IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 43 OF 2022

(Originating from Criminal Case No. 09 of 2021 of Rombo District Court at Mkuu)

GERALD CHRISTIAN WISSO @ GEREMAA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

29/3/2023 & 18/05/2023

SIMFUKWE, J

Before the District Court of Rombo at Mkuu the appellant Gerald Christian Wisso @Geremaa was charged with two offences; namely rape contrary to **section 130 (1) (2) (b) and 131 (1) of the Penal Code, Cap 16 R.E 2002** and cruelty to child contrary to **section 169A (1)(2) of the Penal Code**. He was sentenced to 30 years imprisonment on the first count of rape and one year imprisonment on the second count. Sentences were ordered to run concurrently.

On the first count of rape, it was alleged that the appellant on unknown date of 2020 at 18:00hrs at Mengeni Kitasha village within Rombo District

in Kilimanjaro region did have carnal knowledge of one AG (not her real name) a girl of 8 years old.

On the second count of cruelty to child, it was alleged that on unknown date, in 2020 at about 18:00hs at the same place, being a relative having custody of AG a girl of 8 years, the appellant did ill-treat her by rubbing her lips with irritating substances *'upupu'* and caused her lips to itch.

The prosecution marshalled 4 witnesses to prove the case against the appellant. PW1 the victim testified among other things that she was staying with one Bibi Sharon. That, on the fateful day the appellant who is her step father took her from the said Bibi Sharon alleging that he was going to send her to the shop. However, when they arrived at the appellant's house, the appellant prepared food, they ate and he ordered her to go to sleep. Then, the appellant followed her and ordered her to take off her trouser but the victim refused. The appellant rubbed her lips with irritating leaves commonly known as *'upupu'*. PW1 narrated further that she cried helplessly. The appellant covered her mouth and used force to undress her and then raped her. PW1 kept crying without help. In the morning she returned to Bibi Sharon and narrated to her what had happened. The said Bibi Sharon told her not tell her such nonsense. Later on, when the appellant returned, he was asked by Bibi Sharon, however, the appellant did beat the victim again. The appellant decided to return her to her mother while her mouth was swollen. When she told her mother, her mother (PW3) decided to take her to hospital.

PW4 a medical officer who attended the victim proved that the victim was found to have been carnally known.

In his defence before the trial court, the appellant denied to had committed the offences and alleged that all were fabricated against him because he had grudges with the victim's mother as she wanted them to have a marriage ceremony but he had told her that he had a wife.

The trial court found the prosecution to had proved the charges of rape and that of cruelty to children beyond reasonable doubts and convicted the appellant. The appellant was aggrieved by both the conviction and sentence, he preferred this appeal on three grounds:

1. *That, the trial Court grossly erred in Law and fact when relied on the evidence of PW1 which was taken in contravention of section 127(2) of the Evidence Act.*
2. *That, the trial court grossly erred in Law and fact when convicted and sentenced the appellant while the prosecution evidence was loaded with contradictions, inconsistences and discrepancies.*
3. *That, the trial court grossly erred both in Law and fact in convicting and sentencing the Appellant while the charge was not proved to the required standard by the Law.*

The appeal was ordered to be argued by way of written submissions as prayed by the appellant. The Appellant was unrepresented, while Ms. Grace Kabu opposed the appeal for the Respondent/ Republic.

On the first ground of appeal, the appellant faulted the findings of the trial court which relied on the evidence of the victim on the following reasons; ***First***, that the victim's evidence was taken in contravention of **section 127(2) of the Evidence Act, Cap 6 R.E 2019**. While elaborating this

point, the appellant argued that the reception of the evidence of a child of tender age is governed by **section 127(2)** (supra) which provides that:

> *"A child of tender age may give evidence without oath or affirmation, but shall before giving evidence, promise to tell the truth to the court and not to tell lies."*

The appellant was of the opinion that, the above section presupposes that the court before which the child appears to give evidence, should not treat the evidence of a child as of a normal witness. He explained that at page 6 of the typed proceedings, the trial magistrate merely recorded that the witness who was a child of 7 years had an intelligence to speak and was asked if she promises to speak the truth and not lies. Thereafter, the trial Magistrate proceeded to record the witness's answer and started recording her evidence. According to the appellant, it was wrong and prejudicial for the learned trial magistrate to have a view that, the child had intelligence to speak without showing which procedures had been taken by the court to satisfy itself that the child possesses enough intelligence to warrant the reception of her evidence. That, no questions were put to PW1 and the answers given by PW1 so as to satisfy that the child gave rational answers to the questions put to her by the trial court to justify the reception of her evidence.

To cement his argument, the appellant referred to the case of **Rajabu Ngoma Msangi vs Republic, Criminal Appeal No. 22 of 2019** whereby at page 7, the court cited the case of **Godfrey Wilson vs Republic, Criminal Appeal No. 168 of 2019 (**CAT) at page 13 where the Court held that:

"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127(2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. The question however would be on how to reach at that stage. We think the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case as follows: (1) The age of the child; (2) The religion which the child professes and whether he/she understands the nature of oath; (3) whether or not the child promises to tell the truth and not to tell lies. Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

Equating the above case law with the present case, the appellant argued that nothing of that sort was done in the case at hand. That, the trial court merely recorded that the witness (PW1) had promised to speak the truth before the court, without showing/indicating in the court's proceedings how he had reached there. Basing on such argument, the appellant prayed the court to disregard PW1' s evidence and expunge the same from the record as it has contravened the mandatory provision of the law.

The ***second*** reason for faulting PW1's evidence was that, PW1 gave a highly improbable, inconceivable, incredible and wholly unreliable

evidence which was supposed to be approached with great caution as it demonstrates a manifest intention or desire to lie in order to achieve a certain end against the appellant. The appellant was of the view that PW1 gave false evidence before the trial court on the reasons known to her. He quoted the words of PW1 as found at page 8 second paragraph of the typed proceedings as follows:

> *"My mother take (sic) me to Ureni hospital but she left me there, I get the help of food from other patients who was (sic) there. Later I came to get the help from people and taken to Huruma Hospital then to Mkuu police station."*

Elaborating the above passage, it was the appellant's argument that PW1 meant that she was totally abandoned by her mother at the first earliest moments after the ordeal had befallen her. However, PW3 who claimed to be the victim's mother testified to the contrary as seen at page 13-14 of the typed proceedings.

From the evidence of PW1 and PW3, the appellant noted the following: First, that their evidence is loaded with contradictions which shake their credibility and make them unreliable. He gave the example of PW1 allegation that she was abandoned by her mother (PW3) at Ureni Hospital and that she got help from her fellow patients and other good Samaritans who transferred her to Huruma Hospital. While her mother PW3 stated that she was the one who participated fully in taking PW1 to hospital and made all the transfer until they reported the alleged ordeal to the police station.

Second, the appellant alleged that the victim withheld the details of the said ordeal for quite a while and she never reported to anybody

particularly her mother at the earliest possible moments which renders her reliability to be in question.

It was further submitted that PW3 took her daughter to hospital due to mouth problem *'malenge lenge'* and she came to know about rape when they were before the doctor but prior to that, she was not aware of the allegations of her daughter. The appellant opined that such unexplained delay by PW1 to disclose the details of rape to the person she came across at the earliest possible opportunity cannot attract the confidence of her testimony before the court of law.

It was contended that the above shortfalls and discrepancies in the prosecution evidence escaped the trial magistrate's attention undetected thus ending up in convicting and sentencing the appellant wrongly. The appellant called upon the court to find the noted shortfalls and resolve them in favour of him.

In conclusion, the Appellant prayed this appeal to be allowed, conviction be quashed and sentence be set aside.

Opposing the appeal, the learned State Attorney replied the first ground by quoting the provision of **section 127(2) of the Evidence Act** (supra) and argued that the jurisprudence of such provision is that evidence by a child of a tender age can be sworn or unsworn, but it is mandatory for the Court to make a finding on whether the victim before giving evidence made a promise to tell the truth.

She said that at page 6 of the proceedings, the trial court without recording the simplified questions posed towards the victim, made a finding that a child possessed intelligence to speak the truth and continued to ask her to promise to tell the truth, whereby she replied **"I**

promises to tell the truth and not lie, the person who speak lie is the child of satan."

The learned State Attorney submitted that on what transpired before the trial court, the above quoted words are sufficient to extract that PW1 was aware with the effect of not telling the truth before the court. Thus, no procedural irregularity was occasioned to lower down the credibility of PW1. She supported her argument with the case of **Shani Chamwela Suleiman vs. Republic, Criminal Appeal No. 481 of 2021** (Unreported) where at page 9 it was held that:

> *"He said 'I promise I will speak the truth before this court' with this clear account of what had transpired in the trial court, before PW2 evidence was recorded, just like the first appellate court, we find the appellants' complaint in this aspect unfounded with consequential effect of it being dismissed, as we accordingly, hereby do."*

Ms. Grace was of the view that since at page 6 of the typed proceedings PW1 promised to tell the truth, then there is no doubt that the said evidence was properly received and scrutinized, thus the appellant's ground lacks merit.

Regarding the allegation under the 2nd and 3rd grounds of appeal that the prosecution evidence was not sufficient to prove the case against the appellant; it was insisted that evidence against appellant was watertight to sustain the conviction against him.

To support her argument, the learned State Attorney submitted to the effect that before the trial court, the prosecution paraded a total of four

(4) witnesses and one exhibit, a Medical Examination Report PF3 which was admitted as exhibits P1 to prove the charge of rape.

The learned State Attorney argued further that, it is trite law that in rape cases the best evidence is that of a victim as it was held in the case of **Godi Kasenegala vs Republic, Criminal Appeal No. 10 of 2008 (**unreported**)** at page 11 of the judgment where the Court of Appeal of Tanzania observed that:

> *"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they actually witnessed the incident such as doctors may give corroborative evidence."*

Ms. Grace made reference to page 6 and 7 of the trial court proceedings where the victim narrated what happened and how the appellant raped her. That, the appellant undressed her, took his 'dudu lake' and inserted to *'kidudu changu'* (PW1's vagina). According to Ms. Grace, that narration proves penetration against the victim. She cited the case of **Haruna Mtasiwa vs. Republic, Criminal Appeal No. 206 of 2018 (CAT)** which referred a 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."

The learned State Attorney opined that although PW1 did not mention sexual organs direct, still it doesn't affect her testimony to prove penetration beyond reasonable doubt.

It was stated further by Ms. Grace that evidence of PW1 was corroborated by the evidence of PW3 (victim's mother). That, PW1 /the victim narrated the story as to how the incident occurred which moved PW3 to report the matter to the police station. Thereafter, the victim was taken to Hospital after being issued with a PF3.

Ms. Grace added that, PW2 the Doctor who examined the victim and filled a medical examination Report (PF3) which was admitted as exhibits P.1 at page 12 of the proceedings clearly stated that, the victim had no hymen and the vagina was enlarged thus, he concluded that the existence of penetration was caused by blunt object against the victim.

On the issue of identification, the learned State Attorney was of the view that the issue of visual identification was very tight to link the Appellant because PW1 and PW3 testified that the Appellant was the victim's step father whom they were living together in the same house. Thus, the chance of the victim of mistaken identification is zero on the reason that identification by recognition is more reliable.

Concerning the offence of cruelty to the child; Ms. Grace commented that evidence was also watertight to prove that the appellant did cruelty against his step daughter who was living in the same house. That, the appellant being a stepfather, he had a duty of care as a custodian to protect the victim's welfare. However, the Appellant conducts of mistreating the victim, caused her to be hospitalised due to health injury as elaborated by her mother, PW2 the doctor and the victim herself.

Basing on what she had submitted, Ms. Grace prayed that the appeal be dismissed and conviction and sentence be upheld, as the evidence is sufficient to prove the offences charged against the Appellant.

After going through the grounds of appeal, submissions of both parties and trial court's records, I am of settled opinion that the grounds of appeal are centred on two issues: ***first,*** *whether there were procedural irregularities* and ***second,*** *whether the case against the appellant was proved beyond reasonable doubts.*

The first issue will cover the first ground of appeal while the second issue will deal with the second and third grounds of appeal.

On the 1st ground of appeal, the appellant complained that the trial magistrate failed to comply with **section 127(2) of the Evidence Act** (supra). That, it was prejudicial for the learned trial magistrate to conclude that the child had an intelligence to speak without showing the procedures taken to satisfy that the child possesses enough intelligence to allow the reception of her evidence. Ms. Grace argued to the contrary. She was of the view that PW1's words are sufficient to conclude that she was aware with the effect of not telling the truth.

Looking at the trial court's proceedings particularly at page 6, the trial magistrate before recording the evidence of PW1 (the victim who was of the tender age) stated as follows:

> "***Court:*** *The witness who is a child of 7 years has an intelligent (sic) to speak and is hereby asked if she promise (sic) to speak truth and not lie before this court.*

Witness reply; ***I promise to speak the truth, the person who speak lie is the child of satan****."* [Emphasis added]

The issue here is whether the above quoted words sufficed to conclude that the above section was complied with.

I am aware with the principle established by the Court of Appeal in respect of the requirement to conduct inquiry before concluding that the child has promised to tell the truth and not lies as elaborated in the case of **John Mkorongo James vs Republic (Criminal Appeal No. 498 of 2020) [2022] TZCA 111 [Tanzlii],** at page 12 to 13 of the judgment, where it was stated that:

"... *The import of section 127 (2) o f the Evidence Act requires a process, albeit a simple one, to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court to tell the truth and not to tell lies. It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court to tell the truth and not tell lies. It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the*

court to tell the truth and not tell lies before they testify. This is the reason why any child of tender age who is brought before the court as a witness is required to be examined first, albeit in brief, to know whether he/she understands the meaning and nature of an oath before it is concluded that he/she can give his/her evidence on the promise to the court to tell the truth and not tell lies as per section 127 (2) of the Evidence Act."

The above case law speaks it all. That, the purpose of conducting examination is to know whether a child of tender age understands the meaning and nature of an oath before concluding that he/she can give his/her evidence on the promise to the court to tell the truth and not tell lies.

In the instant case, I don't hesitate to say that though the trial magistrate did not write down the questions posed to the child of tender age, still the written words as seen at page 6 (supra) impliedly show that the trial magistrate conducted the inquiry as the trial magistrate could not jump into such conclusion without posing some questions. Further to that, the witness in her reply added that **"the *person who speak lie is the child of satan."*** It is my opinion that this signified that the witness possessed sufficient intelligence to allow the trial court to receive her evidence and rely on it. On that basis I find the first ground of appeal to have no merit.

Turning to the second ground of appeal, the appellant lamented that the prosecution evidence suffered inconsistence and contradictions. Particularising this grievance, he argued that PW1 gave false evidence because she told the trial court that her mother abandoned her at the

hospital while her mother (PW3) told the court that she participated fully in taking PW1 to hospital. The appellant was of the view that the noted discrepancy shakes their credibility.

The learned State Attorney did not agree with the appellant. She submitted that; prosecution evidence was sufficient to prove the case against the appellant.

I wish to state at this very beginning that not every discrepancy dismantles the prosecution case; it is only the material discrepancy which will flop the case. In the case of **Said Ally Ismail vs Republic (Criminal Appeal 241 of 2008) [2009] TZCA 8** it was held that:

> *"However, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

I fully subscribe to the above decision. From the noted discrepancy, I am of considered opinion that the same has nothing to do with the offence of rape. That, it does not take away the fact that the victim was raped.

Concerning the 3rd ground of appeal which criticized the trial magistrate's finding for convicting the appellant notwithstanding that the offence was not proved to the required standard; the appellant's argument was centred on grievances that the victim withheld the details of the said ordeal and she never reported to anyone. Thus, her credibility is wanting.

I am aware with the established principle that failure to report the matter at the earliest time put the credibility of the witness in question. This has been stated in numerous decisions, for example the case of **Lameck**

Bazil & Another vs Republic (Criminal Appeal 479 of 2016) [2018] TZCA 191 [Tanzlii] page 14 held that:

> *"...the ability of the witness to name the suspect at the earliest opportunity is an important assurance of his reliability; and in the same way unexplained delay or complete failure to report must put a prudent court to inquiry."*

Much as I am aware with the above principle, at this juncture, I hasten to say that I do not agree with the appellant's argument that PW1 did not report the ordeal at the earliest possible time and these are my reasons; the records are loud at page 7 of the typed proceeding that PW1 reported the incident to one Bibi Sharon who did not pay heed to the incidence. Also, the same was narrated to the doctor. Thus, the complaint that the incidence was not reported at the earliest possible time has no merit.

Moreover, for an offence of rape to be proved, the prosecution was required to prove the following; **First,** that a female child was carnally known by a man; **second,** that there was penetration; and **third,** that the accused is the person who had carnal knowledge of the victim with or without her consent.

In the present case, the above elements were proved by PW1 (the victim) whom the learned trial magistrate found that her evidence was credible. Above all, PW1's evidence was corroborated by the evidence of PW3 her mother who testified that PW1's vagina was not normal, it was wide and PW2 the doctor proved that the child was penetrated.

As rightly stated by Ms. Grace, the prosecution evidence was sufficient to convict the appellant with the offences charged.

On the basis of the above findings, I find no reason to fault the findings of the trial court. In the circumstances, the appeal is found to have no merit and it is hereby dismissed in its entirety.

It is so ordered.

Dated and delivered at Moshi this 18th day of May, 2023.

X

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

18/05/2023