

TANZANIA / JUDGMENT

FRANK JEREMIA 2

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IN THE COURT OF APPEAL OF TANZANIA AT MOSHI (CORAM: MWANDAMBO. J.A.. KIHWELO. 3.A. And MGEYEKWA. J.A.^ CRIMINAL APPEAL NO. 177 OF 2022 FRANK JEREMIA M ALIANO.....APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Decision of the High Court of Tanzania at Moshi) (Mwenempazi. dated the 4th day of October, 2021 in Criminal Appeal No. 7 of 2021 JUDGMENT OF THE COURT 14th & 21st March, 2025 KIHWELO, J.A.: This is a second appeal by Frank Jeremia Maliano, the appellant following dismissal of his appeal by the High Court of Tanzania sitting at Moshi (Mwenempazi, J) in Criminal Appeal No. 7 of 2021. By doing so, the High Court affirmed the appellant's convictions for rape and impregnating a schoolgirl as well as the corresponding sentences of thirty years' imprisonment. Believing that justice was not served, the appellant further appeals to this Court essentially on the contention that the offences were not proven beyond reasonable doubt. On account of the prosecution case which was told by seven witnesses and supported by three documentary exhibits, it was the prosecution case on the first count that, on an unknown date in October, 2018 at about 19:00 hrs at Shimbi Mashame Village within Rombo District in Kilimanjaro Region did have carnal knowledge with a girl aged 17 years old. To protect her privacy, we shall refer to her simply as PW3. On the second count, the prosecution sought to prove the accusation that on the same date, time and at the same place stated in the first count, the appellant impregnated the victim who was a schoolgirl. Briefly, according to the prosecution version of the story PW3, a 17 years old girl was a Form 2 scholar at Kwaikuru Secondary School in Shimbi Mashame Rombo. She recalled that sometime in October 2018 at about 19:00 hrs she went to get some groceries in the nearby shop where the appellant was a shopkeeper. The appellant allured PW3 to take home those groceries and return so that the two can make love. Unhesitatingly, PW3 obeyed to the invitation, she went back home and shortly thereafter returned to the shop where she found the appellant anxiously waiting and the duo had sex. Afterwards, PW3 returned home and, according to her, she had to change her clothes which had blood since it was her first time to have sex. She did not dare tell anyone about what happened. One month later, PW3 did not get her routine menstrual cycle and informed the appellant who seemed to be puzzled but in turn told PW3 to inform her step mother. However, PW3 did not heed to that advice. Later, in March 2019 Epifania Peter (PW2), the step mother of PW3 having suspected that PW3 was pregnant, she chose to inform her husband; Rogasian Bongole (PW2). Apparently, the school authorities had also suspected that PW3 was pregnant and decided to investigate and Josephine Japhet Mypila

(PW4) the school teacher who tendered a school attendance register which was admitted in evidence as Exhibit PI, sent PW3 to hospital for pregnancy testing and according to Wilbroad Kyejo (PW5), a clinician at Huruma Designated Hospital, PW3 was five-months and two weeks pregnant when he examined her on 27th March, 2019. PW5 filled a request for medical examination (PF3) documenting the medical findings, which was admitted in evidence as Exhibit P2. WP 3175 D/C Selestina (PW6) from Mkuu Police Station in Rombo recalled that on 28th March, 2019 she was assigned a case file in relation to rape and impregnating a school girl and proceeded to interrogate witnesses and arrested the appellant on 1st April, 2019. The appellant was then interrogated by G. 3702 D/C Christopher (PW7) on the same day and recorded his cautioned statement (Exhibit P3) by which he admitted having had unprotected sexual intercourse with PW3 a couple of times. According to PW7 the appellant promised to marry PW3 upon finishing her school. Although the appellant was non-committal as to whether he was responsible for the pregnancy, he admitted being aware that PW3 was a pupil. In his sworn testimony, the appellant totally disassociated himself from the accusations made against him, but he did not refute the fact that he was arrested on 1st April, 2019 and charged for the offences subject of the case before us. Evidently, the appellant denied any allegations that he confessed before PW7 and recorded a cautioned statement, exhibit P3. In his further testimony, he recalled signing a document which he was made to understand that it was a bail related document. He simply stated that he was not responsible for the alleged pregnancy and did not have any affairs with PW3. As hinted earlier on, at the height of the trial, it was found that, on the whole of the evidence, the charged offences were proven to the hilt and therefore, the appellant was convicted and sentenced as stated above. In this appeal, the appellant initially amassed seven (7) grounds of grievance which may be crystalized as follows:

1. That, the first appellate court erred in denying the appellant an opportunity to argue his appeal by way of written submission.
2. That, the first appellate court erred in relying upon Exhibit P3 whose contents were disclosed by PW4 before it was cleared for admission.
3. That, the first appellate court erred in upholding the appellant's conviction relying on the evidence of PW3 which was incredible and unreliable.
4. That, the first appellate court erred in upholding the appellants conviction while failing to appreciate and distinguish between law and morality.
5. That, the first appellate court erred in upholding the appellant's conviction without considering that the trial Magistrate did not comply with section 210 (3) of the Criminal Procedure Act, Cap. 20
6. That, the first appellate court erred in upholding the appellant's conviction without considering that the defence case casted reasonable doubt in the prosecution case.

7. That, the first appellate court erred in upholding the appellant's conviction without considering that the prosecution did not prove the case beyond reasonable doubt. Later on, in terms of rule 73 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the appellant lodged a supplementary memorandum of appeal containing two (2) points of grievance which may be crystalized as follows:
 1. That, the first appellate court erred in upholding the appellant's conviction relying on the evidence of PW 3 which was unreliable.
 2. That, the trial court erred to deny the appellant's right to bail. We sat on 14th March, 2025 to determine the appeal, and the appellant was fending for himself, unrepresented, while Messrs Isack Mangunu, Peter Utafu, Kambarage Samson and Ms. Edith Msenga, all learned State Attorneys appeared for the respondent Republic. Apart from the grounds of appeal the appellant filed written arguments in support of his appeal. In his submissions in support of the appeal, the appellant sought leave of the court to clarify his written arguments. He began his submissions by assailing the credibility, believability, and reliability of the testimonies of PW3. The appellant criticized PW3 for her failure to disclose her pregnancy to anyone until when she was suspected to be pregnant and later taken to hospital where it was discovered that she was five months and two weeks pregnant. To him, the conduct of PW3 raises suspicion on her credibility and reliability and cited to us the case of Yust Lala v. Republic, Criminal Appeal No. 337 of 2015 (unreported) for the proposition that, lapse of time between the alleged rape incident and the time when the appellant was mentioned raises doubts. The appellant's view is further justified by the fact that PW3 did not mention the appellant despite the fact that there were no threats and she was not staying in the same house with the appellant either. According to the appellant, it took for PW3 to be locked in the police lock up for her to mention the appellant and this raises further suspicion. On the adversary side, Mr. Utafu had an opposing view, he contended that PW3 was a witness of truth and her evidence was credible and reliable for the prosecution. He further argued that, PW3's testimony alone was sufficient to convict the appellant as the best evidence in law, citing subsection 6 of section 127 of the Evidence Act. On our prompting as to the credibility of PW3 given the apparent contradictions between her testimony and that of PW5 as well as Exhibit P2, Mr. Utafu conceded, with remarkable forthrightness that clearly, there was contradiction between the evidence of PW3 at pages 11 to 13 where she mentioned the appellant as the only person she had love affairs with and Exhibit P2 which indicates that PW3 was raped by four adult males. However, he implored us that we should ignore that part of Exhibit P2 for the reasons that PW3 consistently testified how she was raped by the appellant and no one else. We wish to predicate our deliberation by restating that, ours being a second appeal, we are mandated under section 6 (7) (a) of the Appellate Jurisdiction Act (the AJA) to deal with matters of law only but not matters of fact. However, we can only intervene where the courts below misapprehended the evidence, where there were misdirection or non- directions on the evidence or where there was a miscarriage of justice or a violation of some principles of law or practice. There is an unbroken chain of case law in this. See for instance D.R. Pandya v. R [1957] E.A. 336 and Director of Public Prosecutions

v. Jaffari Mfaume Kawawa [1981] T.L.R. 149 and a series of decisions that followed. That being the case and as rightly argued by the learned State Attorney, ground one of the Memorandum of Appeal and ground two of the Supplementary Grounds of appeal do not fall within the purview of subsection 7 (a) of section 6 of the AJA and therefore we will not determine them. Now coming back to the issue of credibility of PW3 which is ground 3 of the Memorandum of Appeal and ground 1 of the Supplementary Grounds, we must admit that the issue of credibility and reliability of PW3, has caused us considerable anxiety. We are alive to the principle that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing such witness. See, for instance, Goodluck Kyando v. Republic [2006] T.L.R. 363. Equally, we are aware that in terms of subsection 6 of section 127 of the Evidence Act, in criminal proceedings involving sexual offences true evidence must come from the victim of sexual offence. That section reads as follows: "Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or a victim of sexual offence, the court shall receive the evidence and may\ after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth." Undoubtedly, we have pronounced ourselves in the above position in the case of Seleman Makumba v. Republic [2006] T.L.R. 379 and a series of decisions that followed, in which we observed that, true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. However, the above rule is not absolute. The court has to be satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth. In other words, the evidence of the child of tender years or the victim of sexual offence has to be subjected to thorough scrutiny in order for the court to be satisfied that the evidence contains nothing but the truth. The reason is not far-fetched, sexual offences are very serious in nature as they often attract public attention and public scrutiny, but more so, they have dire consequences for the accused once found guilty given the severity of the sentence imposed. In the case of Mohamed Said v. Republic, Criminal Appeal No. 145 of 2017 (unreported) while discussing subsection 7 of section 127 we held that, the word of the victim of sexual offence should not be taken as a gospel truth but should pass the test of truthfulness. Ordinarily, credibility of a witness can best be assessed by the trial court during trial. However, the credibility of a witness can also be determined in two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses. There is, in this regard, a considerable body of case law on this aspect. See, for instance, Shabani Daud v. Republic, Criminal Appeal No. 28 of 2001(unreported). Now, regressing back to the appeal before us, obviously PW3 was completely an unreliable witness. What fell from her own mouth portrayed her as an unprincipled character. At first, she testified that she made love once with the appellant and

it was on Saturday, but then she later recanted her earlier testimony by saying that they made love with the appellant several times in the past. This is evident on record during examination in chief and cross-examination at page 12 of the record of appeal as well as during re-examination at page 13 of the record of appeal. This lack of coherence is a clear demonstration that PW3 was not a credible witness. In our view, regrettably the prosecution's evidence was further dented by PW3's statement to the clinician that she was raped by four adult males. Exhibit P2 at page 34 of the record of appeal specifically part (iv) reads: "General Medical History (including details relevant to the offence) HISTORY OF BEING RAPED BY FOUR MALE ADULTS." This is not consistent with PW3's evidence. We may at this point remark in passing that, we find it completely inexplicable why the prosecution did not find it necessary to clarify at the time when Exhibit P2 was tendered in evidence by PW5 and instead this was left as it is. With respect, we think there is some validity and substance to this criticism which goes to the root of the matter. In the premises, we hold that these grounds have merit. In response to the complaint in the fifth ground of appeal that section 210 (3) of the Criminal Procedure Act (the CPA) was not complied with, Mr. Samson learned State Attorney also conceded, with remarkable forthrightness in that from pages 7 to 28 of the record of appeal, it is conspicuously clear that the trial magistrate did not comply with section 210

- (3) of the CPA. However, he had an opposing view as to its consequences. In his opinion, there was no any prejudice to the appellant and therefore, the anomaly is curable under section 388 of the CPA. Elaborating, he contended that, the rationale for that provision is to ensure correctness and accuracy of court record and quite unfortunate, in the case before us, apart from complaining that the provision of section 210 (3) of the CPA was not complied with, the appellant did not say how did it occasion injustice on his part. He paid homage to the case of *Flano Alphonse Masalu @ Singu and 4 Others v. R*, Criminal Appeal No. 366 of 2018 (unreported) to fortify his argument. We have heard the concurrent submissions by the parties that the provisions of section 210 (3) of the CPA was not complied with. The only thing that they parted ways is on the consequences. This ground should not detain us much, and we think, it will only be pretentiously academic to deal with it, in greater detail as we fully subscribe to the submission by the learned State Attorney that court records are deemed to be accurate and authentic such that they represent what actually transpired in court and therefore, they should not be lightly impeached. See, *Paulo Osinya v. R*

- [1959] E.A. 353 and *Halfani Sudi v. Abieza Chichili* [1998] T.L.R. 527. In the latter case, it was observed that: "(i) A court record is a serious document. It should not be lightly impeached. (ii) There is always a presumption that a court record accurately represents what happened. " It is not insignificant to state that, where there is failure or omission to comply with a procedural requirement in the course of trial like in the case before, the question the appellate court should ask itself, before it can nullify or impeach the proceedings, is whether such failure or omission occasioned a miscarriage of justice on the party complaining. See, *Richard Mebolokini v. R* [2000] T.L.R. 90 and *Flano Alphonse Masalu @ Singu and 4 Others v. R* (supra). We are thus satisfied that, failure to comply with

section 210 (3) of the CPA is curable under section 388 of the CPA. That said we find this ground of complaint unmerited. Having disqualified the prosecution's star witness PW3 as unreliable and incredible witness, what is remaining on record is the cautioned statement Exhibit P3 which was admitted in evidence without objection. In that cautioned statement, the appellant is alleged to have confessed to PW7 to have impregnated PW3. But the appellant challenged Exhibit P3 in the strongest terms during his defence and on appeal. We are aware that in criminal cases, the best witness is an accused who confesses his guilty provided that the confession is beyond suspicion. There is a large body of decided cases on this. See for instance, Twaha Ali 15 and 5 Others V Republic, Criminal Appeal No. 78 of 2004 and Prosper Baltazar Kileo and Another V Republic, Criminal Appeal No. 150 of 2011, (both unreported). Certainly, it is settled that, generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars, or unless the court after full consideration of the circumstances is satisfied of its truth- See Bombo Tomola V R [1980] T.L.R. 254. In the instant case before us, Exhibit P3 was repudiated by the appellant and quite unfortunate, there was no any other evidence to corroborate it. We think, with respect, given the circumstances prevailing in this case, there is no ambiguity that Exhibit P3 was wrongly relied upon to convict the appellant. Unfortunately, this went unnoticed by the first appellate court. Accordingly, we find ground 2 of the appeal has merit albeit for a different reason. For the foregoing, we do not think it is necessary, in the circumstances of this appeal, to deal with the other grounds. We are settled in our mind that our deliberation of the above grounds suffices to dispose the appeal. In the circumstances, it is our conclusion that the conviction of the appellant rested on weak and unreliable evidence. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant's immediate release from prison unless held for other lawful cause. DATED at MOSHI this 20th day of March, 2025. L. J.S. MWANDAMBO JUSTICE OF APPEAL P. F. KIHWELO JUSTICE OF APPEAL A. Z. MGEYEKWA JUSTICE OF APPEAL Judgment delivered this 21st day of March, 2025 in the presence of the Appellant in person and Mr. Makore Maheri, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. 3fg. DEPUTY REGISTRAR U COURT OF APPEAL

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