IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 44 OF 2022

(Originating from Criminal Case No. 226 Of 2021 the District Court of Moshi at Moshi)

AMIDEUS LEON MASSAWE @ AMAN .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 13/2/2023
Judgment: 13/3/2023

MASABO, J.:-

In this fist appeal, AMEDEUS LEON MASSAWE@AMAN or simply, the appellant, is challenging the decision of the District Court of Moshi in Criminal Case No. 226 of 2021 by which he was convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 RE 2019] and sentenced to serve 30 years in prison. His appeal is based on the following two (2) grounds:

1. That, the trial court erred in law when it convicted and sentenced the appellant on a defective charge sheet; and
2. That, the trial court grossly erred in law and fact when it relied on the evidence of PW3 which was recorded in contravention of section 127 (2) of the Evidence Act.

The facts of the case as obtained from the record are that, at the time the incidence the appellant was working for the victim's father as a live-in house boy. On the fateful day, 25/5/2021, he called the victim into his bedroom, inserted his fingers into her vagina for sexual gratification and,

afterwards, he undressed the victim and unlawfully knew her carnally. After he had finished, he warned her not to disclose the incident to anyone else she will be killed. Fortunate, as they were walking out of the bedroom, PW3, the victim's sister who had comeback from school, saw them and when she asked the victim what she was doing in the accused's bedroom she muted. Later on, the incident was reported to the victim's mother, PW1, who questioned the victim but she gave no response. After a few strokes inflicted on her by PW1 the victim was softened and made a disclosure that the appellant molested her. The incident was then reported to police. The victim was issued with a PF3 and upon an examination performed on her by PW4, it was established that she has no hymen suggesting that she was carnally known. The appellant denied the charges and averred that they were fabricated so as to deny him the emolument he has lawfully earned by working for the victim's family. Having weighed the evidence from both parties the court found him guilty and proceeded to convict and sentence him.

Hearing of the appeal proceeded in writing at the request of the parties. The appellant was unrepresented while the Respondent was presented by Mr. Philibert Mashulana, learned state attorney.

In his submissions, the appellant introduced two new grounds not set out in memorandum of appeal which I shall not reproduce as they were irregularly raised from the bar. In support of the two grounds of appeal set out in the memorandum, he briefly argued that the trial court grossly erred in law and fact when it convicted and sentenced him in serious violation of section 127 (2) of the Evidence Act.

Rebutting the first ground of appeal, Mr. Mashulana, learned State Attorney, submitted that the appellant was charged with two alternative counts, the offence of rape in the first count and sexual abuse as an alternative count. The court found the appellant guilty of rape and therefore the alternative count ceased to exist. He argued that the provisions cited in the charge are correct and the appellant was properly convicted for having an unlawful carnal knowledge of the victim, a girl child of only 7 years. He stated that the words 'carnal knowledge' were used in the particulars of the offence to mean 'sexual intercourse' and that the same is recognized by courts. Thus, there was no error.

On the 2nd ground, Mr. Mashulana submitted that the law requires a child of tender age to give evidence without taking an oath or making an affirmation but requires that before her evidence is taken, she must undertake to tell the truth and not lies. He stated that PW3 gave her evidence under oath and the court was satisfied that she understood the nature of oath and hence complied with section 127(2) of Evidence Act as seen in the proceedings. He further argued that even if PW3 would not have been sworn nor promised to tell the truth, what she testified was original, true and authentic. Her evidence could not be discredited as noncompliance with Section 127(2) of the Evidence Act does not necessarily mean that the evidence did not constitute truth or authenticity. Fortifying this point, he cited the case of **Wambura Kiginga vs Republic,** Criminal Appeal No. 301 of 2018 CAT (unreported). He proceeded that the testimony of PW3 was credible and was accorded the required weight by the trial court.

Further, he submitted that, although PW3 did not mention the name of the appellant's male organ which penetrated her, the word 'dudu' which she used sufficed in expression. He cited the case **Joseph Leko v Republic,** Criminal Appeal No. 124 of 2013 (unreported) as cited in **Haruna Mtasiwa vs Republic,** Criminal Appeal No. 206 of 2018 where it was held that there are instances where a witness and even the court would avoid using such direct words as 'penis penetrating vagina' because of cultural restrictions and other related factors. He prayed that the court dismiss the appeal as it lacks merit. There was no rejoinder.

I have considered the submissions presented in the light of the two grounds of appeal. I have also studied the records of the trial court. I shall address the two grounds of appeal as two separate issues; one, whether the charge was defective and; two, whether there was noncompliance with the provision of section 127 (2) of the Evidence Act.

Starting with the first issue, it was averred in the first ground of appeal that the charge sheet from which the conviction emanated was defective. Much as the appellant's omission to submit on this issue suggests that he abandoned it, in the interest of justice and considering that he was lay and unrepresented, I will examine the charge sheet to see if it was anyhow defective. As correctly argued by the State Attorney, the charge had two counts, the first containing the offence of rape and the second on sexual abuse and having established the first count, the alternative count was abandoned which is a common and acceptable practice. Turning to the count of rape by which the appellant was convicted and

sentenced, the contents of a charge are clearly depicted under section 132 of the Criminal Procedure Act [Cap 20 RE 2022] which states that:

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

There is, in addition to this provision, a plethora of authorities such that, the position in our jurisdiction is now settled that a charge must disclose the offence the accused is charged with (see such as **Sylvester Albogast V Republic** (Criminal Appeal 309 of 2015) [2016] TZCA 238 (TANZLII) and; **Isdori Patrice V R** (criminal Appeal 224 of 2007) [2007] TZCA 2 (TANZLII)). It was therefore incumbent for the charge to disclose the offence of rape as created by section 130 (1) (2) (e) and section 131 (1) of the Penal Code provides as follows:

> **130**.-(1) It is an offence for a male person to rape a girl or a woman.
> (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions (e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.
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> 131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court,

to the person in respect of whom the offence was committed for the injuries caused to such person.

In the chargesheet, the count of rape laid against the accussed was depicted as follows:

STATEMENT OF OFFENCE

Rape contrary to section 130 (1) (2) (e)and section 131 (1) of the Penal Code [Cap 16 RE 2019].

PARTICULARS OF OFFENCE

AMIDEUS S/O LEON MASSAWE @AMAN on 25th day of May, 2021 at Mabogini area within the District of Moshi in Kilimanjaro Region, did have carnal knowledge of XY (name withheld for concealment of identity) who is 7 years old.

When this count is paired with the provision above it becomes obvious, in my considered view, that it was in good order as it not only disclosed the office of rape as depicted in the provision above but was well crafted to enable the appellant to understand the charges against him and to prepare and render his respective defence. Evidently, this is the reason why, as per the record, when the charge was read over and explained to the appellant and required to plead there to, he ably pleaded and when the facts were read out, he specified the facts he was in agreement and the ones he was not and during the trial he rendered his defence. In the foregoing, I see no error sufficing a reversal of the conviction and sentence as the charge was correctly drafted pursuant to the law. The first ground of appeal, consequently, fails and is dismissed.

On the second issue whether there was noncompliance with section 127 (2) of the Evidence Act, it was the appellant's submission that the testimony of PW3 is unworthy as it offended the above provision. Section 127 (2) of the Evidence Act, which is the epicenter of this ground states that;

> "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."

The import of this provision as discussed in numerous authorities, is that, it recognizes a child of tender age, defined under subsection 4 of the same provision to mean a child below the age of 14, as competent witness capable of testifying on oath or without oath. Where such testimony is to be rendered without oath the child witness must first undertake to tell the truth not lies (**Shomari Mohamed Mkwama vs Republic** (Criminal Appeal No. 606 of 2021) [2022] TZCA 644; **Ramson Peter Ondile vs Republic** (Criminal Appeal No. 84 of 2021) [2022] TZCA 608**; Omary Salum @Mjusi vs Republic,** (criminal Appeal No. 125 of 2020) [2022] TZCA 579 and**; John Mkorongo James vs** Republic (Criminal Appeal 498 of 2020) [2022] TZCA 111 (all from TANZLII). In the present case, the victim who testified as PW3 was 7 years old hence a child of tender age under the purview of section 127(2). Procurement of her evidence had, therefore, to comply with the procedure above meaning that it had to be procured under oath or without oath but with an undertaking to tell the truth.

As per the record, the procurement of the testimony of this witness as depicted in page 9 of the proceedings was preceded by a set of questions and answers as demonstrated below:

> PW3: XY (name)
> Question: How old are you?
> Answer: I am 7 years old.
> Question: Are you school?
> Answer: I am schooling at James Olewilima Primary School standard one. I am Christian.
> Answer: I know the meaning of oath means you must speak truth. I shall speak truth

After this question and answers session and the undertaking to tell the truth, the trial magistrate made the following finding:

> **Court:** the child possesses enough intelligent. She knows the meaning of oath. The child promises to tell the truth.

Thereafter, the victim was sworn and her testimony was recorded. Obviously, the procedure used is slightly fault as the witness was made to undertake to tell the truth and having made the undertaking to tell the truth she was sworn. As clearly demonstrated under the provision, the promise and the oath are alternate. A trial court presented with a child witness of a tender age must first question the child to ascertain whether she understands the nature of oath and if she does, her evidence may be received under oath. Inversely, if she does not seem to understand the nature of oath, she will be required to undertake to tell the truth and her undertaking shall be recorded. Dealing with a similar issue in **Omary Salum @ Mjusi vs Republic** (*supra*) at page 10, the Court of Appeal emphasized that:

> "Many times, this court has stated that the import of section 127 (2) of the Evidence Act requires a simple process to test the competence of a child witness of a tender age to know whether she understood the nature of an oath before it is concluded that his/her evidence can be taken on oath or on promise to tell the truth and not lies."

That said, much as the trial magistrate erred in employing both, the undertaking to tell the truth and the oath, the error is minor and curable in the prosecution's favour as it fortifies the credibility of PW3's evidence. Had the trial court employed neither of the two requirements, it would have committed a fatal and an incurable error capable of vitiating the testimony of PW3 which is not the case in point. To that extent, the second ground of appeal is without merit and is dismissed.

Further to the finding above, having reassessed the evidence as a whole as to the procedural propriety in the procurement of the evidence of PW3, I am fortified that, the conviction and sentence were well grounded as through the testimony of this witness penetration which is the first crucial element of statutory rape was established and the age of the victim which is the second crucial ingredient was uncontested. Also, as correctly argued by the learned State Attorney, the phrase "she inserted *dudu lake kwenye dudu langu*" when used in rape cases against minors is now accepted to as a sufficient demonstration of penetration. It was also established through this witness that the appellant is the one who raped her.

The law is settled that, in sexual offences, evidence obtained from the victim is the best evidence and, if found credible it suffices to convict the accussed even in the absence of corroboration. In the present case, PW3's

evidence was found credible and since there is no evidence that she was any how not reliable, there is nothing to discount her evidence. Moreover, the record clearly demonstrates that PW3's testimony was well corroborated. Her account with regard to penetration was corroborated by PW4, the doctor who examined her and found out that she has no hymen suggesting that she was penetrated by a blunt object. As regards the perpetrator, her testimony was corroborated by PW2 who saw the appellant and the victim coming from the appellant's bedroom at which the offence is believed to have been committed.

In totality of the above, this appeal fails as the charge sheet had no error and procedural irregularity in the procurement of PW3's evidence is minor and inconsequential. Accordingly, I uphold the conviction and sentence of the trial court and dismiss the appeal.

DATED and **DELIVERED** at **MOSHI** this 13th day of March 2023.

X _____

Signed by: J.L.MASABO

J.L. MASABO
JUDGE
13/3/2023

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