted the appellant, he denied the allegation. The next day the matter was reported to the police. At the police

station the victim was given Police Form No. 2, requesting for her medical examination by a medical expert.

The victim was medically observed at Ngome health Centre by Dr. Noah Masamwbile (**Pw3**). In his testimony, he informed the trial court that on the 10th day of August, 2021, at around 20:00Hrs, he conducted a medical examination on the victim. He stated that the victim was brought by her aunt, Pw2, for allegations of rape. In his inspection, Pw3 observed that the victim's vagina had hole untypical of a girl of 11 years. He also observed bruises inside the labio majora with some fluids. Upon conclusion of his examination, Pw3 resolved that the victim was penetrated by a blunt object. The Medical Examination Report (PF3) was admitted in evidence as **Exhibit P1**.

Two days later, on the 12th day of August, 2021, WP6906 CPL Pili (**Pw4**) was assigned to investigate the matter. She narrated that efforts to track the appellant were not fruitful until around January, 2022 when he was finally arrested. Upon his arrest, the charges in the present case were preferred against him.

Briefly, in defence the appellant (**Dw1**) denied raping the victim. He maintained that at the time the incident is alleged to have happened he was nursing his brother Patrick Alfred Mwinuka (**Dw2**) who was

admitted at Iringa Referral Hospital. Dw2 confirmed that at the time of the incident the appellant was nursing him in hospital where he was being treated for Covid 19.

In convicting the appellant, the learned trial magistrate relied on the oral testimony of the victim and the case of **Seleman Makumba vs. Republic** [2006] TLR 375 to form an opinion that she was credible and her evidence was corroborated by Pw2, Pw3 and exhibit P1, the medical examination report.

The appellant, who, at the hearing of the appeal appeared in person, fended for himself. He had earlier on filed a memorandum of appeal comprising eight grounds of appeal, which could be conveniently grouped into the following major complaints: **First**, that the evidence of the victim was contradictory as she also testified that she was initially raped by her father who was living in Dar es Salaam; **Second**, that Pw1 and Pw2 contradicted one another as to the nature of the fluid found on the victims bedsheets; **Third**, that the victim failed to prove before the court that she was raped on the specific dates mentioned in the charge sheet; **Fourth**, that trial court should have drawn a negative inference on the prosecution witnesses who were members of the same family and had intended to frame the appellant for crimes

committed by the victim's father; **Fifth,** Pw3 evidence that the victim had no hymen should not have been relied upon by the trial court as the victim was already penetrated by her father; **Sixth**, the prosecution case was not proved beyond reasonable doubt.

In total, the appellant contends that in view of the above-mentioned discrepancies in the prosecution case, it could not be said that the prosecution case was proved beyond reasonable doubt. Thus, he prayed that his grounds of appeal be adopted and considered and the appeal be allowed.

The respondent, Republic was represented by Ms. Rehema Ndege, learned State Attorney. On taking the stage, the learned state attorney declared that she was opposing the appeal. She then proposed to begin her submission on the consolidated first, fourth and seventh complain in the memorandum of appeal as they all related to contradictions and inconsistencies in prosecution witness testimonies. Ms. Ndege stance was that there was no material inconsistency between prosecution witnesses. While conceding that the victim stated that she was initially raped by her father, the learned counsel argued the case before the trial court concerned an incident where the victim was raped by the appellant. The learned counsel argued that, the fact

that the victim was firstly raped by her father did not give the appellant a right to rape her again. The learned counsel argued that, through the evidence of the victim, the prosecution established that the charges against him were proved to the required standard. To support her argument, the learned state attorney cited the case of **Seiph Athumani Kibinda & Others vs Republic** [2022] TZCA 106 (8 March 2022) TANZLII. In the end, the learned counsel advised the first, fourth and seventh grounds be dismissed for lack of merits.

The learned state attorney also opted to consolidate the third and sixth grounds of appeal which had doubted whether the prosecution proved the precise dates when the incident took place. On this, the learned state attorney argued that despite the fact that the victim failed to state the exact dates as stated in the charge sheet the appellant knew the dates as they were stated by Pw2. The learned counsel argued that, being eleven years, the victim could not have a recollection of the accurate dates. To support this argument, the learned state attorney cited the case of **Jamali Ally @ Salum vs Republic** [2019] TZCA 32 (28 February 2019) TANZLII. Son another limb, the learned state attorney cited the case of **Nyerere Nyague vs Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May

2012) TANZLII, for an argument that since the appellant failed to cross examine the victim on the aspect, inference should be drawn that he accepted what was said. In her view, the two grounds lacked merits.

Regarding the inconsistencies between Pw1 and Pw2 as to the source of the fluid on the bedsheets, the learned counsel submitted that failure to state the source of the fluid was in no way suggestive that the victim was not raped. For this she cited the case of **Yasin Ramadhani Chang'a v. Republic** [1999] T.L.R. 489.

Countering the complaint that Pw3 failed to notice that the victim had long lost her virginity, Ms. Ndege submitted that Pw3 had a duty to establish that the victim was penetrated and not who perpetrator of the incident. Lastly, the learned state attorney bragged that the prosecution managed to prove the case to the hilt by establishing that the victim was under the age of majority, that she was penetrated and that it was the appellant who is responsible for the penetration. The learned counsel prayed that the entire appeal be dismissed for being devoid of merits.

The appellant, a lay person, had nothing of substance to rejoin. He just prayed that his appeal be considered and allowed.

I have carefully scrutinized the record of appeal including the decision of the trial court. I have also heard and considered the submissions from either side, having done so I have chosen to disregard all other grounds of appeal and confine my determination to the last ground of appeal, that is whether the prosecution proved the case beyond reasonable doubt. In light of the above observation, I shall begin by stating that I have noted that two interconnected issues arising out of this general issue; one, whether Pw1 was a credible witness; and two, whether the charge was proved to the hilt. I gather that responding to the above issues is sufficient to dispose of this appeal for the reasons that will evolve during this judgment.

In resolving the above main issue, I propose to begin by re-stating the now settled principle of law that the best evidence in sexual offences comes from the victim. The leading authority on this is **Seleman Makumba's** case (supra). The decision in that case was followed by the Court of Appeal in several of its decisions including in the cases of **Mbaga Julius vs Republic** [2016] TZCA 274 (24 October 2016) TANZLII; **Nasibu Ramadhani vs Republic** [2019] TZCA 389 (8 November 2019) TANZLII; **Julius Kandonga vs Republic** [2019] TZCA 398 (4 November 2019) TANZLII; **Amir Rashid vs Republic**

[2020] TZCA 1806 (7 October 2020) TANZLII; and **Seiph Athumani Kibinda & Others** (supra) (all unreported).

In the case of **Nasibu Ramadhani vs Republic** (supra), the Court (Juma, C.J), at page 14, having quoted the decision in the case of **Seleman Makumba's** case (supra) observed as follows:

> *"We agree with the learned Senior State Attorney that the evidence of the victim disclosed the necessary ingredient of rape. We similarly agree that the evidence of the victim of sexual offence can stand on its own feet to secure a conviction. As this Court referred to the import of section 127 (7) of the Evidence Act in BAKARI HAMISI VS. R, CRIMINAL APPEAL NO. 172 OF 20C5 (unreported), a conviction may be founded on the evidence of the victim of the rape if the court believes, for the reasons to be recorded, that the victim witness is telling nothing but the truth."*

In the instant case, if the prosecution case was to succeed in proving what happened on the fateful day, the evidence had to come from Pw1, the victim. It is unfortunate that, looking at the records, it would appear that her evidence was taken in contravention of the provisions of section 127 (2) of **the Evidence Act [Cap. 6 R.E. 2022]**. For ease of appreciation of what transpired in court I find it apposite to reproduce what transpired on the 11th day of July, 2022, when the evidence of the victim was taken as reflected on page 11 to 12 of typed proceedings of the trial court. The records read:

*"**PROSECUTION CASE OPENS***

***PW1: ADM**, 11 years, Mafifi, S.T.D VI at Ngome Primary School.*

Court: A witness is a child of tender years, her promise is hereby recorded.

Court: What do you promise?

Witness: I promise to tell nothing but the truth.

Court: Section 127(1) of the Tanzania Evidence Act complied with.

S.g.d: E. Nsangalufu-SRM

11/07/2022"

The next question is whether the recording of the above statement complied with the provisions of section 127(2) of the Evidence Act. In resolving this issue, I propose to preface my resolution with a salutary principle of law that all witness must testify under oath or affirmation. This is a requirement under section 198 (1) of **the Criminal Procedure Act [CAP 20 R.E. 2022]** which requires every witness in a criminal case, subject to the provisions of any other written law, to give evidence upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act **[CAP 34 R.E. 2019]**. The entire section 198 of the CPA provides that:

*"198.- (1) Every witness in a criminal cause or matter shall, **subject to the provisions of any other written law to the contrary**, be examined upon oath or*

affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act.

(2) Where an accused person, upon being examined, elects to keep silent, the court shall have the right to draw an adverse inference against him and the court and the prosecution may comment on the failure by the accused to give evidence."

As specified above, unless it is provided different in any other written law, every witness in a criminal trial must be examined upon an oath or affirmation. The provisions of section 127(2) of the Evidence Act provides an exception to the above general rule. For ease of appreciation, section 127(2) of the Evidence Act 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."

In the case of **Ramson Peter Ondile vs Republic** (Criminal Appeal 84 of 2021) [2022] TZCA 608 (6 October 2022) TANZLII, the Court Appeal (Kwariko, J.A) interpreted section 127(2) of the Evidence Act above to mean that, if the child of tender age understands the nature and meaning of an oath, he should give evidence on oath or affirmation or otherwise, if he does not, he will be required to promise to the court to tell the truth and not to tell lies.

The reading of section 198 of the CPA and section 127(2) of the Evidence Act, as well as the above decision leads me to a conclusion that before taking the evidence of a child of tender age a trial court must first conduct an intelligence test to first ascertain whether the child understands the meaning and nature of an oath or affirmation. If he does then the court must administer an oath or affirmation and proceed to record the testimony. Thus, if a child replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies. See **Issa Salum Nambaluka vs Republic** (Criminal Appeal 272 of 2018) [2020] TZCA 10 (21 February 2020) TANZLII.

This view was confirmed by the Court of Appeal (Mwampashi, J.A) 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 both scenarios, before arriving at its conclusion, the trial court must put some questions to ascertain the child's competence in understanding and responding to basic questions. It is for this reason that, in the case of **Godfrey Wilson vs Republic** (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019) TANZLII, the Court (Mkuye, J.A), at page 13 and 14, observed that:

> *"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 y 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." [Emphasis is mine]*

In the instant case, and as I have demonstrated above, the trial court recorded the testimony of Pw1 on the basis of a promise to the court to tell the truth and not to tell lies. However, there are several irregularities regarding how the trial court arrived at such a conclusion. Firstly, it is evident on record that the trial court failed to first test the competence of Pw1 whether she understood the meaning and nature of an oath. Secondly, it is also clear that she did not promise to ***"tell the truth and not lies"***. For a child of tender age, that was not an assurance that she was not going to tell lies. Thirdly, the learned trial magistrate did not make any specific enquiry to ascertain whether the witness, who was a child of tender age, understood the meaning of telling the truth and not lies. The witness was only asked on what she promised. That was is not what is required by law. The law requires a trial magistrate to put forward simplified questions to test the

intelligence of a witness of tender age. This was not done in the present case.

Regarding the consequences of non-compliance with the provisions of section 127(2) of the Evidence Act (supra), the Court in the case **Omary Salum @ Mjusi vs Republic (**Criminal Appeal 125 of 2020) [2022] TZCA 579 (27 September 2022) TANZLII, cited it decision in the case of **Godfrey Wilson vs Republic** (supra) and **John Mkorongo James vs Republic** (supra), and observed that:

> *"In all the cited cases, failure to comply with section 127 (2) of the Evidence Act, rendered the evidence of the witness of tender age with no evidential value thus deserving to be discounted from the record. We are of the same view that the evidence of PW2 which was taken contrary to the law lacks evidential value and we hereby discount it from the record."*

Like their justices in the Court of Appeal, having made a finding that the evidence of Pw1 was recorded in contravention of provisions section 127(2) of the Evidence Act (supra) I proceed to expunge the same from the records.

Having discounted the evidence of the victim (Pw1) from the record, the question to determine is whether there is any other remaining evidence strong enough to sustain the appellants conviction.

I have dispassionately examined the remaining evidence and observed that the said evidence is insufficient to sustain the appellants conviction.

To start with, there were glaring inconsistencies in the prosecution case concerning the reporting of the matter and examination of the victim. The prosecutrix was not forthcoming on this matter. For her part, Pw2 narrated that on the 10th day of August, 2021, she got back home at around 18:00Hrs, inspected the bed and discovered the victim had removed her bedsheet which allegedly had some fluid which she suspected were sperm. She interrogated the victim and victim stated that she was raped by the appellant. Pw2 called the victims aunt and uncle and together they went to report the matter to the village chairman. Together with the village chairman they went to interrogate the appellant who denied his involvement. According to Pw2, it was after the appellants denial that the matter was reported to the police and PF3 was issued.

Pw2 was cross-examined by the appellant regarding the date of reporting the matter to the police. Her response was that the matter was reported to the police the next day, that is on the 11th day of August, 2021. The Republic did not re-examine her to clarify this

stance. Astonishingly though, Pw2 testimony that the incident was reported to the police on the on the 11th day of August, 2021, is in direct collision course with that narrated by Pw3. In his testimony, Pw3 stated that while on night shift on the 10th day of August, 2021, at around 20:00Hrs, he attended the victim for allegations of rape. Further to that, the medical examination report (Exh. P1) indicates that it was prepared on the 10th day of August, 2021.

Looking at the above testimony of Pw2 and Pw3 two issues arise here: **one**, how could the doctor (Pw3) attend and examine the victim when at that time the matter had not even been reported to the police? As pointed out above, Pw2 narrated how she discovered the incident, notified relatives, reported the matter to the ten-cell leader. Thereafter, they went to interrogate the appellant. According to her, it was the next day that the matter was reported to the police. **Two**, even assuming that the matter was actually reported on the same day and the PF3 was actually given to the victim, which it is not, how is it possible that Pw2 managed to inspect the bedsheet, interrogate the victim, call her relatives, go to the ten-cell leader, interrogate the appellant, report the matter to the police and have the victim examined within two hours, that is from 18:00Hrs, when Pw2 arrived home at around 20:00Hrs,

when Pw3 allegedly examined the victim. However, looking at the records, it is not even two hours, because the medical examination report (Exh. P1) was prepared at around 19:00Hrs, on the 10th day of August, 2021. This therefore presupposes that the whole process occurred in an hour. This fact is not supported in evidence. The above inconsistencies and lapses raise doubts in the credibility of Pw2 and Pw3 as well as the prosecution case in general. It is also unfortunate that their inconsistencies were not observed and dealt with by the trial court. As it is, the inconsistencies and discrepancies must be construed in favour of the appellant.

Even assuming without deciding here that the victim's testimony was properly recorded, Ms. Ndege, argued that the evidence of the victim alone was sufficient to ground conviction. However, even if I were to go along with Ms. Ndege's argument that the evidence of the victim alone was sufficient, that alone would not guarantee truthfulness. As I am aware when it comes the evidence of the victim, her credibility is also important. In the instant case, having closely examined the records, I have made a finding that the credibility of the victim was questionable. I will illustrate: Firstly, it is strange that she managed to report her own father following a rape incident but failed to

mention or report a stranger and neighbor to any person; Secondly, as pointed out above, she failed to even state the date or month when the incident took place.

As I heard to conclude on this matter, and now that the victim stated categorically that she was once raped by her own father, I think I feel obligated to say a word or two about this unfortunate revelation. This highlights the extent at which the criminal justice system has been placed on a crossroad by competing social-political and economic dimensions. The appellants contention here seems to be that he was framed to cover up the victim's rape by her own father. But what is more striking here is that the victim reported to her mother that she was penetrated by her own father. Thereafter, the matter was reported to the police in Dar es Salaam. It would appear that the investigation was halted; the victim was shipped to Iringa to stay with her aunt as a coverup. The police did not take up the matter and investigate it any further. I guess, even after the revelation in the instant case nothing has happened. In that, no action has been taken.

Another most astonishing fact is that, there are chances that we have a possible pedophiliac father who is wondering around executing his sexual fantasies with prepubescent children. He knows he might get

a protection from his family and that he can get away with it because the police cannot do anything about it. At the center of all this is a wife and mother at a crossroad. In societal terms, she had to choose between marriage and husband on one side and her daughter on the other. If what is said is correct, it seems that she opted to throw away her baby girl under the bus to protect her husband and marriage. That is a world we are living, and that's how we are raising our future mothers. It is ironical that this decision is coming on the eve of celebrating women's' day for 2024.

For the forgoing reasons, I find merit in the sixth ground of appeal. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I further order his immediate release from prison unless held for other lawful reasons.

The appeal is disposed accordingly.

DATED at **IRINGA** this **08TH** day of **MARCH, 2024.**

THE HIGH COURT OF TANZANIA

S.M. KALUNDE

JUDGE