

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 60 OF 2019

*(Original Criminal Case No. 1 of 2018 of the District Court of Kibondo at Kibondo before Hon.
E.R. Marley - RM)*

ARON S/O ABEL.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

01/07/2020 & 06/07/2020

I.C. MUGETA, J.

The issue upon which I shall decide this appeal are very common so I intend to be very brief. Having been found guilty of rape, the appellant was sentenced to suffer 30 years of jail imprisonment. He is protesting his innocence in a five grounds petition of appeal. On the hearing date he was absent. He had informed the court, by letter, that he never wished to appear.


Robert Magige, learned State Attorney, appeared for the respondent. He supported the appeal on the same grounds for which I intend to dispose of the appeal. These are firstly, that the victim, a child of tender age who testified as PW2, gave evidence without a promise to tell the truth which

violated section 127 (2) of the evidence Act. For this reason, the learned State Attorney argued, her evidence ought to be expunged from record. He referred the court to the case of **Issa Salum Nansaluka v. R**, Criminal Appeal No. 272/2018, Court of Appeal, Mtwara (unreported).

According to the evidence on record, the victim was aged 3 years at the incident time. Her evidence, therefore, ought to have been taken upon compliance with section 127 (2) of the Evidence Act which requires such a witness to make a promise to tell the truth. This was not done and as rightly argued by Robert Magige, her evidence ought to be expunged from record as I hereby do.

Secondly, is the question of the PF3, exhibit P2, which was tendered by the doctor who testified as PW4. Upon being admitted it was not read to the appellant. As rightly submitted by Robert Magige, this violated the procedure and it ought to be expunged too as I hereby do.

Having expunged the evidence of the victim and exhibit P2 from record there is no other evidence to support existence of penetration of the victim's vagina. Therefore, the conclusion that the charge was not proved is inevitable. On this account, I allow the appeal. Appellant to be released from prison immediately unless otherwise lawfully held for another cause.


I.C. Mugeta
Judge
06/07/2020



Court: Judgment delivered in chambers in the absence of the appellant who did not wish to appear and in the presence of Robert Magige, State Attorney.

Sgd: I.C. Mugeta

Judge

06/07/2020