

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA**

CRIMINAL APPEAL CASE NO. 06 OF 2021

(Original from the District Court of Rungwe District, at Tukuyu, in
Criminal Case No. 68 of 2020)

EDWIN JOHN MOTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 06.08.2021

Date of Judgment: 15.10.2021

Ebrahim, J.

The Appellant herein was charged, convicted and sentenced at the District Court of Rungwe at Tukuyu for the offence of Rape contrary to sections 130 (1), (2) (e) and 131 (1)(3) of the Penal Code, Cap. 16 R.E. 2019.

It was alleged before the trial court, according to a charge sheet that, on 25/06/2020, at Ilolo village within Rungwe District in Mbeya Region, the appellant did unlawfully have carnal knowledge of one **EA** (a branded name to protect her dignity), a

girl aged 14 years old. The girl will hereinafter be called the "complainant" for convenience purposes.

The appellant pleaded not guilty to the charge, hence a full trial. The prosecution evidence led to the conviction of the appellant was that of a complainant who testified as PW1. She testified that on 25/6/2020 while from Katumba area where she was sent to buy sardines and collect salt from her grandmother, she was stopped by the appellant who leaved near the road and she knew him since they used to worship in the same church. The appellant was holding a machete. He attacked and dragged her into his house. He undressed her and also undressed himself then penetrated his male organ into her vagina. After the act he pushed her outside. Since it was night hours, she did not return home, she went to sleep in the house which was not resided by any person until the next morning when she returned home. When she arrived at home she was not asked where she slept since her mother believed that she slept at her grandmother. It was until when her father met with her grandmother who denied that the complainant had slept there. She was asked where she slept but she lied that she slept at her grandmother from her father's side.

When asked on the story the said grandmother recanted the complainant's story. It was at that moment when she revealed what befallen her. She was sent to Rungwe District hospital where she was medically examined.

PW2 also adduced evidence on the age of the complainant that she was born 29/03.2004. She further tendered birth certificate of the complainant to prove the date of birth. Another witness was a doctor who medically examined the complainant. He also tendered PF3.

The appellant defended himself and denied to have committed the offence. When he was cross examined, he replied that the case might be a personal grudge since he worshipped with the complainant and they once warned her of her behaviour. After analysing evidence of both sides, the trial court found him guilty, convicted and sentenced him to thirty years imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred this appeal. His petition of appeal contained grounds which were not numbered. However, the grounds are based on the complaints that; the Doctor who examined the complainant

did not also examine him to ascertain if he was a ravisher; that the evidence by the Doctor as contained in the PF3 showed that the complainant was infected with sexual transmitted diseases (STD) which the same was not examined on the part of the appellant; that the evidence of the complainant was not corroborated; that the complainant was not found in the appellants house and that the whole of prosecution evidence was doubtful.

When the appeal was called for hearing, the appellant appeared in person, unrepresented vide virtual court while in Ruanda prison. The respondent/Republic appeared through Ms. Bernadetha Thomas, learned State Attorney who was physically present in court. The appellant had nothing to argue, he only prayed to adopt his grounds of appeal.

On her part, Ms. Thomas opposed the appeal. She told the court that she supported the conviction and sentence passed by the trial court. I will not recount the replying submission made by the learned State Attorney, but I will be referring to them in the cause of determining the merit of the appeal.

In the determination of this appeal, I shall firstly address the main issue of whether the prosecution proved the case at the

required standard, i.e beyond reasonable doubt. The issue is based on the fact that the same was the base of the appellant's grounds of appeal though couched on multiple complaints.

As I have hinted before, the appellant's conviction solely based on the evidence adduced by the complainant (PW1). The trial court was of the view that in sexual offences the best evidence is that of the victim of offence as provided for under **section 127 (7) of the Evidence Act, Cap. 6 R.E 2019** and the principle enunciated in the case of **Selemani Makumba v Republic** [2006] TLR 379. However, it is my concerted view that, at all times the story of the victim must be scrutinized and test the truthfulness of the victim. This was also the spirit by the Court of Appeal of Tanzania in the case of **Mohamed Said v. Republic, Criminal Appeal No. 145 of 2017 CAT at Iringa.**

In the instant case, the question to be answered in connection with the main issue posed above is whether the facts in the Charge Sheet tallied with the evidence adduced by the prosecution witnesses. The posed question resulted from my perusal of the records of the trial court. It was indicated in the charge sheet that the complainant was a child girl aged 14 years

old. The same age was testified by the complainant in her particulars before she started to testify. Again, PW2 (the mother of the complainant) also testified that victim was 14 years old. She went further to give evidence that the complainant was born on 29/03/2004. The date was exhibited by a birth certificate of the complainant which was admitted as "exhibit P1."

Having found as above, I made a simple arithmetic to ascertain the age of the complainant only to find that, the complainant was a girl of 16 years old. This is due to the reason that she was born in 2004 and the offence was committed in 2020 i.e from 29/03/2004 to 25/06/2020 when the offence was alleged to have been committed, the complainant had already attained the age of 16 years.

In the up-short, the learned trial Magistrate received the evidence of the complainant as the evidence of a child of tender age per **section 127 (2) of the Evidence Act**. This means that, the complainant only promised to tell the truth. Nonetheless, it is my concerted view that, since the complainant was the child of 16 years, the provision of **section 127(2) of the Evidence Act** did not cover her. This is because, **section 124 (4) of the Evidence Act**, and

the case of **Issa Salum Nambaluka v. Republic, Appeal No. 272 of 2018, Court of Appeal of Tanzania at Mtwara** (unreported) define the phrase "child of tender age" to mean a child whose apparent age is not more than 14 years.

Following the fact that the complainant was not a child of tender age as demonstrated above, her evidence was supposed to be taken under oath or affirmation depending on her religion/belief. This is the requirement of **section 198 (1) of the Criminal Procedure Act, Cap. 20 R.E 2019** and **section 4 (a) of the Oath and Judicial Proceedings Act, Cap. 34 R.E 2019**.

Moreover, in the case of **Nestory Simchimba v. Republic, Criminal Appeal No. 454 of 2017, CAT at Mbeya** (unreported). The Court observed that:

".....evidence to be acted on by any court must come from a competent witness. Unless a witness is exempted under section 127(1) of the Evidence Act, Chapter 6 of the Revised Edition 2002 (EA) for being a child of tender age and does not understand the nature of an oath hence his evidence is taken without being sworn or affirmed, any other witness in any

*judicial proceedings must be sworn or affirmed. This is the tenor and import of the mandatory provisions of **section 198(1) of the CPA, section 4(a)(b) of the OJPA and the Oaths and Affirmations Rules, GN No. 125 of 1967 made under section 8 of OJPA (the OJPA Rules)**" (bold emphasis is mine).*

In connection with the matter under consideration, it is clear that the evidence of the complainant was taken in violation of the mandatory provisions of the law. In the circumstances, the evidence adduced by the complainant was in law not evidence, the same is expunged from the record.

Now, having expunged the evidence of the complainant from the record, the prosecution remained with no other evidence which would amount to the conviction of the appellant. It is my opinion thus, that the prosecution did not prove the case beyond reasonable doubt.

Owing to the above findings, I hereby allow the appeal, quash the conviction and set aside the sentence. I

also order for immediate release of the appellant EDWIN
JOHN MOTO from prison unless otherwise lawfully held.

Ordered accordingly.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim

Judge.

Mbeya

15.10.2021