

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA SUB- REGISTRY
AT MUSOMA
CRIMINAL APPEAL NO. 63 OF 2021
(Arising from Criminal Case No. 184 of 2020 of Serengeti District Court at
Mugumu)

WIRKRIFU DAUDI @ KITENYI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

5th October and 1st November, 2021

F.H. MAHIMBALI J.:

The appellant, Wirkrifu Daudi @ Kitenyi was arraigned before the district court of Serengeti and charged with the offence of rape contrary to section 130 (1) (2)(e) and 131 (3) of the Penal Code, [Cap. 16 R.E. 2019].

It was alleged by the prosecution that on the 8th day of May, 2020 at Mugumu the appellant had carnal knowledge with AB(her name disguised to protect her identity) a girl of 5 years old. As a result, the appellant was sentenced to life imprisonment.

The material facts leading to this appeal are as follows;

A five years old giri and a 'chekechekea' pupil on the 8th day of May, 2020 was playing with Rose outside their house and the appellant took hold of her hand and led her into his room and had sexual intercourse with her. AB felt severe pains and the appellant warned her not to inform anyone and told her "*kuanzia leo wewe ni mke wangu*". When her mother (PW1) was bathing her two days later, she told her "*baba isack amenibaka*". The victim also told her that the appellant had warned her not to tell anyone and he promised to marry her and that is the reason she did not tell her earlier. AB's mother corroborated this evidence in court and she went further to testify that she knows the appellant as he is the tenant of her mother in law (Bhoke Range) and the appellant is commonly known as Baba Isack or Mkachi. She stated that after her daughter informed her of the rape incident, she checked the victim's private parts and she saw bruises and her vagina was swollen. She also called her relative, one Fely to check the victim. She went ahead to call her husband (PW3)and, on his arrival, he called the sub- village chairman (PW4). PW4 arrived with a 'mgambo' and the appellant was arrested and taken to Mugumu police station. PW3 came to court to corroborate the testimony of her wife (PW1).

PW1 took the victim to the police station and they were given PF3

and they went to get medical treatment at Nyerere DDH. At the hospital AB was attended to by Albert Kasanga, a clinical officer (PW5). The report from the hospital was to the effect that the victim was not a virgin, her private parts were swollen and had bruises. He filed the PF3, that he tendered in court and it was admitted and marked Exhibit PE1 without any objection from the appellant.

At Mugumu police station this case was assigned to DC Sijali (PW6) a police officer, the case file with Ref. No. MUG/IR/1214/2020. She was informed that the appellant is the one who raped AB.

The trial court found the appellant with a case to answer, and he was given his rights to testify under oath and to call his witnesses. The appellant testified under oath and had no witness. He fended for himself that he is a shoe shiner, and he works daily from 7:00 hours to 19:00 hours. He recalls on the 8th day of May 2020 he was in his room, and he went to his work place until 19:00 hours. He also went to work on the following day and on the 10th day of May 2020 while at his work place the chairman and mgambo went and told him he was a suspect in breaking and stealing from a shop. They went to the police station. While at the police station, when the police officer inquired who raped AB, the chairman

pointed at him. He stated that he agreed to committing the offence as he was tortured at the police station and before the justice of peace. He alleged that the case against him was fabricated by AB's mother.

He went further to state that the doctor's testimony is different from the victim on where the victim was from. He also stated that, if it is not fabricated why was the victim not taken to the hospital on the 8/5/2020 and where he lives there is no ceiling, therefore it would have been easy to hear the victim cry.

The trial court heard the parties and, in the end, it found that the prosecution had proved its case beyond reasonable doubt; the appellant was convicted and sentenced to life imprisonment.

The appellant was aggrieved with the decision of the trial court, hence came to this court by way of a petition of appeal containing four grounds of appeal as summarized below;

1. That, the trial court erred as the appellant was not given a chance to call his witnesses.
2. That, the trial court did not consider his defense that he was tortured.
3. That, the trial court admitted wrong evidence of the clinical officer (PW5), as it did not state the date and time when he examined the

victim.

4. That , the trial court erred as it did not bring AB's friend as a witness in court.

When this matter came up for hearing, the appellant was present in person and unrepresented while the respondent enjoyed the legal services of Mr. Malekela , learned state attorney.

Submitting in support of the appeal, the appellant prayed that his grounds of appeal be adopted as part of his submission. He submitted further that, all the prosecution witnesses were relatives, hence unreliable. That the prosecution evidence is also contrary to what happened, as he was arrested for burglary, but it is strange as at the police station he was told he had raped AB. This case is a fabricated case and at page 6 of the judgment it is evident that the prosecution's evidence is not credible enough to maintain conviction. Also, the date of the incident is not reflected in the judgment and the trial court's proceedings. He prayed he be acquitted.

Countering the appellant's submission, Mr. Malekela in regards to the first ground stated that at page 25 to 29 of the trial's courts proceedings it is clear that the appellant was addressed of his rights and he utilized them

as per the law. The grief he was not given a right to be heard is baseless.

On the second ground, the respondent submitted that he has never seen an accused person being tortured in court. Also, it is reflected in the court's proceedings that the appellant denied the charge levelled against him, there is no plea of guilty. It was his submission that this ground is also baseless.

Regarding the third ground, he submitted that PW5's testimony is very vibrant, at page 14 of the typed proceedings it is evident that it was on the 11th day of May, 2020. Therefore, this ground is bankrupt of merits also.

It was the respondent's submission that the fourth ground of appeal is also meritless as the prosecution witness Rose (AB's friend) is not a material witness in this case.

Responding to the issues raised by the court's suo motto, whether the trial court complied with section 127 (2) of the Evidence Act. It was his submission that it was complied with. That AB stated, he was 5 years old , studying at Mapinduzi chekechea , promised to tell the truth.

On the issue whether s. 186 (3) of the CPA , that requires criminal proceedings involving a child as a victim must be conducted in camera, he left it to court to decide on that.

Rejoining, the appellant reiterated his earlier submission and prayed his appeal be allowed.

Having heard the rival submission of the parties and gone through the court's record, the matter to be determined by this court now is whether this appeal has merits.

On the first ground, the appellant complained he was not given a right to be heard and a chance to call his witnesses. The respondent, objected to this ground. I have gone through the trial court's proceedings and at 25 of the typed proceedings the appellant stated as follows "I will adduce my evidence on oath. No witness to call." When he finished testifying at page 29 of the typed proceedings, he prayed to close the defense case, in that regard it is my humble view that this ground is bankrupt of merits.

With the second ground, it was the appellant's grief that he was tortured in court that is why he accepted the charge levelled against him. This ground was also objected by the respondent. This court would have loved to sympathize with the appellant but according to the court's record there is nowhere the appellant admitted having committed the offence. He has also not stated who tortured him in court. Thus, this

ground is meritless.

The appellant's third grief is that PW5's testimony did not state the date, month and time he examined the victim. It is the holding of this court that this ground is also meritless as it is reflected on page 14 the typed proceedings that ;

"... I remember on 11th day May, 2020 at about 11:00 hours I was at my office NDDH I received a girl of 5 years old..."

His fourth complaint is that Rose (AB's friend was not called) and she is a material witness. This court is at one with the learned state attorney that, Rose is not a material witness as this is a rape case and the best evidence is from the victim. This principle was stated in **Selemani Makumba v Republic**, [2003] TLR 203 when the Court of Appeal held:

"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of any other women where consent is irrelevant that there was penetration".

In that regard is also devoid of merits and it is dismissed.

On the issue raised by the court, whether the trial court complied with section 127 (2) of the Evidence Act. It was the respondent's submission that the trial court complied with that section. In the case of

Seleman Moses Sotel @ White v The Republic, Criminal No. 385
Of 2018, CAT at Mtwara from page 11 provided ;

*"...Obviously, the provision is silent on the procedure which a trial court should apply to decide whether a child witness should give evidence on oath or affirmation or upon a promise to tell the truth and on undertaking not to tell lies. Addressing that lacunae, the Court had this to say in the case of Godfrey **Wilson** (supra). "The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender 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 she/he understands the nature of oath.*
- 3. Whether or not the child promises to tell the truth and not to tell lies."*

According to the trial's court in this case, it is evident of the typed proceedings at page 7 as follows;

" PW2: I have 5 years old, studying at MapinduziChekechea , promises to tell the truth ."

As per the above case law , it is safe to state that section 127 (2) was not complied with. The religion of the accused person has not been inquired about and whether she understands the nature of oath. Responding to Age and that she promises to tell truth is not legally sufficient. The witness ought to have been inquired on whether she understands the nature of oath before she promises to tell truth. Promising to tell truth without understanding the nature of oath is as good as nothing as the former is the conditional precedent to a witness of tender age to promise telling truth.

As what is the way forward, is to expunge the evidence of AB (PW2) from the court's record . This court is guided by the decision of the Court of Appeal in the case of **Issa Salum Nambaluka v The Republic** , Criminal Appeal No. 272 of 2018 . Where the trial court did not comply with section 127 (2) of the Evidence Act, PW1's evidence was expunged.

As the appellant's conviction was solely based on the evidence of the victim, therefore, it is the holding of this court that, the prosecution did not prove their case beyond reasonable doubt. As a result, the appeal is allowed. The appellant's conviction is quashed, and the sentence set aside.

It is ordered that the appellant be released immediately from custody, unless held for another lawful cause.

It is so ordered.

DATED at MUSOMA this 1st day of November, 2021.



F. H. Mahimbali

Judge

01/11/2021

Court: Judgment delivered this 1st day of November, 2021 in the presence of the appellant and Mr. Frank Nchanila state attorney for the respondent and Mr. Gidion Mugo – RMA.

Right of appeal is explained.

F. H. Mahimbali

Judge

01/11/2021