IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.1 OF 2022

(Originating from the District Court of Lindi at Lindi in Criminal Case No.29 of 2020 before Hon. M.B. Magara, RM)

ATHUMANI MUSA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

24/7/2022 & 3/10/2022

LALTAIKA, J.:

The appellant herein **ATHUMANI MUSA** was charged before the District Court of Lindi with the offence of Rape contrary to section 130 (1), (2)(e) and 131(1) of the Penal Code, [Cap 16 R.E. 2019] now R.E. [Revised Edition] 2022. The particulars that were laid in a charge indicated that on the 3rd day of April 2020 at Mnonela Village within the District and Region of Lindi the appellant had carnal knowledge of one "ASM" or the victim a 14-year-old girl.

When the charge was read over and explained to the appellant, he pleaded not guilty hence the matter went to full trial. At the trial, the prosecution paraded three (3) witnesses, namely, the victim (PW1), Said

Mohamed Salum (PW2) and Yohamna Zabron (PW3). The prosecution also tendered one (1) exhibit: Police Form No.3 (PF3) (Exhibit P1).

Having been convinced that the prosecution had proved their case at the required standard namely beyond a reasonable doubt, the learned trial Magistrate found the appellant guilty of the offence of Rape contrary to section 130 (1), (2)(e) and 131(1) of the Penal Code and sentenced him to serve a term of thirty (30) years imprisonment. Aggrieved, the appellant lodged a substantive petition of appeal comprised of three grounds namely:

1. *That, the testimonies of PW1, PW2 and PW3 were not credible due to the failure of corroboration Evidence from a Hamlet chairperson who was a justice of the peace in his/her area in which the said crime occurred.*
2. *That, the trial court erred in law and fact in convicting and sentencing the appellant while the evidence of PW1 and PW2 were the family members witness their testimonies failed either to be supported by a nonfamily member such as the police officer who issued the said PF3 (P1) and made investigation to this case.*
3. *That the trial court erred in law and in convicting the appellant while at the trial court PW2 contended that himself with his son arrested the appellant in his room near the door while PW1 was back to the appellant. This short evidence revealed that PW2 was not called anyone to see and arrest the appellant in order to avoid doubts about the false hood case. This means that PW2 and his daughter PW1 fabricated this case to the appellant for their own benefit.*
4. *That the trial magistrate erred in law and fact in convicting the appellant while the evidence adduced by PW3 contained full errors according to his examination done to PW1 on the 3rd April 2020.This witness failed to mention the machine which he used to examine PW1 but for an amazement he said in his examination that the colour of an ordinary vagina is pink and the vagina of the woman who had sex is red. In normal circumstance every woman's vagina is often red inside not pink anywhere.*

On 3/2/2022 the appellant filed two additional grounds of appeal as follows: -

5. *That the trial court erred in law and facts by convicting the appellant relying on the evidence of PW1 without observing the requirement of section 127(2) of the Evidence Act [Cap. 6 R.E. 2002] as amended: since PW1 was a child of tender age (14 years old).*
6. *That, the trial Magistrate erred in law and fact by failing to comply with the requirement of section 235(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] when composing the judgment.*

When this appeal was called on for hearing the appellant appeared in person, unrepresented while the respondent Republic enjoyed the services of Mr. Enosh Kigoryo, learned Senior State Attorney. The appellant opted the respondent to submit first so that he could reply later specifically on important arguments that would be raised by the learned State Attorney.

At the outset, Mr. Kigoryo objected the appeal stressing that the lower court was justified in convicting the appellant. The learned State Attorney argued that PW1 was a child of tender age by section 127(4) of the Evidence Act. In obtaining evidence of such a child, Mr. Kigoryo averred, the law applicable is section 127(2) of the Evidence Act which requires the court to test the intelligence of the child and ensure that the child tells the truth.

Mr. Kigoryo contended further that in the matter at hand, it is not indicated anywhere that the victim had promised to tell the truth. The learned State Attorney submitted that nowhere in the court records can it be seen that the lower court prepared and carried out preliminary questions for ascertaining that the child was capable of telling the truth. It is Mr. Kigoryo's submission that the lower court had acted against section 127(2). Consequently, the learned State Attorney argued this court to expunge the evidence of PW1.To buttress his argument, the

learned State Attorney referred this court to the case of **Masanja Makunga v. Republic,** Crim App No. 378 of 2018 CAT, Dar.

However, the learned State Attorney was quick to point out that in any case expunging the evidence of PW1 does not free up the appellant from conviction and sentence. The learned State Attorney stressed that according to the charge sheet, the appellant was arraigned in court for Rape contrary to section 130(1) and (2) (e) of the Penal Code [Cap 16 R.E. 2022] and the same could be proved in the absence of the expunged evidence. To support his argument, He referred this court to the case of **Saidi Likubu v. Republic**, Crim Appeal No. 228 of 2020 CAT, Mtwara.

On how the appellant was arrested, Mr. Kigoryo submitted that based on suspicion, PW2 went straight to the house of the appellant where he found the victim with the appellant in his room. The learned State Attorney went on and stated that according to the evidence PW2 (father of the victim) he found the appellant and the victim in the appellant's room on the fateful day. The learned State Attorney, however, did not say what the victim and the appellant were doing. He stressed that PW2 was able to arrest the appellant and bring him to the village authorities.

The learned State Attorney argued that PW2 testified further that the victim told him that she was having carnal knowledge with the appellant. In addition, the learned State Attorney submitted that PW3 (a medical doctor) examined the victim and testified that the victim's private parts had been penetrated by a blunt object. The learned State Attorney insisted that PW3 tendered a PF3 as an exhibit.

It was Mr. Kigoryo's submission that the fact that PW2 had arrested the appellant is corroborated by the evidence of the appellant who had testified that he was arrested by PW2 in his house. The learned State Attorney submitted that what was in the lower court's record was the correct information even though the appellant brought a completely new story his arrest was due to the money he owed PW2. The learned State Attorney contended that the defence by the appellant was raised belatedly and called this court to disregard the same as an afterthought.

Submitting on the fifth ground of appeal, the learned State Attorney stressed that the appellant is complaining that one Salum Mohamed was not summoned to testify. However, he later called him to testify for him as DW2.On the sixth ground the learned State Attorney contended that PW2 was not an eyewitness, however, this was corroborated by that of PW3 the medical doctor who had examined the victim.

More so, Mr. Kigoryo submitted on the seventh and eighth grounds: whereby the appellant had asserted that there was no scientific evidence of DNA to prove that he was the one who committed the offence. To this end, the learned State Attorney referred this court to the case of **Julius kandonga v. Republic,** Crim Appeal No. 77 of 2017 CAT, Mbeya the court proffered that the offence of rape is not proved by sperm but can be proved without such DNA.

Regarding the ninth ground of appeal whereby the appellant had asserted that the case against him is fictitious, Mr. Kigoryo submitted that the appellant was connected to the offence and was arrested by the father of the victim. The learned State Attorney stressed that the assertion that the matter was not reported to the police is baseless. On the tenth ground, the learned State Attorney submitted that already prayed that the

evidence of PW1 is expunged. To this end, the learned State Attorney argued that this particular ground of appeal is irrelevant.

In rejoinder, the appellant argued that he remembers that PW2 had hired him to work for him for 40,000. The appellant went further and submitted that PW2 gave him 10,000 and owed him 30,000. He went further and submitted that on the fateful day, about ten minutes before, the appellant went to PW2's home to remind him of the debt to which he was enraged.

The appellant narrated further that as soon as he went back to his home place, PW2 came with his younger brother and told the appellant that he could go with them (PW2 and his younger brother) to collect his money. Since PW2 was not looking angry, the appellant recounts, and since he had no money at all "broke" and needed his money he agreed to follow them to PW2's house. The appellant argued that he did not know his intentions. He followed them only to be taken to the police station. To this end, the appellant prayed this court to untangle the plot against him and set him free.

Having heard the parties' submissions and perused the record of the trial court I am inclined to decide on the merits or demerits of the appeal as I hereby do. At the very outset, it is undisputed that the evidence of PW1 was taken without complying with section 127(2) of the Evidence Act. As submitted by the learned State Attorney it is true the victim when testified was fourteen years old. I am alive that section 127(4) of the Evidence Act defines who is a child of tender age. According to the cited provision of the law herein above a child of tender age entails a child whose apparent age is not more than fourteen years. In the

present case when the victim was testifying was fourteen years old. This means that the victim deserved to be treated within the dictates of section 127(2) of the Evidence Act during adducing her evidence. Unfortunately, as submitted by the learned State Attorney it is true that the evidence of PW1(the victim) was received without complying with section 127(2) of the Evidence Act. The way the learned trial Magistrate took the evidence of the victim, it was as if the victim was above fourteen years of age. I hereby expunge it from the record of the trial court. See; **Godfrey Wilson vs Republic** (supra) and **Masoud Ngosi vs Republic**, Criminal Appeal No. 195 of 2018 (unreported).

Now, the issue is whether the remaining evidence of PW2 and PW3 and exhibit P1 which were relied upon by the prosecution to link the appellant with the offence is sufficient to sustain the appellant's conviction. It is an established principle that in proving sexual offences, the best evidence is that which comes from the victim. The principle was aptly stated in the famous case of **Selemani Makumba v Republic** [2006] T.L.R 379.

Nevertheless, in certain circumstances, the offence may be proved despite the absence of evidence from the victim. Such evidence must, however, be cogent enough such that it leaves no reasonable doubt that the charged person committed it. This happened in some of the cases decided by the Court of Appeal. For instance, the cases of **Yusuf Molo v. Republic,** Criminal Case No. 343 of 2017 and **Mbaraka Ramadhani @ Katundu v. Republic**, Criminal Appeal No. 185 of 2018 137 (both unreported).

The only other evidence worthy of my consideration is that of PW2 father of the victim who, allegedly arrested the appellant in his homestead in the company of the victim. PW2, allegedly, arrested the appellant with the aid of his younger brother (Bashiru Mohamed) and his nephew (Mohamed Salum). Unfortunately, these two persons who aided PW2 to arrest the appellant did not come to court to testify. Worse of all, as complained by the appellant, no local government leader witnessed his arrest. This makes the evidence of PW2 uncorroborated.

Upon my perusal of the evidence of the appellant and his witness, they both features cogent and consistent evidence on the claim of the appellant of TZS 40,000/= against PW2 for work he assigned him at his salt harvesting farm. The record of the lower court shows that PW2 only paid the appellant TZS. 10,000/= and when the appellant was making a follow-up for the remaining amount, PW2 told him that it would put him (the appellant) into trouble. I have also gone through the argument raised by the learned State Attorney and with respect, I disagree with him that the appellant raised the issue of his conflicts with PW2 belatedly. The appellant was right to raise such an issue during his defence and not before.

To this end, I am convinced that the evidence of the victim was so crucial to assist the prosecution to sustain the appellant's conviction. Indeed, with no evidence of the victim, I am of the settled position that the evidence of PW2 and PW3 leaves a lot to be desires. I entertain no doubt whatsoever in my mind that the prosecution has failed to prove its case beyond reasonable doubts as required by law.

That said, I hereby allow this appeal. I quash the judgment and set aside the sentence meted out to the appellant. I order that the appellant **ATHUMANI MUSA** be released forthwith from prison unless otherwise held for other lawful reasons.

It is so ordered.

E. I. LALTAIKA

JUDGE
3.10.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 3rd day of October 2022 in the presence of Mr. Enosh Kigoryo, learned State Attorney and the appellant who has appeared in person and unrepresented.

E. I. LALTAIKA

JUDGE
3.10.2022

Court:

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E. I. LALTAIKA

JUDGE
3.10.2022