IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 49 OF 2022

(Originating from Criminal Case No. 314 of 2018 of Rombo District Court at Mkuu)

FRANK DISMAS KIMARIO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

30/03/2023 & 23/05/2023

SIMFUKWE, J.

The appellant, Frank s/o Dismas Kimario, was charged before the District court of Rombo at Mkuu with the offence of rape contrary to **section 130 (1) (2) (e)** and **131 (1) of the Penal Code, Cap. 16 R.E. 2002** (now R.E 2019). The particulars of the charge were that on 12th day of December 2019 at about 18:30hrs at Momwe Village within Rombo District in Kilimanjaro Region, the appelant did have carnal knowledge with one BT (not her real names) a girl of 03 years old. He was convicted and sentenced to serve thirty (30) years imprisonment.

Before the trial court, the prosecution alleged inter alia that PW1 the victim's mother was informed by the victim that she was raped by the appellant when she went to the appellant's place to collect her shoes. PW1 among other things testified that when she was preparing porridge for the victim, the victim went and told her that *"mama, Frank aliniwekea uchi wake kwenye uchi wangu'.* Following such information, PW1 went

direct to the appellant. They asked the appellant but he denied. They decided to report to the ten cell leader. On their way back, the appellant followed PW1 while begging for forgiveness and stated that she did not fully penetrate the victim. The appellant was quoted to have said *"mama glad nisamehe, ni kweli nilifanya lakini sikuingiza ndani kabisa*." PW1 narrated further that she did not find the ten cell leader, thus, she decided to go to her mother (PW3) and narrated what had happened. When PW3 received the said information, she panicked and went to Frank and pulled him while screaming for help. The appellant kept on apologising before PW3. The militia men went to arrest the appellant and took him to Mashati police station.

PW2 (the victim) testified before the trial court that when she went to the appellant's home to collect her shoes, the appellat told her that he would mend them later. Then, the appellant took PW2 to the farm, took off his trouser and she saw his nakedness, then he took off PW2's underpants and laid her down on the ground and had carnal knowledge of her.

PW4 a police officer, recorded the statements of witnesses.

PW5 the doctor testified among other things that he examined the victim and found that her vagina had bruises on the right side and she was not virgin. PW5 decribed that bruises on the victim's vagina showed that there was something blunt from outside which had entered her vagina which might be an erect penis of a man. Thereafter, PW5 filled a PF3 which he tendered in court and was admitted as pros **exhibit I.**

In his brief defence, the appellant denied the allegations levelled against him. He narrated how he was arrested. He admitted that he knew the victim and the victim's mother.

After considering evidence of both parties, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubts and convicted the appellant. Hence this appeal.

Aggrieved by both the conviction and sentence, the appelant preferred this appeal on 3 (three) grounds:

1. *That the trial Court grossly erred in law when convicted and sentenced the Appellant in serious contravention of section 234(2)(b) of the Criminal Procedures Act [the CPA]*
2. *That the trial court grossly erred in law and (sic) when convicted and sentenced the appellant relying on the the evidence of PW2 which was taken in contradiction of section 127(2) of the evidence act. (sic)*
3. *That, the learned trial magistrate grossly erred in law and fact when convicted and sentenced the appellant on the case which was not proved beyond reasonable doubt.*

During the hearing, the appellant was unrepresented while Ms. Grace Kabu, learned State Attorney appeared on behalf of the respondent. The appellant prayed that the appeal be disposed by way of written submissions, his prayer was granted.

Submitting on the first ground of appeal, the appellant faulted the trial magistrate for contravening **section 234(2)(b) of the Criminal Procedure Act** (supra). He reffered page 21 of the proceedings and argued that the charge was substituted and the new charge was read over to him and he pleaded to it in terms of **section 234(2)(a) of the**

Criminal Procedure Act (supra). However, at the time when the charge was substituted the prosecution had already paraded five witnesses who had already testified. Thereafter, the prosecution closed its case. The appellant argued and opined that since the charge sheet was amended after the witnesses had testified, then, the trial court was supposed to comply with section **234(2)(b) of the Criminal Procedure Act (supra)** which reads:

> *(2) subject to subsection (1) where a charge is altered under that subsection*
>
> *(b) The accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross- examined by the accused or his advocate and in such last mentioned event the prosecution shall have the right to re- examine any such witness on matters arising out of such further cross- examination . "*

The appellant supported the above provision with the case of **Ezekiel Hotaly vs Republic, Criminal Appeal No. 300 of 2016** which was cited in the case of **Balole Simba vs Republic, Criminal Appeal No. 525 of 2017** at page 8 where it was held that:

> *" According to the preceding cited provision, it's absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant, (sic) having substituted the charge the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross- examined. This was not done n (sic) failure to do so, rendered the*

evidence led by five prosecution witnesses to have no evidential value."

The appellant contended that in the cited case of **Balole Simba** (supra) the Court of Appeal discussed the effect of omission to address the accused on his right to call the witnesses who had already testified after the charge is altered. At page 8 the Court held that:

"In the present case although the substituted charge was read over to the appellant, he was not subsequently addressed on his right to have the two prosecution witnesses who had already testified be recalled so as to give fresh evidence or be further cross examined. On account of the said omission this verdures (sic) the evidence by PW1 and PW2 with no evidential value."

On the strength of above cited decision, the appellant urged this court to follow the same route and find that in the instant matter there was serious contravention of **section 234(2)(b) of the Criminal Procedure Act** (supra) which renders evidence of five prosecution witnesses who testified before the substitution, valueless.

On the second ground of appeal, the appellant submitted that there was contravention of **section 127(2) of the Evidence Act** (supra). While submitting in respect of this issue, the appellant referred the court to what transpired before the trial court at page 9 of the typed proceedings. He quoted **section 127(2) of the Evidence Act** and cited the case of **Issa Salum Nambaluka, Criminal Appeal No. 272 of 2018**, which at page 11 stated inter alia that:

"Where a witness is a child of tender age a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child understands the nature of oath if he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence be required to promise to tell the truth and not tell lies."

Elaborating the above cited case, the appellant said that the same puts a mandatory requirement to ask a child of tender age few pertinent questions before jumping to the conclusion that the child is promising to say the truth. The appellant challenged the way the promise was made in this case by stating that the same offends the dictates of **section 127 (2)** (Supra). He cited the case of **John Mkorongo James**, **Criminal Appeal No. 498 of 2020** at page 13 where it was held that:

"We have also observed that beside the omission of failure by the trial court to have first examined PW1 to test his competence and know if he understood the meaning and nature of an oath before jumping to the conclusion that PW1 would give unsworn evidence on the promise to the court to tell the truth, PW2 promise was incomplete and it was in form of indirect or reported speech instead of a direct speech. It was incomplete because while section 127(2) of the evidence Act required that the promise should be in telling the truth and not telling any lies what PW1 is said to have promised is only to tell the truth. He

did not promise not to tell any lies. It is recommended that the promises to the court under section 127 (2) of the Evidence Act should be in direct speech and complete"

The appellant went on to argue that, in the instant matter, PW2 was not examined to test his competence to ascertain her intelligence for the trial court to decide how her evidence would be received.

The appellant noted another omission in respect of the said promise. He argued that the said promise was not made by PW2 herself since it was reported by the learned magistrate. Moreover, the said promise was incomplete as there was an omission of the promise not to tell any lies. He asserted that PW2's evidence cannot be relied upon to incriminate the appellant of the offence charged.

The appellant emphasized that the decision of **John Mkorongo James** (Supra) held that the omission to conduct brief examination on a child witness of a tender age to test his competence and whether he/she understands the meaning and nature of an oath before his/her evidence is taken on the promise to the court to tell the truth and not tell lies is fatal and renders the evidence valueless. He prayed this court to hold the same, disregard evidence of PW2 and hold that it was taken in violation of **section 127 (2) of the Evidence Act.** (supra)

Concerning the remaining evidence of PW1, PW3, PW4 and PW5; the appellant argued that the same is hearsay evidence with no evidential value in law. To substantiate his argument, the appellant re-cited the case of **John Mkorongo James** (supra) at page 15 where it was stated that:

"The evidence from PW2, PW3, PW4 and PW7 is whole hearsay evidence and incapable of incriminating the appellant of the offence charged. No one saw the appellant committing the charged offence. Likewise, the evidence of PW6 and from the PF3 which is to the effect that there were bruises in PW1's anus only proves that PW1 's *anus was penetrated. It does not prove that it was the appellant who penetrated him. Lasting (sic) the evidence from PW5 is just on how the appellant was arrested.* "

The appellant implored this court to subscribe to the above decision of the Court of Appeal and disregard the hearsay evidence of PW1, PW3, PW4 and PW5 and find that there is no any other evidence on record capable of holding the appellant liable of the offence he was charged.

Submitting in support of the third ground that the case was not proved beyond reasonable doubt; the appellant noted that there was contradiction between PW1 and PW3 on what actually the appellant said regarding the act done to PW2. That, PW3 testified that when she went to the appellant's home PW1 was not there while PW1 testified as if she was in the company of PW3.

Another noted weakness on part of prosecution was that Mama Pendo who was mentioned by PW1 was a material witness who was not summoned to lead credence to her evidence.

In addition, the appellant alleged that the defence case was not considered. He prayed the court to allow his appeal, quash the conviction and set aside the sentence against him.

In her reply Ms. Grace, learned State Attorney did not support the appeal. On the 1st ground of appeal; the learned State Attorney submitted that the provision of **section 234(2)(b) of the Criminal Procedure Act** (supra) was not violated. That, on 16.09.2019 the prosecution before closing their case substituted a charge and it was read to the appellant (Accused) who pleaded not guilty. That, the trial court observed the requirement of **section 234(2)(a) of the Criminal Procedure Act** and found that no party was prejudiced and that the substituted charge did not cause injustice to the appellant.

It was submitted further that the rights under **section 234(2), (3), (4) and (5) of the Criminal Procedure Act** (supra) are not granted automatically to any party since the party is required to move the court requesting to examine a witness afresh or further examination. She added that, where any party requests, if the court finds that it is not necessary, it will not grant the prayer. She explained that the appellant herein did not move the Court or request to examine any witness regarding the amendments made on the charge. Furthermore, the amendment which was made did not affect the evidence given by prosecution hence, no prejudice to the appellant. For that reason, the learned State Attorney was of the view that the ground raised is without merit.

Responding on the allegation that there was non-compliance of section **127(2) of the Evidence Act** (supra) as raised under the 2nd ground of appeal, Ms. Grace submitted to the effect that the law requires a child of tender age to 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.

In the case at hand, Ms. Grace submitted that as seen under page 9 of the proceedings, evidence of PW2 was recorded after PW2 promised to tell the truth hence, complied to the said provision.

The learned State Attorney submitted further that even if PW2 did not promise to tell the truth, still what she narrated was original, true and authentic. Ms. Grace opined that non-compliance with the said provision does not necessarily mean that the evidence did not constitute truth and authenticity. She referred to the case of **Wambura Kiginga vs. Republic, Criminal Appeal No. 301 of 2018 (CAT)** (unreported) which held that:

> *"Notwithstanding the preceding provisions of this section to mean that, a conviction can be based on only subsection (6) of section 127 without complying with any other sub section of 127 including sub section (2)".*
>
> *Based on that understanding, we were satisfied that, it is not impossible (sic) to convict a culprit of a sexual offence, where section 127(2) of the Evidence Act is not complied with, provided that some conditions must be observed to the latter. The conditions are; first, that there must be clear assessment of the victim's credibility on record and; second, the court must record reasons that notwithstanding noncompliance with section 127(2), a person of tender age still told the truth.* "

Also, the learned State Attorney referred to the case of **Shabani Daud vs Republic, Criminal Appeal No. 28 of 2001** (unreported) which held that:

"The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses…"

Ms. Grace was of the view that the testimony of PW2 is credible in terms of the consistency and coherence of her testimony and what she was testifying as seen at page 9 of the proceedings is nothing but original truth.

Responding to the third ground of appeal that the prosecution case was not proved beyond reasonable doubt; the learned State Attorney stated that evidence of PW1, PW2 and PW4 is credible and unshaken hence is enough to warrant conviction. She cited the case of **Suleman Makumba Versus Republic, [2006] T.L.R. 379** which held that:

"*The best evidence in sexual offence cases comes from the victim.*

Ms Grace continued to explain that in the present case, PW2 managed to narrate what transpired on a fateful date consistently and coherently. The learned State Attorney referred to the case of **Haruna Mtasiwa vs. Republic, Criminal Appeal No. 206 of 2018** which referred to the case of **Joseph Leko v. Republic, Criminal Appeal No. 124 of 2013** (CAT) (Unreported) which held that:

"*The circumstances of each case including cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. The reason is obvious. There are instances and they are not few, where* a *witness and even the court would avoid*

using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters.

On the basis of the above authority, Ms. Grace expounded that in this case, though PW2 did not mention sexual organs direct, it doesn't affect her testimony to prove the case beyond reasonable doubt.

The learned State Attorney concluded that the appeal has no merit, hence, should be dismissed.

I have considered the rival submissions of both parties, the grounds of appeal raised by the appellant and the trial court's records. The issue for determination is ***whether the prosecution case was proved beyond reasonable doubts***. In scrutinizing this issue, I am aware that this being the first appellate court, it is obliged to re-evaluate evidence on the record in case the trial court did not evaluate evidence properly.

On the first ground of appeal, the appellant faulted the trial magistrate for failure to comply with **section 234(2)(b) of the Criminal Procedure Act** (supra). That, the charge was amended while the prosecution had already paraded 5 witnesses who had already testified. Thus, the trial court was required to order the witnesses to be recalled for further cross examination as enshrined under **section 234(2)(b) of the Criminal Procedure Act** (supra).

Disputing this argument, Ms. Grace was of the view that the rights under **section 234(2)(3)(4) and (5) of the Act** are not automatically granted to any party. The section requires a party to move the court to request recalling a witness. The learned State Attorney added that, the

amendment did not affect the evidence given by the prosecution hence the appellant was not prejudiced.

Looking at the records, as rightly submitted by the appellant, the charge was amended after prosecution witnesses had testified. I studied the two charge sheets, and discovered that it was the date only which was amended.

According to the records, the trial magistrate addressed the appellant under **section 234(2)(a) of the Criminal Procedure Act** (supra). However, the appellant did not exercise his right under **section 234(2)(b)** to require any of the prosecution witnesses to be re-called. Therefore, he cannot at this stage blame the trial magistrate since he failed to exercise his right.

Apart from that, as rightly submitted by the learned State Attorney the amendment which was effected to the charge did not affect the prosecution evidence. Thus, the appellant was not prejudiced.

On the second ground of appeal, the appellant complained that there was noncompliance of **section 127(2) of the Evidence Act** (supra) on the reason that the trial magistrate did not assess whether or not the said child understood the nature of oath before receiving her evidence by asking her few pertient questions before jumping to conclusion that the child promised to say the truth. Also, the appellant lamented that the said child gave ahalf promise since she did not promise not to tell lies. Lastly, he stated that the said promise was not made by PW2 herself since it was reported by the trial magistrate.

On the other hand, the learned State Attorney had differrent opinion; she told this court that evidence of PW2 was recorded after she had promised to tell the truth. She argued that even if the witness did not promise to tell the truth, still what she narrated was original, true and authentic. She added that, noncompliance with the said provision does not necessarily mean that the adduced evidence did not constitute truth.

The above noted provision has been interpreted by the Court of Appeal in numerous decisions one of them being the case of **John Mkorongo** (supra) cited by the appellant. In another case of **Mathayo Laurance William Mollel vs Republic (Criminal Appeal 53 of 2020) [2023] TZCA 52 at page 12** it was held that:

> *"We understand the legislature used the words "promise to tell the truth to the court and not to tell lies". We think tautology is evident in the phrase, for, in our view, 'to tell the truth" simply means "not to tell lies". So a person who promises to tell the truth is in effect promising not to tell lies. The tautology in the subsection is, in our opinion, a drafting inadvertency."*

In the instant matter, the trial magistrate before receiving evidence of a child of tender age, while inquiring the particulars of the witness recorded that the child had promised to say the truth. The trial magistrate did not conduct any examination to PW2 who was a child of tender age to test her competence and to ascertain whether she knew the meaning of telling the truth and not lies. Rather, the trial magistrate jumped into conclusion that PW2 promised to tell the truth. Due to the fact that the said promise was written in reported speech, it cannot be concluded with

certainty that the said child of tender age had promised to tell the truth in her own words.

In line of the above cited case law, it goes without saying that the trial magistrate contravened **section 127(2) of the Evidence Act** (supra) as rightly submitted by the appellant.

The remaining question is whether the above noted omission is fatal. The learned State Attorney was of the view that the omission is not fatal as non-compliance with **section 127(2) of the Evidence Act** (supra) does not necessarily mean that the evidence did not constitute truth and authenticity. In the case of **John Mkorongo James** (supra) the Court of Appeal held that omission to conduct a brief examination on a child of tender age is fatal which renders such evidence valueless and hence should be expunged from the record. Thus, in the instant matter, since there is such omission, evidence of PW2 is hereby expunged from the record.

The next question for determination is *whether the conviction can stand in absence of the victim's evidence*. The appellant was of the view that the rest of the evidence is hearsay thus the conviction cannot stand. This being a sexual offence, it is trite law that the best evidence comes from the victim. In that regard, having expunged evidence of the victim, I am convinced that it is not safe to find conviction on the basis of evidence of the rest of the witnesses. I could do so if they were eye witnesses of the incidence of rape. It is a considered opinion of this court that, evidence of PW1, PW3, PW4 and PW5 is corroborative in nature, meaning that the same corroborates evidence of PW2 (the victim) which has been

expunged from the record for noncompliance of **section 127(2) of the Evidence Act** (supra).

In the circumstances, on the basis of the findings on the second ground of appeal, I am of considered opinion that this appeal has merit. I therefore quash the conviction against the appellant, set aside the sentence of 30 years imprisonment and order the immediate release of the appellant, unless he is held for other lawful reasons.

Order accordingly.

Dated and delivered at Moshi this 23rd day of May, 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

23/05/2023