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

**(DAR ES SALAAM REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 17 OF 2021**

**ELIAS JOHN..... APPELLANT**

**VERSUS**

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

(*Originating from the judgment of District Court of Kinondoni, Criminal Case No. 225 of 2019)*

**JUDGMENT**

*Date of Last Order: 17/11/2021*
*Date of Judgement: 1/7/2022*

**LALTAIKA, J.**

The appellant, **ELIAS JOHN** (hereinafter to be referred appellant) was charged before the District Court of Kinondoni with the offence of rape contrary to section 130(1),(2)(e) and 131 (1) of the Penal Code, Cap. 16 R.E.2019. The particulars that were laid in a charge sheet revealed that the appellant on diverse dates between October 2018 and 26th day of February, 2019 at Kimara area within Ubungo District in Dar es Salaam the appellant did have carnal knowledge of the victim (name is withheld) a girl, 9 years old.

To prove the charge the prosecution called six witnesses and tendered three exhibits while the appellant was the only witness for the defence side.

A brief background of the matter which led to the appellant's conviction is that on 23/2/2019, PW1 was at the house of Rufina Justine Milamo and her husband Godwin Kessy where they also live with other seven people including the appellant. She told the court that on 24/2/2019 the victim's parents travelled to Morogoro on official duties leaving the household under PW1's care. On 26/2/2019 the victim's mother called her informing her to take the victim to hospital as she was complaining to have vaginal pains. Before taking the victim to hospital PW1 examined the victim's vagina she found it with bruises.

The victim was then taken by PW1 to Bochi hospital upon examination of her private parts the doctor prescribed some medicine to the victim. PW1 went on to testify that later the victim revealed to her it was the appellant who raped her. PW2 the victim's mother whose testimony solely relied on the information received from PW1 told the court that she reported the incident at Mbezi Police Station thereafter the appellant was arrested. She also tendered the victim's birth certificate which was admitted as exhibit P1.

PW5, the medical doctor who examined the victim testified that on 3/3/2019 he received the victim who was accompanied by PW1 with PF3 complaining that the victim was raped. Upon medical examination he found the child with no hymen, pathologically that means there was penetration on the victim's vagina. He then filled in the PF3 which was later admitted as exhibit P2. PW2 (also appears in the record of appeal as

PW2) the victim told the court that the appellant seduced him and he later inserted his penis in her vagina. On the other incident the appellant asked her if the she was alone and whether her parent were around, she replied in negative, the appellant covered his mouth and raped her. She screamed out of pain, then the appellant ran away. The victim told the court that on another different day the appellant raped her again while she was in her bedroom while promising her it will not pain if they continuing doing it, while also threatening her not to tell anybody.

On his defence the appellant told the court that he received a telephone call requiring him to go and collect something however he was arrested and was taken to police station. At the police station he was told that he had raped his boss's child, the allegation which he is unaware of. He also claimed that he was not at the premises when the incident occurred.

At the conclusion of the trial, the trial court found the appellant guilty and convicted him to serve 30 years imprisonment.

Aggrieved with the conviction and sentence, the appellant appealed to this court with five grounds of appeal and two additional grounds of appeal. I am at liberty not to reproduce them.

When the matter was called for hearing Mr. Japhet Mmuru appeared for the appellant whereas the respondent was represented by Ms. Christine Joas.

Submitting on the first ground of additional grounds of appeal Mr. Mmuru submitted that the evidence of the victim was taken contrary to section 127(2) of the Evidence Act which requires the witness of tender age who does not understand the nature of an oath to promise to tell the

truth and not to tell lies. He referred this court to page 18 of the record of trial court proceedings which indicate that the victim promised to tell the truth but did not undertake to not tell lies in accordance to the said provision. On the other hand, Mr. Mmuru faulted the trial court for taking the victim's oath while the procedure was for swearing witnesses ought to be in accordance to section 198 of the CPA upon satisfaction that the child understood the meaning of an oath. To cement his argument Mr. Mmuru cited the cases of **Issa Salum vs Republic,** Criminal Appeal No.272 of 2018, CAT and **Geofrey Wilson vs Republic**, Criminal Appeal No.168/2018, CAT.

Mr. Mmuru also argued that the record of trial court on the above requirement of the law is silent, it does not indicate whether the trial court was satisfied that the child understood the meaning of an oath.

Amplifying on the second ground of additional grounds of appeal Mr. Mmuru faulted the trial court for failing to consider the defence of the appellant, he contended that the appellant's defence was also to that he was not at the scene of crime nor he was staying at the victim's house. He is of the view that the trial magistrate relied on the prosecution evidence and disregarded the appellant's defence.

With regard to the of original grounds of appeal Mr. Mmuru opted to argue them collectively. In his submission he argued that the trial court failed to analyse the credibility of PW2, on the ground that PW2 was not telling the truth, he relied his submission to the victim's testimony that the house girl one Happy found the appellant in her room who told him to collect his clothes but the accused went on to commit the offence. Mr. Mmuru is of the view that the said Happy was a material witness ought to

be summoned by the prosecution. To support his argument, he cited the case of **Isaya John vs Republic**, Criminal Appeal No.167 of 2018 CAT.

In response Ms. Joas submitted that the provisions of section 127(2) are tailored with the word "*may*" which is it not mandatory for the child to precisely state that she would tell the truth and not lies, what is required is the child to promise not to tell lies. She referred this court to page 18 of the trial court proceedings where it is shown that the victim promised to tell the truth she is of the view that the trial magistrate complied with the said section.

With regard to the trial court's failure to consider the defence of the appellant, Ms. Joas submitted that the appellant fronted the defence of alibi, in terms of section 194(1) of the Criminal Procedure Act, the appellant was required to furnish notice of defence of alibi before the closure of the prosecution case. she is in agreement with the trial's omission to consider the said defence, therefore it was right for the trial court to conclude that the appellant denied to have committed the offence. Ms. Joas is also in agreement with the trial court's finding that the best evidence of rape comes from the victim, she invited this court to consider page 8 of the trial court's judgment.

On the remaining grounds of appeal Ms. Joas argued them collectively she is of the opinion that the prosecution proved the case beyond reasonable doubt, she says so relying on evidence the victim who explained what happened. She maintained her earlier position that the victim's evidence was the best evidence which was corroborated with the evidence of the medical doctor who told the court that the victim was carnally known several times.

In his rejoinder Mr. Japhet reiterated his submission in chief.

Having considered the submission from learned counsels from both sides, my task is to determine the merit of this appeal before this court, I will start with the first ground of additional grounds of appeal, that the evidence of PW2 the victim contravened section 127(2) of the Evidence Act. For the better understanding I find it pertinent to quote the said provision below;

> *127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.*
>
> *(2) 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 any lies.*

In the matter at hand Mr. Mmuru faulted the trial consider for failure to comply with the above quoted provisions. I have taken liberty to visit the proceedings of the trial court and below is what transpired;

> *QN: You (sic) what it means by speaking the truth and lies?*
>
> *Yes I know.*
>
> *QN: What do they mean?*
>
> *It (sic) to speak what happened and lies is vice versa.*
>
> *QN: What is better between the two?*
>
> *It is better to speak the truth.*

*QN: What do you promise us that you will speak?*

*I promise you that I will speak the truth.*

*PW2: Sworn and states as follows;*

From what I have gathered from the trial court record there is no doubt that the victim knew the difference between speaking the truth and lies, thus she opted to speak the truth. I am of the considered view there the law does not specifically state the type of questions that should be put forward to the witness of tender age, what is required before reception of the evidence of a child of tender age is that the child should promise to tell the truth and not lies. The trial magistrate or judge can ask the witness of a tender age such relaxed questions, which may not be comprehensive depending on the circumstances of the case. The court was of the same view in the case of **Geofrey Wilson vs Republic** (supra), the court held that;

> *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.*

In the instant matter, it is evident from extract of the trial court's proceedings PW2 promised to tell the truth and not lies. I am therefore in

agreement with Ms. Joas that her evidence was appropriately taken in terms of section 127(2) of the Evidence Act.

I am also guided by the finding of the court in the case of Wambura Kiginga vs Republic, Criminal Appeal No.301 of 2018, CAT the court stated that;

> *"Our understanding of the rationale for enactment of section 127 (6) of the Evidence Act, among other objectives like to get away with corroboration of the evidence of the victim of a sexual assault, was also to remove limits to the courts and give them wider ground to operate outside the confines of subsection (2) of section 127. The law also, in our view, was enacted to net the offenders who would otherwise go scot-free only because of non-compliance with subsection (2) of section 127. We must also emphasize that invoking subsection (6) of section 127, without first complying with subsection (2) of that section, should always be cautious, rare and only in exceptional circumstances. The major point is to ensure that an offender is not proclaimed innocent, just because the trial court did not follow rules of evidence or procedure, in taking the evidence of the victim. In any event, non-compliance with subsection (2) of section 127, in no circumstance can it be a blame on the victim, but on the courts".*

With regard to the issue of taking an oath, I think that aspect should not detain us on the ground that the provision of section 127(2) is clear to the effect that the child of tender age may give her evidence without giving an oath, I find nothing wrong with PW2 taking an oath.

As regards to the second ground of additional grounds of appeal, Mr. Mmuru faulted the trial court for disregarding the appellant's defence that when he stated that he was at the victim's house when the incidence occurred. It is trite law that for the defence of alibi to be sustained by the court the accused is required to comply with the provisions laid under section 194(4) of the CPA, the relevant provisions read as hereunder;

> *(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.*
>
> *(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish case for the prosecution is closed.*
>
> *(6) Where the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence.*

In this case under scrutiny, I have examined the record of the trial court proceedings the appellant neither raised the defence of alibi nor gave notice to that effect in line with the above provision of the law. In my considered view I find Mr. Mmuru's submission is from the bar. As rightly submitted by Ms. Joas certainly the trial magistrate had a discretion not to accord with any weight if the appellant raised the same. The court in the case of **Robert Mningwa vs Republic,** Criminal Appeal No. 326 of 2007, the court held that;

> *"We commend the approach adopted by the trial court, as the correct one. As stated in **CHARLES SIMON'S** case (supra) the trial court is not necessarily barred from considering the defence of alibi*

*simply because an accused had not given notice of intention to rely on the defence of alibi before the prosecution closes its case. We understand it to be the law, that where an accused person does not give such a notice, the trial court has a discretion. It may consider it (i.e. take cognizance of it) or ignore such defence and accord no weight to it. But in our view if the court takes cognizance of the defence, it must subject it to a critical analysis, bearing in mind that an accused person has no duty to prove the alibi, but only to raise a reasonable doubt. (See,* ***ALLY MSUTU V. R. (1980) TLR****)".*

With regard to the issue of credibility of PW2's evidence I have this to say; the victim's evidence was to the effect that the appellant had carnal knowledge of her twice while her mother testified also to the same effect. The argument by Mr. Mmuru is an attempt to discredit the victim's evidence that she did not mention the time which the incidents took place. However, I am of the considered view that the fact that the victim is of tender age it cannot be expected that she could be in a position to remember each and every detail that took place on her fateful days.

The courts in our jurisdiction have been emphasizing that the best evidence comes from the victim of rape is also agreed in this case given the fact that the victim was able to narrate the story of what really happened. The missing gaps of the story cannot drive this court to conclude that the victim was telling lies. In the case of **Yohana Said @ Bwire vs Republic,** Criminal Appeal No.202 of 2018 CAT, the court quoted with approval the case of **Selemani Makumba v. Republic**, [2006] T.L.R 379

*"It is trite law as stated in the case of **Selemani Makumba v. Republic**, [2006] T.L.R 379 that the best evidence in proving a sexual offence is that of the victim. The Court stated as follows:*

> "The true evidence of rape has to come from the victim if an adult that there was penetration and no consent and in the case of any other woman where consent is irrelevant that there was penetration."

*In this case, PW1 testified that the appellant had been having carnal knowledge of her on three occasions. The evidence that she had been raped was supported by PW5. In an attempt to discredit the evidence of PW1 to the effect that he was the one who raped her, the appellant argued that her evidence is unreliable because at first, she mentioned Lukumai as the person who raped and caused her to suffer serious pains on the date when her trudging condition was noticed by her step mother. As sufficiently explained in her evidence, PW1 named Lukumai out of fear of being killed by the appellant who had warned her not to disclose to anyone that he had been having carnal knowledge of her"*

The court went on to hold that;

*"The trial and the first appellate courts believed the evidence of PW1 as supported by the evidence of the Doctor (PW5) and PW2. On our part, we similarly do not find any substantial contradictions in their evidence".*

Mr. Mmuru further challenged the failure by the prosecution to bring the house maid who had been mentioned by the victim who found the appellant in the victim's bedroom , in his opinion he thinks the said Happy

was the material witness, this argument does not need to detain us simply on the ground that it is the prosecution who has the duty to parade accordingly to prove their case, as rightly submitted by Ms. Joas that failure to summon the said Happy does not mean that the case was not proved beyond reasonable doubt.

Consequently, in view of this foregoing analysis I find this appeal devoid of merit. I therefore dismiss it in its entirety.

**E.I. LALTAIKA**


**JUDGE**
**1/7/2022**