IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 12 OF 2022

(Arising from the decision in Criminal Case No. 348 of 2020 of District Court of Tarime at Tarime)

BETWEEN

MWITA NYAIKERI MARWA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

2nd & 4th November, 2022

M. L. KOMBA, J.:

This is the decision against an appeal by Mwita Nyaikera Marwa who convicted and sentenced to thirty years imprisonment by the District Court of Tarime at Tarime (the Trial Court) where he was arraign for offence of rape contrary to section 130(1) (2)(e) and 131(1) both of the Penal Code, [Cap 16 R.E. 2019]

It was alleged by the prosecution that on 27 November 2020 while at the market at Masanga in Karakatonga village within Tarime District in Mara region, the victim (name withheld) was selling milk where appellant appeared as a customer who wanted to buy milk but he had no jug. Victim accompanied the appellant to his place where he can get jug to put milk.

The exercise completed successful but surprisingly the victim informed the court that she was claiming her jug back and the appellant refused that's when the appellant took advantage of pulling the victim into his house, removing her underwear and raped her.

She further said that she did not raised an alarm because the appellant was holding her neck. She felt bad and started bleeding and run away outside the house where she raised an alarm and the appellant was arrested. In the following morning she was taken to Nyamwanga Health centre where she was attended by Winfrida and that, Winfrida filled PF3 (exhibit P1) though she was not called in court to testify.

PW2 testified in court that he was informed by the Masanga Hamlet chairman that her brothers' daughter, who is the victim was reported to have been raped. He went to Masanga and find the victim and the appellant and that he left with the victim to home and in the following morning he took her victim to the police station and later on to health center. The accused was taken to police.

WP 9271A police officer testified as PW3 informed court that she escorted the victim to health center, on their way she interrogated the victim and

victim told PW3 that she was raped by appellant while selling milk. At the health center, the victim was attended by Winfrida who after examination, she filled PF3 which proved that victim was raped PF3 was given to PW3 filed it in a police file. During cross examination PW3 informed the court she do not know who raped the victim. The appellant found with the case to answer and upon closure of defense case, appellant was convicted and sentenced to thirty years.

Dissatisfied by decision of trial court, the appellant lodged 6 grounds of appeal to challenge it. For reasons I will explain latter, I am only reproducing the 1st ground which read as follows; -

1. *That, the trial magistrate erred in law and fact to convict the appellant basing on the evidence of PW1 which do not comply with section 127 (2) of the evidence Act Cap 6 R. E. 2019.*

During hearing date the appellant was remotely connected from Mbigiri Prison-Morogoro, unrepresented while the State Attorney, Mr. Nimrod Byamungu, was present in court representing Republic.

When invited to argue his appeal, the appellant prayed this court to adopt his petition of appeal as filed and that he did not wish to submit anything more. Petition adopted.

Mr. Byamungu submitted on first ground that PW1 was 13 years at the time she was testifying and she was the key witness. He said the wordings of S. 127 (2) of the Evidence Act, [Cap 6 R. E 2019] (here in after the Evidence Act) was not adhered to while testifying on court. PW1 was supposed to promise to speak truth or court satisfy that she understanding the meaning of oath as was in **Martine Mathayo vs. Republic**, Criminal Appeal No. 93 of 2021 High Court of Musoma (unreported) and in **Selemani Moses Sotel @ White vs. Republic**, Criminal Appeal No. 385 of 2018 CAT at Mtwara where both decision was to the effect that if the child of tender age is taking an oath court must testify itself that the child understanding the meaning of oath.

He said the evidence of PW1 was contrary to law and must be expunged from the record. After removing PW1 evidence, the rest testimony at page 17 PW2 (the baba mdogo) was informed of the occurrence of the crime it was hearsay. The other witness was a police officer who was not in the scene of crime, her evidence is hearsay. In that circumstance the case cannot stand, he resounded. He further submitted that the case has other illegality which when the court directed on that could find. That is, PW1 explain that after the action, PW1 came out of the house and sound alarm and crowd

followed her and arrest the appellant. These crowd who showed up to arrest the appellant were not summoned to testify. It was his argument that the Trial court was supposed to draw adverse inference against the prosecution that all crowd who gathered and arrest the appellant could have different version of the story contrary to what the prosecution alleges. It was his prayer this court to visit the case of **Aziz Abdalah vs. R** (1991) TLR at 71 where the court said;

> *"the general and well known rule is that the prosecutor is under **prema facie** duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witness are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".*

According to him people who arrested appellant were material witness, failure to summon them to testify in court gives the benefit of doubt of the assertion by the appellant that appellant and Waitunguru (the kitongoji chairman) were not in harmony that they had issues on 26/11/2022 in the pombe shop and he was arrested on 27/11/2022 in the presence of Mwita Waitunguru and *Sungusungu.* Mr. Byamungu agrees that in that

circumstance the case was not proved beyond reasonable doubts. He submitted that if it fits this court, it was his prayer that conviction and sentence to be quashed and the appellant set free.

I have duly gone through the petition of appeal and arguments done by the State attorney. I find to be prudence first to analyse the issue of credibility of PW1 as modelled by State Attorney. PW1 was the important witness in the trial as her evidence is the best. See **Selemani Makumba V. Republic** [2006] T. L. R 379, **Shani Chamwela Suleiman V. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022; **Mohamed Said V. The Republic**, Criminal Appeal No, 145 of 2017, CAT at Iringa (unreported).

PW1 gave her evidence under oath and it was recorded at page 14 of the proceedings of the Trial Court. For clarity I reproduce the excerpt; -

> *'PP: I have one witness I pray to proceed with hearing.*
>
> *Accussed: am ready for hearing.*
>
> *Court: Prosecution case Opens*
>
> *PW1, the victim, 13 years, resident of Karakatonga, a student of class seven Karakatonga primary school, Christian, sears and states;*
>
> *XD by PP;*

From the above excerpt, the court did not certify itself whether the child understand the nature of speaking the truth or meaning of oath.

It is true that there is great development of the law on how evidence of a person of tender age can be tendered in court. All traces its root from section 127 of Evidence Act: -

> S. 127.-(1) *Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*
>
> *(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.' (Emphasis supplied)*

In the present appeal, PW1 was supposed to promise to speak truth or court was supposed to satisfy that PW1 understanding the meaning of oath as was in various decision including the case of **Selemani Moses Sotel @ White vs. Republic** (supra) where the Court of appeal while accepting credence of the evidence of a child of tender age was of the consideration that the child understands the nature of oath, in that case the trial court needed to

satisfy itself that a child know the meaning of oath and it should be on face of record. With due respect, the trial Magistrate did not consider that.

For failure to adhere to procedures before admitting evidence of a person of tender age, PW1 is implausible witness and therefore this court expunge her evidence from court record.

Having expunged PW1 evidence, the remaining evidence is not sufficient to sustain appellants' conviction. The rest of witnesses provided hearsay evidence, at this moment, I join hand with Mr. Byamungu that PW2 and PW3 both heard the story from PW1, and their evidence is worthless. Prosecution opted to enjoy the provision of section 143 of Cap 6 on who to be called in court to testify and decide not to take advantage of those who arrested appellant to buff up the case. See **Henry Rimisho Mtenga vs. Airtel Tanzania Limited,** Civil Appeal No. 145 of 2020 HC at Dar Es. Salaam.

In the end, from the circumstances of this case and analysis done, I allow the appeal on the point of law. I quash conviction and set aside sentence inflicted against the appellant, I direct the appellant be unconfined from the prison immediately unless otherwise lawfully held.

Since the 1st ground of appeal suffices to dispose of appeal, I will not dwell determining other grounds.

It is so ordered.

M. L. KOMBA

JUDGE

04th November, 2022

Judgement Delivered on 4th November, 2022 while both parties were connected via teleconference, Appellant connected from Mbigili Prison.

M. L. KOMBA

JUDGE

04th November, 2022