**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MWARIJA, J.A., MAIGE, J.A., And MASOUD, J.A.)**

**CRIMINAL APPEAL NO. 139 OF 2021**

**BABU s/o ABDULLAHAMAN @ MSUYA .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the Resident Magistrates' Court of Arusha at Arusha)**

**(Mwakatobe, SRM-Ext.Jur.)**

**dated the 6th day of December, 2019**

**in**

**Criminal Appeal No. 59 of 2017**

.....

# JUDGMENT OF THE COURT

13th & 22nd December, 2023

## MASOUD, J.A.:

There was an allegation that a girl of tender age (PW1), who was then aged seven (7) years, herein the victim, was raped by the appellant on 11th November, 2017 at around 07:00 hours at Buguruni area, Namanga village within Loliondo District in Arusha Region, as she was on her way to school. The allegation was that the appellant called the victim as she was passing by his place, he held her hand, took her inside his place, undressed her and himself, made the girl to lie on her stomach, inserted his penis into the girl's vagina and penetrated her. Once he was done, the appellant warned the victim not to tell anyone and if she did, he would stab her.

The allegation led to the appellant being charged with, convicted of the offence of rape contrary to section 130(1) and 131(3) of the Penal Code, [Cap. 16 R.E 2019] and was sentenced to life imprisonment by the District Court of Longido, at Loliondo.

At the trial that led to the conviction of the appellant and his imprisonment for life, the evidence of the prosecution came from the victim (PW1); Mary Anase (PW2), a vegetable vendor, and a grandmother of the victim, who overheard some pupils saying that the victim had been raped by the appellant; Dativa Martin Mushi (PW3), a medical doctor who examined the victim and tendered Exhibit P1; E9243 CPL Nicolaus who received and registered the complaint from PW2 on 12th December, 2023 that the victim had been raped by the appellant who had then already been arrested for another allegation of commission of unnatural offence; and H557 DC Tumaini (PW5), an investigator, who investigated the case when the appellant was already in custody.

The prosecution evidence described through PW.1's testimony how the incident occurred at the appellant's place on 11/11/2017 at around 07:00 hours while PW1 was on his way to school. PW1 testified that having been raped, the appellant warned her not tell anyone and if she did, he would stab her with a knife. As a result, the appellant did not tell

anyone. PW1 further testified that some other day, the appellant saw her as she was passing by his place and as he was going to toilet, holding a backet of water. The appellant called her, took her inside his place, made her to undress, and raped her and warned her not to tell anyone. It was her colleagues, whose identities were not disclosed, who told her grandmother about her being raped by the appellant.

In addition to PW1, there was also the evidence of PW2, who testified on how she reported the incident of rape to the police on 12th November, 2017 whilst accompanied by the victim, having learnt from some pupils about it. She also testified that she was given PF3 and took PW1 for examination accompanied by a woman police who however did not testify for the prosecution case at the trial. PW2 testified further that she inquired from PW1 who confirmed that she was indeed raped by the appellant. The evidence of the medical doctor (PW3) who examined PW1 was critical. It established that on 13th November, 2017 the victim was brought to her for examination. She carried out the examination and found that the victim had indeed been raped. There was in her vagina evidence of sperms and loss of her virginity. In addition, there were evidence of old bruises. She filled PF3 which she tendered in evidence as Exhibit P1. The other evidence came from PW4 and PW5, the police officers, who took

part in receiving the complaint on 12th November 2017 and investigating it as from 13th November, 2017.

Looking at the evidence of the prosecution as a whole, it was wholly dependent on the evidence of the victim (PW1) and the evidence of the medical doctor (PW3). Although the evidence of pupils who were allegedly overheard by PW2 saying that PW1 had been raped was crucial, the pupils were nonetheless neither named in the testimony of PW2 nor PW1 nor called to testify in support of the prosecution case. There was nothing on the record why those pupils were not called as witnesses. The absence of the evidence of those pupils meant that the evidence of PW2 was a mere hearsay which could not link the appellant to the allegation. Despite the failure to call the said pupils to testify, the evidence of PW3 established that the victim was indeed raped. The issue would be whether it was the appellant who raped the victim as also contended by the victim (PW1). The evidence of the two police officers, namely, PW4 and PW5 was of information that they received from PW1, PW2 and the appellant and from the investigation that was conducted on the case.

In so far as the defence evidence is concerned, DW1 denied to have raped the victim. He contended that he was not at the scene at the time the incident is alleged to have happened as he was at Minaramitatu area in

Kenya's side, working from 06:00 hrs to 16:30 hrs, and arrived home at 17:10 hours. Other than the appellant's only oral testimony, there was nothing else produced in evidence to substantiate his line of defence.

The trial district court was, on the basis of the above evidence, and in particular, the evidence of the victim (PW1) and the medical doctor (PW6), satisfied that the prosecution proved its case beyond any reasonable doubt. It was for such reason that the appellant was convicted as charged and sentenced to life imprisonment.

Aggrieved by the trial district court's decision, the appellant preferred an appeal to the High Court. The appeal was however, transferred to the Resident Magistrates' Court of Arusha to be heard by Mwakatobe, SRM-Extended Jurisdiction. It was in the end not determined in the appellant's favour. The first appellate court was satisfied that the evidence on the record, in particular, the evidence of PW1 and PW6, established beyond reasonable doubt that the appellant committed the offence as charged. It, therefore, found the appeal devoid of merit and it dismissed it in its entirety. It means that there are concurrent findings of fact of the two lower courts that the prosecution case against the appellant was by virtue of the evidence of PW1 and PW6 proved beyond reasonable doubt.

Since the appellant was dissatisfied by the decision of the first appellate court which upheld the finding of the trial court, he lodged the instant appeal to this Court. In his both original memorandum of appeal, and supplementary memorandum of appeal, the appellant raised nine (9) and three (3) grounds of appeal respectively. However, all of the grounds of appeal in their totality raised an issue as to whether the charge laid against the appellant was indeed proved beyond reasonable doubt.

To resolve the above issue which arises from the concurrent findings of fact of the two lower courts that the prosecution case was proved beyond reasonable doubt, we will endeavour to establish whether there is any mis-direction or non-direction on the evidence, or a miscarriage of justice or violation of some principle of law or practice entitling us to interfere with such findings of fact. See for instance, **D.P.P v. Jaffari Mfaume Kawawa** [1981] T.L.R 149 and **Musa Mwaikunda v. The Republic** [2006] T.L.R 387.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented, while the respondent Republic was represented by Ms. Janeth Sekule, Ms Amina Kiango, Mr. Charles Kagirwa, all learned Senior State Attorney, and Ms. Tusaje Samwel, learned State Attorney. On

his part, the appellant opted to let the respondent be heard first on his grounds of appeal as he reserved his right to rejoin if need be.

On behalf of the respondent, Ms. Tusaje Samwel informed us that they support the appeal. In her brief but focused submission which was in the end concurred by the appellant, Ms. Tusaje argued that the victim (PW1), then aged seven (7) years, gave her evidence neither after taking an oath nor affirmation nor without oath or affirmation but after "*promising to tell the truth and not to tell any lies*" contrary to the requirements of section 127(2) of the Evidence Act, [Cap.6 R.E 2020]. To drive home her argument, she referred us to page 11 of the record of appeal where before the victim gave her evidence, the trial court had it, and we hereby quote, that:

> *"Section 26 Tanzania Evidence Act Written law miscellaneous amendment Act No.2/2016 comply with."*

With the foregoing in mind, Ms. Samwel, correctly in our view, understood the trial court as saying that it complied with section 127(2) of the Evidence Act. She, however, insisted that there was no indication whatsoever on the record, of which we also agree with Ms. Samwel, that there was either a clear and valid "*promise to tell the truth and not to tell any lies*" reflected on the record of the trial court or an oath or affirmation properly taken and reflected on the record, before the victim gave the

evidence. See, **Yusuph Molo v. Republic**, Criminal Appeal No. 343 of 2017 (unreported) where we held at page 12 of our typed judgement as follow with regard to non-compliance with section 127(2) of the Evidence Act:

> *The procedural irregularity, in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity. The effect is to render the evidence of PW1 ( a child of tender age) with no evidentiary value. It is as if she never testified to the rape allegation..... It was wrong for the evidence of PW1 to form the basis of conviction....*

As a result, we are in agreement with Ms. Samwel that the resulting evidence of PW1 had no evidentiary value as it was taken in violation of section 127(2) of the Evidence Act and has to be expunged as we hereby do so. Again, as Ms. Samwel urged us, we find that once the evidence of the victim is expunged, there would be no evidence left on the record to sustain the conviction. There would be no evidence left because, unlike the evidence of PW1 herein expunged and the evidence of PW6 which is the expert evidence of the medical doctor who examined the victim, the rest of the evidence is, in the absence of the evidence of PW1, a mere hearsay. The evidence of PW6, which does not in any way link the appellant to the offence, could not by itself establish the charge laid against the appellant,

much as it established that the victim, a child then aged 7 years, had indeed been raped.

Although the evidence of the pupils who were, allegedly, overheard by PW2 saying that the appellant raped the victim was material in linking the appellant with the offence; the said pupils were as we pointed out above neither named nor procured as prosecution witnesses for no apparent reason shown by the prosecution. We draw a negative inference and hold that had they been called as prosecution witnesses; they would have given evidence in the favour of the appellant and thus against the prosecution case. See for instance the case of **Aziz Abdalla v. Republic** [1991] T.L.R 71.

What we have found herein above amount to a violation of law and procedure entitling us to interfere with the concurrent findings of fact of the two lower courts that the appellant was guilty of the offence as charged. See, **DPP v. Jaffari Mfaume Kawawa** (supra). In the result of our interference, therefore, we find that there was no evidence led by the prosecution proving the charge laid against the appellant beyond any reasonable doubt. We say so because the evidence of PW1 was, as shown herein above, of no evidentiary value for being taken in violation of section 127(2) of the Evidence Act, and the remaining evidence is as a result

insufficient to sustain the conviction. This finding suffices to dispose of the appeal.

In the light of the foregoing, we allow the appeal. The appellant's conviction is quashed and the sentence meted out to him is set aside. We, henceforth, order the immediate release of the appellant from prison if he is not otherwise retained for some other lawful cause.

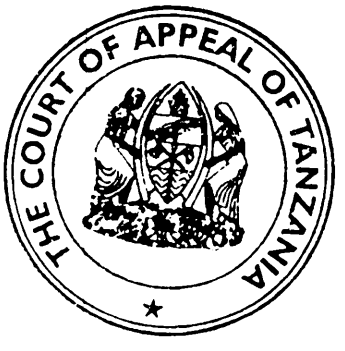
**DATED** at **DAR ES SALAAM** this 21st day of December, 2023.

A. G. MWARIJA
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

B. S. MASOUD
**JUSTICE OF APPEAL**

The judgment delivered this 22nd day of December, 2023 via video conference from the High Court of Tanzania at Arusha, in the presence of the appellant in person and Mr. Stanslaus Halawe, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**