

TANZANIA / JUDGMENT

james lobulu juma vs the dpp 2023

tzhc 22848 17 november 2023

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TZHCDECIDED
17 November 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA DISTRICT REGISTRY
AT ARUSHA CRIMINAL APPEAL NO. 67 OF 2023 (C/f the District Court of Arusha at Arusha in
Criminal Case No. 01 of 2022) JEMSI S/O LOBULU ©
JUMA.....APPELLANT VERSUS THE
D.P.P..... RESPONDENT

JUDGEMENT

07/11/2023 & 17/11/2023 KINYAKA, J.: The Appellant was on 22/12/2022 convicted by the District Court of Arusha of an offence of rape contrary to section 130 (1) (2) (e) and 131(1) of the Penal Code, Cap. 16 R.E. 2019 (herein after, the "Penal Code"). The Appellant was sentenced to life imprisonment. Aggrieved by the conviction and sentence, the Appellant preferred eight grounds of appeal which are reproduced herein below:

1. That the trial court erred in law and in fact when finding the appellant guilty of the offence of rape and accordingly convicting him in situation where the offence was not proven on the standard required in criminal trial; i
2. That the trial court erred in law and in fact in not complying with the requirement of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2022] before receiving the evidence of PW2, the child of tender age; and failure to demonstrate on how the court came to know the victim knows the meaning of oath (in short, the victim neither swore nor promised to tell the truth before giving her evidence)
3. That the trial court erred in law and in fact for failure to determine the age of the appellant despite the appellant, during preliminary hearing, specifically stated his age at the time of hearing to be 18 years old;
4. That the trial court erred in law and in fact in excessively and illegally sentencing the appellant as an adult while at the time of the commission of the offence he was a minor (below 18 years) contrary to the dictates of section 131(2) of the Penal Code, Cap. 16 R.E. 2019; and 2

5. That the trial court erred in law and in fact in admitting Exhibit Pl, Appellant's caution statement and use it to convict the appellant despite being in violation of section 50(l)(a), 57(3)(a)(i) and 57(4)(a) of the Criminal Procedure Act, Cap. 20 R.E. 2019. At the hearing of the appeal, the Appellant enjoyed the services of Advocate Elibariki Maeda and the Respondent was duly represented by Ms. Alice Mtenga, learned State Attorney. The Counsel for the Appellant submitted in support of the first ground that it is a requirement of the law in criminal trials that the prosecution must prove their case beyond reasonable doubt. He stated that the prosecution failed to prove the case on the required standard due to variance between the charge and prosecution evidence. He contended that the charge indicates the Appellant on diverse dates in the month of December 2021, in Sakina Kiranyi, Arusha, did unlawful have sexual intercourse with one AJ, a girl of 11 years old. But, on page 7, 21st line of the typed proceedings, PW1 Neema Juma testified that PW2 was raped on 01/12/2021 after looking on her vagina where she found sperms and bruises. According to him, PW2, the 3 victim, testified that on 08/12/2021, when she was going to school, she mate the Appellant who frightened her with a panga and took her to his place known as freedom area, nearby her school. Counsel added that the caution statement tendered by PW3, the police officer, indicated that the Appellant confessed to have raped PW2 on 28/11/2021. Counsel submitted that there are variance of the dates of commission of the offence. The charge indicates the offence was committed on diverse dates of September, 2021 while the evidence of PW1 and PW2 spoke of the offence to be committed on 01/12/2021, but the caution statement (Exhibit Pl) show that the offence was committed on 28/11/2021. Counsel cited the case of Damas Mgova v. R., Criminal Appeal No. 13 of 2022, where the Court of Appeal held on page 7 that it is the settled law that it is the duty of the prosecution to prove the allegation laid in the charge. He also cited the case of DPP v. Yusufu Mohamed Yusufu, Criminal Appeal No. 331 of 2014 (unreported), where Court of Appeal held that it is always the duty of the prosecution to make sure that what is contained in the particulars of statement of the offence including the dates when the offence was committed, is proved and supported by evidence and not otherwise. He 4 added that the Court of Appeal held in Mathias s/o Sam we I v. R., Criminal Appeal No. 271 of 2009 (unreported) that when specific date, time, and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed in that specific time and place. Counsel pointed out that when the Court of Appeal was faced with an akin situation in Ryoba Mariba @ Mungwe v. R., Criminal Appeal No. 74 of 2023 (unreported), the Court held that it was essential for the Republic which had charged Ryoba with raping one, Sara Marwa on 20/10/2010 to lead evidence showing exactly that Sara was raped on that day, a charge the accused was required to answer. He concluded that the prosecution failed to prove on required standard, the date on which the alleged offence occurred and the place where the victim was alleged to have been raped which is a serious discrepancy. On the second ground, Counsel stated that the court recorded on page 9 of the proceedings that it examined and found that PW2 had sufficient understanding to give her evidence under oath, sworn and promised to speak the truth. Counsel viewed that the victim did not swear at all, she did 5 not promise to speak the truth as the words were not hers but of the court. Counsel contended that section 127 (12) of Evidence Act, Cap. 6 R.E. 2022

(herein after, the "Evidence Act") require that the evidence of the child will be taken if the child understands the oath or promises to tell the truth and not lies, but PW2 was sworn and at the same time promised to tell the truth which is contrary to section 127 (2) of Evidence Act, citing the case of Edmund John @ Shayo v. R. Criminal Appeal No. 336 /2019 (unreported) on pages 14 and 15. Counsel concluded that PW2's evidence was taken contrary to section 127(2) of the Evidence Act with consequence to expunge the same from the record for being valueless. On the third ground, Counsel submitted that on page 5, 8th line of the proceedings of the trial court, the accused stated that he was 18 years old. He stated that the trial court drew the memorandum of agreed facts, except for the age of the Appellant. He argued that the trial court erred in not conducting an inquiry to determine the age of the Appellant at the time of commission of the offence as required under sections 113 and 114 of the Law of the child Act, Cap. 13 R.E. 2019 (herein after, the "LCA"), citing the 6 case of Athanas Mbilinyi v. Rv Criminal Appeal No. 275 of 2020, the decision of the Court of Appeal on page 10 of the decision. In support of the fourth ground, the Counsel submitted that during the alleged commission of the offence, he was 18 years old and when he was found guilty, he was convicted to life imprisonment. He stated that according to the case of Athanas Mbilinyi (supra), the sentence caused more injustice as section 131 (2) (a) of the Penal Code read together with section 160B of the Penal Code, require the first offender of the age of 18 years and below should be convicted to suffer corporal punishment. Counsel contended that the trial court erred to sentence the Appellant to life imprisonment under section 131(3) of the Penal Code which is excessive, unjustifiable, and occasioned injustice to the Appellant. On the fifth ground, Counsel submitted that the trial court erred to admit the caution statement (Exhibit pl) which was taken beyond four hours from the time when the Appellant was arrested, contrary to section 50 (1) (a) of the Criminal Procedure Act, Cap 20 R.E. 2022 (herein after, the "CPA"). According to the Appellant, it is shown on page 8 of the proceedings that 7 the appellant was arrested on 10/12/2021 at 04:00 am, but on page 15, PW3 testified that she found the Appellant in the morning at the police station. Counsel prayed the Court to expunge Exhibit Pl from the record for being procured beyond the four hours contrary to the law. On the last ground, Counsel submitted that PW1, mother of the victim testified that PW2 was raped and she found her vagina discharging whitish stuff and later on went to Police Station where she was given PF3 for further medical examination. Counsel argued that PW2 had no knowledge or expertise in medical issues. He contended that the evidence of PW2 is unreliable when she mentioned the name of Akida immediately when she was asked of the person who raped her and later on, she mentioned the Appellant, which create a possibility that PW2 lied as whether she was raped or not. Counsel submitted that it was crucial for the prosecution to call a medical doctor to prove whether PW2 was raped as PW2 was under pressure of being beaten by her brother, and could state anything in the situation. Counsel contended that in the circumstance of the case, the medical doctor alleged to have examined the victim, was a key witness to establish that 8 PW2 was indeed raped, citing the case of Yohana Chibwingu v. R., Criminal Appeal No. 117/2015, the decision of the Court of Appeal in the second paragraph of page 6. He submitted that the omission to call the medical doctor is a weakness in the prosecution case. He prayed to the Court to

draw an adverse inference that if the medical doctor was called, the decision of the trial court would have been different. Counsel prayed for the appeal to be allowed, the conviction and sentence to be reversed and set aside, and the Appellant to be set free. In opposing the appeal, Counsel for the Respondent submitted against the first ground that the evidence of PW1 and PW2 and the charge do not vary, as the charge clearly state that the offence was committed on diverse dates between 02/09/2021 and 01/12/2021, contrary to the Appellant's allegation that the charge sheet show that the offence was committed on diverse dates in the month of September 2021. She stated that there is no variance between the charge and Exhibit Pl, as Exhibit Pl does not state specific dates but PW2 stated that she does not remember the other date when the Appellant raped her but it was in September, 2021. Counsel argued that 9 when one considers the evidence and the charge, it is clear that the periods of commission of the offence are all covered in the charge sheet. Counsel submitted that there was no variance on the place of commission of the offence between Freedom Area and Sakina Kiranyi as Freedom Area is within Sakina Area. Counsel argued that even if there was such a variance, the Appellant had a chance to ask questions on that aspect but he did not do so which according to her, is an afterthought and has been improperly raised at this stage. Submitting against the second ground, Counsel stated that PW2's testimony was taken on oath after the court was satisfied that the witness understands the meaning of oath as reflected on page 9 to 11 of the proceedings, where the trial court asked such questions to the victim before taking her evidence. Counsel argued that there is a recent decision of the Court of Appeal in the case of Kastuli Charles @Akonaay v. R., Criminal Appeal No. 4/4/2020, where it was held on page 13 that the fact that the trial court did not ask the victim questions to determine the manner in which she would give evidence, does not have any effect as regards the validity of her evidence. Counsel contended that as long as the court examined and was satisfied that PW2 understood the meaning of oath and was sworn before taking her evidence, it is clear that the evidence was taken in compliance with the law, irrespective of the fact that the questions are not featured in the proceedings. Against the third ground, Counsel submitted that although the Appellant stated to have 18 years at the time of preliminary hearing, but it does not mean that at the time of commission of the offence, he was not 18 years of age. She stated that 18 years is the age of majority which qualified the Appellant to be tried in a normal court. She distinguished the case of Athanas Mbilinyi (supra) with the present case, as in Athanas's case, the Appellant informed the court that he was 16 years old contrary the Appellant's 18 years, which justified the jurisdiction of the trial court to hear the case against the Appellant. li Counsel opposed the fourth ground relying on the caution statement (Exhibit Pl) that indicated that the Appellant was 19 years. She contended that the Appellant neither objected to the admission of Exhibit Pl nor cross examined PW3 on her evidence or the caution statement which indicates that he was 19 years. She contended that failure to cross examine confirm that the Appellants age of 19 years in Exhibit Pl was correct. Counsel stated that during his defence hearing, the Appellant was sworn as having 19 years as shown on page 18 of the proceedings. She concluded that as the Appellant was 19 years old, the sentenced should have been 30 years imprisonment and not life imprisonment because the victim of rape was child aged 11 years.

Counsel submitted against the fifth ground that page 15 and 16 of the proceedings reveal that the Appellant did not object to the admission of Exhibit P1, the caution statement. She stated that it is the position of the law that if the accused person intends to object to the admission of confession statement, he should object before they are being admitted as held in the case of *Nyerere Nyague v. R.*, Criminal Appeal No. 67/2010 on page 7. Counsel conceded that the accused person should be interrogated 12 within 4 hours after he is arrested, but she stated that there are exceptions under section 50 (2) of the CPA. Counsel contended that on page 8 of the proceedings, PW1 explained that they were not accompanied by a police when they went to the Appellant's home, Sakina Area, but later on they asked for assistance of the police to arrest the Appellant from Central Police Station. She argued that PW1 did not state when the police arrested the Appellant, and that is why it was crucial for the Appellant to raise objection to admission of the caution statement so that the police who arrested him would testify as to the time of arrest. In opposing the sixth ground, Counsel stated that it is a trite law that in sexual offences the best evidence comes from the victim and the evidence of the victim, PW2, is sufficient to prove the offence charged. Counsel submitted that the ingredient of penetration is proved by the victim's testimony that the Appellant took his penis and inserted into her vagina as reflected on page 10 of the proceedings. She contended that the victim knew the person who raped her as she testified to have known the Appellant before he raped her who used to take her on his motorbike and touching her breasts. Counsel viewed the alleged unreliability when PW1 mentioned the 13 name of Akida and later on the Appellant, as occasioned by the Appellant's threats to kill the victim and in order to hide his identity. Counsel disagreed that the medical doctor was a key witness and his evidence was necessary. She stated that the prosecution witnesses were sufficient to establish commission of the offence of rape against the Appellant. She contended that the testimony of PW2 was sufficient without corroboration from the medical doctor. She was of the view that the evidence of PW2 was sufficient as her testimony was not shaken and the Appellant did not cross examine her. Counsel referred to the case of *Nyerere Nyague* (supra) to buttress his position that failure to cross examine against the evidence, is tantamount to accepting the evidence given. Counsel prayed for dismissal of the appeal. In his rejoinder, Counsel for the Appellant submitted in respect of the first ground that, although he has noted that the charge indicates the offences to have been committed between the months of September to December 2021, there are still variance in respect of the time stated by PW1 and PW2 and that appearing in the caution statement. He stated that the evidence of 14 PW1 and PW2 indicate the date of commission of the offence was 01/12/2021, but Exhibit P1 show that it was 28/11/2021. He reiterated that between Sakina Kiranyi and Sakina Freedom area near Gracious School are two distinct places. Counsel submitted that failure by the prosecution to amend the charge is tantamount to failure to prove the charge as to the place of commission of the offence. He argued that, the ground is not an afterthought as it was not the duty of the Appellant to assist the prosecution to prove the offence charged. He concluded that where the discrepancy is so vital, it can be raised at any stage even at the court of appeal, citing the case of *Damas Mpova* (supra) on page 7 of the decision. Counsel distinguished the decision of *Kastuli Charles* (supra) on the ground that, in *Kastuli's* case,

the evidence of the child was taken specifically upon the child's promise to speak the truth and not lies, that it is the child who promised to speak the truth, but in the present case, the statement to understand the meaning of an oath to speak the truth was made by the court contrary to section 127 (2) of the Evidence Act. Counsel argued that the 15 evidence of PW2 did not comply with the requirement of the law and prayed for the same to be expunged. Counsel submitted in respect of the third ground that when the Appellant was testifying on 07/11/2022 he might have been 19 years old, but not at the time of preliminary hearing on 13/04/2022. He stated that the alleged offence is alleged to be committed on diverse dates between the months of September to December 2021, which sufficiently prove that the Appellant was below 19 years on the date of commission of the offence. He argued that the fact that the Appellant did not object to the admission of Exhibit P1 does not remove the fact that the Appellant stated clearly that he was 18 years at the time the preliminary hearing. He argued further that the caution statement is not a proof of the age of the Appellant taking into account that the trial court was required to conduct inquiry immediately upon the Appellant's statement that he was 18 years. In respect of the fourth ground, Counsel submitted that if the appellant was 19 years when he was testifying on 07/11/2022, he could not be on the same age when the alleged offence was committed. He argued that there 16 was a sufficient reason to conduct an inquiry and the sentence was not supposed to be life imprisonment but corporal punishment. In respect of the fifth ground, Counsel disagreed that the Appellant's attack on the caution statement is not an afterthought as it is not necessary to object Exhibit P1 at the time of admission. He contended that the Appellant was unrepresented before the trial court, but being a point of law, it can be raised at any time. On the sixth ground, Counsel reiterated his submissions in chief and insisted that evidence of the medical doctor was vital. Upon hearing the Parties, the duty of the Court is to establish whether there is a merit in the present appeal. In determining the appeal, I will start with determining the third ground of appeal relating to the alleged failure by the trial court to determine the age of the Appellant at the time of commission of the offence. 17 the record reveal that the Appellant committed the offence in the months of September 2021 to December 2021. PW1 stated that he Appellant raped the victim on 01/12/2021. The testimony of PW2 is that she was raped by the Appellant on 01/12/2021 and sometimes in September 2021. In the caution statement, the Appellant stated that he raped the Appellant on 28/11/2021. On 13/04/2022, during preliminary hearing, the Appellant stated that he was 18 years old and not 19 years old. When he was sworn for his testimony on 07/11/2022, the proceedings on page 18 indicate that the Appellant was 19 years old. It is clear that there was uncertainty as to the age of the Appellant before the trial court. I am of the considered view that, if during preliminary hearing on 13/04/2022, the Appellant informed the trial court that he was 18 years, there was a likelihood that in the previous four or seven months, that is, from the months of September 2021 to December 2021 when the Appellant is alleged to commit the offence of rape, the Appellant was below the age of 18 years. I agree with the Counsel for the Appellant that it was necessary for the trial court to conduct an inquiry as to the age of the Appellant as required under section 113(1) of the LCA. This would lead to a conclusion 18 whether at the time of commission of offence, the Appellant was a child which

would then establish whether the Appellant was triable before the trial court or the juvenile court. I find the omission by the trial court to conduct an inquiry as to the age of the Appellant as a fatal irregularity. I hereby nullify the proceedings of the trial court, quash the conviction and set aside the life imprisonment sentence imposed upon the Appellant. I am guided by decision in Athanas Mbilinyi (supra), where the Court of Appeal on 10 of the judgement held We wish to point out that, the life imprisonment sentence meted out to the appellant is tantamount to causing more injustice to him under the circumstances of this case where his age is not established. We therefore, agree with Ms. Massambu that the proper cause to take in this case is to nullify the lower courts' proceedings and order for a retrial of the appellant. In a retrial, the trial court must abide by the procedure of establishing the appellant's age at the time of commission of the offence as stipulated under Rule 12 of the Law of the Child (Juvenile Court Procedure) Rules, 2016, which provides.....! 19 Before I order retrial, I should first consider whether the evidence before the trial court was sufficient to find the accused guilty of the offence charged. Starting with the Appellant's complaint in first ground of appeal, the Counsel for the Appellant conceded that there is no variance of the date of the alleged commission of the offence between the charge and the evidence of the prosecution. Counsel maintained that there was variance between the charge which indicated the offence to have been committed at Sakina Kiranyi area and the evidence of prosecution that indicated that the offence was committed at Freedom Area Sakina. I am of considered view that Sakina Kiranyi is Ward within Arusha and Freedom Area Sakina is a place within Sakina Kiranyi Ward. It has been alleged that the offence of rape was committed at the Appellant's residence. I noted from the caution statement admitted as Exhibit P1 that the particulars of the Appellant indicate that the Appellant lives at Sakina Kiranyi. Further, the charge indicate that the Appellant lives at Kiranyi, so as on page 18 of the proceedings, where the Appellant was about to give his testimony. Further, during the preliminary hearing, the Appellant admitted all his 20 particulars except his age. It means that he confirmed that he lives at Sakina Kiranyi, the place of commission of the offence. I find the cases cited by the Counsel for Appellant to support the ground including the case of Damas Mpova (supra) distinguishable because, in the present case, there is no variance between the charge and the evidence of the prosecution on the place of commission of the offence. In respect of the second ground, the Appellant contends that words appearing on page 9 of the proceedings are not PW2's words but the court's. Counsel for the Respondent stated that it was sufficient for the court to establish that PW2 understood the nature of the oath and promised to tell the truth and not lies, citing the case of Kastuli Charles (supra). I have noted from page 9 of the proceedings that the trial magistrate made the following observation: 'I examined the witness, she knows the meaning of oath, therefore swear promise to tell the truth state as follows' 21 The above observation of the trial court show that the court examined the witness who understood the meaning of oath. What is seen in the record is an observation of the court. The trial court failed to record in the witness's own words that she understands the meaning of oath and her promise to tell the truth and not lies. I hold that the trial court failed to comply with section 127(2) of the Evidence Act as expounded in Edmund John @ Shayo (supra) which on page 15

of the decision, it was held Thereafter, the court recorded the testimony of PW4. In the reproduced excerpt above, the Court does not seem to make any finding regarding whether or not PW4 understands the meaning of an oath or affirmation and whether he has promised to tell the truth and not tell lies. We have observed that there is an absence of any record of there being any test conducted by way of simple questions from the trial court to PW4 in line with what was expounded in the cases cited above, Geoffrey WUson(supra) or Issa Salum Nambaluka (supra)' 22 The case of Kastuli Charles (supra) cited by the Counsel for the Respondent is distinguishable with the present case. In the Kastuli's case, the Appellant complained that the child was not asked simple questions to ascertain the manner in which her evidence would be taken. In this case, the trial court did not record the witness's statement that she understand the meaning of oath and promise to tell the truth and not lies. My observations are fortified by the holding of the Court of Appeal in the case of John Mkorongo James v. R., Criminal Appeal No. 498 of 2020

[2022] TZCA 111 (11 March 2022; TANZLII) where it was held on page 13 that:- We have also observed that besides the omission or failure by the trial court to have first examined PW1 to test his competence and know if he understood the meaning and nature of an oath before jumping to the conclusion that PW1 would give unsworn evidence on the promise to the court to tell the truth, PW1's promise was incomplete and it was in form of an indirect or reported speech instead of a direct speech. It was incomplete because while section 127 (2) of the Evidence Act, require that the promise should be in telling the truth and not telling any lies, what PW1 is said to have promised is only to tell the truth. He did not promise not to tell any lies. It is recommended 23 that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete. '[Emphasis added] Upon finding that the trial court omitted to record PW2's statement that she understands the meaning of oath and her promise to tell the truth and not lies, the evidence of PW2 become inconsequential. I hereby expunge the evidence from the record. The fourth ground should not detain me much. The Parties are in agreement that it was incorrect for the trial court to sentence the Appellant to serve life imprisonment. However, parties are at issue as to the appropriate sentence. While the Appellant viewed corporal punishment as appropriate under section 131(2) (a) of the Penal Code, the Counsel for the Respondent argued that the appropriate sentence is 30 years under section 131(1) of the Penal Code. I have held in respect of the third issue above that it was crucial for the trial court to conduct an inquiry of the age of the Appellant. Although the 24 determination of the fourth issue highly depends on establishment of the correct age of the Appellant, the record reveal that the prosecution failed to establish that the age of the Appellant was 19 years at the time of commission of the offence. My observation is fortified by the Appellant's statement that he was 18 years on 13/04/2021 during the preliminary hearing. As it was the duty of the prosecution to prove otherwise, that the age of the Appellant was not 18 years at the time, I resolve the doubt in favour of the Appellant that he was 18 years as of 13/04/2021. I holding as I do, I am guided by section 114(2) of the LCA which states that:- 'Without prejudice to the preceding provisions of this section,

where the court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person.' In view of the above finding, I hold that the trial court erred to sentence the Appellant to life imprisonment instead of corporal punishment under section 131 (2)(a) of the Penal Code, being the first offender with an age of 18 years or less. 25 The fourth ground is a complaint against the caution statement that was procured beyond four hours after arrest, contrary to section 50(1) (a) of the CPA. I have read the record and it is not shown anywhere the time the Appellant was arrested. I expected the evidence of PW3 or Exhibit Pl to indicate the time when the Appellant was taken under restraint in respect of the offence. On page 15 of the proceedings, PW3, WP DSGT Rehema testified that when she reached the office, she found the Appellant already arrested. On page 16, PW3 testified that he started interrogating the Appellant from 10:00 am to 10:55 am. I find that the prosecution failed to establish compliance of section 50(1) (a) of the CPA, which casts doubt on the prosecution case in the procurement of Exhibit Pl. I disagree with the Counsel for the Respondent that raising that issue is an afterthought as the Appellant did not object to the admission of Exhibit Pl and never cross examined PW3. The ground on contravention of section 50(1) (a) of the CPA is justified as long as it relates to a matter that came up in the lower court and decided. In the case of Hassan Bundala Swaga

- v. Rv Criminal Appeal No 416 of 2014, the Court of Appeal held:- 26 'It is now settled law that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal.' I hold that the caution statement admitted by the trial court as Exhibit Pl was improperly admitted. The trial court did not consider the manner in which it was procured by the prosecution. I expunge Exhibit Pl from the record. I do not find merit in the sixth ground of appeal. Apart from expunging the evidence of PW2 in respect of the second ground above, the evidence of rape is proven by penetration and age of the victim. According to section 127(6) of the Evidence Act, the evidence of the victim of sexual offence can be relied independently to convict the accused person, with or without corroboration, if after assessing the credibility of the evidence of victim, the court is satisfied that child is telling nothing but the truth. On the basis of the above provision, the medical doctor was not a key witness and his 27 evidence was not necessary under the circumstance where the evidence of the victim was found to be credible. I am not convinced with the argument of the Counsel for the Appellant that challenged credibility of PW2 that she named another person, Akida, before the Appellant. I find that on page 10 and 11 of the proceedings, PW2 stated that the Appellant told her she should not mention him but Akida whenever she is asked where she was. That is what exactly she told her mother, PW1 whose evidence is found on page 8 of the proceedings. Similar position was taken by the Court of Appeal in the case of Raphael Ideje @ Mwanahapa

- v. the DPP Criminal Appeal 230 of 2019 [2022] TZCA 71 (25 February 2022 TANZLII), where on page 10 through to 11, it was held: '...However, in this case, at page 12 of the record of appeal, the victim offered the reason why she would not speak out as soon as the offence was committed. This was her evidence: "At home I met my sister Martha but I was afraid to tell Martha because Rafael told me that if I would tell anybody he would stab me with a knife." 28 PW1 maintained that position even during cross examination where she told the appellant that she did not report the incidence in time because he threatened to stab her with a knife. That was the reason which was offered as to why it took her over a week to disclose the details of the incidence to a third party. In our view, that reason is sound.' Upon expunging the evidence of the victim (PW1) and Exhibit Pl, the only evidence that linked the Appellant with the commission of the offence was that of PW2 which I have expunged. I find that the remaining evidence of PW1, the mother of the victim, together with that of PW3, the police officer prove that the victim was raped. However, there is no remaining evidence to prove that it is the Appellant who raped the victim. In the final analysis, I find the prosecution to have failed to establish the offence against the Appellant beyond reasonable doubt. Based on the above, I find that the present appeal is not a fit case to order retrial. I find merit in the appeal and proceed to quash the trial court's conviction against the Appellant, set aside the sentence and order his immediate release from prison, unless he is held therein for any other lawful cause. 29 It is so ordered. Right of Appeal fully explained. DATED at ARUSHA this 17th of November 2023. 30

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Prepared on 14 October 2026 · Esheria