IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: WAMBALI, J.A., FIKIRINI, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 249 OF 2021

DEUS KATTO @ KABAIZI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Resident Magistrates' Court of Bukoba with Extended Jurisdiction)

(Luambano-SRM – Ext. Juris.)

dated the 9th day of March, 2021

in

Criminal Appeal No. 18 of 2021

.....

JUDGMENT OF THE COURT

4th & 13th December, 2023.

FIKIRINI, J.A.:

The Resident Magistrates' Court of Bukoba at Bukoba convicted the appellant, Deus Katto @ Kabaizi, as charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap 16 [R.E. 2002 now 2022], in Criminal Case No. 145 of 2019. It was alleged that on 26th May, 2019 at Bweyunga Village within Misenyi District in Kagera Region, the appellant did have carnal knowledge with a girl aged eight years old whose name is withheld or shall be referred to as PW1 or the victim.

He was sentenced to life imprisonment. Aggrieved, he unsuccessfully appealed to the High Court, in Criminal Appeal No. 57 of 2020, in which the matter was assigned to Luambano, the Senior Resident Magistrate with Extended Jurisdiction and registered as Criminal Appeal No. 18 of 2021. Still believing himself to be innocent, he has lodged this appeal containing eight (8) grounds challenging both the conviction and sentence.

Before discussing the grounds of appeal and the submissions by the respondent Republic, we find it apt to summarize the facts and evidence before the trial court, eventually leading to this appeal. What is gathered from the record of appeal is that the victim who testified as PW1 was staying with Jasinta Felician (PW2) - her auntie in Kanyigo Ward. On the fateful night after dinner, PW1's auntie went to buy kerosene from a nearby shop, leaving her at home. While at home alone, the appellant came in through the back door. PW1 managed to identify the appellant using light from the lit lantern lamp placed in the living room where the victim was seated. The appellant went straight and sat where PW1 was seated. Shortly thereafter, PW1 left for the bedroom she was sharing with PW2, carrying the lit lantern lamp, and went to bed. A little while later, the appellant followed her from the sitting room into the room. PW1 had already covered herself and was in

bed. The appellant using the lantern lamp placed on the floor, flashed the light to PW1 before he proceeded to rape her. He started by undressing her skirt, shorts and underwear and went on top of her fully dressed. He then unzipped his trousers and took off his manhood and inserted it in PW1's private part. PW1 explained that she had been hurt and when the appellant got off her and left, she checked herself and found blood coming from her private part.

PW1's account was supported by PW2, who described meeting the appellant she knew as his neighbour on her way to the shop, moving in the direction she was coming from. She proceeded to the shop and came back. On her coming back, she found PW1 half naked, standing by their bed, bleeding. On inspection, she found blood coming from her private parts and faeces from her anus. Upon inquiry, PW1 mentioned "Takabaizi," the appellant's alias name commonly used in the village. An alarm was raised and people gathered. Once again, PW1 mentioned "Takabaizi," the appellant as the one who had raped her. The matter was reported to PW3, the Hamlet Chairman, before whom PW1, once more mentioned "Ta Kato Kabaizi" as the one who raped her. PW3 inspected PW1's private parts and found her bleeding. PW1 was later taken to hospital, where she was examined and issued with a PF3 (exhibit P3). Later, the chairman and other people went to hunt for the

appellant, who was arrested at his home and taken to Kanyigo Police Station.

The appellant was the sole witness testifying as DW1 in the defence case. He denied committing the offence. Satisfied that the prosecution was able to prove all the three ingredients of the offence of rape, namely: penetration, age and who committed the offence and that the defence case did not raise any doubt, the trial court, accordingly convicted and sentenced the appellant as intimated earlier in this judgment.

In his petition of appeal, the appellant had in vain raised two grounds of complaint, challenging the application of section 127 (2) of the Evidence Act, Cap. 6 (the Act) as amended vide the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 and admission of exhibit P3 – PF3 contrary to what the law requires. In its well-reasoned judgment, the first appellate court dismissed the appeal hence the present appeal predicated on the following paraphrased grounds: **one,** that the prosecution failed to prove its case instead relied on the balance of probabilities; **two**, that the trial court wrongly admitted evidence not proved scientifically; **three,** that the prosecution evidence was untruthful, fabricated, unreliable and could not support conviction; **four,**

that PW1's evidence was of no value since section 127 (2) of the Act was not complied with; **five,** that PW1's evidence was invalid for failure to comply with section 127 (2), there was thus no evidence to be corroborated by that of PW2, PW3 and PW4 to sustain conviction; **six,** that the first appellate court failed to re-evaluate the evidence adduced by the prosecution before it made it's decision; **seven,** that both two lower courts erred in convicting and sentencing the appellant while there was no DNA test conducted to ascertain whether it was the appellant who raped PW1; and **eight,** that the prosecution case was not proved beyond reasonable doubt.

During the hearing, the appellant was present unrepresented and therefore fended for himself, whereas the respondent Republic was represented by Ms. Judith Mwakyusa, learned Senior State Attorney and Ms. Edith Tuka, learned State Attorney.

Addressing the Court, the appellant adopted the grounds of appeal he advanced for the Court's consideration. The respondent Republic, through Ms. Mwakyusa, learned Senior State Attorney, opposed the appeal. Before proceeding with arguing the grounds of appeal, the learned Senior State Attorney had the following to say: that out of the eight (8) grounds raised, only one had been raised and decided on by

the first appellate court, which is the 4th ground on non-compliance with section 127 (2) of the Act. The 6th ground on evaluation of evidence and 8th ground of proof on the prosecution beyond reasonable doubt being legal points deserved attention. She thus answered those three grounds, namely: one, that section 127 (2) of the Act was not complied with; two, failure by the first appellate court to re-evaluate the evidence and three, whether the prosecution ably proved their case beyond reasonable doubt.

Submitting on the first ground on omission to observe section 127 (2) of the Act, she asserted that the provision was complied with. Substantiating her point, she referred the Court to page 12 of the record of appeal, where PW1 promised to tell the truth. She argued that even though PW1 did not promise she would not lie, her evidence was competent and properly received, as she promised to tell the truth. Buttressing her point, she cited the case of **Sixmund Angelus Masoud v. R,** Criminal Appeal No. 85 of 2021, [2023] TZCA 17601(5 September 2023, TANZLII) in which the Court had the opportunity to grapple with the same issue on the application of section 127 (2) of the Act and settled that once a witness has promised to tell the truth it means she/he will not lie. The learned Senior State Attorney discarded the first ground as meritless.

The second ground on failure by the first appellate court to re-evaluate the evidence was equally met with fierce resistance. On this point, the learned Senior State Attorney referred the Court to page 66 of the record of appeal. It was her submission that the first appellate court considered all the issues raised and, as a result, expunged the PF3 and the Doctor's findings.

She further submitted that the evidence was re-evaluated and all the elements required to prove the charge of rape were considered as articulated in **Selemani Makumba v. R** [2006] T. L. R. 379, in which it was decided that the victim's evidence could suffice and warrant conviction. Likewise, PW1's evidence was sufficient to ground conviction in the present appeal. She impressed upon the Court to find the ground devoid of merit.

The third ground was whether the prosecution had proved its case beyond reasonable doubt. On this point, the learned Senior State Attorney contended that the evidence of PW1, PW2 and PW3 was solid and good enough to prove the prosecution case beyond reasonable doubt.

Expounding on that, she itemized the following: identification of the appellant. On this aspect, she contended that PW1 on page 13 of

the record of appeal identified the appellant using the lantern lamp light. And the fact that the appellant on page 35 of the record of appeal admitted knowing PW1 tightened the identification evidence. In addition, she named him to PW2 – her auntie right away and later to PW3, as indicated on pages 16 and 22 of the record of appeal, respectively. Moreover, the appellant when interrogated by PW3 as shown on page 23 of the record of appeal, had nothing to say to refute the accusation.

Another item explained by the prosecution was that it proved the victim's age. Through PW2, it was revealed that PW1 was born on 13th November, 2011 and a clinic card issued showed she was eight years old.

Besides the above item, the learned Senior State Attorney also submitted on the credibility of the three witnesses believed and relied on by the trial court to ground conviction. She contended that the trial court found all three witnesses credible, although PW1 and PW2 were related.

Probed by the Court on how long it took PW2 to come back, Ms. Mwakyusa responded that the record is silent; however, she was quick to argue, that it did not discredit PW1's identification.

In winding up her submission, the learned Senior State Attorney invited the Court to apply retrospectively the amendment of section 127

of the Act, which added subsection (7) vide the Legal Sector Laws (Miscellaneous Amendments) Act, 2023. In the end, she urged us to dismiss the appeal for lacking merit.

The appellant had nothing to say in rejoinder besides pressing that his appeal be allowed, a sentence set aside, followed by his release from prison.

We have duly considered the grounds of appeal raised by the appellant and we agree that the same can be compressed in the three grounds submitted by the learned Senior State Attorney.

In determining this appeal, we shall remain alive to the fact that this is the second appeal. And therefore, we shall only interfere, if the evidence on the record has not been subjected to adequate scrutiny by the trial court or the first appellate court, resulting in a miscarriage of justice or violation of some principles of law or procedure. See: **Joseph Safari Massay v. R**, Criminal Appeal No. 125 of 2012, and **Felix s/o Kichele & Another v. R,** Criminal Appeal No. 159 of 2005 (both unreported).

In determining this appeal, starting with the first ground on non-compliance to the provisions of section 127 (2) of the Act, this ground has no merit. We say so because our examination of the record of

appeal, particularly on page 12, clearly reflects how PW1 had been processed before giving evidence. The process started with her being interviewed by the trial magistrate and besides providing answers to the questions asked, she promised to tell the truth. Content that PW1 who did not understand the meaning of oath or affirmation, had promised to tell the truth, the trial magistrate correctly allowed her to give evidence without taking oath or being affirmed. The provision of section 127 (2) of the Act is couched as follows:

> *"127-(2) A child of a 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."*

Although in the present situation, PW1 did not complete the whole phrase that "she will not tell any lies", we do not think by not reciting the last part of the requirement; she had come short of the promise that she would tell the truth. Promising to tell the truth in itself suffices to say one would not tell lies. The pertinent fact is that the child of a tender age, once she/he appears in court to testify and has been processed by being asked questions and finally, a promise to tell the truth and not lies are made, compliance with section 127 (2) of the Act, is fulfilled. We had come across such a challenge before. In the case of

Sixmund Angelus Masoud (supra), in which the Court, among other cases, referred to the case of **Mathayo Laurence William Mollel v. R**, Criminal Appeal No. 53 of 2020 [2023] TZCA 52 (20 February 2023, TANZLII), which we discernibly reiterated that: -

> *"We understand the legislature used the words "promise to tell the truth to the court and not tell lies." We think tautology is evident in the phrase, for, in our view, "to tell the truth" simply means "not to tell lies." So, a person who promises to tell the truth is in effect promising not to tell lies."*

Thinking logically, we are without a doubt that PW1 had promised to tell the truth, meaning she would not tell lies. This is because the trial magistrate recorded what transpired on pages 12 and 13 of the record of appeal, indicating PW1's promise to tell the truth to the court, after answering a few questions put to her. The procedure applied was in line with our decision in the case of **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 [2019] TZCA 109 (6 May 2019 TANZLII), in which we stated:-

> *"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 the 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."

Since the trial magistrate is on record to have done so, it is, thus, our considered view that the provision of section 127 (2) of the Act was complied with and hence agree with the learned Senior State Attorney's submission that there was no omission warranting faulting PW1's evidence as to have been taken without complying with the requirement. This ground is without any merit and is dismissed.

Our next ground for consideration is the complaint that the first appellate court did not re-evaluate and analyze the evidence. Again, we are not at one with the appellant. Our scrutiny of the record of appeal revealed that it did re-evaluate the evidence in detail. Its re-evaluation began by listing the ingredients required to establish a charge of rape as

outlined in the case of **Selemani Makumba** (supra) and gauged PW1's evidence if it falls within the ambit of what has been prescribed.

In **Selemani Makumba's** case, the Court established what should be proved, setting out two categories. One for adults and the other one for statutory rape, which covers any female person below 18 years of age, when it said:-

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in the case of any other woman where consent is irrelevant that there was penetration."*

Apart from setting the ingredients, the Court also resolved that true evidence of rape has to come from the victim. In addition to acknowledging that, the law has equally provided punishment upon conviction. For any woman above 18 years of age, the sentence is thirty years and for a girl below the age of 10 the sentence is life imprisonment. Since the appellant was charged with the offence under sections 130 (1) (2) (e) and 131 (3) of the Penal Code, as the victim was eight years old, his conviction attracted a life imprisonment sentence.

Against the established principles, we find the first appellate court closely re-evaluated the evidence adduced as reflected on pages 67–69 of the record of appeal. On page 67 it affirmatively considered the graphic description by PW1 of how the appellant raped her and the unpleasant experience she went through. It was in this nasty state PW2 found PW1, bleeding from her private parts. Upon inquiry as to what has occurred to her, PW1 recounted the ordeal and named the appellant as the person who raped her.

As pointed out in **Selemani Makumba's** case (supra), the best rape evidence comes from the victim. The first appellate court, based its findings on the explicit and graphic description by PW1 and was content that there was penetration. PW1 without hesitation named the appellant as the one who committed the offence. On page 68 of the record of appeal, the first appellate court, thoroughly re-evaluated the evidence and satisfied itself that there was no evidence to the contrary coming from the appellant which would have shaken the prosecution case. According to it, PW1's evidence alone sufficed and the conviction was correctly grounded.

Further in re-evaluation and analysis, it expunged exhibit P3 - PF3. Before the trial court, the appellant argued that PW5 was not a

competent person to tender exhibit P3 and that he wanted the Doctor who dealt with the exhibit to be summoned for cross-examination according to section 240 (3) of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA). The Doctor could not be found, and the trial magistrate concluded that the evidence carried no weight and proceeded to expunge exhibit P3. Despite the prosecution's vehement submission contending that PW5 was a competent witness to tender the PF3, the first appellate court found merit in the trial magistrates' decision on the expunged exhibit. We agree with the learned Senior State Attorney that it did re-evaluate and analyze the evidence on the record, resulting in a conclusion upholding the conviction and sentence meted out on the appellant. This ground lacks merit and is dismissed.

The third and last ground encompasses evaluation of the evidence in general, on whether the prosecution proved the case beyond reasonable doubt. This ground shall cover all other concerns raised by the appellant. As it can be fathomed from the record, the prosecution heavily relied on PW1, PW2 and PW3's evidence to secure the conviction. Their evidence covered identification, penetration and proof of age.

Starting with the identification evidence, we find that it was watertight. It was the prosecution evidence that although the offence was committed at night, PW1, on page 13 of the record of appeal, meticulously illustrated how she recognized and identified the appellant. First, she knew him and hence easily recognized him. The appellant did not controvert PW1's assertion. This is drawn and reflected from page 35 of the record of appeal. The appellant, when he was cross-examined, admitted that PW1 stays in their village, he knew where she stays, and so knew each other. Second, although the incident occurred at night and inside the house, PW1 using light from the lantern lamp, recognized and identified the appellant, who came in through the back door and went to sit with her in the sitting room. Even though PW1 did not state for how long she was with the appellant in the sitting room, since PW1 did not indicate anything threatening or did not know what would happen to her shortly thereafter, we are convinced, she was in a state of mind allowing her to correctly identify the appellant. Third, PW1, as shown on page 16 of the record of appeal, she outrightly mentioned him as "Takabaiza" the alias name the appellant is known with in the village, as the one who raped her, first to PW2, later to those who came after PW2 raised the alarm namely Rwehumbiza, Angelica, Thomas, Theonistina and ma Domitina and lastly to PW3 as reflected on page 22 of the record of

appeal. As stated in **Marwa Wangiti and Another v. Republic** [2002] T. L. R 39, the ability of a witness to name the suspect at the earliest opportunity tends to render assurance of the reliability of his/her evidence. PW1's early naming of the appellant in the present case has reinforced the credibility and reliability of her evidence, making the identification evidence irrefutable.

More so, the appellant could not challenge the above piece of evidence. First, when PW3 interrogated him as shown on page 23 of the record of appeal, while he was in the company of Diocles Lushasi and Steven Augustine when he went to arrest him if he raped the victim. The appellant did not respond. Second, during cross-examination, the appellant did not ask a single question to counter the evidence by PW1, PW2 and PW3. In **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010 [2012] TZCA 103 (21 May 2012, TANZLII), we observed that failure to cross-examine on a vital point suggests admission of the said fact. Failure by the appellant to respond to the question put forward by PW3 and cross-examine PW1, PW2 and PW3 when given the opportunity to clear himself or deny the allegation places him in an awkward place.

In addition to the identification evidence, penetration one of the elements to be considered, was established and proved. Both PW2 and PW3 who examined PW1 found her bleeding from her private parts. And when she was asked who did that to her, she outrightly named the appellant. Hand in hand with proving penetration, the prosecution side proved that PW1 was eight years old, hence under eleven years of age as she was born on 13th November, 2011. No evidence was given contrary to that stated by PW1 and supported by PW2.

In its totality, the trial court relied solely on the evidence of PW1, PW2 and PW3 to convict the appellant. Despite PW1 and PW2 being related, still the trial court found them credible witnesses. We find no reason to depart from the concurrent findings of the two lower courts.

Lastly, we wish to react to the prayer by the respondent that we retrospectively apply the amendment made to the Act. We think the stance in our previous decisions has covered the application of section 127 (2) of the Act fittingly. As discussed in this judgment, the Court interpreted and applied the provision in various kindred situations. Thus, in the circumstances of this case, we do not find the need to retrospectively apply the amendment of section 127 of the Act, which added subsection (7).

Having re-evaluated the evidence on record, we are at one with the two lower courts concurrent findings that the charge of rape preferred against the appellant was proved beyond reasonable doubt. We accordingly dismiss the third ground. Consequently, we find the appeal lacking in merit and accordingly dismiss it.

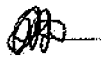
DATED at **BUKOBA** this 12th day of December, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2023 in presence of the appellant in person and Mr. Kanisius Ndunguru, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL