

IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

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

CRIMINAL APPEAL NO. 39 OF 2020

ELITWAZA RODRICK MBWAMBO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated the 13th day of December, 2019

in

Criminal Appeal No. 27 of 2019

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JUDGMENT OF THE COURT

25th & 29th September, 2023

MAIGE, J.A.:

The appellant was convicted by the District Court of Same (the trial court) of rape contrary to section 130(1) (2) (e) and (2) and 131 (1) (a) of the Penal Code and was sentenced to 30 years imprisonment. The offence was allegedly committed to a girl of 11 years old (the victim) at Goma village within Same District in Kilimanjaro Region on 30th August, 2018 at about day time (the

material day). The appellant's first appeal to the High Court of Tanzania sitting at Moshi failed and thus the current appeal.

The victim was at the material time staying with her grandmother one Rafiki Mbonea (PW4). She was by then 11 years old and a standard four student at Goma Primary School. She testified that on the date which she could not recall, she was raped by the appellant in an unfinished building. The appellant, she added, had repeatedly raped her starting when she was in standard one but she was unable to disclose in fear of being killed by the appellant. It happened that the victim disclosed the matter to her teacher Monica Joseph Shirima (PW2) after the latter had asked her why she was having a khanga at school. On this, PW2 testified that on 31st August, 2018 as she was at school, she was surprised to see the victim having a khanga. When she asked her what was that for, the victim replied that, she had an appointment to meet with the appellant after school hours in an unfinished building for having sex. She said, that had been a tendency from the time she was in standard one. PW2, therefore, conveyed the information to the head teacher who in turn reported to Nikolaus Samwel Daniel, the village executive officer

(PW3). At the instance of PW3, the appellant was arrested on the same day and taken to the police. Subsequently, the victim was taken to hospital for examination. Dr. Ibrahim Maliki (PW5) examined the victim and established as per exhibit P1 that she had been raped.

In his defence, the appellant denied committing the crime. He denied as well presence in the village on the material date saying that he had been, from August 2018 and 5th September, 2018 at Muheza ward carrying out his daily activities.

The trial court believed the evidence of the victim as corroborated by that of PW2 and PW5 and, as we said above, convicted the appellant with the offence and sentenced him accordingly. The first appellate court sustained the sentence and conviction. The appellant, once again aggrieved, has preferred this appeal. In the initial memorandum of appeal, he has raised seven grounds to challenge the concurrent decision of the two lower courts. On top of that, he has lodged two supplementary memoranda of appeal containing three grounds of appeal each. In the first ground in the initial memorandum of appeal which, in our view, is suffice to dispose of the appeal, the appellant is faulting the two courts below

for placing reliance on the evidence of the victim which was received in violation of the requirement of section 127(2) of the Evidence Act.

At the hearing, the appellant appeared in person and without representation. Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Ms. Eliainenyi Njiro, learned Senior State Attorney, represented the respondent Republic. The appellant did not have much to say than fully adopting the three versions of memoranda of appeal and praying that the appeal be allowed.

For the respondent, Ms. Njiro submitted in support of the appeal basing on the first ground in the initial memorandum of appeal. She submitted that although the victim testified without oath, she did not promise to tell the truth and not lies. The requirement being a precondition for the evidence of a child of tender age under section 127(2) of the Evidence Act, she submitted, non-compliance with it renders her testimony to be void of any evidential value. She, therefore urged us to discard it. She submitted, therefore, that, once such evidence is expunged, there remains nothing on the record that can support the appellant's conviction.

Having considered the submission by the learned Senior State Attorney in line with the record of appeal, we are inclined to agree with her that, the evidence of PW1 was admitted in total violation of the mandatory requirements under section 127(2) of the Evidence Act. As it can be seen from the record of appeal, PW1 was, as she was testifying, a child of tender age. In terms of the provision just referred, she could only testify without oath upon giving promise to tell the truth and not lies. In the absence of that, the law is very clear, her testimony lacks any evidential value and deserves to be discarded as we hereby do. To that effect, see for instance, **Godfrey Wilson v. R**, Criminal Appeal No. 168 of 2016 (unreported).

In the circumstances, we uphold the first ground of appeal and expunge the evidence of PW1 from the record. After excluding such evidence from the record, we are in agreement with the learned Senior State Attorney that, what remains on the record is nothing but hearsay evidence which cannot suffice to sustain conviction.

In the final result, we find the appeal merited and we allow it. Having so do, we find it irrelevant to consider the other grounds of appeal. We accordingly quash and set aside the appellant's conviction

and sentence sustained by the first appellate court and order for his immediate release from prison unless therein withheld for other justifiable causes.

DATED at **MOSHI** this 28th 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 29th day of September, 2023 in the presence of the appellant in person and Ms. Bertina Tarimo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL