

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA  
(SONGEA DISTRICT REGISTRY)  
DC CRIMINAL APPEAL NO 6/2021  
(Originating from the District Court of Mbinga in Criminal Case  
No. 107/2020)**

**FELIX FELIX NDIMBO ..... APPEALANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Date of Last Order: 11/08/2021**

**Date of Judgment: 23/08/2021**

**BEFORE: S.C. MOSHI, J.**

The appeal was not contested. The appellant was arraigned before the District court of Mbinga for the offence of rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code, Cap. 16 R.E 2019. It was alleged that Felix S/O Felix Ndimbo @ Kamanyola on 24<sup>th</sup> day of July, 2020 at day time at Tanga village within Mbinga District in Ruvuma Region did have a sexual intercourse with one Frascisca D/O Ndunguru a girl of 11 years old. After a full trial the appellant was found guilty as charged. Consequently, he was convicted and sentenced to 30 years imprisonment. Aggrieved by the conviction and sentence he has appealed to this court on the following grounds: -

- 1) *That, the honourable trial court erred in law and fact to convict the appellant without the case being proved beyond all reasonable doubt as required by law due to the inconsistency and contradictory evidence of PW1 and PW2 whose evidence differs each other before the court of law.*
- 2) *That, the learned honorable magistrate erred in law and fact in basing the appellant conviction on the evidence of exhibit which was improperly admitted as evidence before the court of law because the procedure of tendering exhibit was not adhered according to the law and procedure the appellant was not given opportunity to accept or deny the exhibit PF3.*
- 3) *That, the learned trial Magistrate erred in law and fact to uphold the appellant conviction founded on the evidence PW1 which was taken on the contravention of section 127(2) of the Evidence Act Cap. 6 R.E 2019 the procedure of taking the evidence of PW1 on oath without giving the promise to tell the truth without telling lies was invalid this was reiterated in the case of Seleman Moses Sotel @White vs. Republic Court of Appeal at Mtwara, Criminal Appeal No. 385/2018(Unreported).*
- 4) *That, the learned trial Magistrate erred in law and fact by denying the victim defense of alibi without giving the opportunity to the prosecution side to prove the case beyond all reasonable doubt that the accused was at the scene of crime.*

At the hearing of the appeal the appellant appeared in person whereas the Republic was represented by Ms. Generosa Montano, State Attorney who supported the appeal.



The appellant had nothing to add to the grounds of appeal.

Ms. Montana supported the appeal on the third ground of appeal, that when receiving the testimony of PW1 the trial court didn't comply with section 127(2) of the Evidence Act, Cap. 6 R.E. 2019, herein referred to as the Evidence Act. She said that, the charge sheet and the testimony of PW1 indicated that PW1 was aged 11 years this means that, she was a child of tender age hence, the court was duty bound to comply with section 127(2) of the Evidence Act (Supra) which requires the court to ask the child to promise that when testifying she will tell the truth and not lies. However, in this case PW1 did not promise to tell the truth. In this regard she cited the case of **Godfrey Wilson V.R**, Cr. Appeal No. 168/2018, Court of Appeal sitting at Bukoba (unreported).

She argued that, in this case, the testimony of PW1 was very crucial because she was alone at the crime scene and is the only one who could identify the appellant to be the rapist who raped her. Without having PW1's testimony, the remaining witnesses' evidence can't establish that the appellant was the rapist who raped the victim.

She submitted further that, the proceedings indicates that PW1 was sworn in but the proceedings don't reveal if PW1 knew the meaning of oath. She therefore said that since section 127(2) of the Evidence Act (Supra) wasn't complied with, it was her opinion that the case wasn't

proved on the required standard against the appellant. Hence, she proposed that the conviction be quashed, sentence be set aside and the appellant be set free.

Having carefully considered the grounds of appeal, the record of the trial court and the submission made by the parties, I will limit myself to the third ground of appeal as the same suffices to dispose of the appeal. It was conceded by the respondent that the trial court erred in relying on the evidence of PW1, a child of tender age without making a promise by her words of mouth to tell the truth as required by section 127(2) of the Evidence Act, I find it proper to have a look at the relevant provision of the law. It is stipulated thus: -

*"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 any lies."*

The wording of the above quoted provision of the law is very clear. I find, as rightly argued by Ms. Montana that the law requires a child of tender age to promise to the court to tell the truth and not any lies before giving his or her evidence. Compliance with the stated law is mandatory as the word used in the cited provision of the law is "shall" which is interpreted by section 53(3) of the Interpretation of Laws Act, Cap. 1 R.E 2019 to mean the function so conferred must be performed.



The trial court record at page 3 of the typed proceedings shows that the trial Magistrate recorded PW1's particulars thereafter she was sworn in and gave her testimony. For the purpose of appreciating properly what was recorded by the trial Magistrate the proceedings of the trial court read thus: -

***PROSECUTION CASE OPENS***

***PW1;*** *Fransisca Ndunguru, 11 Christian, Matengo, Student, a resident of Tanga Village sworn and states*

***PW1 XD***

*I am studying in std V in Tanga primary school, at home I am living with my grandfather. On 24/07/2020 I was at school and later on I went back at home to get my mathematic exercise book which I forgot. When I was back to school I met Felix (the accused herein) who attacked me and forced me to the hole (pit) used for making bricks he then removed my under pants and put some papers in my mouth and started to rape (by inserting his gududu into my private parts) he then ran away so I had to go back home where I my grandmother was not there so I removed my under pant a skin tight which was torn of blood and I washed them and kept them on ropes, then went back to school where I told my teacher of the whole story and the teacher called my grandmother and narrated the story, and she was*

*advised to go to Police Station and then to the Hospital my grandmother is Fransisca Ndunguru. at the Police station we were given a form to go to Mbuyula Hospital.*

*Felix (accused) is a cousin to my father and I have known him for long time.*

*That's all.*

*C.J. HAULE-RM*

*28/7/2020*

From the above quoted PW1'S testimony as rightly complained by the appellant in his grounds of appeal, and conceded by the respondent, there is nowhere indicating that PW2 was asked to promise to tell the truth to the court and promised to do so as required by section 127(2) of the Evidence Act. When tackling this issue, the Court of Appeal of Tanzania in the case of **Godfrey Wilson** (supra) at page 13 and 14 stated that: -

*"The trial Magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127(2) as amended imperatively requires a child of tender age to give promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of tender age. The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of attender*



*age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows:*

- 1. The age of the child.*
- 2. The religion which the child professes and whether he or she understand the nature of oath.*
- 3. Whether or not the child promises to tell the truth and not lies.*

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

Therefore, the trial court was duty bound to ask the child her age, the religion which she prophesies, whether she understands the nature of oath and whether or not she would tell the truth and not lies on her own words of mouth.

The effect of evidence of a child of tender age being received without taking her or his promise to tell the court the truth and not lies as required by the above cited provision of the law was stated in the case of **Godfrey Wilson** (supra) to be that, the same has no evidential value. Similarly, the evidence of PW2 which was taken without recording her promise to tell the truth as stated in the above cited case has no evidential value.

It is also settled that the best evidence of a sexual offence must come from the victim. See the case of **Seleman Makumba vs. R** [2006]. Having discarded PW1's testimony, I find that the remaining evidence cannot stand to find the appellant guilty of the offence of rape.

Furthermore, I noted another anomaly in the trial court proceedings, both exhibits P1, (PF3) and P2 (a sketch map) were tendered by a Public Prosecutor and it was admitted by the court. The law is very clear on who should tender the exhibits in court, it is the witness and not the prosecutor or advocate. The duty of the prosecutor is to lead the witness to tender the exhibit in court and not for herself/ himself to step into the shoes of the witness which is wrong. See the case of **Haruna Mtasiwa vs. R**, Criminal Appeal No. 206 of 2018, Court of Appeal sitting at Iringa (Unreported). Since the procedures were not followed the exhibits are expunged from the record. The other anomaly is that having being admitted both exhibits were not read in court. Not reading the contents of the exhibits denied the appellant with the opportunity to understand the case and make a meaningful defence. In the case of **Rashid Kazimoto and Masoud Hamis vs. Republic**, Criminal Appeal No. 558/2016, Court of Appeal sitting at Mwanza and in the case of **Mbagga Julius vs. Republic**, Criminal Appeal No. 131 of 2015, Court



of Appeal sitting at Mwanza, the court insisted that documentary exhibit must be read out in court to the parties after they are admitted, and that failure to read out the documentary exhibits after their admission renders the said evidence contained in that documents, improperly admitted and should be expunged from the record. Being guided by the cited case laws, and in the premises, I do hereby expunge from the records of evidence both exhibits i.e. P1 and P.2.

Having said all this, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant, and the appellant should be released forthwith unless he is held for other lawful reasons.

It is so ordered

Right of appeal explained.



  
**S.C. MOSHI**

**JUDGE**

**23/8/2021**