

**IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI**

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 284 OF 2020

EMMANUEL SUMWI @ EMA APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the Judgment of the Resident Magistrates' Court
of Moshi at Moshi)**

(Maziku, SRM - Ext. Juris.)

dated the 30th day of March, 2020

in

Criminal Appeal No. 3 of 2020

JUDGMENT OF THE COURT

20th & 22nd September, 2023

MUGASHA, J.A.:

The appellant was arraigned before the District Court of Moshi where he was charged and convicted of the offence of rape contrary to sections 130(2) (e) and 131(1) of the Penal Code [Cap 16 R.E 2022]. It was alleged that, the appellant on diverse dates between 2017 and 17th day of July 2018 at Shirimatunda area within the District of Moshi in Kilimanjaro Region did have carnal knowledge of a girl of 7 years old. In order to conceal her identity, the girl shall be referred to as the victim in this decision.

The appellant pleaded not guilty. He was convicted and sentenced to life imprisonment. His first appeal was dismissed in its entirety hence the current second appeal whereby the appellant seeks to demonstrate his innocence.

A brief account underlying the impugned conviction is to the effect that: Magreth Traton Mlembelu (PW1) a school teacher at Shirimatunda Primary School, told the trial court how on 17/7/2018 at about 08:30 she saw the victim (PW3) not walking properly. She inquired from the victim who replied that she had a stomach ache. Upon a further interrogation, the victim disclosed that she was raped and sodomised by the appellant in his room when she went to play where Prince resided. This prompted PW1 to take the victim to the school head teacher. Later, the victim's parents were informed and the matter was reported to the police station.

On her part, in addition to what was said by PW1, the victim stated how she was raped and sodomised by the appellant from July 2017 to 2018 and that she was warned not to reveal the incident. She obliged and had to reveal the ordeal when her teacher noticed that she was not walking properly. Then, she was taken to Mawenzi Hospital for medical examination. Dr. Victor Adolf (PW2) who examined the victim established

that, although the victim was physically fit, she had bruises in her vagina and was discharging PV watery substance with a bad smell. That apart, the victim had bruises on her anus but there was no discharge and the sphincter muscles were normal. With these findings, the doctor concluded that a blunt object had penetrated the victim's vagina and subjected her to medication.

On his part, the appellant denied the accusations by the prosecution. He claimed that the case was fabricated out of grudges arising from his demanding of the unpaid dues from the victim's grandfather where he had worked for three months. Ultimately, he was arrested in July 2018 by two police officers and arraigned on accusations of rape and sodomy.

Both courts below found that the prosecution case was proved beyond reasonable doubt, hence the conviction. The appellant has preferred this appeal seeking to impugn the concurrent findings of the lower courts on the following grounds of complaint:

- 1. That, the learned SRM with extended jurisdiction grossly erred in law and fact in upholding the appellant's conviction relying on the evidence of PW3 which was recorded in contravention of section 127(2) of the Evidence Act.*

2. *That, the learned SRM with Extended jurisdiction erred in law and fact in failing to note that the case against the appellant was purely fabricated, as the charge sheet indicate that the said offence was committed between 2017 to 17th day of July 2018. But the victim of the alleged offence (PW3) in her evidence never mentioned the above shown dates.*
3. *That, the learned SRM with extended Jurisdiction, erred both in law and fact in upholding the appellant's conviction based on weak tenuous, contradictory, inconsistent, and wholly unreliable evidence from the prosecution witness.*
4. *That, the learned SRM with extended jurisdiction grossly erred in law and fact in upholding the appellant's conviction but failed to note that the victim of the alleged offence was a self-confessed liar because she withheld the details of the alleged sexual encounter against her for quite a while and non-disclosing the ordeal at the first early possible opportunity cannot attract the confidence/credibility of her testimony before the Court of law.*
5. *That, the learned SRM with extended jurisdiction grossly erred in law and fact in upholding the appellant's conviction based on irregular proceedings which offended the mandatory provision of section 186 of the CPA Cap 20 RE 2002. Where the appellant was unable to cross-examine the 1st to 3rd prosecution witnesses in some facts because of the presence of other people in Court.*

At the hearing, the appellant appeared in person unrepresented and implored on the Court to consider the grounds of appeal and set him at liberty. Ms. Revina Tibilengwa, learned Principal State Attorney who co-appeared with Ms. Eliainenyi Njiro, learned Senior State Attorney initially did not support the appeal.

However, upon being probed by the Court on the value of evidence of the victim taken in contravention of the mandatory dictates of section 127(2) of the Evidence Act (Cap 6 R.E 2022), on a reflection, she changed her mind and supported the appeal. On this, she submitted that since the victim adduced evidence without initially making a promise to speak the truth and not to tell lies, her evidence is valueless and it deserves to be expunged. In this regard, it was Ms. Tibilengwa's contention that, without the victim's evidence, the remaining prosecution account cannot sustain the appellant's conviction. She thus urged the Court to allow the appeal and set the appellant at liberty. On the other hand, the appellant had nothing useful to add besides supporting what was submitted by the learned Principal State Attorney.

Having carefully considered the first ground of appeal as conceded by the learned Principal State Attorney, the record before us and the submission of the parties the issue for our determination is the propriety or otherwise of the conviction of the appellant.

The appellant basic complaint hinges on the first ground and he is faulting the learned SRM with Extended Jurisdiction to have sustained the conviction which is based on the evidence of PW3 taken in contravention of the provisions of section 127(2) of the Evidence Act [Cap 6 R.E 2019] which stipulates as follows:

*"A child offender 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.**"*

The above provision imposes a mandatory requirement that before taking the evidence of the child of tender age, the child must promise to tell the truth and not to tell lies. It is settled law that the undertaking to make the promise to speak the truth and not lies cannot be merely assumed as it must be reflected in the record of the trial court. See: **YUSUPH MOLO VS. REPUBLIC**, Criminal Appeal No. 343 of 2017, **GODFREY WILSON VS. REPUBLIC**, Criminal Appeal No. 168 of 2018,

and **MASOUD NGOSI VS. REPUBLIC**, Criminal Appeal No. 195 of 2018 (all unreported).

In the present case what transpired before the trial court before the victim adduced the evidence is discerned at page 13 of the record of appeal as hereunder:

"PW3 Doreen Nemes Malya 7 years old X-tian, Shirimatunda, I am in standard 11 at Shirimatunda Primary School.

Anna Daniel Check – Ustawi wa Jamii

COURT: I am satisfied that, the girl is possessed enough intelligence and she promised to speak the truth."

[Emphasis Supplied]

The above extract does not show if the trial magistrate did ask or rather require the victim to promise whether or not she would tell the truth and not lies which is in accordance with the dictates of section 127(2) of the Evidence Act. In the circumstances, the finding by the trial magistrate that the victim promised to tell the truth is not backed by the record which is rather unfortunate. That apart, the record does not bear the process which made the trial court reach to the conclusion that, the victim (PW3) possessed enough intelligence and promised to speak the truth. Instead,

we have gathered that, the victim was answering questions regarding her profile to wit, her name, age, religion and that she was a school child. The absence of a promise to tell the truth and not lies was a fatal omission which vitiated the victim's evidence rendering it valueless. In the premises, we agree with the parties and accordingly discount the victim's account.

Having discounted the evidence of the victim, a follow up question is whether the remaining prosecution account is capable of sustaining the conviction of the appellant. We do not think so because owing to the nature of the offence charged, and given that the only direct evidence is that of the victim which has been discarded, the evidence of remaining prosecution witnesses is hearsay, it lacks corroboration and it cannot be acted upon to prove the charged offence beyond reasonable doubt against the appellant. A similar fate befalls the evidence of the Doctor who, besides establishing that the victim's vagina was penetrated by a blunt object, such evidence is not capable of pin pointing the actual perpetrator.

On account of what we have endeavoured to demonstrate, given that the charge against the appellant was not proved beyond reasonable doubt, the two courts below erred to ground the conviction. Thus, the appellant's complaint under discussion is merited and it disposes the appeal and as

such, we shall not determine the remaining grounds. Consequently. We allow the appeal, quash and set aside the conviction and sentence and order the immediate release of the appellant unless held for other lawful cause.

DATED at MOSHI this 22nd day of September, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of September, 2023 in the presence of Appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.




D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL