

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 226 OF 2017**

(Originating from Kinondoni District Court Criminal Case No. 369 of 2016)

**PAULO DIONIZ.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

**MURUKE, J.**

The appellant, in this case was charged and convicted with the offence of rape contrary to section 130(1)(2)(e) and section 131(1) of the Penal Code, [Cap 16, R.E. 2002], and he was sentenced for thirty (30) years imprisonment. Being dissatisfied with the decision of the district court, appealed to this court basing on four (4) grounds as listed in the petition of appeal.

During hearing, the appellant requested the court to adopt his seven grounds of appeal as his submission in support of the appeal. The Learned State Attorney, Christian Joas, submitted that they are not supporting the appeal and submitted on grounds 1, 2, and 4 together because they all speak on evidence

grounded conviction. Evidence of prosecution proved the case beyond reasonable doubts. There is no contraction of evidence as alleged by appellant. PW2 Victim Esther explained the incidence, clearly. She knew the appellant before and mention him by his name as evidenced by proceeding at page 10 line 3 of proceeding. Victim is the one who sent police, and his father (PW) Tutufuge Godfrey to the scene of Crime. Appellant admitted at page 22 of proceedings that on the date of arrest victim PW2 was present. PW4 Doctor Halevi Makere testified that, victim PW2 that, she was raped. PW2 has was being threatened by the appellant, that she will be killed in case the disclose what appellant has been doing to him.

Until PW1, saw her wet then asked. She did not disclose, until taken to school then disclosed the incidence. PW2 explained how she was being given money and take her to insisted house (pagala) where she was being raped PW2 victim has explained how the act of rape was being conducted at page 10 of proceedings at paragraph (1). Also when appellant cross examined the victim PW2, she clearly narrated her evidence without hesitation. During mitigation, appellant admitted to commit the offence. So, the evidence of prosecution does not contradict at all.

On ground 3 that evidence of PW2 (the Victim) was in property received. It is not true, *voire dire* test was conducted as indicated on page 9 of the typed proceedings.

Upon reading the proceedings of the lower court, it is clear that during the hearing PW1 Tutufuje Godfrey, told the court that after they found that the victim started delaying to come back home, and she was not eating as usual. He reported the matter to the teacher. According to him, the teacher asked the victim and he was told that she used to pass where Paul, accused (appellant) works and she is given money and buy her chips. At page 7 of the proceedings PW1 told the court that when the victim when coming from the school used pass to the accused where she was taken to the unfinished building and raped there.

On her side PW2, Easter Odel (8yrs) said at page 9, when she meets the appellant, she was told to go to the unfinished house (pagala) where the appellant also keeps his material for his work. After going there, the appellant undress the victim, take his penis inserts to the victim's vagina as clearly stated at page 10 as quoted hereunder;

***When I go there he showed and told me to enter into unfinished house(pagale). Then he comes after wards in the unfinished house (pagaie), is the place which the***

***accused keeps his materials for shoe shine and saving shoes materials. When he comes he asked me to undress my clothes. The accused also removes his clothes. Then he inserts his penis on my vagina***

PW3, WP5656, D/C Neema at page 13, testified that, she managed to visit the scene of crime, they found the accused person there. They also found the pagale where the accused kept material for sewing shoes, the place where the victim said the accused used to penetrate her vagina with his penis. Lastly, PW4, Dr. Italevi Makere, told the court that, the hymen was not intact, which it not normal to a child of 8 years old. Therefore, regarding all the above testimonies, I consider there was no any contradiction among the prosecution witnesses. Thus, the first ground has no merit.

On the second ground of appeal; the victim,(PW2) narrated the story very well. From page 9 to 10, PW2 told the court that she knows the appellant and described him where she stated that;

***I know the accused who is before this court. He is shoe shiner also he is selling water. The accused name is Paul. He used to give me money, Tshs. 100/=sometimes 200/= for expanding money. When he gave me he directs me to go and see him after coming from school.***

This statement has weight to the prosecution case, because for the victim knowing and describing the accused well adds advantage. The Court of Appeal in the case of **Gerald Daudi vs. Republic, Criminal Appeal No. 591 of 2015 (CAT) Dodoma** (unreported) at page 10 referring the case of **Thomas Mlambivu vs. Republic, Criminal Appeal No. 134 of 2009**, held that;

***"...Indeed, the ability to name the appellant at that early opportunity was an all- important assurance of her reliability."***

At the same page, second paragraph PW2 (victim) expressed how she felt during sex where she stated that, she used to feel much pain as hereby quoted;

***The penis comes from his trouser felt very pain when she inserted his penis in my vagina. He used to intercourse me several times. He told me that he will kill me if I tell someone else.***

I consider all the above victim's statements to be the best evidence and proved the case against the accused. The evidence of this nature was also discussed in the case of **Tumaini Mtayomba vs. Republic, Criminal Appeal No 217 of 2012**

**(CAT) Mwanza** (unreported) where the Court of appeal held that;

***"The Court has laid up a principle that in rape cases the victim is the best witness. She is the one in a position to described her feelings during the sexual intercourse."***

PW4, the Medical Doctor proved in court that after he examined the victim he found that her vagina was discharging water and there was no hymen. He further stated that it uncommon for the victim who is 8 years old her hymen to be not present. This proves that the victim used to have sexual intercourse several times. The evidence of PW2 the victim was well corroborated with the testimony of PW1, PW3 and PW4. Even if the evidence of PW1, PW3 and PW4 were not present still the evidence of PW2 the victim suffices. **In the case of AnselimoKapeta vs. Republic, Criminal Appeal No. 365 of 2015 (CAT) Mbeya (unreported)** it was held that, at page 12;

***"The learned State Attorney summited correctly that, the evidence of the complainant did not require corroboration under section 127(7) of the Law of Evidence Act, Cap 6, R.E. 2002. The only requirement which has to be met before the trial court enters a conviction is to be satisfied that the child witness told nothing but the truth."***

I also concur with the learned State Attorney Christian Joas that the statement of apology by the appellant during mitigation at page 7 of the judgment where he said;

***"I apologies to commit this crime offence...."***

This statement signifies that, the appellant committed the crime. Therefore, regarding the second ground appeal, I consider the prosecution proved the case beyond reasonable doubt.

Regarding the third (3) ground of appeal, the appellant complaint that the evidence of the victim was improperly received is just an afterthought. It need not to be any attention because the voire dire was clearly and correctly conducted as seen at page 9 of the proceedings and it is hereby quoted;

**"Voire dire test conducted as follows:**

**Swali      Jibu**

***Jina lako rasmi?***

***Easter Odel***

***Una miaka mingapi***

***Miaka 8***

***Unakaa wapi?***

***Temeke***

***Unasoma shule gani?***

***Sandali Shuleya Msingi***

***Unasoma darasa la ngapi?***

***Darasa la kwanza***

***Mwalimu wako wa darasa anaitwa nani? Nimesahau***

***Unajua kusema ukwali?***

***Ndiyo***

***Unajua maana ya kiapo?***

***Sijui maana ya kiapo***

***Order: Voire dire test has been conducted under section 127 (2)***

***of The TEA [ CAP 6 R.E. 2002] the victim is not knowing the meaning of oath".***

Although the victim does not know the meaning of oath, she told the court that she knows to speak the truth and on her evidence she clearly told the court the it is the This ground also is not meritious.

On the fourth ground; the trial magistrate in his judgment considered well the evidence of both parties. Upon examination of all evidence, he concluded at page 6 as follows;

***"It is apparent that the adduced by PW2, and PW4 is sufficient to prove that the accused person penetrated his penis in the victim's vagina"***

The claim by the appellant that, the trial magistrate decided the case against the weight of evidence is afterthought. Therefore, this ground also is devoid of merits.

In conclusion, from all the above in composite; this Court is satisfied that this appeal has no merit. It is dismissed in its entirety.

It is so ordered.



Z. G. Muruke

**JUDGE**

**31/05/2018**



Judgment delivered in the presence of the appellant in person  
and Ms. Christian Joas, State Attorney for the respondent



Z. G. Muruke

**JUDGE**

**31/05/2018**