

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 30 OF 2020

(Original Criminal Case No. 95 of 2020 of the District Court of Kasulu at Kasulu before Hon. I.E. Shuli - RM)

MAULIDI S/O KACHUMBA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

08/10/2020 & 03/11/2020

I.C. MUGETA, J.

A child of three years was confirmed by Martin F. Gabriel (PW5) who is a clinical officer to have been carnally known. It was both anal and vaginal carnal knowledge. The PF3 for her treatment was admitted as exhibit P1. The victim identified in court the appellant as the person who raped her. Her's is the only evidence which identify the appellant as the rapist. Upon conviction of both rape and unnatural offences, the appellant was sentenced to 30 years jail imprisonment for each count. He is protesting his innocence in a petition of appeal containing six grounds of appeal. He was represented by Sadiki Aliku, learned advocate while Clement Masua, learned State Attorney appeared for the Respondent. The grounds of appeal are:-

Mugeta

- (i) *That, the learned trial Resident Magistrate grossly erred in law and fact in convicting the appellant basing on the evidence adduced by PW1 a child of tender age contrary to the mandatory requirements of the law rendering the whole of the evidence of PW1 of no evidential value.*
- (ii) *That, the learned trial Resident Magistrate grossly erred in law and fact in convicting the appellant of the offences of rape and unnatural offence on the basis of tenuous, weak, unsatisfactory investigation and prosecution evidence.*
- (iii) *That, the learned trial Resident Magistrate grossly erred in law and facts in convicting the appellant of the offences of rape and unnatural offence while the evidence of PW1 and of the other witnesses did not prove the necessary ingredients of the offences.*
- (iv) *That, the learned trial Resident Magistrate grossly erred in law and facts in convicting the Appellant of the offences of rape and unnatural offence basing on the prosecution evidence which was full of contradictions and inconsistencies.*
- (v) *That, the learned trial Resident Magistrate grossly erred in law and facts in convicting the Appellant of the offence of rape and unnatural offence without considering Appellant's undisputed*

defence that at time of the alleged commission of the offences the Appellant was playing football.

- (vi) *That, the learned trial Resident Magistrate grossly erred in law and facts in convicting and sentencing the Appellant as charged while the charges were not proved beyond any reasonable doubt regarding the Appellant's defence, missing explanation of his arrest, missing explanation of the scene of crime and the general condition of the victim by the time was seen by one ANNA MTO (PW3) allegedly crying with another child by the name of FELIX and the alleged treatment of PW1 by PW5 with its environment.*

Sadiki Aiki argued the first ground separately while the second, third and fourth grounds were combined. The fifth and the sixth grounds of appeal were also argued independently. Clement Masua, learned State Attorney appeared for the Republic and he supported the appeal. In determining the appeal, I shall consider all the grounds of appeal under one head. Whether the case was proved beyond reasonable doubts.

Both counsel for the appellant and the learned State Attorney are of the view that the offence was not proved. Their reasons include that the evidence of the victim was recorded in violation of section 127 (2) of the Evidence Act, [Cap. 6 R.E. 2019]. I shall decide this case on this fact alone.

Before the evidence of the victim was recorded, the learned trial magistrate made the following record:-

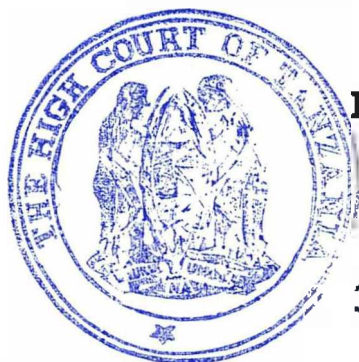
"PW1: Fanta (name withheld), 3 years, Nyamlenge, Christian, resident of Nyarugusu Camp, not sworn promise to tell the truth not lie".

Section 127 (2) of the evidence Act provides:-

"A child of tender age may give evidence without taking an oath or affirmation but shall, before giving evidence promise to tell the truth to the court and not tell lies".

It is my view that the above statement in the court record is not in line with the provisions of section 127 (2) of the evidence Act. This section requires the promise to be recorded in the witness's own words and not in the reported speech as above. In the case of **Godfray Wilson v. R**, Cr. App. No. 168/2018, Court of Appeal – Bukoba (unreported) it was held that evidence recorded in contravention of section 127 (2) of the Evidence Act is of no probative value. Following this decision, I hereby expunge the evidence of PW1 from the record. Without the evidence of PW1, there is no other evidence upon which the guilty of the appellant can be established.

In the event, I find merits in the appeal. It is hereby allowed. Appellant should, immediately, be released from custody unless otherwise lawfully held for another cause.



I.C. Mugeta
I.C. Mugeta

Judge

3/11/2020

Court: Judgment delivered in chambers in the presence of the appellant in person represented by Sadiki Aliko Advocate and Clement Masua State Attorney for the Respondent.

Sgd: I.C. Mugeta

Judge

3/11/2020