IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 49 OF 2022

(Originating from Criminal case No. 30 of 2021 of the District Court of Sengerema at Sengerema)

MASUMBUKO S/O SIMEO@ CHIBOMBOLWA----------APPELLANT

VERSUS

THE REPUBLIC----------RESPONDENT

JUDGMENT

Last Order: 11.07.2022
Judgment: 25.07.2022

M.MNYUKWA, J.

The appellant, Masumbuko s/o Simeo @ Chibombolwa was charged before the District Court of Sengerema at Sengerema for the offence of Rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code Cap. 16 RE: 2019 (now RE: 2022). The prosecution case was that, on the 24th day of September 2021 at Kome Island within Sengerema District, in Mwanza Region, the appellant had carnal knowledge with a young girl aged 10 years, who, for purposes of concealing her identity will be referred to, in this judgment, as either the victim or PW3.

The appellant denied the charge, so the prosecution called a total of six (6) witnesses, who proved the case against the appellant beyond a reasonable doubt, according to the judgment of the trial court. The accused entered his defence as DW1 and he did not call any witnesses. At the trial, the accused was accordingly convicted followed by a statutory minimum sentence of thirty (30) years imprisonment and in addition, ordered to suffer 12 strokes of cane. Dissatisfied, the accused has lodged the present appeal before this court appealing against the conviction and the sentence.

The accused fronted grounds of appeal thus:-

1. *That voire dire was not conducted properly as what prescribed by S.127 (2) of TEA (Cap 6 RE: 2019).*
2. *That no penetration was proved. The word "mtalimbo kwenye Kibumbu chake" neither denotatively nor connotatively does not mean penis (Mtalimbo) and vagina (Kibumbu).*
3. *That the whole evidence adduced before the court of Law was an afterthought hence there were no reasonable grounds raised by PW1 as to why they delayed to send the victim to the hospital.*
4. *That the PH was not conducted properly hence is c/s 192 of the CPA (Cap 20 RE: 2019).*

5. *That albeit the defence of alibi was not complied with section 194(4) still the lower court would have acted with weight considering this defence is of technical one.*
6. *That the caution statement procured out of prescribed time, therefore, is c/s 50 of CPA (Cap 20 RE 2019) and section 169 of the Act prohibits such kind of evidence to be admitted.*

When the matter was called for hearing, the appellant appeared in person while the Republic was represented by Sabina Choghogwe, State Attorney.

The respondent was the first to submit on the raised grounds of appeal and in the process, she opposed the appeal fronted by the appellant and consequently, supported the conviction and sentence.

On the 1st ground of appeal that *voire dire* was not properly conducted, Ms. Sabina submitted that, currently *voire dire* is not the requirement of the law as to the requirement of section 127(2) of the Tanzania Evidence Act, Cap. 6 RE 2019 (Now RE:2022). Whereas the child of tender age is required to promise to tell the truth. Referring to page 14 of the trial court's proceedings, she insisted that PW3 who was of a tender age promised to tell the truth and not lie. Referring this court to pages 8 to 9 in the case of **Wambura Kiginga vs Republic,** Criminal Appeal No. 301 of 2018, that the child of the tender age shall only promise to tell the

truth and the issue of *voire dire* does not exist. She prays this ground to be dismissed for want of merit.

On the 2nd ground of appeal, that no penetration was proved for the word *"mtalimbo kwenye Kibumbu chake"* neither denotatively nor connotatively does mean penis (Mtalimbo) and vagina (Kibumbu). It was her submission that, due to the environment the victim has been brought up, she could not be able to mention the names of the private parts as known. Referring to this court on page 14 of the trial court's proceedings, PW3 narrated how the incident happened. To support her averments, she cited the case of **Hassan Bakari @ Mama Jacho vs R,** Criminal Appeal No. 103 of 2012, which held that it is not easy for a child of tender age to name her private parts due to the customs and traditions of our society. She went on averring that, in rape cases, the best evidence is that of the victim who stated how she felt pain. Referring to the case of **Seleman Makumba vs R** [2006] TLR 379 the victim evidence is the best evidence. For that reason, therefore, she prays this court to dismiss this ground of appeal.

On the third ground of appeal, that the whole evidence adduced before the court, was an afterthought hence there were no reasonable grounds raised by PW1 as to why they delayed sending the victim to the

hospital. It was her submission that the main argument was that, the appellant raped the victim and the delay is baseless. She went on that, the victim knew the appellant and named where he resides and narrated the story citing page 14 of the trial court's proceedings insisting that the same was corroborated with that of PW4, the medical doctor as it appears on page 20 of the proceedings. She insisted that this ground is baseless.

On the fourth ground of appeal that, *the Preliminary Hearing was not conducted properly* it was her submission that, the aim of the Preliminary Hearing is to accelerate the trial as per section 192 of the CPA Cap 20 RE: 2019 (now 2022), and referring to pages 3 and 4 of the trial court proceedings, she insisted that, Preliminary Hearing was properly conducted and therefore this ground lack merit.

On the fifth ground of appeal that, the defence of alibi was not complied with, she submitted that, the appellant falls short of the requirement of the law for he did not file a notice as required for under section 194(5) of the CPA cap 20 RE 2019 (now 2022). She went on that, even if they fail to file notice, still the trial court can rely on the defence of alibi. Insisting, she cited the case of **Maganga Udugali vs R, Criminal** Appeal No.144 of 2017, that this court can step in the shoes of the trial court to find out if there was a suspicious or doubts raised by the

defence of alibi. However, she avers that, the victim properly identified and knew the appellant. She prays this ground to be dismissed.

On the sixth ground of appeal that, the caution statement procured out of prescribed time, therefore wrongly admitted, she referred this court at page 23 of the trial court's proceedings, she avers that, the appellant challenged the caution statement at a trial and the inquiry was conducted and as a result, the trial court found out that the caution statement was taken within time. She therefore retires and prays this court to dismiss the appeal.

Responding, the appellant prays this court to adopt his grounds of appeal and form part of his submissions. he insisted that he did not commit the offence charged and the case was cooked against him and consequently, he was denied the right to be heard. He retires prays this court to allow the appeal and set him free.

After the submissions from both parties, I now proceed to determine this appeal where the appellant is appealing his innocence fronting six grounds of appeal.

As it is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond a reasonable doubt. The burden never shifts to

the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence. See the cases of **Woolmington v. Director of Public Prosecutions** [1935] AC 462; **Abdi Ally** (supra) and **Mohamed Haruna @ Mtupeni & Another v. Republic,** Criminal Appeal No. 25 of 2007 (unreported). In the just cited case of **Mohamed Haruna @ Mtupeni & Another** (supra), the Court stated that: -

> *"Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."*

Again, in **Mwita and Others v. Republic** [1977] TLR 54 the Court said:

> *"The appellants' duty was not to prove that their defence was true. They were simply required to raise a reasonable doubt in the mind of the magistrate and no more."*

The central issue to the grounds of this appeal is, the appellant is contesting the prosecution evidence to the extent that the case was not proved to the required standard. From the outset of the grounds of

appeal, therefore, I am now placed with a legal duty to determine whether the prosecution case was proved and the proof was beyond reasonable doubts.

On the first ground of appeal, the appellant is contesting that *voire dire* was not properly conducted. This connotes that, the appellant did acknowledge that the victim was a child and the charges of statutory rape under sections 130(1) and (2)(e) and 131(1) of the Penal Code Cap. 16 RE 2019 (now 2022) were properly levied against him.

The claim by the appellant was that *voire dire* was not conducted properly as required by section 127(2) of TEA Cap. 6 RE 2019 (now 2022). Ms. Sabina opposed insisting that *voire dire* is not a requirement of law but rather the witness of the tender age needs only to promise to tell the truth and not to tell lies. The position of the law prior to the amendment of section 127(2) of the Evidence Act, Cap 6 RE: 2019 (Now 2022) it was a requirement of the law for a trial magistrate or judge to conduct a *voire dire* test and indicate whether or not the child of a tender age understands the nature of an oath and the duty of telling the truth and if she possesses the sufficient intelligence to justify the reception of her evidence.

I agree with Ms Sabina that, the 2016 amendments brought through Act No. 4 of 2016 changed the position. The position of law when a child

of tender age is giving evidence before the court of law, requires the child to promise the court to tell the truth and not lies. The law under section 127(2) of the Law of Evidence Act, as I quote it expressly states: -

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."*

Under the above amendment, the requirement to conduct a voire dire test has been removed. What is paramount in the new amendment is for the child before giving evidence to promise to tell the truth to the court and not to tell lies. As stated in **Yusuph s/o Molo vs The Republic** Criminal Appeal No. 343 of 2017, all what is required is that, such a promise must be reflected in the record of the trial court. If such promise is not reflected in the court record, then it is a big blow in the prosecution case.

As I peruse the court records, when PW3 was paraded to testify, as reflected on page 14 of the trial court typed proceedings, the trial court made an enquiry and as it reads the accused stated: -

> *Accused; "Naahidi kusema ukweli na sio uongo"*

I find that, the trial court conforms with the requirement of the law, for it only requires the child to promise to tell the truth and not to tell lies and not otherwise. In the premises, I find this ground lacking.

On the second ground of appeal that no penetration was proved. The word *"mtalimbo kwenye Kibumbu chake"* neither denotatively nor connotatively mean penis (Mtalimbo) and vagina (Kibumbu). It was the submission by the prosecution that, based on the environment where the victim was brought up, she could not be able to mention the names of the private parts as known. Going to the records, the charge sheet is narrative that the alleged incident took place in Kome Island within Sengerema District in Mwanza, which I agree with Ms. Sabina that based on the environment, it is little expected for a child of tender age as the victim to name the private parts to the names known in Kiswahili. Again, the cited case of **Hassan Bakari @ Mama Jacho vs R,** (supra) is relevant in the context that, it is not easy for a child of a tender age to name her private parts due to the customs and traditions of our society.

According to PW4, the medical doctor suggested that, the victim was penetrated by a blunt object but did not state precisely what was the blunt object. It was PW3 who stated with certainty as to what penetrated her. The victim used the term *'Kibumbu',* showing to the trial court where

the said *'Kibumbu'* is located showing her private parts and according to the trial court, PW3 meant her vagina. Again, the victim used the term *"Mtalimbo"* telling the court that Mtalimbo of the accused was inside his trousers and according to the trial court, PW3 meant the accused penis. In the case of **Filbert Gadson @ Pasco vs The Republic** Criminal Appeal No. 267 of 2019 which referred with authority the case of **Simon Erro vs Republic,** Criminal appeal No.85 of 2012 (CAT) the victim, like here, referred to the penis as "dudu" and the Court held that to be sufficient. I agree with the trial court findings that the words "*kibumbu*" and "*mtalimbo*" used by PW3 connotes vagina and penis as construed by the trial court. [See also in **Haruna Mtasiwa vs. Republic,** Criminal Appeal No. 206 of 2018 CAT (both unreported)].

That said, I wish to reiterate the settled law that, true and reliable evidence in sexual offences is that of the victim who is required to prove penetration as one of the essential ingredients. In **Yohana Said @ Bwire vs The Republic**, Criminal Appeal No. 202 of 2018 which refers to **Selemani Makumba** (supra), at page 13 where it was held: -

> *"The 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."*

In the appeal at hand, PW3 testified to have been feeling pains when the said '*Mtalimbo'* penis was placed in her '*Kibumbu'* vagina. It is obvious that, just placing it on the vagina could not have caused pains to PW3 unless inserted. That being the case, PW4 the medical doctor examined the victim PW3 and found that she was penetrated. I am satisfied that the totality of the evidence on this aspect confirms that the PW3 vagina was penetrated by the penis and the perpetrator was the appellant. That said this ground is not merited.

On the third ground of appeal, it is the allegation of the appellant that the whole evidence adduced before the trial court was an afterthought hence there were no reasonable grounds raised by PW1 as to why they delayed sending the victim to the hospital. As submitted for by Ms. Sabina, she insisted that PW3 managed to testify how the appellant raped her and the delay to send the victim to the hospital was immaterial.

Going to the records, it was alleged that the offence of rape was committed on 24th September 2021, and PW3 was examined on 27th September 2021 which makes a total of 3 days. First, on the evidence of PW1, Obadia Pamba, mother of the victim on page 6 of the trial court proceeding testified as to why they delayed to take the victim to the hospital the reason being the nature of the environment they lived. As

alleged that, the crime took place in Kome Island and the victim was referred to Sengerema District Hospital, it is a justifiable reason for delay.

Secondly, as submitted by Ms. Sabina that the delay is immaterial what is required is whether the testimony of the victim of rape did narrate and prove the commission of the offence of rape as against the accused person. This is explained by the enactment of section 127(6) of the Evidence Act, Cap 06 RE: 2019 (Now 2022) which provides that: -

127(6)

"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 years 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 or 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 years or the victim of the sexual offence is telling nothing but the truth."

The position of the law was also elaborated in the case of **Wambura Kiginga vs The Republic,** Criminal Appeal No. 301 Of 2018. In fine, though the above provision of law gave the court mandate to

enter conviction solely on the evidence of the victim, in the appeal at hand, the evidence went further to elaborate as to why the victim delayed to be referred to the hospital. In the circumstance, I proceed to find this ground lacking.

On the fourth ground of appeal the appellant submitted that, that the preliminary hearing was not conducted properly hence contradicts section 192 of the CPA (Cap 20 RE: 2019), Ms. Sabina opposed the claim insisting that the preliminary hearing was properly conducted referring to page 3 and 4 of the trial court proceedings. I agree with Ms. Sabina contention that the aim of preliminary hearing is to accelerate the trial. It helps the court to ascertain between disputed and undisputed matters. In the case of **Director Of Public Prosecutions Vs Jaba John** Criminal Appeal No. 206 Of 2020 the Court of Appeal held that:-

> *"It is the position of the law that, the aim of the preliminary hearing is to speed up criminal trials so that matters which are not disputed will be identified and thus witnesses to prove them will not be called to testify hence saving court's time and costs".*

The law also states that failure or erroneous preliminary hearing only vitiates its proceedings and does not vitiate the proceedings of the trial. See also **Kalist Clemence @ Kanyaga v. R,** Criminal Appeal No. 1 of 2000 (unreported). Going to the trial court records, I find that the preliminary

hearing was properly conducted and in line with the principle stated above, I find no merit on this ground.

On the fifth ground of appeal that, that the defence of alibi was not complied with, Ms. Sabina submitted that the accused did not comply with the requirement of the law under section 194(5) of the CPA cap 20 RE 2019 (now 2022) and went on citing the case of **Maganga Udugali** (supra) that this court can step in the trial court evidence to find out if there was a suspicious or doubts raised by the defence of alibi. In **Yohana Said @ Bwire Vs The Republic**, Criminal Appeal No. 202 of 2018 as in many other cases, failure by a trial court to fully consider a defence of alibi is a serious error. Going to the records, the accused person at a trial court testified in person and consequently, he did not comply with section 194 (5) of the CPA Cap 20 RE2019. Going through the appellant's evidence at a trial court on whether he managed to establish the defence of alibi, as it stands on the record, he denied to have committed the offence for among the reason that he was not on the scene of crime but he failed to prove his assertion as required by the law. Based on the circumstances alluded by the appellant that he was with other fishermen in the lake and later in the camp, he could not exhibit the same for the trial court to invoke the defence of alibi. In that regard, this ground lacks merit too.

On the sixth ground that the caution statement procured out of prescribed time, therefore, is contrary to section 50 of CPA (Cap 20 RE 2019) and section 169 of the same Act prohibits such kind of evidence to be admitted. Ms Sabina submitted that, the appellant challenged the caution statement at a trial and the inquiry was conducted and as a result, the trial court found out that, the caution statement was taken within time.

As stated in **Leopold Mutembei Vs Principal Assistant Registrar Of Titles, Ministry Of Lands, Housing And Urban Development And The Attorney General** Civil Appeal No. 57 Of 2017, in dealing with the above issues as the first appellate Court, I am to re-appraise the evidence on the record and draw my inferences and findings of fact subject, without doubt, with little difference to the trial court's advantage that it enjoyed of watching and assessing the witnesses as they gave evidence. See D.R. **Pandya v. R.** [1957] EA 336; and **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 (unreported).

On record, specifically on pages 29 to 36 of the trial court typed proceedings, the trial court made an inquiry on the allegation by the accused person that the caution statement was illegally procured. As it is

on records, this was not a point for inquiry at a trial court but this being a first appellate court and the same being a point of law, I proceed to inspect the records to find out whether the allegation is true. Though the appellant's assertion did not elaborate as to what extent the caution statement was taken out of time, but on the face of it, it reads that, the same was taken on 24.09.2021 at 13.21 hrs the date the crime was alleged to have been committed. Going to the evidence of PW1, the father of the victim and PW2, her mother testified to have arrested the accused on 24.09.2021 at around 9.00 hrs, and was sent to the village executive office, slept there and the other day the accused was sent to the Nyakalilo police station. The evidence of PW1 and PW2 contradicts the caution statement to the extent that, the statement shows that it was taken on the date of the commission of the offence on 24.09.2021 while the evidence of PW1 and PW2 indicates that the accused was yet to be sent to Nyakalilo Police station. In that regard, I find this ground has merit to the extent explained and I allow it and consequently, I proceed to expunge the caution statement from the court records.

In view of this Court's findings in determining the grounds of appeal above, I proceed to test the evidence in the record after expunging the caution statement to find whether the prosecution case is still intact. Going to the analysis made the evidence of PW3, the victim established and proved

the offence of rape against the appellant which in fact, under section 127(7) of the law of Evidence Act, Cap. 6 RE: 2019, can be acted upon. That not being enough, the evidence of PW3 was corroborated by the evidence of PW4, the medical doctor and the evidence of PW1, PW2, and PW6. In that end, I find the prosecution case intact and in fine, I find no justification to interfere with the findings of the trial court below. Accordingly, I find the appeal devoid of merit and it is hereby dismissed in its entirety.

M.MNYUKWA

JUDGE

25/07/2022

Right of appeal fully explained

M.MNYUKWA

JUDGE

25/07/2022

Court: Judgement delivered on 25th July 2022 in the presence of both parties.

M.MNYUKWA

JUDGE

25/07/2022