**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 5 OF 2022**

*(Originating from Ruangwa District Court at Ruangwa in Criminal Case No.65 of 2021 before Hon. A.F. Ngwaya, RM)*

**MUSSA HASSAN OMARY..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*15/8/2022 & 03/10/2022*

**LALTAIKA, J.:**

The appellant, **MUSSA HASSAN OMARY**, was arraigned in the District Court of Ruangwa at Ruangwa where he was prosecuted on an allegation of two counts. 1. Rape contrary to section 130(1)(2)(e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2019] now the Revised Edition 2022 and 2. Impregnating a School Girl contrary to section 60A (3) of the Education Act [ Cap.353] as amended by Miscellaneous Act No.2 of 2016.

The particulars of the first count that were laid in a charge indicated that on the 03rd day of July 2021 at the Kitandi Village within Ruangwa District in Lindi Region the appellant did have carnal knowledge of one "FAR" or the victim of fourteen years old. Whereas the particulars of the second count that were laid in a charge provided that 03rd day of July

2021 at the Kitandi Village within Ruangwa District in Lindi Region the appellant did impregnate a school girl one one "FAR" or the victim a student of Kitandi Primary School.

When the charge was read over and explained to the appellant, he pleaded not guilty to both counts hence the matter went to full trial. At the trial, the prosecution paraded six (6) witnesses, namely, Jeremia Donald (PW1), Mary Khalifa Lucas Mchopa (PW2), the victim (PW3) and Mwajuma Anthony (PW4). The prosecution also tendered two (2) exhibits; a cautioned statement of the appellant (exhibit "P1"), victim's PF3 (exhibit "P1") (sic) and school register [book] (exhibit P2) which were admitted in evidence.

Having been convinced that the prosecution had proved their case at the required standard namely beyond a reasonable doubt on the first count only, the learned trial Magistrate found the appellant guilty of the offence of rape contrary to section130(1)(2)(e) and 131 (1) of the Penal Code and sentenced him to serve a term of thirty (30) years imprisonment.

Aggrieved, the appellant lodged a substantive petition of appeal comprised of four grounds namely:

1. *That the trial Court erred in law and fact to convict and sentence the appellant based on the evidence of the prosecution side which had a lot of reasonable doubts while the appellant pleaded not guilty to the offence charged.*
2. *That the trial court erred in law and fact by convicting the appellant based on the evidence which at firmed by PW1 which had a lot of reasonable doubt when the victim was escorted by her parents to make a general examination and why not a police officer.*
3. *That trial Court erred in law and facts convicting the appellant only by the evidence produced by PW1, while the offence was not proved and had a lot of reasonable doubt because the scene of the crime did not show the element of rape offence when the PW1,*

*which had to make a general examination. He said the result of the patient being raped and impregnated is why the trial court did contradict the evidence when PW1. He does not show the time of pregnancy and the time of the accused committing the rape offence.*

4. *That the trial court erred in law and fact by convicting the appellant based on the weakness of the defence case rather than the strength of evidence of the prosecution side as it had a lot of reasonable doubt which would benefit the appellant. Hence the trial court was wrong to convict the appellant prosecution failed to prove its case to the required standard of law.*

When this appeal was called on for hearing, the appellant appeared in person, unrepresented while the respondent Republic enjoyed the services of Mr. Enosh Kigoryo, learned State Attorney. The appellant prayed that his four additional grounds that were filed in this court be adopted and considered along with his substantive petition.

In his oral submission, Mr. Kigoryo opted to start with the four additional grounds of appeal. On the first additional ground, the learned State Attorney submitted that the appellant has complained that the doctor (PW1) was unable to mention the name of the victim in court. Mr. Kigoryo disagrees. He argued that on page 7 of the typed proceedings the doctor had tendered PF3 which was admitted and marked as exhibit P1. He insisted that exhibit P1 was read out loud in court and it contained the name of the patient (the victim). To that end, Mr. Kigoryo contended that the complaint was baseless since the issue of the name is solved by the exhibit. He prayed that the ground is rejected.

Responding to the second additional ground, the learned State Attorney submitted that the appellant is complaining that the victim was unable to mention his name except to point him out with a finger. Mr. Kigoryo contended that this ground is weak because, according to the

record, the appellant was not a stranger to the victim. The learned State Attorney insisted that throughout the trial, the appellant was being referred to as the "accused". He went on to point out that even PW3 to him as accused and recorded on page 9 of the trial court's proceedings. The learned State Attorney stressed that the appellant did not ask any questions during cross-examination making the ground more of an afterthought. He argued this court to dismiss the ground as baseless.

Regarding the third additional ground where the appellant has asserted that the evidence of the victim contradicted section 127(2) of the Evidence Act Cap 6 RE 2019, Mr. Kigoryo conceded. He agrees that as per the records, the victim was 14 years old by the time she was testifying. To this end, he stressed that as per the law, she is considered a witness of tender age. However, the learned State Attorney argued this court to consider that even if the evidence contradicted section 127(2) of the Evidence Act, it could still be taken into consideration.

To fortify his argument, the learned State Attorney referred this court to the case of **Wambura Kiginga v. R Crim App 301 of 2018** CAT Mwanza (unreported) whereby the court took cognizance of section 127(6) and on page 10 it observed that since the appellant had not cross-examined the victim, the evidence was true and went ahead and dismissed the appeal. To this end, the learned State Attorney prayed that the ground is rejected to uphold justice to both sides.

On the fourth additional ground where the appellant complained that exhibits P1 and P2 were not read out loud in court, the learned State Attorney contended that the appellant did not make thorough scrutiny before trying to impeach the court records. Mr. Kigoryo stressed that such

a practice offended the principle of sanctity of court records. He insisted that court records speak for themselves as per the case of **Halfani Sudi v. Abieza Chichi [1998] TLR 527**. The learned State Attorney stressed that looking at the lower court records of the instant matter, both exhibits were read out in court and the appellant had no questions. To this end, the learned State Attorney argued that the fourth additional ground is dismissed.

Moving on to grounds of appeal as they originally appeared on the petition, Mr. Kigoryo prayed to consolidate the first to the fourth ground since, he asserted, they were all on alleged lack of proof beyond reasonable doubt of the prosecution case. The prayer was granted, and the learned State Attorney took up the podium.

It is Mr. Kigoryo's submission that the appellant was charged with raping a child below 18 years. He averred that one of the issued that needed proof was the age of the victim. To that end, the learned State Attorney maintained, the evidence of PW4 had proved the age of the victim and that, Mr. Kigoryo stressed, even the victim herself (PW3) had mentioned her age. The learned State Attorney is of a firm view that there was no dispute on the age of the victim.

Moving on, the learned State Attorney submitted that the second element that needed proof is penetration. Mr. Kigoryo submitted that the evidence of the victim, corroborated by that of PW1 (the medical doctor) proves that there was penetration. The learned State Attorney stressed that the victim had pointed out in her testimony that it was the appellant who had penetrated her and nothing else. In addition, the learned State Attorney argued that even during the Preliminary Hearing as per the

memorandum of agreed facts which appear on page 4 of the typed proceedings, the appellant had accepted that he had carnal knowledge with the victim. To buttress his argument, the learned State Attorney cited the case of **Mgonchori (Bonchori) Mwita Gesine v. R. Criminal Appeal 410 2017 CAT, Mwanza (unreported)** where on page 12, the Court of Appeal of Tanzania took cognizance of section 192(4) of the Criminal Procedure Act [Cap. 20 R.E. 2019] and stated that all evidence admitted during the preliminary hearing is taken to have been proved and needed no further proof.

It is Mr. Kigoryo's submission further that the only argument that the appellant had brought forth as appeared on pages 12 to 13 of proceedings of the lower court is that the victim was not a pupil. The learned State Attorney submitted that the appellant had explained that they were in a relationship stressing that by then, the victim was a Primary School pupil (std 5). The learned State Attorney submitted that the lower court was convinced that the appellant had committed the offence despite his attempts to avoid liability.

Winding up his submission, the learned State Attorney contended that although the republic has the duty to prove the case beyond doubt, the court is also obliged to weigh up the evidence of both parties. To this end, Mr. Kigoryo earnestly prayed this court to dismiss the appeal.

In rejoinder, the appellant maintained that he had not committed the offence. The appellant went on and submitted that it all started on 3/7/2021 at around 13:00 while he took his disabled mother to traditional ceremony "unyago" of the Mwera people ( Known as "LIKOMANGA" in Kimwera language). The appellant argued that he was with his mother

and the children of his late sister. Furthermore, the appellant submitted that his mother is disabled with paralyzed legs and was begging for help from the MWERA people who had come to the ceremony. He insisted that he was assisting his mother as she begged for financial assistance from the people who had come to that traditional ceremony of the Mwera people.

Finally, the appellant submitted that there is hate, in his village, against him and his poor family. He argued that initially, PW4 (mother of the victim) wanted to buy their land but his family refused. The appellant suspects that refusal is what triggered the hate. The appellant stressed that PW4 wanted him to be jailed so that she could easily take their land in his absence. To this end, the appellant prayed this court to set him free so that he could go back and meet his mother.

After careful consideration of the submissions from either side, grounds of appeal and the trial court's records before me, the determination of this appeal hinges on several issues framed by the grounds of appeal and additional grounds. Initially, I will start my deliberation on the issue of whether the trial court made an omission in applying section 127(2) of the Evidence Act [Cap.6 R.E. 2019] when it took the evidence of the victim (PW3). In case it made such an omission, what are the consequences? At the outset, it is important to know how the trial court took the evidence of the victim as it is envisaged on page 9 of the typed proceedings of the trial court. The evidence of PW3 was taken as follows: -

> *"PW3 (FA),14 years, Muslim, Mwera, peasant, Kitanda: affirmed and states;"*

From the above excerpt, the trial court did not take cognizance of the age of the victim as a child of tender age (14 years old) as per section 127(4) of the Evidence Act. The trial court ought to have asked the victim if she could take the oath or affirmation or promise to tell the truth only before the victim testified as was stated in the case of **Godfrey Wilson vs. Republic**, Criminal Appeal No.168 of 2018 and **Mwalimu Jumanne vs Republic**, Criminal Appeal No.18 of 2019 (all unreported).

Unfortunately, in the case at hand, the learned trial Magistrate directly switched to the step of taking the victim's particulars without posing her some questions which would eventually lead her to order the victim to affirm or promise to tell only the truth. It is well known that the consequence of not complying with section 127(2) of the Evidence Act is to expunge the gathered evidence on the record of the lower court.

The learned State Attorney has strived to convince this court that such noncompliance did not affect anyhow the rights of the appellant. Indeed, there is another development of the application of section 127(2) in our jurisprudence from expunging to another level of looking at the originality, truthiness and authenticity of the evidence adduced by the victim as was stated in the case of **Wambura Kiginga v. R** (supra). In that regard, I am convinced with the submission of the learned State Attorney that even if the victim did not promise to tell the truth but she affirmed. I still hold that her evidence is original, true, and authentic since is supported by the evidence of the appellant himself.

This takes me to the fourth additional ground that exhibits P1 and P2 were not read out loudly in court. First, I subscribe to what the learned State Attorney had submitted that both exhibits were read out in court and the appellant had no questions or objections. However, I should

stress that the trial did not seem to recall that earlier on, during preliminary hearing, it admitted the appellant's cautioned statement and marked it as exhibit P1. Therefore, the victim's PF3 ought to have been marked exhibit P2 and pupils register [book] as exhibit P3. As the first appellate Court vested with powers to reevaluate the entire evidence of the trial court, I am of the settled position that the anomalies are not fatal because they did not cause any injustices to the appellant.

Based on the given circumstances, it is important now, for this court to step into the shoes of the trial court. By stepping into the shoes of the trial court, PF-3 of the victim is hereby marked as exhibit P2 and Pupils' Register [Book] as exhibit P3. The reason for doing so is two-fold, **one,** those admitted exhibits are present in the lower court file. **Two**, since all important steps were observed and adhered to before and after admission of the same, thus failure to mark them accordingly and failure to put the marks on the physical documents tendered by prosecution witnesses in court is not fatal and is curable under section 388(1) of the Criminal Procedure Act [Cap.20 R.E. 2022].

On the first and second additional grounds, I do not intend to be detained simply because the appellant and the victim knew each other before and after the incident. This argument is backed up by the evidence of the appellant that the victim is his neighbour. Moreover, there was no need for PW1 to mention the name of the victim during his oral testimony because the name of the victim is found in the document he tendered and read out loudly after its admission. I do subscribe to what the learned State Attorney had submitted that PW1 mentioned the name of the victim when he was reading out loud exhibit P2. In that regard, I find these two grounds unmeritorious hence, dismissed.

Finally, the first to the fourth ground as originally appeared in the substantive petition are tackled as one by framing an issue as to whether the prosecution proved the case against the appellant beyond a reasonable doubt. Indeed, it is a trite principle of law that the prosecution is duty bound to prove any criminal case beyond reasonable doubt.

Having gone through all the records and weighed in the arguments by both parties, I am convinced that the prosecution proved the second count beyond a reasonable doubt due to the following reasons. **One**, the appellant had admitted to having carnal knowledge with the victim during the preliminary hearing. The fact that the appellant had admitted formed the memorandum of the agreed facts. **Two**, the evidence of PW3 (the victim) is explicit in the way she was seduced by the appellant and went to the appellant's house and had sexual intercourse. In addition, the victim went further and provided details of the second time their sexual intercourse took place which led to the arrest of the appellant on 3/7/2021.

The evidence of PW3 clearly shows how she met the appellant till the apprehension of the appellant. Furthermore, the evidence of PW1 and exhibit P2 shows that the victim was raped by a man. More importantly, the medical practitioner's remarks in exhibit P2 are as follows: -

> *"There are (sic) bruises at labia majora and more. Also, no hymen in the vagina. Indication sign of vaginal penetration..."*

In addition to the above observation of PW1 and his oral evidence that the victim was raped by a man, it is important to note that the evidence of PW1 and PW3 were not contested by the appellant through cross-examination of the act which presupposes admission of the facts. It is

settled law that failure to cross-examine a witness on a particular point or issue leaves his evidence to stand unchallenged. See; **Mohamed Hamis vs Republic**, Criminal Appeal No.114 of 2013 CAT at Mtwara (unreported)

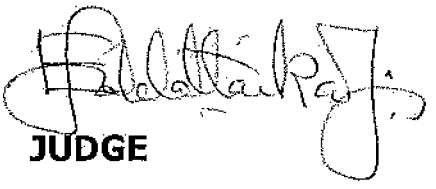
On the age of the victim, the evidence of PW3, PW4 and exhibit P2 and P3 have all proved that the victim was born in 2007. Indeed, the corroborating evidence has proved that the victim was fourteen (14) years old at the time the appellant had carnal knowledge with her. This has proved that the victim first is a child of tender age and two, PW3 is under eighteen years. These facts imply that the appellant had committed statutory rape which does not require the consent of PW3. Indeed, what is important in statutory rape, with or without "consent" is penetration. I have no doubt that the same has been proved beyond reasonable doubt.

Based on that finding, I am of the settled view that all the grounds of appeal have no merit and the same are hereby dismissed.

In the upshot, this appeal falls short of merits. I hereby dismiss it in its entirety and endorse the conviction and sentence passed by the learned Resident Magistrate.

It is so ordered.

**E. I. LALTAIKA**



**JUDGE**

**03.10.2022**

**Court:**

This Judgment is delivered under my hand and the seal of this Court on this 3rd Day of October 2022 in the presence of Mr. Wilbroad Ndunguru, learned State Attorney and appellant who has appeared unrepresented.

**E. I. LALTAIKA**

**JUDGE**

**03.10.2022**

**Court:**

The right to appeal to the Court of Appeal of Tanzania is fully explained.

**E. I. LALTAIKA**

**JUDGE**

**03.10.2022**