**IN HIGH COURT OF TANZANIA**

**AT BUKOBA**

**HC CRIMINAL APPEAL NO. 24 OF 2017**

*(Arising From Criminal Case No. 190 of 2016 in the District Court of Bukoba).*

**GODFREY WILSON ..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

**14.03 & ~~25.05~~.2018**

**BONGOLE J.**

At the District court of Bukoba the appellant by then accused was charged with the offence of **Rape Contrary to Section 130 (1), (2) (e) and 131 (3)(a) of the Penal Code [Cap. 16 RE: 2002]**. He was convicted and sentenced to thirty years imprisonment.

The particulars of the offence as started in the charge sheet were that *Godson s/o Wilson on the 16th day of July, 2016, at around 18:30hrs at Mafumbo, Kashai area within Bukoba Municipality in Kagera Region did rape one "Y" (the name withheld) a girl aged ten years.*

When the charge was read to the accused person he pleaded not guilty. In order to prove the offence the prosecution called four witnesses namely the victim (PW1-"Y"), Doctor Hakimu Ibrahim(PW2), Johanitha Lazaro (PW3) and WP5939D/C Eva (PW4) well as one exhibit that is, PF3 exhibit was tendered and admitted as exhibit "P1".

As stated before, the appellant was convicted and sentenced to thirty years in jail. Aggrieved he appealed to this court armed with 8 grounds of appeal coached thus:-

1. *That,the trial court erred in fact and in law to convict and sentence the appellant while there was improper admission of evidence of a child of tender age.*

2. *That, the trial court grossly misdirected itself by convicting and sentencing the appellant who was never taken caution statement at police while the appellant was restrained in police custody for ten days.*
3. *The trial court grossly erred in law and in fact to convict and sentence the appellant by relying on the evidence of Pw2 on the allegations of sperms while there was no any proof as to whether Pw2 has any expertise in sperms identification.*
4. *That, the trial court grossly erred in law and in fact to convict and sentence the appellant whose identification by the prosecution witnesses cast reasonable doubt.*
5. *That, the trial court erred in law and in fact to convict and sentence the appellant relying on the evidence of Pw3 who produced evidence that did not suggest immediate penetration but penetration that would have been caused by any other thing/person other than the accused*
6. *That, the trial court grossly erred in law and in fact to convict and sentence the appellant by*

*denying the fact that the victim of the crime had gone with her mother during and at all times the appellant came from tuition.*

7. *That, the trial court grossly erred in law and in fact to rely on exhibits which did not prove the case beyond reasonable doubt.*
8. *That, the trial court grossly erred in law and in fact to proceed against the appellant by convicting and sentencing without ascertain the relationship of the appellant and complainants which brought deadly allegation.*

The abbreviated facts on record, giving rise to this appeal are that the incident took place on the 16.07.2016 at Mafumbo area within Bukoba Municipality. On that date the appellant went to the rented house of PW1's parents and found her seated on the chair and asked where her mother was. PW1 told him that she had gone to the market place. That after that response the appellant undressed her underwear and inserted his penis into her vagina thereby causing pain to her. That as she shouted the

appellant covered her mouth telling her that she would wake up the children.

Soon her mother called and asked to be given a small bag around but PW1 did not immediately find it. As she got out she found it and gave it to her mother. It was at this time the mother noticed that she was wet and asked her the reason for that .PW1 replied that it was water but as her mother smelt her and asked what had happened the latter revealed that it was Godfrey (appellant) who had undressed her and had carnal knowledge with her.

From that moment the said mother locked the appellant inside the rented room and called neighbours to come and witness the incident. As the neighbours arrived they took the victim to the other room laid her on bed in order to examine her. As they told her to spread the legs apart they started crying and called her mother and told her there was something wrong.

The mother told her husband and resolved to go and call the Street Chairman and after she returned they went to the Police where they made a statement and then proceeded to the hospital.

As stated earlier on, at the trial the learned trial court Magistrate was satisfied that the case against the appellant had been proved beyond all reasonable doubt so he convicted and sentenced him to thirty years in jail.

At the hearing of this appeal the appellant was represented by Mr. Lameck Erasto learned Counsel while the respondent was represented by Ms. Veronica Mushi learned State Attorney. By leave of this court the appeal was argued by way of written submissions.

Mr. Lameck decided to abandon grounds 2, 4, 6 and 8 and opted to argue grounds 5 and 7 jointly while grounds 1 and 3 were argued separately.

In respect of ground one he submitted that the prosecution called four witnesses one being the child of tender age "Y" aged ten years and who featured as PW1. He submitted that before admitting the evidence of this witness the trial court ought to have conducted voire dire test. He submitted that the record shows that voire dire was not conducted as required by the law under **section 127 (2) (7) of the evidence Act [Cap.6 RE 2002]**. He argued that by admitting this evidence without voire dire being conducted, that act vitiated the evidence of PW1 hence its probative value is questionable thus inadmissible.He substantiated his argument with the case of **Kisiri Mwita Kisiri V Republic [1981] TLR No. 218** where it was held that in case the evidence of a child of tender age is relied on without corroboration, conviction cannot stand.

Regarding ground three he briefly submitted that the trial court erred to rely on the evidence of PW3 who testified that they discovered that PW1 had been raped after she smelt her clothes

and noted that the smell was of sperms. He argued that since PW3 was not proved to be an expert on that field, it was illegal to rely on this evidence to convict the appellant. He argued that in relying on this evidence the learned trial court Magistrate misdirected himself because PW2, the Medical Doctor had concluded the results in the PF3 exhibit P1 that there were no spermatozoa observed.

On grounds 5 and 7, he submitted that exhibit P1 relied on by the learned Magistrate did not prove that rape had been committed against PW1. He submitted that the same demonstrated that labia were normal and no blood discharge from the vagina as well as absence of bruises. He argued that there could be no proof of carnal knowledge in absence of multiple injury and bruises in the victim's vagina. He further stated that even when the trial court found the PF3 convincing on penetration, he was not bound by it as it was expert evidence. On this he referred to the case of **Agnes Doris Liundi V.R [1980] TLR No. 46** where it was held

that a court is not bound to accept medical testimony if there is a reason so to do.

He thus invited this court to allow this appeal.

On her part Ms. Mushi submitted on the first ground that the requirement on voire dire test is no longer applicable. She submitted that what the court is now required to do in admitting the evidence of a child of tender age is to ensure that the same promises to tell the truth. She submitted that since PW1 proved have sufficient intelligence and the fact that she testified the truth, her evidence was admissible. In order to substantiate her submission she relied on the case of **Japhari Juma V. R, Criminal Appeal No. 104 of 2006 CAT Arusha Registry (unreported)** in which it was held that differentiation between lies and truth by a child constitutes sufficient intelligence.

On grounds 3, 5 and 7 she submitted that the evidence of PW1 proved beyond any reasonable doubt that the offence of rape had

been committed against her. She submitted that as the victim was able to narrate exactly that the appellant undressed her and inserted his penis into her vagina that constituted penetration necessary to constitute the offence of rape. She referred to **Section 130 (4) (a) of the Penal Code [Cap.16 RE: 2002]** which requires that penetration however slight it may be it is necessary to constitute the sexual intercourse that proves the offence of rape. She argued that since the law requires that the evidence of rape must come from the victim therefore, PW1's evidence was a proof to that effect. On this she referred to the cases **of Idd Aman V. R, Criminal Appeal No. 184 of 2013 and Seleman Makumba V.R, Criminal Appeal No. 94 of 1999 both un reported** which cases insisted that evidence proving rape must come from the victim.

She went on submitting that the evidence of PW2 and PW3 corroborated that of PW1. That whereas, PW2 observed that "PW1's" hymen was ruptured thereby suggesting the possibility of

penetration, PW3 stated also at page 14-15 of the proceedings that she examined the victim and noted spermatozoa. She argued that the fact the evidence of PW2 and PW3 corroborated that of the victim on penetration, it was a conclusion that the said penetration was caused by no other than the appellant. She bucked up her argument with the case of **Omary Kijuu V. Republic, Criminal Appeal No. 35 of 2005 CAT, Dodoma Registry (unreported)**

Supporting her conclusion she invited this court to glance on the case **of Goodluck Kyando V.R [2006] TLR No. 363** which held that every witness is entitled to credence, she urged this court to find that the witnesses in this case are entitled to credence as there are no cogent reasons to discredit them.

Upon microscopic navigation on the grounds of appeal and submissions of the parties in respect of the same, it is that the entire appeal centres on issues of credibility or reliability of the

witnesses as well as voire dire examination. I say so by considering the position of the law that it is the duty of the first appellate court such as this one, to re-evaluate the evidence of the trial court and come out with different conclusion in as far as there may be a need so to do. This position of the law is supported by the cases of **Hassan Mzee Mfaume Vs. [1981] TLR No. 167** where it was held:-

> "The *first appellate court should re-appraise the evidence because the appeal before it is in effect a re-hearing of the case and that in the course of doing so, it should set out or indicated the grounds for the decision."*

In the other case of **Salumu Mhando V.R [1993] TLR No. 170** it was held thus:-

> "*Where there is misdirection and non-directions on the evidence a court of second appeal is entitled*

*to look at the relevant evidence and make its own findings of fact."*

It is also a settled position of the law that in assessing credibility of a witness the court must adopt careful and dispassionate approach and critically evaluated the evidence in order to find out whether it is cogent, persuasive and credible. (Referee **Bahati Makeja V.R, Criminal Appeal No. 118 of 2006 CAT Mwanza Registry (unreported).**

Let me commence with voire dire examination. Voire dire examination in simple langues implies the procedure by the court to ascertain if a child witness (child of tender age) knows the meaning of oath and possesses sufficient intelligence to justify reception of his or her evidence. It was the submission of Mr. Lameck that the trial court record shows that PW1- "Y" was a child of tender age that is, ten years but it was not indicated that the learned trial court conducted voire dire examination. On the

contrast, Ms. Veronica Mushi had it that the alleged procedure is no longer applicable as the position of the law has changed to the effect that a child can just give evidence as longer as the child promises to tell the truth. I agree with Ms. Veronica without further demur, only to the extent of the change of the law to the effect that a child witness can now give evidence without being sworn in. What the court should test is to ensure that the said witness promises to tell the truth. My reservation is on the issue of possession of sufficient intelligence by such a child witness as Ms. Veronica tried to put it. That was not omitted in the amendment imported by **Section 127 of the Evidence Cap. 6 R.E.2002] as amended by Section 26(a) of The Written Laws (Miscellaneous Amendments) Act No. 4 of 2016**. It provides thus:-

*"Section 127 of the principal Act is amended by-*

*(a) deleting subsections (2) and (3) and*

*substituting for them the following:*

*"(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."*

The aspect of possession of sufficient intelligence used to be under subsection (3) of section 127(supra) was deleted.

The record of this appeal shows that this amendment was observed by the learned trial Magistrate at page 10 of the typed proceedings, thus he should not be faulted on this. Therefore, the argument of Mr. Lameck on voire dire is unattainable at law. Equally, the case cited in support of this position and those of Ms. Veronica on possession of sufficient intelligence by a child of tender age are no longer good law.

I now turn on credibility of witnesses. "PW3" who was a neighbour having been called by "PW1"s' mother stated to have examined "PW1" and found sperms on "PW1"s tights. "PW2" the Doctor who examined "PW1" stated in his examination of the sexual parts of "PW1" labia was normal, the hymen was not intact; the test did not show any sign of spermatozoa, hymen was raptured and that there was a probability of penetration.

This is also what is revealed in the "PF3" Exhibit "P1".

Further, the evidence of "PW1" the victim categorical stated that the Appellant the then accused namely Godfrey went and found her seated on the chair and asked her the where about of her mother. She said to have told him that she the mother had gone to the market. That the accused undressed her underwear and he also undressed then took his penis and inserted his penis into her virgina. That as he inserted his penis to her virgina she felt pain and told him to leave her. That she shouted but the accused

covered her mouth telling her that she would awaken up the children.

With this evidence in particular the one of "PW1", can one stand and say with absolute servitude that "PW1" told the trial court lies? Her evidence was empirical that the accused inserted his penis to her virgina an act that amount to penetration which constitute the offence of rape. Her evidence was corroborated or supported by exhibit "P1" that her hymen was raptured. Therefore, there was no any reasons on the trial court to discredit her testimony as is suggested by Mr. Lameck. This position applies also to the evidence of "PW2" and "PW3" who had no interest to save in the matter.

The record in the proceeding shows that the accused defended himself that it was true he entered into the room where "PW1"s mother requested him to remain in that house as there was no one to leave in and that he agreed and that is where "PW1"s

mother locked the door from the outside and left to the market with "PW1". That about 22:45 hrs. he heard the door been opened from outside and saw three policemen officers who entered and arrested him.

This defence evidence suggests and supports the fact that the accused was in the room where "PW1" alleged to have been lavished and also the fact that he was locked in the room from outside till when the policemen arrived and opened the door and arrested him.

It is my best findings as correctly found by the trial court that the defence evidence never casted doubt on the cogently, consistent, plausible, credible and reliable evidence of the prosecution case. The accused defence was a defence of saving his skin from the offence he stood charged off the sin which was correctly not saved by the trial court and too by this court. I find the arguments advanced by Mr. Lameck learned Advocate in support

of this appeal though not lacking in attractiveness to be with no merits.

That been said, this appeal stands dismissed for want of merits.

S.B. Bongole

Judge

25/5/2018