

TANZANIA / JUDGMENT

CRIMINAL APPEAL MARWA

COURT
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IN THE HIGH COURT OF TANZANIA MUSOMA DISTRICT REGISTRY AT MUSOMA CRIMINAL
APPEAL NO. 000029914 OF 2024 REFERENCE NO. 202410192000029914 (Arising from the District
Court of Serengeti at Mugumu in Criminal Case No. 14565 of 2024) MARWA MWITA
MASENGWE..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

& 2nd November, 2024 M. L. KOMBA. J.; This appeal arises from the decision of the District Court of Serengeti at Mugumu (the trial court) in Criminal Case No. 000014565 of 2024. In the core, the appellant was convicted and sentenced to thirty (30) years imprisonment for the offence of incest by male contrary to Section 158 (1)

(a) of the Penal Code [CAP 16 R.E 2022]. It was alleged by prosecution that on 15th day of May, 2024 and 16th day of May 2024 at Kibeyo street in Mugumu Urban within Serengeti District in Mara Region, appellant above named had carnal knowledge with his daughter who will be referred as PM or the victim (the name withheld) a Page 1 of 13 girl aged 10 years old. On 17 May victim was found on the office of legal aid providers and was attended by PW4 who upon asked some few question and responded was taken to social welfare officer, PW1. Victim was interrogated again and her story made PW1 to report the matter to police where PF3 was prepared and victim was taken to Kibeyo Hospital. At the hospital she was attended by PW3 where physical and laboratory examination was done and Exhibit P1 was admitted. The trial court was satisfied that the case was proved against the appellant who was convicted and sentenced as explained previous. Appellant was dissatisfied and decided to appeal to this court fronting three (3) grounds of appeal to wit;

1. That, there is a contradiction on evidence between the prosecution witnesses. PW2 said on 17/05/2024 when expelled by her father from home she met a lady who took her to a certain office where PW4 Gabriel Simon Mwita testified that he found the victim where he was going to his office.
2. That, the trial magistrate unreasonably failed to consider that the appellant with 72 years old and with poorly health condition cannot be able to have sexual intercourse like he said himself when he was defended in his case. Page 2 of 13

3. That, the presiding magistrate overlooked in law and fact hence it was the magistrate to act judiciary and acquit the appellant after been considered.
- (i) The psychological situation experienced, while he was arrested for raping his own daughter.
 - (ii) The appellant age it is enough to say that he is been fabricated to do so. During hearing of this appeal, the appellant stood solo, unrepresented, while Respondent, the Republic was represented by Mr. Zarubaberi Ngowi, State Attorney. In support of the appeal, the appellant did not have much to say. He denied to commit the offence and prayed this court to adopt his petition of appeal. It was adopted. Mr. Ngowi started by registering the position of respondent that they resist an appeal and argued all grounds separately. Starting with the 1st ground he submitted that there was no contradiction of prosecution witnesses. Pointing testimony of PW2 (the victim) he said the witness testified that when she was forceful raped on 15 and 16 May, 2024, she was chased away by appellant she was taken to PW4 office. Then PW4 testified that he found PW2 outside of his office. He insisted there was no contradiction, Page 3 of 13 however, he paused that in case this court will find there was contradiction that may be cured as it does not go to the root of the case and supported his submission with Dickson Elia Samba Shapatwa and Another vs Republic Criminal Appeal No. 92 of 1997. Arguing for the second ground he submitted that appellant was supposed to give notice of his defence before prosecution close their case. However, he went on adage the onus of prove his status was on the side of appellant that he was incapable of performing sexual intercourse while supporting his submission with the decision in Leonard Mkumbo vs Republic, Criminal Appeal No 78 of 2019. He prayed this court to find the ground is afterthought and has to be dismissed. Mr. Ngowi went on submitting that the trial court consider all evidence for and against appellant. The issue of appellant psychological problem was not registered during trial and he said that was afterthought as everything was considered during trial. The second part of the third ground based on age and complaints about fabrication of the offence and he repeated that during trial he did not raise the fabrication of case and was not among his defence. However, Mr. Ngowi submitted that the age of the person is not a bar from criminal liability. Page 4 of 13 When given another time for him to address this court as rejoinder the appellant prayed to be free. I have duly gone through the petition of appeal and submission by the State attorney. It has to be known that this is the first appeal. I will preface my determination with the position of the law as to the duty of the first appellate court as held in Registered Trustees of Joy in The Harvest vs Hamza K. Sungura (Civil Appeal 149 of 2017) [2021] TZCA 139 that; 'it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.' See also Mwita Cornel Philimon @ Gaucho vs Republic (Criminal Appeal No. 306 of 2020) [2023] TZCA 17822 This is also a final court of fact as was determined in Firmon Mio we vs Republic (Criminal Appeal No. 504 of 2020) [2022] TZCA 694. 1st I find necessary to address submission of State Attorney on the third ground where appellant complained that the case was staged against him. Apart from other issues Mr. Ngowi submitted that appellant did not raise the issue of fabrication in his defence. I had time to read all records of trial Page 5 of 13

Court and find on 27/08/2024 when given time to defend appellant testified that; 'It is not true that I committed the offence this case is fabricated case against me. I be medically tested to ascertain on whether the said discharges were mine and if I was the one raped her' I find in his defence, appellant complained of fabrication of the case and what was submitted by Mr. Ngowi was not correct. In this appeal, I shall combine all grounds of appeal as found in petition of appeal and direct my analysis on whether prosecution managed to prove the offence against appellant beyond reasonable doubt. The victim was said she was raped and sodomised as per testimony of PW3. The victim herself testified that her father raped her and chased her away from home. PW3 (Sic) one Gabriel testified that when he arrived at his office, the morning around 08:30 am on 17/05/2024 he found a lady child to mean a girl child and testified he was informed that her father expelled her from home last night. PW1 testified that on 17/05/2024 she was informed by PW4 through telephone that he found victim outside his office. She (PW1) proceeded to report to police and then she took victim to Page 6 of 13 hospital. Victim testified that she was taken to certain office by a lady whom she met her on the way. Victim was expelled at night and was found in the morning at the office. Neither PW3 (Gabriel) nor PW1 testify where the victim was from the night when she was expelled as testified to the trial court that she was found outside the office. Prosecution maintained it was night but exactly time was not stated. From night to the time PW3 (sic) found victim is long time and anything might happen to victim. I find doubt on the time spend and whereabouts of the victim from the time she was chased from the house of her father to when she was found. At night a lot of things may happen. Further, prosecution did not state where they arrest the accused and circumstances of the house which victim said she was chased away, was she the only child in that house? Did she raised an alarm when she was raped? I know answers to these questions might not disapprove that victim was raped but answers may create doubt if really it was appellant who raped the victim as appellant said he stayed with the victim and a boy child since 2013. Page 7 of 13 Appellant (the accused) was testifying that the house had more people than himself and the victim. Appellant who testified as DW1 entitled credence just like other witnesses. See *Godluck Kyando vs Republic*,

- (2006) TLR 363. It is trite that the duty of the accused in his defence is to cast doubt in prosecution case as was decided in *Lack s/o Kilingani vs Republic* (Criminal Appeal No. 402 of 2015) [2016] TZCA 688. In this appeal, apart from the truth that appellant said the case was staged and he was not examined to prove that semen found in victim were from him, he cross-examined all prosecution witnesses on where they found the victim. PW3 (sic) said he found her outside the office, PW1 said she received victim from PW3 (sic) and PW3 (medical practitioner) testified she was not the one found the victim, her duty was to examine her. The question how did the victim arrived at PW3 office is not answered as she was found raped and lost her hymen. While I understand and subscribe to the principle in *Selemani Makumba vs Republic* [2006] T. L. R. 379, in this appeal there are doubts which need to be considered. I read the record of the trial court and noted victim testified on 13/05/2023. She was a girl of 10 years on the day she was giving her Page 8 of 13 testimony.

What does the Evidence Act, Cap 6 provides before the testimony of a minor is recorded; S. 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.' (Emphasis supplied) From the wording of the above provisions, sub section 1 enunciates that every person is competent to testify unless where the court finds the contrary by reasons of age or state of mind. Consequently, the Court must test whether the witness is competent to testify or not. That can only be done by the court by imposing some questions to the witness as observed by the Court of Appeal in *Godfrey Wilson vs Republic* (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019). Further in the case of *Wambura Kigingwa vs Republic* Criminal Appeal No. 301 of 2018 [2022] TZCA 283 (13 May 2022) at page 9 Court of Appeal of Tanzania interpreted Section 127(2) of the Evidence Act to mean that:- Page 9 of 13 A child offender age, which means a child of an apparent age of not more than fourteen (14) years as provided under section 127(4) of the Evidence Act, may legally give evidence if one of the two conditions is fulfilled. One, if before testifying the child swears or affirms; and two, if he or she promises to tell the truth and not lies In the course of giving evidence. According to the position of this Court at the moment, if none of the two conditions is fulfilled and the evidence of the child is taken, such evidence is deemed to have no evidential value and it must be expunged from the record.' The cited case above provides two conditions of which at least one should be adhered when a child is about to testify. In appeal at hand, reading careful record of the trial court in ecms I find the victim did not swear before she testified. If that was not option then she was supposed to promise to tell truth. After recording particulars, the trial Magistrate write; 'Court: Witness asked by the court on whether she is worshipping and she admitted having worshipping God, and she knows the duty of telling truth and she promises to tell the truth and not lies.' In the case of *Yusuph s/o Molo vs Republic* (Criminal Appeal 343 of 2017) [2019] TZCA 344 when the Court of Appeal discussing the gist of section 127 (2) of the Evidence Act they have this to say; Page 10 of 13 "What is paramount in the new amendment is for the child before giving evidence to promise to tell the truth to the court and not to tell lies. That is all what is required. It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record then it is a big blow in the prosecution case." Further in the case of *Hemedi Omary Ally @ Dallah vs Republic* (Criminal Appeal 181 of 2018) [2020] TZCA 1846 the Court of Appeal held that; In the appeal before us, we have gone through the voire dire session conducted of PW1 and it is dear its aim was to ascertain whether PW1 had adequate intelligence to testify and also understood the nature of an oath. Despite the fact that it is recorded that the court was satisfied that PW1 had sufficient intelligence to speak the truth, in our view this was not in line with the demands of the section under discussion in terms of what a

child of tender years has to do, because in the trial court, PW1 did not promise to tell the truth and not to tell lies. In the appeal at hand, it was recorded by the trial Magistrate that victim promised to tell the truth. As directed by the Court in the cited cases, voire Page 11 of 13 dire was supposed to be conducted and the court record should indicate so. Victim was supposed to promise to court that she will speak truth and not that Magistrate report that he was promised by the victim. Failure to record the voire dire is fatal as record does not show if the victim is intelligent enough to speak the truth. In this appeal victim did not promise to speak truth and therefore her testimony has no credential value and should not be regarded. Apart from the testimony of the victim which has no value, there is no testimony that incriminate appellant in the offence and it cannot be said the offence was proved beyond reasonable doubt. In the case of John Makolebela vs Kulwa Makolobela and Eric Juma @ Tanganyika

[2002] T.L.R. 296 the Court held that: 'A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt'. Moreover, the court in the case of Samson Matiga vs Republic, Criminal Appeal No. 205 of 2007 went further to providing the meaning of the stated principle that; Page 12 of 13 'What it means, to put is simply, is that the prosecution evidence must be strongly as to leave no doubt to the criminal liability of an accused person.' In the case at hand, victim did not promise to tell the truth and there is no other evidence to collaborate what was said the victim or rather there is no evidence which point appellant to commit the said crime. In the upshot, I find the appeal has merit and proceed to allow it. I quash the conviction and set aside the sentence. I order the appellant marwa mwita masengwe to be released from prison unless lawfully held. Right of appeal explained. Dated in 28th Day of November, 2024 M. L. KO MBA Judge Judgement delivered in chamber in presence of appellant and in presence of Mr. Jonas Kivuyo, State Attorney for respondent. M. L. KOMBA Judge 28th November, 2024 Page 13 of 13

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