

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(Kigoma District Registry)**

**AT KIGOMA**

**APPELLATE JURISDICTION**

**(DC) CRIMINAL APPEAL NO. 14 OF 2020**

*(Original Criminal Case No. 293 of 2019 of the District Court of Kasulu at Kasulu before Hon.  
I.E. Shuli - RM)*

**AMOS S/O NORBERT.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

*03/06/2020 & 11/06/2020*

**I.C. MUGETA, J.**

The appellant was convicted of raping a child of four years. He was sentenced to the statutory minimum of thirty years jail imprisonment. He is protesting his innocence hence this appeal the petition of which carries four grounds of appeal. Ground one and four are to the effect that the charge was not proved beyond reasonable doubts. The complaint in the second ground is that the whole of the prosecution evidence was hearsay and the third complaint is that the evidence of the victim, a child of tender age was recorded without first making her take a promise to tell the truth.

On the hearing date the appellant was very brief. He submitted that the charge was a frame up because he could not have raped the victim in the presence of Evodia who is his daughter per the victim's (PW1) testimony. Then, he adopted the content of the petition of appeal to form part of his submission.

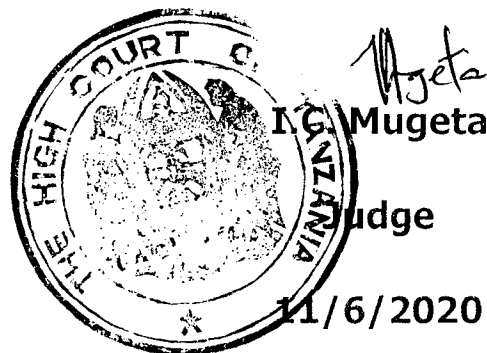
The respondent was represented by Shaban Masanja, learned State Attorney who supported the appeal for a reason that the charge was not proved to the standard. He argued that the PF3 (exhibit P1) was admitted without first being read to the appellant, therefore, it ought to be expunged from record. That once this is expunged, the remaining evidence is that of PW1 which is so shaky to support the conviction. The learned State Attorney argued that it is unknown who raped the victim because even the doctor (PW3) testified that the investigator had told him that she had been raped by her father.

I agree with the complaint that the charge was not proved. In her judgment, the learned trial magistrate relied on the evidence of PW1 and the doctor (PW3) to find the victim guilty. While I agree with Mr. Masanja that the PF3 (exhibit P1) was irregularly admitted and I hereby expunge it from record, the evidence of PW3 as to the status of the victim's vagina is very clear. That she had lost her hymen and this was the only indicator of penetration. However, this evidence which is corroborative by nature, corroborates nothing. The evidence of PW2 (father of the victim and PW4 the investigator) is completely hearsay based solely on what the victim told them. The victim's evidence, however, is highly unreliable for two major reasons. Firstly, there is completely no evidence as to when she identified the assailant. Even the place of rape is not disclosed. In her evidence she

only identifies the accused in the dock. Dock identification without prior description of the culprit is unreliable.

Secondly, the victim is a child of tender age. In terms of section 127 (2) of the evidence Act, her evidence ought to have been taken after ascertaining she does not understand the nature of oath consequently, made to promise to tell the truth. This was not done which makes her evidence lose probative value.

From the evidence on record, the rapist was not sufficiently identified. The appellant was wrongly convicted. I hereby quash the lower courts judgment and the sentence is set aside. He is to be released from custody unless otherwise lawfully held for another offence.



**Court:** Judgment delivered in chambers in the absence of the appellant who is in custody and could not be brought due to COVID 19 pandemic and in the presence of Raymond Kimbe, State Attorney for the Respondent.

**Sgd: I.C. Mugeta**

**Judge**

**11/6/2020**