IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 164 OF 2022

(Originating from the District Court of Rungwe at Tukuyu, Criminal Case No. 39/2022)

BINAISA JULIUS ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

20th & 28th Feb, 2023

Nongwa, J.

The appellant Binaisa s/o Julius Kapusi, aged 38 years old resident of Ilundo village, had been charged, tried, convicted and sentenced to life imprisonment for the offence rape contrary to section 130 (1) (2) (e) and section 131(3) of the Penal Code Cap 16 R.E 2019 (now R.E 2022). The appellant, a motorcyclist had been alleged to have raped a child of 8 years old on 19/4/2022, while carrying the victim on his motorcycle heading to her grandmother.

From the records, it was until 29/5/2022 when the victim's mother heard that her daughter was sick and went to inquire about it only to be told that her child was raped. When the victim was sent for medical examination, it was discovered that she had been raped. It was then when the appellant

was arraigned to face the charges that was followed with conviction and sentence as stated above.

Aggrieved by the conviction and sentence the appellant has preferred this appeal on the following grounds which are reproduced as submitted;

1. *'That the trial magistrate erred in law and in fact to consider the evidence adduced by the prosecution witness which was doubtful in verifying the incident.*
2. *That the trial magistrate erred in law and in fact by accepting the statement of PW1 that (victim) that after the incident I threatened her not to tell anybody while knowing that I had engaged in such felony the victim had to bleed and felt pain that everybody should know when reached at her grandmother's house (sick)*
3. *That the trial magistrate erred in law and in fact by not consider the time the alleged incident occurred and the time I was arrested, it was almost two (2) months. Had I did it I would have been arrested immediately regarding the age of the victim who was 8 years old.*
4. *That the trial magistrate erred in law and in fact to convict and sentence the accused basing what the law states "the true evidence of rape comes from the victim herself" without corroboration of another vivid evidence.*
5. *That the trial magistrate erred in law and in fact to convict and sentence the accused regarding the evidence adduced by PW3 and PW4 that the hymen of the victim was not intact while it was not stated that before I sent the victim to her grandmother her hymen was intact*

or not in putting consideration that those witnesses observed nothing rather than penetration'

The appellant prayed that the appeal be allowed, conviction be quashed and set aside the sentence imposed by the trial court. He also wished his appeal to be heard in his presence. At the hearing, the appellant has been under representation of the learned counsel, Mr. Nickson Kiliwa while the respondent has been represented by the leaned State Attorney, Mr. Emmanuel Bashome. When the matter came for hearing, the counsel for the appellant, prayed to submit additional grounds of appeal, the prayer was uncontested, and the following three more grounds were added. These are;

1. *That the trial magistrate erred in law and facts by convicting and sentencing the appellant basing on the evidence of PW1 (Victim) who is a minor without making a promise as required by the law.*
2. *The trial magistrate erred in law and facts by convicting and sentencing the appellant basing on the contradictory evidence which were not proved properly as required by the law.*
3. *The trial magistrate erred in law and fact by convicting and sentencing the appellant basing on the evidence which he had failed to analyze properly which resulted to a wrong decision.*

In support of the appeal, Mr. Nickson Kiliwa abandoned the grounds contained in the petition of appeal save for the 3rd ground and the added new three grounds. He started with the issue of failure to cause the victim PW1 to make a promise to tell the truth. That, after amendment of the Law

of Evidence, Cap. 6 R. E. 2019 in particular section 127 of the Evidence Act (2), requires a child of tender age to promise to tell the truthhe referred the case of **Geofrey Wilson vs. Republic, Criminal Appeal No. 168/2018 CAT Bukoba (unreported)** where, the court stated about the foundation as to what the court should do to reach a conclusion that the child has made that promise. In that, a trial magistrate is required to ask the child simple questions, like age of the child, religion which he professes and other simple questions to ascertain if the child will tell the truth, and the same be recorded in the proceedings.

Mr. Nickson Kiliwa also referred the position in **Ahazi Mwakisisye @ Sugu vs. Republic, Criminal Appeal No. 66/2019 HC Mbeya – Mongella, J**. and in the case of **Athman Ally vs. Republic, Criminal Appeal No. 61/2022 CAT, Tanga**, insisting on showing in the proceeding how the court reached the conclusion that the child promises to tell the truth.

Mr. Kiliwa argued further that in the case of Ahazi (supra) the Judge remarked that the foundation and the promise was not seen anywhere in the proceedings of the trial court hence vitiating the whole proceedings and the conviction and sentence of such trial court becoming nulity as it originates form defective proceedings. That, in the case at hand, page 5 of typing proceedings the last paragraph, it is only written the child promise to tell the truth, nowhere shows the foundation that led to that conclusion. It was his submission that, the trial magistrate did not follow the requirement of the law and convicted the appellant.

On the 2nd ground on convicting the appellant basing on contradictory evidence contrary to the law. Mr. Kiliwa submitted that, section 110 of Cap. 6 (supra) that it puts it clear that the burden of proof lies on the one who brought the charges. That, in the case at hand, when reading the page 6 of typed proceedings in particular the last paragraph PW1 being cross-examined said it was on 18 May, 2022 when the alleged offence took place while heading to her grandmother on the appellant's bike PW2, victim's mother said the alleged offence occurred 19/04/2022 this is seen at page 8 paragraph 2 basing on those two dates 18/5/2022 and 19/4/2022 the question remains as to when is the exact date the scene took place. It was the Republics duty to clear that doubt as to when did the crime was committed.

As to the 3rd ground, on failure to properly analysis the evidence hence arriving at a wrong decision. Mr. Kiliwa stated that the trial magistrate based on the evidence of the Medical Doctor that there was rape. The PW3 and PW4, Doctors gave contradicting evidence. In the proceedings, page 11 paragraph 2 of the typed proceedings, while the first doctor stated the problem of the child was failure to urinate, he did not say the reason for failure to urinate but come to state that he examined the child and found that there is no hymen. The question is, is the absence of hymen caused the child not to be able to urinate? PW4, also a doctor said he did the examination, he also stated that at page 12 paragraph 1 of the proceedings, that he inspected that child and noted nothing concerning sexual abuse and filled PF3 for that purpose. PW4 also confirmed that the child had no hymen.

Mr. Kiliwa referred the court to page 13 last paragraph where the court did examine PW4, as to what may cause destruction of hymen, he said anything may and in the judgment at page 2 – 3 (last paragraph of page 2 to first paragraph of page 3 a trial magistrate stated that the witnesses said/proved that the victim was raped while PW4 said he noted nothing.

Submitting on the 3rd ground contained in the petition on the time frame the event alleged to have taken place to the time of arrest of the appellant, Mr. Kiliwa cited the case of **Maria Wangita Mwita and another vs. Republic 2002 TLR 39** where the court stated on the ability of the victim to name the suspect at the earliest stage opportunity is and all important assurance of his reliabilities, in the same ways as unexplained delay or complete failure to do so should put the prudence court to inquiry.

He said that in the case at hand, mother of the victim, PW2 claimed the crime took place 19/4/2022 while the appellant came to be arrested 1/6/2022. Looking on that it is two months after that is when the appellant came to be arrested this is shown at page 3 paragraph 2 of the Judgment.

That, despite the fact of much time to have been passed, PW1 said she was sent to her grandmother, slept there and in the morning she went to school, page 6; 1st paragraph of the proceedings. The question is a person of such tender age of 8 years after such incident, could have managed to sleep with pain and woke up and go to school, even the grandmother did not appear before the court and say about the condition of the child when she arrived, as she was the first one to receive her.

That, for all those reasons he found just for the court to let the appellant free so that he can go and take care of his family whose children now are not schooling for lack of assistance, he prayed that conviction and sentence be quashed.

In his reply, Mr. Emmanuel Bashome, State Attorney, supported the appeal on the reasons that the proper procedure in recording the victim child witness promise to tell the truth or to swear, was not followed. As evidenced on page 5 when PW1 was testifying what the magistrate did was just to record the conclusion that the child promises to tell the truth.

Therefore, the child was not made to swear or promise to tell the truth as required by section 127 (2) of TEA the child on her own words was supposed to state that promise to tell the truth.

Mr. Bashome referred this court to the case of **Athman Ally (supra)** which had same circumstance of the present one, where at page 9 the court stated that the omission was fatal, the magistrate ought to have stated how he reached that decision, therefore the available remedy is to expunge that evidence from the records and if that evidence is expunged from the records, the evidence of remaining witnesses remain unsatisfactory to warrant conviction. There was no rejoinder from the appellant's counsel.

I have endeavored to through the two sides submission in support of the appeal and find it clear that the trial magistrate did not record properly the victim's promise to tell the truth, at page 5 last paragraph of the typed proceedings the record shows that, for clarity I wish to reproduce the same

while hiding the names of child witness and use ***xx xx*** to protecting her identity;

*'**TRIAL STARTS***

PROSECUTION CASE OPENS:

PW1: *xxx xxx 8 years old, Mtokela, kyusa. The child promises to tell the truth.*

Section 127(2) TEA C/W.

Signed
R. I. Shehagilo - SRM
30/6/2022'

It is obvious that the trial magistrate did not do his duties properly as required by the law and practice, that the proceedings must speak for themselves clearly showing the child of tender age say the promise to tell the truth. It is only the magistrate who is reporting the child promise to tell the truth, but it is not clear in the record if real the child promised to tell the truth. The court decided to put words to mouth of the child witness. In the light of the decision in **Athuman Ally** (supra), which has also been referred by the two sides in supporting the appeal, shows that the procedure was not followed then the evidence of the victim PW1, is subject to be expunged from the record, and doing that, it is evident that the remaining part of other witnesses' testimony, hold no weight to uphold conviction against the appellant.

However, there is a very recent decision that explains further the position of laying foundation for the child witness who is of tender age. The position stated in **Mathayo Laurance William Mollel vs Republic Criminal Appeal no. 53 of 2020** (2023) TZCA 52 tanzlii, the dated 20th February 2023 has made it clear that by virtual of the provision of section 127 (2) of TEA, if a child of tender age is not to testify on oath or affirmation, a preliminary test on whether he knows and understands the meaning of oath may be dispensed with. That, a preliminary test is to be conducted or will be necessary if the child witness is to testify on oath. In **Mathayo** (supra) the court of appeal stated inter alia;

> *'As we held in Issa Salum Nambaluka v. Republic, Criminal Appeal No. 195 of 2018 (unreported), the plain meaning of the provisions of subsection (2) of section 127 of the Evidence Act reproduced above, a child of tender age may give evidence on oath or affirmation or without oath or affirmation. Where a child of tender age is to give evidence without oath or affirmation, he must make a promise to tell the truth and undertake not to tell lies. In the case at hand, the child witnesses who are the victims on the counts on which the appellant was convicted, did not give evidence on oath or affirmation. They simply promised to tell only the truth. We think thiswas quite appropriate in terms of sub-section (2) of section 127 of the Evidence Act reproduced above. We are unable to agree with the appellant that the trial court ought to have conducted a test to verify whether the child witnesses knew and understood the meaning of oath or*

affirmation. ***In our considered view, that requirement would only be necessary if the child witnesses testified on oath or affirmation. We respectfully think that if a child of tender age is not to testify on oath or affirmation, a preliminary test on whether he knew and understands the meaning of oath may be dispensed with.'*** (emphasis supplied)

In the case at hand, it is unclear as to whether the child was going to take oath or not, and if the position was not taking oath, then the child had to make that promise. From the proceedings, nowhere showing the child witness promising to tell the truth.

As stated in the cited case of **Athuman Ally** (supra) at page 8 last paragraph, while referring to the case of **Raphael Ideje @Mwanahapa V. R** [2022] TZCA 71 (TANZLII) and **Yusuph s/o Molo v. R.** [2019] TZCA 344 (TANZLII) the Court of Appeal re-stated the mandatory requirement of trial court to record the words of the child of tender age promising to tell the truth unlike what has been done in the appeal at hand. For clarity, the Court of Appeal in **Athuman Ally,** stated inter alia;

'The position is to the effect that the record of the trial court ***must show the words*** *of a child of tender age promising to tell the truth before the trial court allows him to testify.' (emphasis supplied)*

In the case at hand and as the records of the trial court shows, it is as good as the child did not make the promise to tell the truth. From the submission of the learned State Attorney Mr. Bashome and the appellant's counsel, they are correct to fault the trial magistrate in this appeal for the failure to record her engagement with the child witness PW1 before writing down her conclusion that this child of tender age promised to speak the truth. For those reasons the evidence of PW1 is therefore discarded from the evidence on record.

Looking at the remaining evidence, from the records, there has been contradicting evidence between PW1 and PW2 on the date the event took place. PW1 when being cross-examined said it was on 18 May, 2022 when the alleged offence took place while heading to her grandmother on the appellant's bike. PW2, victim's mother said the alleged offence occurred 19/04/2022 this is seen at page 8 paragraph 2 basing on those two dates 18/5/2022 and 19/4/2022, it is unclear as to when is the exact date the scene took place. The prosecution therefore failed to prove as to the date when the crime was committed. Again, the evidence of PW3 and PW4, (Doctors) at page 11 paragraph 2 of the typed proceedings, while the first doctor stated the problem of the child that was reported being difficulty in urinating, he stated that he examined the child and found that there is no hymen. PW4, also a Doctor, he said he did the examination, he also stated that at page 12 paragraph 1 of the proceedings, that he inspected that child and noted nothing concerning sexual abuse and filled PF3 for that purpose. PW4 also confirmed that the child had no hymen. PW4,was asked as to what

may cause destruction of hymen, he said anything may. Clearly there were inconsistence in the evidence of the two doctors who examined the child.

As submitted by the learned State Attorney that the evidence of the remaining witnesses contradicts each other as such stands unsatisfactory to warrant conviction. Moreover, even if there could be proof that the victim was raped, the remaining evidence could not tell that it was the appellant who raped the victim.

From the foregoing analysis, and considering the fact that the appeal has not been contested, it is the findings of this court that the appeal is allowed, the conviction and sentence meted on the appellant is set aside, the appellant to be freed unless otherwise lawfully held for other cases.

Dated and delivered at Mbeya this 28th February, 2023

V. M. Nongwa
Judge
28/2/2023