

**IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA
DC CRIMINAL APPEAL NO. 97/2019**

(Original from District court of Mpanda in criminal case No. 78 of 2019)

JEREMIA S/O MICHAEL APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

W.R. MASHAURI – J

11/05/2020 & 14/05/2020

In Mpanda District court at Mpanda the appellant in this appeal Jeremia s/o Michael was charged and tried with the offence of Rape C/S 130(1) and (2) (e) and 131 (1) of the Penal Code Cap. 16 RE 2002. He was convicted as charged on the charge and sentenced to suffer 30 years imprisonment. He now appeals against the conviction and sentence and has fielded five grounds of appeal namely:-

1. That, the trial court erred in law by its failure to consider the alibi defence raised by the appellant.
2. That, the trial court erred in law by holding that the appellant did rape the victim between 01/02/2019 – 11/05/2019 while the victim herself claim that she was a virgin until 11/05/2019 when she lost her virginity to appellant.

3. That, the trial court erred at law and fact by convicting the appellant relying on the evidence of the victim whose evidence was unreliable and unworthy of belief.
4. That, the trial court erred at law by admitting the cautioned statement which was procured contrary to law and disputed by the appellant.
5. That, the trial court erred at law by convicting the appellant on charged not proved beyond reasonable doubt.

On the hearing of this appeal held in court on video conference, the appellant and Mr. Saraji Senior State Attorney for the Respondent both appeared on the screen.

When the court asked the appellant to give his submission in support of his grounds of appeal, he did not say anything save pray the court to adopt them as part of his submission in support of his appeal. The court adopted them.

On his part, Mr. Saraji Senior State Attorney, upon given chance by the court to give his submission, he did support the appellant's grounds of appeal chronologically. He started with grounds number 2 and 1 whose circumstances resemble.

That, the victim was raped throughout from 01/02/2019 to 11/5/2019 while in her evidence the victim (PW1) said that she lost her victim on 11/5/2015 and the appellant was not in the victim's area. Hence the defence of alibi on the appellant's part was proved and adopted.

For ground of appeal No. 3, the learned Senior State Attorney for the Republic submitted that, the said is depending for the evidence of the victim who by virtue of the provision of S. 127(5) is a child of tender age" which means a child of (whose apparent age is not more than 14 years).

That, by dint of the written laws (Misc. Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) which came in force on 8/7/2017,, and through amendment Act No. 4 of 2016, subsections 2 and 3 of section 127 of the Evidence Act Cap. 6 RE 2002 are substituted with subsection (2) which provides thus:-

(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 tell lies.

In this case the said requisite of the Act No. 4 of 2016 subsection (2) supra was not complied with. The evidence of PW1 ought to be expunged from the record as the court was not promised by PW1 to tell the truth before giving her evidence, her evidence was therefore no evidence value.

That, since the evidence of PW1 is invalid at law, the same has therefore no evidential value.

There is therefore no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of sustaining the conviction.

That, the evidence of PW1` is invalid and since there is no other witness on the prosecution who witnessed the rape, the Republic had failed to prove its case beyond reasonable doubt.

Mr. Saraji Senior State Attorney finally submitted that there was a cautioning statement (exhibit P3) though was objected by the appellant for being tendered in evidence but was admitted by the trial court, but the said admission was illegal for want of conducting a trial within trial.

That, removing the evidence of PW1 and the appellant's cautioned statement remaining to be no clog to the prosecution to support the appellant's appeal.

Mr. Saraji Senior State Attorney therefore supported the appellant's appeal.

On my part, I am also have a finding upon heard the submission by the prosecution in supporting the appellant's appeal that, in this case the prosecution had failed to prove its case beyond reasonable doubts because there is no any reliable evidence given by the prosecution witnesses save the evidence of PW1 which was found invalid at law and the purported cautioned statement of the appellant which also was unlawfully admitted.

In concert with the submission by the Republic in support of the appellant's appeal, I do hereby also support the appellant's appeal.

In the event, the appellant's appeal is hereby allowed in its entirety. He shall be released from custody forthwith unless further held in some other lawful connection.




W.R. Mashauri

Judge

14/05/2020

Judgment delivered in video conference in the presence of Miss Maguta
State Attorney and the appellant this 14th day of May 2020




W.R. Mashauri

Judge

14/5/2020