**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 212 OF 2022**

**ABUBAKARI HAMIDU BIGE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

***(Arising from the decision of the District Court of Temeke at Temeke in Criminal Case No. 155 of 2021)***

**JUDGMENT**

20th June & 21st July, 2023

**KISANYA, J.:**

The appellant, Abubakari Hamidu Bige was arraigned before the District Court of Temeke on a count of rape contrary to section 130 (1)(2)(e) and 131(1) of the Penal Code, [Cap 16 RE 2019] (now R.E. 2022). It was alleged that, on diverse dates in March, 2021, at Chamazi Mlondogwa street area within Temeke District in Dar es Salaam Region, the appellant did unlawfully have carnal knowledge of one, DDZ (name withheld), a girl of twelve years. Upon full trial, the appellant was convicted of the offence he was charged with. He was accordingly sentenced to serve thirty (30) years imprisonment.

Aggrieved by the conviction and sentence, the appellant has appealed to this Court. His petition of appeal has a total of seven (7)

grounds of appeal. For convenience, the grounds of appeal are summarized as follows:

1. *That, the learned trial magistrate erred in law and fact in convicting the appellant basing on evidence of PW1 (the victim) which was received in contravention of section 127 (2) of the Evidence Act.*
2. *That, the learned trial magistrate erred in law and fact in convicting the appellant basing on evidence of PW1 which was improbable, incredible and unreliable.*
3. *That, the learned trial magistrate erred in law and fact in convicting the appellant basing on the evidence of PW1, PW2, PW3 and PW5 who contradicted each other on whether the victim was raped or sodomized.*
4. *That, the learned trial magistrate erred in law and fact in failing to drawn adverse inference to the prosecution for failure to parade one Nasma who was alleged to have seen the victim being raped by the appellant.*
5. *That, the learned trial magistrate erred in law and fact in convicting the appellant without making any critical evaluation, analysis, discussion and consideration of the evidence adduced by the defence.*
6. *That, the learned trial magistrate erred in law and fact in convicting the appellant basing on the*

*evidence of PW1, PW2, PW3, PW4 and PW5 which was shaky, incredible, incoherent and unreliable to ground the appellant's conviction.*

7. *That, the learned trial magistrate erred in law and fact in convicting the appellant while the prosecution failed to prove the charge against the appellant beyond reasonable doubts.*

At the instance of the appellant who appeared in person, this appeal was heard by way of written submissions. The respondent was represented by Mr. Clement Masue, learned State Attorney, who supported the conviction and sentence meted upon the appellant. I will consider the submissions and authorities relied upon by both parties in the course of discussing the grounds of appeal.

Having examined the record and considered the rival submissions, I prefer to start with the fifth ground. The appellant is faulting the trial court for failure to evaluate, discuss, analyze and consider the defence case. It is his contention that the said omission resulted to a serious error amounting to miscarriage of justice.

Mr. Masue conceded to the appellant's complaint that the defence case was not considered and analyzed in the trial court's judgment. However, making reference to the case of **Siaba Mswaki vs R**, Criminal

Appeal No. 401 of 2019 (unreported), he submitted that the proper recourse is for this Court to step into the shoes of the trial court and analyze the appellant's evidence. He was of the firm view that even if the trial court had considered the evidence adduced by DW1, DW2 and DW3, it would have arrived at a finding that the said evidence did not raise doubt on the prosecution case.

As rightly submitted by both parties, it is settled position that, the defence case must be considered when determining whether the accused person is guilty or innocent of the offence. See for instance, the case of **Charles Issa @ Chile vs R**, Criminal Appeal No. 97 of 2019, CAT at Mbeya (unreported). I also agree with the parties, in the present case, the trial court arrived at the findings that the appellant was guilty of the offence charged without considering the defence case.

The appellant is of the view that the omission led to a miscarriage of justice while the learned State Attorney has moved this Court to step into the shoes of the trial court by analyzing and evaluate the evidence adduced by the defence. I am in agreement with the learned State Attorney that, this being a first appellate court it is enjoined to step into the shoes of the trial court and do what it failed to do. This stance has been taken in a number of cases including the case of **Siaba Mswaki**

*(supra*) in which the Court of Appeal cited its decision in the case of **Karim Jamary @ Kesi vs R**, Criminal Appeal No. 412 of 2018 (unreported) where it was held that:

> "*In the cited case of **Karim Jamary @ Kesi** (supra), having been conceded that defence case was not considered, the State Attorney invited the Court to step into the shoes of the High Court (the first appellate Court) to consider defence case. The Court accepted the invitation and took the position which we adopt as it stated that:-*
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> > *"The learned Senior State Attorney conceded as much that the trial court wrongly rejected the appellant's defence of alibi. He too conceded the first appellate judge glossed over the issue in his judgment. Under the circumstances, Mr. Maleko invited us to step into the shoes of the High Court and do what it omitted to do. We accept the invitation having regard to our previous decisions particularly; **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) to which reference was made recently in **Julius Josephat v. Republic**, Criminal Appeal No. 3 of 2017 (unreported),"*

Being guided by that position, I will consider the appellant's defence in the course of determining other grounds of appeal.

Reverting to the first ground of appeal, the learned trial magistrate is faulted for relying on evidence of PW1 which was procured in contravention of the Evidence Act, Cap. 6, R.E. 2019 (now R.E. 2022). Arguing this ground, the appellant submitted that the learned trial magistrate was mandatorily required to observe the following procedures; One, question the child witness to ascertain his or her age and religion, whether the child understand the meaning and nature of oath or affirmation and whether the child understand the meaning of speaking the truth and not to speak lies. Two, make a finding on the above stated points, including the question and answers received. Three, allow the child to give evidence on oath or affirmation after being satisfied that the child understands the meaning and nature of oath or affirmation. Four, require the child who does understand the meaning and nature of oath or affirmation, to promise to tell the truth and not to tell lies. To support his argument, the appellant cited the cases of **Godfrey Wilson vs R**, Criminal Appeal No. 168 of 2018 (unreported) and **John Mkongoro James vs R**, Criminal Appeal No. 498 of 2020 (both unreported).

It was his further submission that the trial court did not ask PW1 whether or not she understood the meaning and nature of oath. Further to this, the appellant contended that PW1 did not promise to tell the truth

and not tell lies as required by law. In that regard, the appellant argued that the evidence of PW1 lacks evidential value. He invited this Court to expunge it from the record. The appellant went on submitting that, after expunging the evidence of PW1, there remain no evidence to prove the offence laid against him. His argument was based on the grounds that; the best evidence in rape cases comes from the victim as held as in the case of **Seleman Mkumba vs R** [2006] TLR 379; the prosecution failure to call Nasma who was stated to have witnessed the incident raises doubts which must be resolved in his favour as held in the cases of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113; the evidence of PW1, PW2, PW3 and PW5 was inconsistent, improbable, contradictory; and the charge was not proved beyond reasonable doubt. On that account, the appellant urged this Court to find merit in his appeal, quash the conviction and set aside the sentence.

Responding, Mr. Masue submitted that section 127(2) of the Evidence Act was complied with. His submission was based on the contention that, before recording PW1's evidence, the trial court caused her (PW1) to promise to tell the truth and not lies. Referring the Court to page 17 of the proceedings, the learned counsel submitted that PW1 promised to tell the truth to the court and not lies.

It is common ground that the victim (PW1) was a child of tender age. Thus, her evidence was required to be taken in accordance with the procedure provided under section 127(2) of the Evidence Act. The said section reads:

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

The above cited provision has been interpreted in a number of cases to mean that evidence of a child of tender age may be given as follows: One, on oath or affirmation if the trial court is satisfied that the said child understands the nature and meaning of an oath. Two, where the court is of the view that the child of tender age does not understand the nature and meaning of oath, he or she is required to promise to the court to tell the truth and not to tell lies. See for instance the cases of **John Mkorongo James** (*supra*), **Ramson Peter Ondile vs R**, Criminal Appeal No. 84 of 2021 (unreported) and **Salum Nambaluka vs. R**, Criminal Appeal No. 272 of 2018 (unreported). In the last case, the Court of Appeal underlined that section 127(2) of the Evidence Act cannot be blindly applied without first testing a child witness if he does not understand the nature of an oath; and whether he is capable of

understanding questions put to him or her and also if he gives rational answers to the questions put to him. Similar position is found in the recent case of **Edmund John @ Shayo vs Republic** (Criminal No.336 of 2019) [2023] TZCA 17386 (11 July 2023) where it was stated that:

> *"…section 127(2) of the Evidence Act requires that, where the evidence of a child of tender age is taken without oath, the intended witness must promise the court to tell the truth and not to tell lies. That, in the absence of any direction engrained in the provision of how the promise can be procured, the court must prior to getting the said promise, ask few and simple questions to the said witness to determine, foremost, whether the child understands the nature of oath or affirmation. When the answer is in the affirmative then receive the testimony under oath or affirmation. If not, then the child witness should be required to promise to tell the truth and not tell lies.*

In our case, what happened before PW1 gave her testimony is found at page 17 of the proceedings. The relevant part is reproduced as hereunder:

> *"PW1-DDZ, 13 years, Zaramo, Mbagala Saku, Student at Saku Primary School, Muslim*.
>
> *"I am a Muslim, prophesying at Firaja Mosque at Saku, we learn at the mosque not to steal, not to do things*

*which are not proper such as insulting, robbing. If a person is doing things prohibited, I don't know what will be gotten him. I don't know what I am called to do in court though I am the one who was raped. I will state what transpired on that material date. I will tell the court what I know:*

*Court: Having interrogated the child PW1, it seems that PW1 does not fear supernatural power nor does she know what is to be done to a person telling lies.*

*However, so long as she knows what transpired on her, I find her to promise telling the truth and not lies. In that respect, the requirement under section 127(2) of the Evidence Act, Cap. 6, R.E. 2019 is complied with.*

***Signed by Hon. Ngeka RM***
***18/03/2022***

*Pros: I pray to adjourn the matter for my witness seems to be not conversant with court procedure.*
*Order - Hearing on 23/03/2022*

- *Accused bail proceeds*

***Signed by Hon. Ngeka RM***
***18/03/2022"***

However, hearing did not commence on 23rd March, 2022 as ordered. It was held on 6th April, 2022. Before inviting PW1 to give her oral testimony, the learned trial magistrate recorded as follows immediately after recording the coram:

"**PW1 CONTINUES ON PROMISE**"

As it can be glanced from the above excerpt of the record, the trial court conducted a test and arrived at a finding that PW1 did not understand the meaning of oath or affirmation. However, PW1 was not asked to promise to tell the truth and not tell lies as required by the law. The trial court recorded that PW1 had promised to tell the truth to court while that fact does not feature on the record.

From the foregoing, I agree with the appellant that the evidence of PW1 was procured in contravention of section 127(2) of the Evidence Act. Applying the position stated in the case of **Edmund John @ Shayo** (*supra*), the omission to comply with section 127(2) of the Evidence Act renders PW1's evidence valueless. It is accordingly expunged from the record.

Having expunged the evidence of PW1, the issue for determination is whether the remaining evidence is sufficient to find the appellant guilty of the offence of rape levelled against him. The appellant was of the view that such evidence is not available. I am inclined to agree with him due to the following reasons.

*First,* PW1 was the victim of the offence. It is trite law that the best evidence in the cases of this nature comes from the victim. Now that the victim's evidence has been expunged, the best evidence is wanting.

*Second,* the remaining witnesses did not witness the appellant raping the victim. According to PW2, PW3, PW4 and PW5, the victim told them that she had been raped by the appellant. That is hearsay evidence which is not admissible in evidence to support the conviction.

*Third,* as rightly submitted by the appellant, the prosecution did call one, Asma who was stated to have witnessed the appellant raping the victim the fifth time. Given that the prosecution did not give reasons of not calling the said witness, the Court is enjoined to draw adverse inference against the prosecution.

*Fourth,* the victim's mother (PW3) stated on oath that she took PW1 to the hospital where the medical examination revealed that she (PW1) had been penetrated into her vagina and her anus. However, the fact that the victim was sodomized is not found in the evidence of the remaining witnesses. Indeed, it is deduced from the evidence of the medical doctor (PW5) and Exhibit P1 that the victim was not penetrated in her vagina. Such contradiction raises doubt whether the evidence of victim's mother (PW3) is credible and the vice versa.

In the circumstances, I have no flicker of doubt that the remaining evidence does not prove the charge preferred against the appellant. Therefore, I find no need to determine other grounds of appeal and evaluating the appellant's defence.

On the basis of the foregoing reasons, I allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant. It is further ordered that the appellant be released from custody unless he is otherwise lawfully held.

DATED at DAR ES SALAAM this 21st day of July, 2023.


S.E. KISANYA
**JUDGE**