IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 565 OF 2020

HAMISI RAMADHANI LUGUMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Dudu-PRM-Ext Jurisdiction,)

dated the 27th day of October, 2020

in

Criminal Appeal No. 29 of 2020

.....

JUDGMENT OF THE COURT

6th & 9th May, 2022.

FIKIRINI, J.A.:

This appeal is from the decision of the Resident Magistrate's Court of Dodoma at Dodoma, in Criminal Appeal No. 29 of 2020 dated 27th October, 2020, in which the Principal Resident Magistrate with Extended Jurisdiction (PRM-Ext-Juris), upheld the decision of the trial court, which convicted the appellant of rape contrary to section 130 (1) (2) (e) and section 131 (1) of the Penal Code, [Cap.16 R.E. 2019], and sentenced him to thirty (30) years imprisonment, however by substituting the illegal

sentence of thirty (30) years to life imprisonment considering the victim was nine (9) years old.

Before the trial court, the particulars of the offence were that on the diverse dates between July and August, 2019 in Nkuhungu area within the District and Region of Dodoma, the appellant, a motorcycle rider commonly known as "bodaboda", is claimed to have carnal knowledge of a nine year old girl who was in Standard III, who we shall refer to as PW1, to conceal her identity and protect her dignity.

Facts, as established by the prosecution before the trial court, were that; while PW1 was at the bus stop waiting for a school bus, the appellant twice, solicited her to go with him to his home but she declined. On a fateful day at 7:00 am, the appellant again solicited PW1 who kept on resisting, the appellant then threatened her with a knife and forcibly asked her to lie to the school bus driver that she was not well and so she was not going to school. The appellant then rode PW1 on his motorcycle and took her to his home. At his home, the appellant forcefully undressed PW1, and he took his clothes off and started having sexual intercourse with the victim on his bed. Due to the pain caused by the appellant's sexual encounter, PW1 tried to shout but the appellant stopped her. Done

with his heinous act the appellant warned PW1 not to tell anyone. The appellant then took PW1 back to the school bus stop for her to catch her bus home.

As it is always said no secret can be kept forever. The teachers noticed PW1's absence from school as she continued skipping attending school. Upon interrogation by her teachers as to why on some days she missed school, PW1 candidly revealed the appellant to be the perpetrator of her skipping school and named him to have been sexually abusing her during those times she missed school. Osward Onesmo Maro (PW2), PW1's uncle was informed and he informed Julieth Onesmo Maro (PW3), PW1's mother and later PW1's grandmother. PW3 examined PW1's private parts and noticed bruises and her vagina was not normal, whereas PW2 reported the matter at Nkuhungu Police Station, where PW1 was issued with RB and PF3. PW3 took PW1 to Dodoma General Hospital for medical examination. Dr. Enidi Simon Chiwanga (PW6) examined PW1 and concluded there was penetration. Through PW3 exhibit P1, PW1's birth certificate was admitted into evidence, while through PW6 exhibit P3 (the PF3) was received into evidence.

Based on the appellant's description given by PW1, PW2 looked out for the appellant at Daraja la Siri bus stop, and with the assistance of police officers succeeded to apprehend the appellant at the bodaboda hang-out place commonly known as "kijiwe cha bodaboda". He was taken to Nkuhungu Police Station and later arraigned before the District Court of Dodoma charged with the offence of rape.

In his defence, the appellant exonerated himself from the allegation directed to him and brought two (2) witnesses to testify in support of his put forward defence.

Having heard the prosecution and defence witnesses the trial court was satisfied with the prosecution evidence and concluded that the defence case has failed to shake the prosecution case. Relying on PW1's account, the trial court was convinced that she was able to specifically explain what transpired during the encounters. PW1 also managed to describe the marks on the appellant's chest she saw when he undressed. The evidence of penetration was fortified by exhibit P3 which reported finding bruises in the victim's private parts and a broken hymen proving penetration. Believing the prosecution witnesses to be truthful and

reliable, the trial court convicted the appellant and sentenced him to thirty (30) years imprisonment.

Irked with the trial court decision the appellant unsuccessfully appealed to the 1st appellate court, PRM-Ext Juris, who upheld the trial court decision but substituted the illegal sentence of thirty (30) years to life imprisonment considering the victim was nine (9) years old. Still vexed, he has now approached this Court with a Memorandum of Appeal listing nine (9) grounds.

The grounds are paraphrased as follows: **one**, that the charge against the appellant was not proved beyond reasonable doubt, **two**, that both two lower courts failed to apprehend PW1's incredible and contradictory evidence, **three,** that no arresting officer testified or Police occurrence book tendered which would have featured the appellant's description made by PW1, instead, the court relied on PW2 who was unprofessional investigator, **four**, that the prosecution had a motive of covering up on the identification parade conducted in which PW1 failed to identify the appellant, **five,** that while PW1 had an opportunity to identify the appellant at the identification parade conducted, but PW2 and PW7 merely relied on dock identification to incriminate the appellant, the

evidence which is not reliable, **six,** that the prosecution failed to tender a sketch map of the scene of crime as it would have been in favour of the appellant, **seven,** that the scars or birthmark lines on the appellant's chest never confirmed anything to bolster the prosecution case, **eight,** that both PW6's account and exhibit P3 did not connect the appellant with the commission of the alleged crime or bruises or loss of virginity which could have been caused by activities like jumping, riding a bicycle and roper skipping and, **nine,** that the defence case particularly, DW2 and DW3 corroborated DW1's account and raised doubts against the prosecution case. The weakness raised should have been resolved in favour of the appellant.

On 6th May, 2022 when the appeal came up for hearing, Mr. Leonard Mwanamonga Haule learned counsel appeared on behalf of the appellant who was also present in Court and Ms. Patricia Mkinja learned State Attorney appeared for the respondent Republic.

On taking the floor Mr. Haule learned counsel, focused on one ground, and that would have embraced all other grounds, which is whether the prosecution case was proved beyond reasonable doubt. In endeavor, Mr. Haule was to cover the following sub-items:

(i) Non-compliance with section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 (the Act),

(ii) The identification process, and

(iii) Contradictions in the prosecution case.

On non-compliance to section 127 (2) of the Act, Mr. Haule referring us to page 10 of the record of appeal contended that PW1's religion was not stated, neither was she sworn nor asked if she knew the meaning of oath or questions directed to her to test is shown on the record. He further contended that the wording appearing following the title "Prosecution case in camera", at the bottom of page 10 of the record of appeal, is not what PW1 stated as at her age she could not have been versed or been able to cite the legal provision cited therein. And that aside from the shortfalls, even the trial magistrate did not commit himself to have complied with the provision of section 127 (2) of the Act. Fortifying his submission, he backed it up by citing the case of **Issa Salum Nambaluka v. R,** Criminal Appeal No. 272 of 2018 (unreported).

According to Mr. Haule, pertinent questions should have preceded the way forward when dealing with a child of tender age, however, he submitted these were missing in PW1's evidence on pages 10-11 of the

record of appeal. He thus urged us to expunge PW1's evidence from the record.

Mr. Haule continued with his submission on the identification aspect. He contended that the appellant was not identified by PW1. On this he referred us to the bottom of page 13 of the record of appeal, where PW1 has admitted that she went to the Central Police Station but could not identify the appellant. He also submitted that the issue of identification is again featured on pages 14 and 47 of the record of appeal. On page 14, when PW1 was cross-examined she admitted not seeing the appellant at the Police station, whereas the appellant on page 47 admitted being in the identification parade which PW1 failed to identify him. To buttress his contention, he referred us to the case of **Hepa John Ibrahim v. R**, Criminal Appeal No. 105 of 2020 (unreported), which discouraged dock identification of a stranger as to have no value unless backed by an identification parade at which the witness identified the accused person.

Moving to contradictions, Mr. Haule took us through and pointed to us some of the contradictions, arguing they have raised doubts and shaken the credibility of the prosecution witnesses leading to weakening the case. He started by taking us to page 10 of the record of appeal

where PW1 gave an account of her travels to school back and forth, yet she did not disclose to anyone what has befell her. On page 11 of the record of appeal, there is information of PW1 missing attending school on several occasions as indicated in exhibit P2. In all those days PW1 missed going to school, she does not say or it is not known where she was. This created doubts about her doings and this makes her not credible at all from her actions and conduct, argued Mr. Haule. This account he submitted, is supported by PW5's narrative as indicated on page 28 of the record of appeal, that she noticed after being informed by one of the parents that PW1 was seen leaving school while in uniform and during lessons. To Mr. Haule, PW1 is not credible otherwise she would have told her parents of her doings. The case of **Rehani Saidi Nyamila v. R,** Criminal Appeal No. 222 of 2019 (unreported) was cited in bolstering his position.

Probed by us if the two lower courts considered PW1 credible, Mr. Haule acknowledged they did, but according to him she was not credible. On the strength of his submission, Mr. Haule prayed for the appeal to be allowed as the prosecution case was not proved beyond reasonable doubt

hence quash the conviction, set aside the sentence, and release the appellant from prison.

Ms. Mkinja learned State Attorney, initially contested the appeal contending that the trial magistrate recorded the answer to the questions posed. Urged by us to take us to the page where that is reflected on the record of appeal. Unable to point to us a particular page reflecting that there were questions put across to PW1 and therefrom answers recorded, the learned State Attorney upon reflection and pondering admitted that section 127 (2) of the Act was not complied with and as such, PW1's evidential value is reduced. She conceded that PW1's evidence deserved expunging from the record. And knowing with the expunging of PW1's evidence, the remaining prosecution evidence would not hold together the prosecution case, she changed her stance and no longer opposed the appeal. She thus prayed for the appeal to be allowed and for the appellant to be released from prison.

Mr. Haule in rejoinder appreciated the prosecution's realization and her support of the appeal.

We have duly gone through the grounds of appeal, the record, submissions, and the list of authorities we were invited to visit. This being

a second appeal, as a general principle we are not expected to interfere with the concurrent findings of facts made by the lower courts. That can only occur once there is a misapprehension of evidence. We have in a number of our decisions tackled that issue. See: **The Director of Public Prosecution v. Jaffar Mfaume Kawawa** [1981] T. L. R 149, **Mussa Mwaikunda v. R** [2006] T.L.R. 387, and **Dickson Elia Nsamba & Another v. R,** Criminal Appeal No. 92 of 2007 (unreported).

In the present appeal, it is evident that the credibility of a witness or witnesses' is crucial, knowing they are the ones holding together and advancing the prosecution case. The credibility of the witness/witnesses is, however, subject to the tests of the demeanor and coherence of the testimony of the witness on one hand, and on the other with the testimony of the witness *vis a vis* of other witnesses. PW1 being a key witness, and a girl of nine (9) years, examining the authenticity of her evidence becomes crucial. And, this is governed by section 127 (2) of Act which provides:

> *"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 tell lies."*** [Emphasis added]

Deducing from the provision what we understood is the child of a tender age may testify in court after taking oath or affirmation or without oath or affirmation as stated in the cases of **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018, **Hamisi Issa v. R,** Criminal Appeal No. 274 of 2018 and **Issa Salum Nambaluka** (supra). However, the flexibility given has limitations, as the provision requires, the intended witness of tender age to make a promise, to tell the truth, and not lies. However, the provision is silent on how that can be procured from such a child of tender age. Faced with the akin scenario in the case of **Issa Salum Nambaluka** (supra) citing the case **Godfrey Wilson** (supra) the Court concluded that a few pertinent questions must be asked to determine, first and foremost, if the child witness understands the nature of oath or affirmation. When the answer is affirmative then testimony can be given under oath or affirmation. If not, then the child witness should be required to promise to tell the truth. The Court had this to say in the case of **Godfrey Wilson:-**

> "*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 tell lies."*

In the appeal before us, the appellant testified without compliance with the requirement of section 127 (2) of the Act, and that what is reflected on page 10 of the record of appeal, in our view, does not read or sound like compliance to the provision. What is on record reads:

> ***"PROSECUTION CASE OPEN IN CAMERA***
> *PW1: .....9 yrs I promise this court that I shall tell the truth and not tell any lies S. 127 (2) of the Evidence act as amended by written Laws (Miscellaneous Amendments) Act complied with."*

From the excerpt, it is not clear what exactly the trial magistrate is saying and we find it unsafe to conclude that there was compliance with section 127 (2) of the Act.

Regrettably, PW1 had to be recalled during the trial. The second set of PW1's evidence that calls for expunging also is that after she was recalled under section 147 (4) of the Act, we think the trial magistrate wanted to correct the blunder made by the predecessor trial magistrate since the former was transferred to a different station (see page 37 of the record of appeal). Upon reviewing the record the anomaly must have been noticed that section 127 (2) of the Act, has not been complied with. We say so because ordinarily when a witness is recalled, he/she is simply reminded that she/he is still under oath or affirmation and not to start the whole process all over. From there the prosecution processed the recalled witness be it for further examination in chief, cross-examination or re-examination. This is nonetheless not what transpired in the appeal before us.

In the present appeal as indicated on page 42 of the record of appeal, PW1 even though the record is silent on whether the pertinent questions were put across, the record shows that she promised to tell the truth and not lies. Again, reading from the record the statement does not reflect as to have been made by PW1, but to us seems to have been made by the trial magistrate. We shall let the record speak for itself:

*".....she **has promised** to the truth and not lies **as per the case law.**"*

As intimated earlier upon reflection, the learned State Attorney concurred that the provision has not been complied with and supported the contention by Mr. Haule praying for the expunging of PW1's account from the record, and we hereby do by expunging PW1's evidence from pages 10 -14 and 42-43 the record of appeal.

Our next move is to consider the evidence on the appellant's identification. The prosecution contended that the appellant was properly identified whereas the defence declined the assertion. PW1 was the sole witness in this regard, as PW2 and PW7 relied on PW1's account. On page 17 of the record of appeal, PW2 described the appellant as he was described by PW1. The description goes as follows:

> *"**I came to know after victim told me the way Hamis is** and went to find him at that kijiwe cha bodaboda and Hamisi introduced himself to me as Hamisi after I faced him."* [Emphasis added]

Other than the above excerpt there is nothing on record indicating what description was given to PW2 by PW1. If we go by what is found on

page 17 of the record of appeal, we find the statement too blank to be of any assistance in identifying a person let alone a person who is a stranger like the appellant was to PW1. Again, on page 34, PW7 the investigator of the case claimed that the appellant's arrest was effected after interviewing PW1, who gave the appellant's description, including that he had a mark on his chest. It is indeed correct that PW1 mentioned the appellant's name and where he parks his bodaboda but that in our view is not sufficient to conclusively say the appellant was properly identified. It was important for PW1 to give a specific description of the appellant, such as how he looked tall, slim, complexion, and any specific marks as she pointed out that he had a mark on his chest. The description of the name Hamisi which is a common name cannot be of much assistance or the fact he was a bodaboda rider that can mean any bodaboda rider. PW1's description even if it led to the arrest of the appellant, it was still important to conduct an identification parade, for the investigator to satisfy herself that the appellant has been properly identified.

On record there is, a conflicting account of whether an identification parade was conducted or not. Whilst PW1 and the appellant were in agreement that an identification parade was conducted, the prosecution

did not feature a witness or procure the identification parade register. On page 13 of the record of appeal, PW1 admitted being at Nkuhungu Police station for identification parade purposes, but denies identifying the person who raped her being on the identification parade.

This account is backed by DW1's account on page 47 which reads:

> *"On 15/8/2019 I was put in an identification parade. The same date my caution statement was taken.*
> ***I was in the identification parade then the victim was brought.***
> ***We were about 8 of us she passed to everyone of us she said none of us had done that to her as she knows him.***" [Emphasis added]

In short, we are entitled to conclude that the appellant was not identified as alluded by PW1. The dock identification that followed during the trial as stated in the case of **Hepa John Ibrahim** (supra) in which the case of **Musa Elias & 2 Others v. R,** Criminal Appeal No. 172 of 1993 (unreported) was of no value as was contrary to what the law provides:

> *"It is a well-established rule that dock identification of an accused person by a witness who is a stranger to*

the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial."

In this appeal, even though the dock identification was preceded by the identification parade, PW1 admitted she could not identify the appellant whom she claimed raped her, which was not the case in the above cited cases. Therefore PW1's dock identification of the appellant was of no value. Moreover, failure by the prosecution to lead evidence or to avail the identification register has made us draw an adverse inference that, had that evidence been led it would probably have weakened their case. See: **Aziz Abdallah v. R** [1991] T.L.R.71, **Hemedi Saidi v. Mohamed Mbilu** [1984] T.L.R. 113, and **Boniface Kundakira v. R,** Criminal Appeal No. 350 of 2008 (unreported). In **Aziz Abdallah** (supra), the Court restated the law thus:-

"...the general and well known rule is that the ***prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called***

without sufficient reason being shown, the court may draw an inference adverse to the prosecution.."

[Emphasis added]

In another endeavor to salvage its case, particularly on identification as shown on pages 41-43 of the record of appeal PW1 was recalled. She was essentially recalled to point out the mark she claimed the appellant had on his chest. We say this is a back doorway to bringing evidence. The application to recall a witness like any other application has to be keenly attended to. In the circumstances of this case, the application was not given the seriousness it deserved: *one*, no reason or clarification needed to be made were stated, and *two*, the court ordered the appellant to take off his shirt and made a remark as reflected on page 43 of the record of appeal. By so doing the court turned itself into a witness instead of playing its role as an umpire. This is unbecoming, unprocedural, and improper for the court to act so and in future it should not be condone.

The last aspect of our discussion is on contradictions. This will not detain us long, because after expunging PW1's evidence the contradictions canvassed through by Mr. Haule, which we find are of no

consequences. It is indeed correct that PW1 has given contradictory accounts. At one point she stated she was both sexually assaulted and sodomized, in another instance she stated to only have been sexually molested. Also, in her account of how many times that had happened, she gave different answers. Moreso, her account and other prosecution witnesses were not in harmony. Some of the contradictions we admit go to the root of the matter but others were minor. But, on a general note since PW1's evidence has been expunged her credibility calls for no more discussion unless we do so for academic purposes.

It is for the above discussions we found a reason to disturb the concurrent findings of fact on compliance to section 127 (2) of the Act and identification of the appellant.

In conclusion and as rightly conceded by the learned State Attorney, we find the prosecution has failed to prove its case beyond reasonable doubt when it failed to comply with requirements under section 127(2) of the Act and the appellant's identification left a lot of questions than answers.

We thus allow the appeal, quash the conviction, set aside the sentence imposed, and order the appellant be released forthwith from custody unless he is otherwise lawfully held.

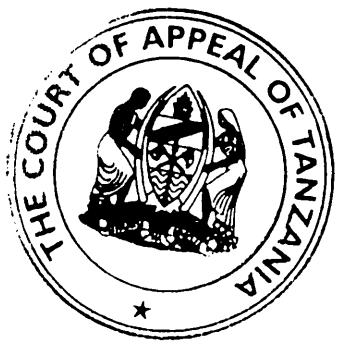
DATED at **DODOMA** this 9th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 9th day of May, 2022 in the presence of for the Appellant in person and Ms. Bernadetha Thomas, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL