

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

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**(APPELLATE JURISDICTION)**

**(DC) CRIMINAL APPEAL NO. 6 OF 2021**

(Original Criminal Case No. 182/2020 of the Kibondo District Court, before Hon. M.M.  
Majula - RM)

**NDIYOKUBWAYO BOSCO..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

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

23<sup>th</sup> March & 6<sup>th</sup> April, 2021

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

This is an appeal that is based on three grounds of appeal. The first ground is distinct while the second and third grounds are similar. The first ground is that the evidence of the victim being a child of tender years was illegally recorded while the second and third grounds can be jointly described as presenting a complaint that the charge was not proved.

The appellant attended the hearing unrepresented. Raymond Kimbe, learned State Attorney, appeared for the Republic. While the appellant just requested the court to consider his grounds of appeal, Raymond Kimbe supported the



appeal on the ground that evidence of the victim (PW1) was recorded in violation of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019]. He argued that such evidence ought to be expunged from the record and once that is done, there remains no other evidence that can support the conviction.

The appellant was convicted of two counts. Firstly, rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code and incest by males contrary to section 158 (1) (a) of the Penal Code. The victim was aged 13 years and the incident took place on unknown date and time in April, 2020 at Mtendeli Refugees Camp.

The evidence of the victim is recorded from page 8 of the typed proceedings. It reflects that before she testified, the learned trial magistrate obtained the usual personal particulars then the witness is recorded to have stated: -

*"I promise to tell the truth and not to tell lies".*

It is now a settled principle of practice that before a child witness promises to tell the truth he/she must be asked basic question to test if she/he understands the nature of oath. If he/she does, he/she swears. If he/she does not, he/she is made to promise to tell the truth. In this case, such an exercise was not done, therefore, there is no criteria upon which the witness

was adjudged to give unsworn evidence. I agree with the learned State Attorney that the evidence of the victim was illegally recorded and it ought to be expunged from record. I hereby expunged it. I also do agree with him that once her evidence is expunged no evidence remains on record upon which the conviction can be sustained.

In the event, I allow the appeal. Conviction is quashed and the sentence is set aside. Appellant to be released from prison unless otherwise lawfully held for another cause.



*Mgeta*

**I.C. Mugeta**

**Judge**

**6/4/2021**

**Court:** Judgment delivered in the presence of the appellant and Mr. Shabani Masanja, State Attorney for the respondent.

**Sgd: I.C. Mugeta**

**Judge**

**6/4/2021**