

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA fCORAM: NPIKA. J.A.. MWAMPASHI. 3.A. And MGEYEKWA. J.A.T CRIMINAL APPEAL NO. 572 OF 2021 GEORGE ANDREA..... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Judgment of the Resident Magistrate's Court of Arusha at Karatu) (Mkarria. SRM-Ext. Jur.1 Dated the 9th day of July, 2021 in Criminal Appeal No. 58 of 2020 JUDGMENT OF THE COURT 12th& 16th August, 2024 MGEYEKWA. J.A:.. In this second appeal, the appellant, George Andrea, is still faulting his conviction and sentence of thirty years imprisonment by the trial District Court of Karatu at Karatu for the offence of rape. Based on the testimonies of six witnesses, the prosecution sought to establish the charge that the appellant, on 26th January, 2019 around 11:00 hours at Endallah Village within Karatu District in Arusha Region, did have carnal knowledge of a girl aged nine years whose identity is concealed, i henceforth to be referred to as "the complainant" or simply as "PW2" the codename by which she testified. In brief, the evidence adduced by the prosecution was to the effect that, the complainant was a grade four pupil. On 26th January, 2019 around 11:00 hours, the appellant went to the complainant's house to buy banana brew. When he arrived there, he met the complainant and promised to give her TZS. 500.00 should she agree to meet him at a place known as Karantini. The appellant instructed her to use a different route to avoid being seen. She agreed to the meeting. When they arrived at the designated spot, the appellant demeanor took a dark turn. He manipulated and forced her into a distressing situation. He undressed her and inserted his manhood into her vagina. According to the complainant's father, Elirehema Essaw (PW1) on 26th January, 2019, around 11:00 hours, he received information from his wife that the appellant who was their neighbour had sexual intercourse with the complainant. On arrival home, he asked the complainant, she told him that the appellant had carnal knowledge of her. Upon learning what had happened, they searched for the appellant who was found in an unfinished building. Thereafter, the incident was reported to the Village Executive Officer, and subsequently to the police leading to the appellant's arrest. The complainant's evidence was supported by PW4, the complainant's sister. She recalled that on the fateful day, she left the appellant at their house while the complainant was playing with her playmates at their compound. A moment later, PW4 noted that the complainant was missing. Then, she left home heading to Karantini to collect grass which she used to make brooms. Unexpectedly, she saw the appellant in the middle of the act of sexual intercourse with PW2. Upon seeing them, she called PW2 but she did not respond. When PW4 approached them, the complainant took to her heels

and disappeared from the scene. She asked the appellant the whereabouts of PW2. He told her that he did not know. From the scene of the crime, PW4 marched back home where she reported the ordeal to her mother. Following a long wait, PW4 saw the complainant return home crying, she provided detailed information that helped them to take swift action. A moment later, the appellant was apprehended. On the part of the complainant's mother, Theresia Lohay (PW3), she testified that when the incident occurred, she was at home with her daughter Elizabeth Chalali (PW4) who was selling banana brew. Later that day, PW4 informed her that the appellant had sexual intercourse with the complainant. PW3 headed to the appellant's place and found the complainant's slippers. Later, the complainant came back home crying. When PW3 asked her, what had befallen her; she told her that the appellant promised to give her TZS. 500.00 and then ravished her. Shortly later, the complainant was taken to Karatu Health Center for medical examination and treatment. There was further prosecution evidence from WP. 5302 Detective Corporal Eugenia (PW4), stationed at Karatu Police Post. On 28th January, 2019, she interrogated the appellant who denied the allegation of rape levelled against him, and prepared a medical examination Form (PF3) which was tendered and admitted as exhibit PI. Upon obtaining the PF3, PW1 took the complainant to Karatu Health Center where she was examined and treated by Rhoda Muhoja, a Clinical Officer (PW5) who found that the complainant was penetrated by a blunt object as her hymen was perforated and there were fresh bruises in her vagina. The defence by the appellant was total denial, refuting all the allegations fronted against him. He complained that the case was framed- up against him due to a misunderstanding between him and PW1 arising out of a debt. 4 On the whole of the evidence, the trial court findings were to the effect that the prosecution witnesses presented a credible tale on what transpired at the scene of the crime. The trial court thus, established that the appellant ravished the complainant. Against this backdrop, the trial court convicted and sentenced the appellant to life imprisonment. His appeal to the High Court was; transferred to the Resident Magistrate's Court of Arusha at Karatu to be heard by Mkama -SRM with Extended Jurisdiction (SRM -Ext. Jur). The appeal was not successful. Still undaunted, the appellant has preferred this second appeal. He filed a memorandum of appeal containing five grounds of grievance which may be paraphrased as follows: one, that the location where the incident occurred in the charge sheet and evidence was at variance; two, that the evidence of the complainant was received contrary to section 127 (2) and

- (6) of the Evidence Act (the EA); three, that the testimonies of prosecution witnesses were contradictory and inconsistent; four, that the trial court wrongly relied on exhibit PI which was not read over in court; and five, that the trial court did not consider the defence case. At the hearing of the appeal, the appellant appeared in person and urged us to consider his written arguments. The respondent was represented by three learned Senior State Attorneys; Ms. Lilian Kowero, Ms. Grace Madikenya, and Ms. Naomi MoJiel. However, in arguing against the appeal, it was Ms. Madikenya who took charge. She stoutly resisted the appeal. We shall revert to the details of the parties' arguments in the course of determination of the issues of contention. On the first ground, the appellant complained that there was a variance between the charge sheet and the prosecution witnesses¹

evidence. In his written argument, the appellant elaborated that, the charge sheet states that the alleged offence occurred in Endallah while the prosecution evidence was to the effect that the offence occurred in Manusai and Karantini. At the outset, we express that, the appellant's complaint does not yield any material consequences, particularly in the light of the prosecution testimonies. The complainant stated that she was residing at Manusai and studying at Endallah and the incident occurred at a place called Karantini. According to the record of appeal, in particular, on pages 13 and 18, it is an undisputable fact that PW1, PW3 and PW4 testified that they were residing at Endallah Village and the incident occurred at a place called Karantini. To support the Court's findings; PW1 testified that the incident occurred at a place called Karantini. His evidence was supported by PW4 who testified that she was studying at Endallah Primary School. As rightly submitted by Ms. Madikenya that, PW4 testified to the effect that she went to Karantini to gather grass which she used to make brooms, which means that, Karantini was a forest or a bush and not a Village as alleged by the appellant. It is, therefore our view that, the only reasonable inference to be drawn from the established facts was that Karantini is an area within Endallah Village. Therefore, we find this complaint without substance and dismiss it. The second complaint by the appellant is that the provisions of section 127 (2) of the EA were flouted. Our starting point in addressing this ground is the provision of section 127 (2) of the EA. For ease of reference, we reproduce the section hereunder: "127 (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 lies." In order to determine that aspect of the case, it is significant that we demonstrate how the evidence of the complainant was taken on 20th June, 2019 as reflected at page 12 of the record of appeal: " Court: Per nature of this witness, she is hereby asked to promise to tell the truth to this court and not lies in line of the decision of *Jamali Ally v. R* Criminal Appeal No. 52 of 2017 (unreported) where she replied: PW2:1 will tell the truth I am a Christian " In our view, the above excerpt, leaves no doubt that PW2 promised to tell the truth to the trial court in consonance with requirement under section 127 (2) of the EA applicable to witnesses of tender years, that is, those whose apparent age is not more than fourteen years. The approach augurs well with our construction of the said provisions. See *Issa Salum Nambaluka v. Republic*, Criminal Appeal No. 195 of 2018 [2020] TZCA 10 (21 February, 2020 TanzLII). Obviously, what we find baffling, however, is that after the trial court had extracted PW2's promise as stated above, it went on recording her evidence on oath. That was certainly wrong because PW2 could not have been made to give evidence on oath without the trial court having determined if she understood the nature and meaning of oath. Nonetheless, the said error was obviously innocuous and had no deleterious effect on the promise to tell the truth that PW2 had given earlier. All said, we find that PW2's evidence was correctly and properly received on her promise to tell the truth. 8 Therefore, it is our considered view that the requirement under section 127 (2) of the EA was complied with. An issue akin to this was discussed in the case of *Mathayo Lauranee William Mollel v. Republic*, Criminal Appeal No. 53 of 2020 [2023] TZCA 52 (20 February,

- 2023) TanzLII, the Court held that: "In the case at hand, the child witnesses who are the victims on the counts on which the appellant was convicted, did not give evidence on oath or affirmation. They simply promised to tell only the truth. We think this was quite appropriate in terms of sub-section (2) of section 127 of the Evidence Act reproduced above...". See also: *Msiba Leonard Mchere Kumwaga v. Republic*, Criminal Appeal No. 550 of 2015 [2018] TZCA 571 (6 July 2018 TanzLII). Therefore, we find the complaint in the second ground of appeal wanting in substance and dismiss it. We now turn to determine the third ground. The appellant pegs his complaint on the fact that the evidence of the prosecution witnesses was riddled with glaring contradictions in particular on the date when the incident occurred, thus, rendering their respective testimonies unworthy of belief. Admittedly, the learned Senior State Attorney submitted that there was a variance of dates between the charge sheet and the prosecution witnesses' evidence. However, she backtracked and urged that the said contradiction is a slip of a pen. Elaborating, she contended that the record of appeal reveals that, it was only PW3 who testified that the incident occurred on 29th January, 2019 while the key witnesses, PW1, PW4 and PW6 testified to the effect that the incident occurred on 26th January, 2019. She added that, even the appellant in his defence acknowledged that he was arrested on 26th January, 2019. She referred us to the case of *Emmanuel Josephat v. Republic*, Criminal Appeal No. 449 of 2018 [2022] TZCA 629 (13 October 2024 TanzLII), for the proposition that minor contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. She urged us to dismiss this ground of appeal. We are aware that when it comes to issues of contradictions and inconsistencies of the witnesses' evidence, the court has a duty to determine whether the contradictions are so material that the trial court ought to have rejected the evidence. See: *Mohamed Said Matula v. Republic* [1995] T.L.R. 3 and *Dickson Elia Nsamba Shapwata & Another v. Republic*, Criminal Appeal No. 92 of 2007 [2008] TZCA 17 (30 May 2008 TanzLII). In the latter case, the Court quoted an excerpt 10 from the learned authors of Sarkar, the Law of Evidence, 16th Edition, at
- p. 48, which we find worth reproducing as follows: "Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do." We shall apply the above authority to this case, and look at the circumstances pertaining to this ground and in determining the issue, whether from the available evidence on the record, the evidence of the prosecution was contradictory or otherwise. As rightly submitted by Ms. Madikenya, the testimonies of PW1, PW2 and PW4 indicate that the incident occurred on 26th January, 2019, while PW3 testified that the incident occurred on 29th January, 2019. Although, PW3's evidence on this aspect has been materially contradicted by the rest of the prosecution witnesses, but the said contradiction in our view was not material. It is plain from the

tenor of the trial court's judgment that in arriving at conclusion, he relied on the complainant's evidence which was the best evidence in sexual offences cases. Therefore, we are satisfied that the discrepancy in PW3 testimony was trivial. It did not go to the root of the case. Ground four, faults the prosecution for failure to read over the exhibit PI (PF3) before the trial court after its admission in evidence to enable him to comprehend its contents. We think this should not detain us. As can be discerned from the record of appeal on page 22, we are at one with the learned Senior State Attorney that the PF3 was tendered and read over in court. Therefore, this ground is misconceived and thus devoid of merit. As regards the complaint in the last ground of appeal that the trial court did not consider his defence case, we do not agree with him. As rightly submitted by Ms. Madikenya that, the trial court in its judgment considered the defence case. In his judgment, the trial magistrate at page 36 of the record of appeal held, and we take the liberty to partly quote him: "I wish to say that the prosecution side in this case left no loose end untied, and I think that no 12 wonder the accused person failed to raise a reasonable doubt. The argument that he was once the labourer who worked with the victim's father that is why he was fabricated in this case to my view is nothing but afterthoughts." It is plain from the tenor of the trial court judgment that in arriving at his conclusion, it considered the appellant's defence but rejected it in view of the strong prosecution case based on the truthful evidence of the complainant. The fact that the appellant's evidence was rejected, does not mean that it was not considered. See for instance Jafari Mohamed

- v. Republic, Criminal Appeal No. 112 of 2006 [2013] TZCA 344 (15 March 2013). Therefore, this ground fails. Having reviewed the testimonies of the prosecution witnesses in view of concurrent findings of the courts below, we hold without hesitation that the appellant's conviction was based upon robustly evaluated evidence. The prosecution evidence sufficiently established that there had been vaginal penetration by a blunt object as per section 130 (1) and (2) of the Penal Code. It was undisputed that the complainant's age at the time of the sexual act was within the ambit of a child under the age of eighteen years, and the complainant identified the appellant as the perpetrator and described the episode in detail. 13 In the end result, we hold that the appellant was properly convicted of the offence of rape contrary to section 131 (1) of the Penal Code. Consequently, his appeal has no merit. It is accordingly dismissed in its entirety. DATED at ARUSHA this 16th day of August, 2024. G. A. M. NDIKA JUSTICE OF APPEAL A. M. MWAMPASHI JUSTICE OF APPEAL A. Z. MGEYEKWA JUSTICE OF APPEAL The Judgment delivered this 16th day of August, 2024 in the presence of the Appellant in person and Ms. Lilian Kowero, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

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