

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 47 OF 2020

(Originating from Criminal Case No. 39 of 2020 of Kalambo District Court).

CHRISANT LONGWANI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

14 & 16/07/2021

JUDGMENT

J. F. Nkwabi, J.:

The appellant Chrisant Longwani was aggrieved with the decision of the District Court of Kalambo, which convicted and sentenced him to serve thirty (30) years imprisonment. He had been found guilty of the offence of attempted rape contrary to section 132 (1) of the Penal Code Cap 16 R.E. 2002. The appellant filed this appeal consisting of six (6) grounds of appeal.

In the trial court, it was alleged by the prosecution side, that on the 30th day of March 2020 about 20:00hrs at Mwazye village within Kalambo District in Rukwa region, the appellant attempted to have sexual intercourse with PW3. PW3 was aged 11 years at the material time. She was in standard four at Mwazye Primary School.



As indicated above, the Appellant had six grounds of appeal but since the same are not the basis on my decision, I do not find the necessity to reproduce them.

During the hearing of the appeal, the appellant appeared in person and prayed this court to allow the appeal and quash the conviction and sentence. He urged that he did not commit the offence he was convicted with.

Mr. John Kabengula, learned State Attorney, appeared for the respondent (the Republic). In his submission, he urged that the proceedings of the trial court have serious irregularities which go to the root of the matter.

He submitted, PW3, the alleged victim of the alleged offence, was aged 11 years whose evidence was taken without following the procedure under Section 127 (2) of the Evidence Act Cap 6 R.E. 2019. She did not promise to speak the truth and not tell lies. Her evidence, therefore, is weightless and it ought to be expunged, the learned State Attorney submitted. The learned State Attorney added that, the same mistake was done by the trial court while recording the evidence of PW4 who was aged 10 years old.

Mr. Kabengula rested his submission by arguing that, the rest of the evidence has no weight to convict the appellant and as such, they support the appeal.

In his rejoinder, the appellant concurred with what was submitted by the learned State Attorney for the respondent.

Section 127 (2) of the Evidence Act provides:

"(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 to tell lies."

It is trite law that the evidence of the victim is the primary evidence as per **Hangwa William v Republic, Crm appeal no 117 of 2009 (CAT) Mwanza** (unreported) the Court said:

"The evidence of the victim is the primary evidence; the other pieces of evidence could only come in as corroboration."

Another authority that guides me in my decision is the case of **Godfrey Wilson vs. Republic Criminal Appeal No. 168 of 2018** (Unreported), the Court of Appeal of Tanzania held:

"Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

In the case at hand, just as it was submitted by the learned State Attorney for the Respondent, PW3 who was a child of a tender age, gave her evidence before the trial Magistrate without promising to tell the truth and not tell lies. I agree with the submissions of the Learned State Attorney for the Respondent that the trial court did not comply with the requirement of the law under section 127(2) of the Evidence Act. Such evidence cannot be the basis of conviction of the appellant.

There is, therefore, no sufficient evidence that is remaining in the court record to support conviction. Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I order for an immediate release of the appellant unless he is held for other lawful reason(s).

It is so ordered.

Dated at Sumbawanga this 16th day of July 2021.




J. F. Nkwabi

JUDGE

16/07/2021