IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 202 OF 2022

(Originating from the Decision of District Court of Bagamoyo at Bagamoyo in Criminal Case No. 257 of 2020 before Hon. Mbefu-RM)

OBADIA FREDRICK NTABWA @ BANJUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 08th May, 2023

Date of Judgment: 02nd June, 2023

E.E. KAKOLAKI, J.

The appellant before this Court has preferred this appeal challenging the conviction and sentence of thirty (30) years meted in him by the District Court of Bagamoyo at Bagamoyo on the offence of Rape, Contrary to section 130 (1) and (2) (c) and 131 of the Penal Code, [Cap 16 R.E 2019] [now R.E 2022]. Arraigned before the trial court the appellant was accused that, on 23rd date of August, 2020 at about 17.30 hours at Makurunge area within Bagamoyo District and Coast region, he unlawfully had canal knowledge of a girl aged 11 years old whom for the purpose of this appeal shall be christened as victim or PW2 to hide her identity.

It was her (PW2) tale and prosecution case that, on the fateful date in company of her siblings Ester (PW4) and Omary were sent the shop by (PW4) Husna Daud (Mama Warda or aunt) for buying her vegetables (mboga) before they met the appellant (Banjuka) at njia ya ng'ombe areas, who asked them to accompany him to his house so that they could also buy him cigarette. Obedient as they were, the trio followed him to his house after which he gave PW4 Tshs. 2,000 to buy him cigarette as requested earlier who left for shop with one Omary while leaving her at the appellant's premises. The appellant it is said, took that advantage to take her (PW2) in the house removed her underwear before he undressed his clothes and inserted his penis into her vagina, causing her much pain and started crying. When her siblings came back with juice only the appellant gave them Tshs. 500 asking them to give it to her when ceases to cry. The trial went back to their aunt (mama Warda PW4) where PW2 disclosed what the appellant had done to him the result of which PW2's mother (PW1) was informed and on querying her she narrated the whole story, the story which prompted PW1 in company of PW4 to report the matter to the village authority and later on police before the victim was issued with the PF3 and attended by PW7 (the

doctor) who after examination confirmed that, PW2 had her vagina penetrated and filled in the PF3 (exhibit P1).

Efforts to arrest the appellant were made and finally arraigned before the court where he flatly denounced the allegations levelled against him, the fact that prompted the prosecution to parade seven (7) witnesses and relied on PF3 (exhibit P1) to prove the case against him. It was appellant's defence that, the case was framed against him as he had bad blood with PW2' parents for being hard working in the village and that, the court should disbelieve the prosecution witnesses for coming from one family while there was a possibility of calling other villagers to testify against him. At the conclusion of the trial, the trial court was convinced that, the case was proved against him beyond reasonable doubt and proceeded to convict and sentence him accordingly. Discontented the appellant is before this Court fronting six (6) grounds of appeal in expression of his grievances going thus:

1. That, the learned trial magistrate erred in law and fact in conviction the appellant based on incurable defective charge sheet as the prosecution evidence did not support the Statement of Offence leveled before the appellant, the omission which prejudiced the appellant's defence case at large.

2. That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of PW2 and PW4 who were barely incompetent witnesses, hence their testimonies were received in contravention of section 127(2) of the Evidence Act, [Cap. 6 R.E 2019] as the court did not make any findings on whether or not PW2 and PW4 understood the meaning and nature of an oath in order to justify their unsworn evidence.
3. That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of PW2, PW2 and PW7 whose evidence was barely improbable, incredible, shaky and unreliable to warrant the appellant's conviction as charged as the evidence of PW7 did not prove the nature of the alleged bruises found on PW2's vagina and whether or not PW2 was raped on the material date.
4. That, the learned trial magistrate erred in law and fact in believing the evidence of prosecution witnesses without considering and determining effectively doubts raised by the defence evidence (appellant) and resolve the same on the appellant's favour.
5. That, the learned trial magistrate erred in law and fact in conviction the appellant when the prosecution erroneously failed to establish the

appellant's apprehension in connection with the case at hand as the prosecution did not call/parade the people who arrested the appellant ot testify in court in order to prove its allegation.

6. That, the learned trial magistrate erred in law and fact in convicting the appellant in a case where the prosecution failed to prove its charge against the appellant beyond reasonable doubt as required by section 110,112 and 3(2) of the Evidencre Act, [Cap. 6 R.E 2019].

On the strength of the above grounds of appeal the appellant in urging this Court to allow the appeal by quashing his conviction and set aside the sentence imposed on him while ordering for his release from prison. The appeal was heard in the form of writings and the appellant proceeded unrepresented while the respondent enjoyed the services of Ms. Elizabeth Olomi, learned State Attorney. In this judgment I am prepared to determine the grounds of appeal in the order preferred by the appellant.

To start with is the first ground the appellant is complaining that, the charge was defective as the statement of offence was at variance with the tendered prosecution hence fatally affected prosecution case and prejudiced him as the prosecution ought to have amended it but failed. He relied on the case of **DPP Vs. Jaffari Mfaume Kawawa** (1981) TLR 149, **Mussa**

Mwaikunda Vs. R (2006) TLR 387, **Mohamed Juma @ Mpakama Vs. R**, Criminal Appeal No. 385 of 2017, **Noah Paul Gonde abd Another Vs. R**, Criminal Appeal No. 456 of 2017 and **Issa Mwanjiku @ White Vs. R**, Criminal Appeal No. 175 of 2018 (CAT-unreported). It was his conclusion therefore that, as the charge was not amended to rectify the statement of offence the same was not supported by evidence by all prosecution witnesses to prove his case beyond reasonable doubt.

In her side Ms. Olomi, while admitting that, there was an omission in the charge by citing the provisions of section 130(1),(2)(c) and 131 of the Penal Code in a charge involving the child instead of section 130(1)(2)(e) of the Penal Code, recanted the allegation by the appellant that, the omission was such grave to the extent of prejudicing him by affecting his defence as alleged. She took the view that, much as the particulars of offence were so express to inform him of the charge hi was facing such as the date, place of commission of the alleged offence and how was it committed, meaning by having carnal knowledge of PW2, coupled with evidence adduced by PW1, PW2, PW5, PW6 and PW7, the appellant was able to understand the nature and seriousness of the offence he was faced with for him to be able to prepare a sound defence, hence no prejudice occasioned to him. The learned

State Attorney relied on the case of **Jamal Ally @ Salum Vs. R**, Criminal Appeal No. 32 of 2017 where the Court to Appeal held non-citation or citation of inapplicable provisions in the statement of offence are curable under section 388 of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA). In rejoinder the appellant had nothing useful to add apart from reiterating his submission in chief.

Having considered the submission from both parties and paid a look in the record, there is no dispute as rightly conceded by Ms. Olomi that, the prosecution when drawing the charge omitted to include paragraph (e) to subsection 2 of section 130 of the Penal Code, concerning the circumstances when rape is perpetrated to the child, instead cited paragraph (c) to subsection 2 of section 130 of the same Act, providing for circumstances when consent to sex is obtained under intoxication or when the woman is in the state of unsound mind. Now the issue for determination is whether such omission is fatally defective and prejudiced the appellant. As the law stands, under sections 132 and 135(a) (ii) of the CPA, the charge must contain all essential elements of the offence and specify section of the enactment or the law creating the offence, so as to enable the accused person to understand the nature of the offence he is faced with and thereby prepare

his sound defence. This sound principle of law was articulated by the Court of Appeal in the case of **Isidori Patrice Vs. Republic**, Criminal Appeal No. 224 of 2007 (CAT-unreported) where the Court held that:

> *It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged... It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence with the necessary mensrea. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law.*

See also the cases of **Mussa Mwaikunda** (supra) and **Jaffari Mfaume Kawawa** (supra).

It is a well settled principle of law that, a defective charge leads to unfair trial to the accused. This principle was expounded in the case of **Abdallah Ally Vs. Republic**, Criminal Appeal No. 253 of 2013 (CAT-unreported) cited

with approval in the case of **Robert Madololyo & Another Vs. R**, Consolidated Criminal Appeals Nos. 46 and 428 of 2019 (CAT-unreported). However, none citation of the subsection of the section creating an offence is not fatal and therefore curable under section 388 of the CPA, if the court is satisfied that, the same did not prejudice the accused person and in particular when the particulars of offence are express to enable him comprehend the nature of the offence facing him and therefore be in a position to enter his sound defence. The Court of Appeal in the case of **Jamali Ally Salum Vs. Republic**, Criminal Appeal No. 52 of 2017 when discussing as to whether wrong citation of the law and citation of inapplicable provisions; prevented the appellant from understanding the nature and seriousness of the offence of rape and prevented him from entering his proper defence thereby occasioning him injustice, had this to say:

> *"In the instant appeal before us, the particulars of the offence were very clear and in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age."*

The Court went further to state that:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA."*

Like in the situation obtained in the above cited case, in the present matter having a glance of an eye to the complained of charge, it is conspicuously seen and I hold that, the particulars provided therein were sufficient enough to inform the appellant of the nature and seriousness of the offence faced him, hence convinced that he was not prejudiced at all. I so view as it was stated in the charge sheet that, the offence allegedly perpetrated by him occurred at Makurunge area with Bagamoyo District, Coast Region on 23rd day of August, 2020 at about 17.30, to PW2 the child of 11 years old, by having carnal knowledge of her. I therefore find the omission is curable under section 388 of the CPA and proceed discard this ground of appeal.

Next for determination is the lamentation that, the trial court wrongly convicted him by relying on incredible evidence of PW2 and PW3, children of tender age whose evidence was received in contravention of the provisions of section 127(2) of the Evidence Act, [Cap. 6 R.E 2022], as the trial court failed to make assessment to satisfy itself as to whether child witnesses were understanding the nature of oath or not, before promising to tell the truth to the Court and not lies. The appellant relied on the cases of **Godfrey Wilson Vs. R**, Criminal Appeal No. 168 of 2018 and **John Mkorongo Jamas Vs. R**, Criminal Appeal No, 498 of 2020 (both CAT-unreported) to fortify his submission that, before recording evidence of the child of tender age questions were to be put to him/her first as suggested in Godfrey Wilson (supra) before allowing him/her to promise to tell the truth and not lies. To him therefore in absence of the discredited evidence of PW2 and PW4, no remaining evidence which could stand to prove the offence against him warranting conviction.

In rebuttal Ms. Olomi, argued that, provision of section 127(2) of Evidence Act was complied with as under the law, the trial court ought to have ascertained whether the child (PW2) knew the meaning of oath or affirmation in order to receive her evidence under oath or let her promise to

tell the truth and not lies, in which the trial court chose the last option as PW2 promised to tell the truth and not tell lies before reception of evidence. Hence PW2 testified in line with the law. She cited the case of **Abdallah Athuman Vs. R**, Criminal No. 669 of 2020 (CAT-unreported) to impress upon the Court that, even when the fails to establish whether the child witness understands what an oath or affirmation means, in as along as extracts child witness' promise to speak the truth, then the evidence is received in accordance with the law. In this case she submitted, PW1 promised to tell the truth and not lies hence a competent witness as per section 127(1) of the Evidence Act. In rejoinder submission the appellant was insistent that, the trial court record does not show any assessment made to PW2 and PW4 by the trial court in terms of section 127(2), hence their evidence has no value.

It is true and I am at one with the appellant that, under section 127(2) of Evidence Act before reception of evidence of a child of tender age, the trial court has to ascertain whether she/he understands the nature of oath or affirmation or not, then proceed to promise to tell the truth and not lies and courts are encouraged to conduct assessment on the witness on that fact. The object of that ascertainment by the court is to satisfy itself whether the

child witness can testify under oath or not. If she/he cannot do so then require him/her to promise to the court to tell the truth and not lies. In other words failure of the trial court to extract child witness knowledge of the meaning of oath or affirmation, does not render his/her evidence incredible in as long as he/she promises to tell the truth. This position of the law was set by the Court of Appeal in the case of **Abdallah Athuman** (supra) where the Court observed after noting that, there was no ascertainment by the trial court of the witness' understanding on the meaning of oath or affirmation. The Court said:

> *"…the trial magistrate did not ask any preliminary questions to determine if PW2 understood the nature of oath or affirmation for her to qualify to give evidence on oath or affirmation, she recorded her to have said,* ***I [normally] speak the truth. I promised (sic) to speak the truth"*** *before she let her testify. Unquestionably, the trial court could not let her testify on oath or affirmation because it had not established whether she understood what an oath or affirmation meant.* ***All the same, so long as the trial magistrate extracted the child witness' promise to speak the truth in compliance with the law, she rightly allowed her to give evidence on the strength of such promise****."* (Emphasis supplied)

In the present matter the trial court it is noted, before receiving evidence of PW2 did not ask any preliminary questions to determine if PW2 understood the nature of oath or affirmation for her to qualify to give evidence on oath or affirmation, instead proceed to record that she had promised to tell the truth. To paint the picture of what transpired in Court I find it imperative to quote the excerpt from page 7 of the proceedings concerning PW2's evidence:

> *Court: Because the child is of tender age (minor) under the provision of section 127(2) of the evidence Act, [Cap. 6 R.E 2019] her evidence is taken without oath.*
>
> *Sgd: B.E Mbafu*
>
> *RM*
>
> *23/09/2020*
>
> *"I don't know the consequences of telling lies but **I promise I will tell the truth and not lies.**"*

From the above cited excerpt it is evident to this Court that, like the situation in **Abdallah Athuman** (supra), in the present matter the trial court did not ask any preliminary questions to determine if PW2 understood the nature of oath or affirmation for her to qualify to give evidence on oath or affirmation, but recorded that she was promising to tell the truth to the court and not tell lies. Much as PW2 promised to tell the truth and not tell lies, I am of the

findings that, the trial court justifiably received her evidence and in accordance with the law. I find no merit in appellant's complaint concerning reception of PW2' evidence by the trial court.

As regard to PW4's evidence Ms. Olomi commented nothing. A close look at it has driven this Court to conclude that, the same was not recorded in compliance with the provisions of section 127(2) of Evidence Act, as she did not testify on oath or affirmation after questions of knowledge were put to her nor is there any court's findings to the effect that, she promised to tell the truth and not lies. Her evidence is therefore disqualified.

In the third ground of appeal the appellant assails the trial court decision for convicting him basing on improbable, incredible, shaky and unreliable evidence of PW2, PW4 and PW7. And further that, PW7's evidence did not prove the nature of alleged bruises found in PW2's vagina as to whether she was raped or not. The appellant did not expound more on this ground in his submission. On her side Ms. Olomi denounced the assertion by the appellant averring that, their evidence was credible enough warrant conviction bearing in mind that, the best evidence in sexual offences comes from the victim. A celebrated case of **Seleman Makumba Vs. R**, (2006) TLR 379 which is in line with section 127(6) of the Evidence Act, was relied on by her. She

submitted that, PW2 being the victim and having known the appellant before confidently explained how the appellant undressed her at his home and inserted his penis into her vagina the act which left her with much pain before the incident was reported to PW5 (aunt) who had sent her to the shop and who informed victim's mother PW1, who in turn relayed the information to the village authority and later on at police. She said PW2's evidence which remained unshaken during cross-examination was corroborated by that of PW1, PW5 to whom that incident was reported to and finally the doctor PW7 who confirmed in her testimony and in PF3 that, PW2 was raped. According to her since every witness is entitled to credence as explained in the case of **Goodluck Kyando Vs. R**, (2006) TLR 362 and **Aloyce Mridadi Vs. R**, Criminal Appeal No. 208 of 2016 (CAT-unreported), and given the fact that, there is no reason to disbelieve evidence of PW1, PW2, PW5 and PW7 on the proof of rape charge against the appellant, then the trial court was justified to convict the appellant of the offence of rape.

The issue for consideration in this ground is whether the trial court was justified to convict the appellant basing on the evidence of PW2, PW4 and PW7 in which the appellant claims was incredible, shaky and unreliable. I do not find merit in the appellant's lamentation on this ground. As correctly

stated by Ms. Olomi, the proposition which I embrace as the settled principle of law, every witness is entitled to credence and must be believed and her/his testimony accepted unless there are good and cogent reasons for not believing that witness. See the cases of **Goodluck Kyando** (supra) and **Wambura Kiginga Vs. R**, Criminal Appeal No. 301 of 2018 (CAT-unreported). Having revisited the evidence of PW2 at pages 7 -8 of the proceedings, there is nothing suggestive that, her evidence is improbable, incredible, shaky and unreliable. I so view as she gave a very detailed account of what happened to her when met the appellant who took her into his house undressed her under pants before he ravished her. She was very specific that, after undressing her the appellant also undressed and inserted his penis into her vagina living her with much pains while crying and that, she later on reported to aunt (PW5) before the information reached her mother (PW1) who took her to police and later for examination by PW7. The PW2 identified the appellant by the name of Banjuka which name he did not dispute even during his defence. And when cross-examined this witness remained firm and unshaken. Her evidence is corroborated by that of PW1 (her mother) who after receiving information from PW5 reported the matter

to the village authority before the incident was also reported at police and the victim examined by PW7.

Apart from PW4 whose evidence is already declared lacking in credence, there is also no advances reasons by the appellant to convince this court find PW7's evidence unworthy of being believed and accepted. I therefore find his evidence is credible enough to be relied on. It is this witness who examined the victim (PW2) and found out that, her private parts was bruised with no hymen and had stains (uchafu) in her vagina, before he filled in the PF3 (exhibit P1) which confirmed PW2's testimony of being raped. PW7's evidence no doubt proves PW2 was penetrated in her vagina. With such unshaken corroborative evidence of PW7 together with that of PW1 and PW5, I am satisfied that, the prosecution case was proved against the appellant beyond reasonable doubt.

In his defence the appellant raised a defence that, his case was concocted by the PW2's parent who envied him for being hardworking person in the village and that there was dispute amongst them. With due respect to the appellant like the trial court, I find this defence is without merit as it does not to raise any doubt against prosecution's case, as he failed even to expound on the alleged dispute that would lead PW2' parent to frame such

serious case against him. The issue is therefore answered in affirmative that the trial court was justified to rely on the evidence of PW2 and PW7 to convict the appellant.

Next for determination is the fourth ground in which the appellant is faulting the trial court for believing prosecution witnesses despite of doubts raised by the defence that there was a dispute between him and PW2's parents that led them to frame the case against him. Ms. Olomi is of the contrary view maintaining that, the appellant failed to raise doubt in the prosecution case as he never cross-examined PW1 on that assertion of existing dispute between them. It is true and I agree with Ms. Olomi as also found when considering the third ground that, the appellant failed to raise any doubt against prosecution case. As correctly stated by Ms. Olomi the appellant ought to have cross-examined PW1 on the existence of any dispute amongst them that would suggest the case against him was concocted. It the law that, failure by the party to cross-examine on an important matter implies acceptance of what is testified against him/her by the witness. See the cases of **Nyerere Nyague Vs. Republic,** Criminal Appeal No. 67 of 2010, (CAT-unreported) and **Hatari Masharubu @Babu Ayubu Vs. R,** Criminal appeal No. 590 of 2017[2021]TZCA 41 www.tanzlii.org/tz/judgment. In this case

since the appellant failed to cross-examine PW1 on such importance fact of existence of dispute between them, I find there was no doubt by the appellant to dent prosecution case, hence this ground lacks merit too.

In his fifth ground of appeal the appellant is faulting the trial magistrate for convicting him despite of none establishment by the prosecution of the fact on how he was apprehended. According to evidence on his arrest was so important and prosecution's failure to parade witnesses to establish such fact weakened prosecution case. On her side Ms. Olomi resisted this submission arguing that, the fact as to whether the appellant was arrested and charged was not disputed during the preliminary hearing therefore there was no need of calling witness to prove it. Having paid a look at page 3 of the typed proceedings this Court is satisfied that, the fact that the appellant was arrested and taken to Bagamoyo Police Post and interrogated regarding this case were amongst the agreed facts in the memorandum of agreed fact. The object of conducting preliminary hearing under section 192 of the CPA, among other things is to establish what matters are in disputed and the agreed ones, so that the prosecution concentrates in proving the disputed matters only. This serves court's time and well as resources that would have been spent in parading witness to prove facts not disputed by parties. As the

fact on appellant's arrest was not disputed, I find no merit in the appellant's complaint and hold that the prosecution was not bound to prove it.

Lastly is on the complaint that, the prosecution failed to prove the charge against him beyond reasonable doubt as per the requirement of section 110,112 and 3(2) of the Evidence Act. Ms. Olomi in her submission stressed that, the prosecution was able to prove its case basing on evidence of PW2 as prosecutrix corroborated by PW1, PW5 and PW7 together with the PF3 (exhibit P1). I think this ground need not detain this Court much as the issues as to whether the prosecution proved its case against the appellant beyond reasonable doubt has been dealt with and determined in the third ground and answered in affirmative. It is true as submitted by the appellant that, the onus of proving that, it is the appellant who raped PW2 lies on the prosecution and the standard of proof is beyond reasonable doubt. See also the cases of **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017, **Gulf Concrete & Cement Products Co.Ltd Vs. D.B Shaprya & Co. Ltd**, Civil Appeal No.88 of 2019 and **Mollel Electrical Contractors Limited Vs. Mantrac Tanzania Limited**, Civil Appeal No.394 of 2019 (all CAT-unreported). In this case as alluded to, PW2 was firm in her evidence on how the appellant perpetrated the offence to

her before she reported it to PW5 who informed her mother (PW1) and later on the matter reported to the village authority and police for issue of PF3 where she was thereafter examined by PW7 who proved to have been penetrated in her private parts (exh.P1). As PW2 mentioned the appellant to be her rapist, the person whom she knew before and mentioned him immediately to his aunt (PW5) and mother (PW1), the rape which was confirmed by evidence of PW7 and the PF3 (exhibit P1), I find the ground is destitute of merit as the case was proved against him beyond reasonable doubt.

In the event the appeal is without merit and I hereby dismiss it in its entirety.

It is so ordered.

DATED at Dar es salaam this 02nd June, 2023.

E. E. KAKOLAKI

JUDGE

02/06/2023.

The Judgment has been delivered at Dar es Salaam today 02nd day of June, 2023 in the presence of the appellant in person, and in the presence of Ms. Asha Livanga, Court clerk and in the absence of for respondent.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
02/06/2023.