IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 49 OF 2021

(Originating from Criminal Case No. 152 of 2020 before the Resident Magistrate Court of Njombe at Njombe)

ANDREA S/O MOTELA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last order: *21/03/2022*
Date of Judgement: *15/06/2022*

MLYAMBINA, J.

Andrea s/o Motela, the Appellant herein above, moved this Court to reverse the decision of the Njombe District Court in *Criminal Case No. 152 of 2020* in which he was convicted and sentenced to thirty years imprisonment, after been found guilty of the offence of rape contrary *to section 130 (1), (2) (e) and 131 (1) of the Penal Code [Cap 16 R. E. 2019].*

The accusation by the prosecution against the Appellant, as reflected in the particulars of the offence, was that: On 19th day of June,

2020 and 21st day of June, 2020 at Kahawa Street Makambako within the District and Region of Njombe, the Appellant had a carnal knowledge of a girl aged seventeen (17). For the purposes of preserving her identity, I shall in this judgement refer her as the victim or PW1.

Been aggrieved by the decision of the trial Court, the Appellant has preferred the present appeal basing on the following grounds: *One,* the Trial Court erred in law and fact to convict and sentence the Appellant while the Prosecution side failed to prove the case beyond reasonable doubt as a standard required in Criminal Cases. *Two,* the Trial Court erred in law and fact by relying on weak evidence adduced by the Respondent and his witnesses which was contradictory completely. *Three,* the Trial Court erred in law by relying on solely evidence which is weak testimony adduced by PW1 who failed to prove sexual intercourse. Also, she failed to tender the phone and text which were received via her phone as evidence which demand her to meet with the accused at railway and other information which require her to go the Appellant's home. *Four,* the Trial Court erred in law by ignore the strong evidence adduced by the Appellant and his witness. *Five,* the Trial Court erred in law and facts by failure to evaluate properly the evidence adduced by the parties, hence it led injustice on the Appellant side. *Six,* the learned

Trial Magistrate erred in law and fact for basing on unfounded evidence adduced by PW1 who is the fabricator of her own story which was not corroborated with any other witness, say a doctor's report, taking into account that PW1's narrations does not professionally and technically prove precisely of the commission of the alleged offence. Instead, left doubts on her testimony. Consequently, relying on those fabricated narrations makes the whole judgement to its absurdity. *Seven,* the Trial Court erred in law by relying on cooked story and evidence on the prosecution side which was contradictory as a result they failed to prove the offence of rape. *Eight,* the Trial Court erred in law by improperly convicting and sentencing the Appellant.

Before this Court, the Appellant was represented by Ms. Rosemary Wambali, Learned Counsel while Ms. Veneranda Masai Learned State Attorney represented the Respondent, Republic. By consent of the parties, this appeal was disposed by way of written submission wherein parties accordingly adhered to the schedule of the Court.

In his submission, the Appellant through his Counsel Ms. Rosemary Wambali preferred to consolidate grounds of appeal number 1,2,3,4 6 and 7 and submitted them to the effect that: As per the evidence adduced, PW1 testified that she received a text via her phone

from the Appellant who got the phone number from a friend named Rehema d/o Said. PW1 stated that:

> *On 5th of June, 2020 at about 13:00 hrs, I was at Sokoni area with my friend at the shop. My fellow did bring phone inside and I was standing outside. There at appeared accused who stated seducing me. I then moved to our home. After four days while at home I received a message from Andrea asking to meet me at the railway area. He got my phone number from Rehema Saidi.*

The Counsel averred that the prosecution side through PW1 failed to prove the case beyond reasonable doubt due to the reasons that they failed to tender the device which used to send messages or the phone devise of PW1 which used to receive the message exhibit which shows that the Appellant send a message to PW1.

Also, the prosecution side neither showed the kind of massage received by PW1 nor the phone number which received or sent the message from the Appellant to PW1. Even if the prosecution side failed to tender such evidence in order to show the circumstantial evidence to prove the offence of rape, they failed to bring 'Rehema Saidi' as witness in order to testify as to whether she gave a phone number of PW1 to

the Appellant. She stressed that such circumstances render doubt to the prosecution evidence.

Again, Ms. Rosemary Wambali contended that the evidence testified by PW1 was doubtful as to why she failed to inform any person that she was raped since from 21st June, 2020 up to 25th July, 2020 when she was checked pregnant, taking into account, she was 17 years of age. That was almost one month and four days since she alleged to be raped by the Appellant. She stated that there is no any evidence on prosecution side which shows the reasons as to why PW1 failed to report the offence to any person rather than when she was found pregnant. The testimony was that she was impregnated by the Appellant.

She argued that the victim testified that the Appellant raped her on 19th of June, 2020. But she failed to inform any person even her parents or a Ten Cell Leader or to report to the police station about the offence. On 24th day of June, 2020 she went to school at Kheri Christian and on 25th July, 2020 the student was checked pregnant. The Counsel stated that, in the eyes of justice, it is dangerous on the Appellant side to be convicted and sentenced for offence of rape by relying on the

evidence adduced by the victim side without proving the offence beyond reasonable doubt.

Ms. Rosemary further contended that the evidence adduced by the prosecution side was contradictory. According to the evidence adduced by PW2 (Matron of Kheri Christian Secondary School), she checked PW1 on 25th July 2020 and found that she was impregnated. For unknown reasons, PW3 (the mother of PW1) testified that she was given information concerning the pregnancy of PW1 by the Head Teacher on 27th day of July, 2020. Also, there is no reasons which shows as to why PW1 failed to inform PW2 about pregnancy as stated by PW2: "she *did not tell me who caused her pregnant*".

Ms. Rosemary Wambali proceeded to submit that; PW2 (the matron) testified that the school was closed on 17/03/2020 and opened on 28th June 2020. In her testimony, PW2 stated that; PW1 did not tell as to who impregnated her. She added that, there are no reasons as to why PW2 or even Head Teacher of Kheri failed to inform PW3 about pregnancy of PW1 from 25th July 2020 up to 27th day of July 2020. In that regard, she argued that; the evidence adduced by prosecution side was cooked and renders injustice on the Appellant side. To cement her submission, she referred this Court to the case of **Abiola Mohamed @**

Simba v. The Republic, Criminal Appeal No. 291 OF 2017, Court of Appeal of Tanzania at Arusha (unreported), in which the Court held that:

> *We think it is momentous that we should remark, in passing, that, there is a dire need to exercise extra care in handling cases of sexual offence as we earlier cautioned in the case of* ***Mohamed Said v. Republic,*** *Criminal Appeal No. 145 of 2017 (unreported) in which faced with an akin situation we quoted with approval the cautionary statement of Lord Chief Justice Mathew Hale made in the 17th Century which is still very relevant during our times. The Lord Chief Justice stated in* ***People v. Benson,*** *6 Cal 221 (1856) that rape:*
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> > *Is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent?" It is a preemptory principle of law that the best evidence of sexual offence comes from the victim. See, for instance,* ***Magai Manyama v. Republic****, Criminal Appeal No. 198 of 2014 and* ***John Martin @ Marwa v Republic****, Criminal Appeal No. 22 of 2008 (all unreported). However, we wish to emphasize as we did in the case of* ***Mohamed Said*** *(supra) the need to subject the evidence of the victim to scrutiny in order for Courts to be satisfied that what they testify is nothing but the truth the*

testimony of the victim of sexual offence should not be taken as gospel truth but has to pass the test of truthfulness. It is only through this litmus test that Courts will ensure that only deserving offenders are kept behind bars and the innocent are set free. It is our conclusion that the conviction rested on weak, unreliable and inconsistent prosecution evidence which should not be left to stand. For these reasons, we find that, the guilty of the Appellant was not proved beyond reasonable doubt. We allow the appeal, quash the conviction and set aside the sentence and direct the Appellant's immediate release from custody forthwith unless held for other lawful cause.

Ms. Rosemary learned Counsel narrated that, the above cited case is similar to the matter in dispute due to the reasons that the prosecution failed to prove the case beyond reasonable doubt. Therefore, the Court quashed the sentence and orders of the trial Court which led to the release of the Appellant from custody. Ms. Rosemary Counsel argued that PW2 (the matron) who checked the pregnancy of PW1 was not professionally qualified to check the issue of health status of PW1.

Concerning ground number five, she reiterated what have been submitted earlier above. She insisted that the offence of rape in this case has not been proved beyond reasonable doubt. Thus, in order to establish the offence of rape, three elements must be proved, namely: penetration, lack of consent and that it was the Appellant who committed the act.

Ms. Rosemary claimed that, basing on the testimony of the Appellant, there is no doubt that the Appellant is free from any conviction of rape. Therefore, the Trial Court was wrong to declare a decision against the Appellant. She invited this Court to go through the case of **Ally Bakari and Pili Bakari V Republic** [1992] T.L.R 10 where the Court stated that:

> *Where the evidence against the accused is whole circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred.*

Moreover, the Learned Counsel stayed alarmed that, it is now settled law, the proof of rape comes from prosecutrix herself. Other witnesses such as doctors, if they never actually witnessed the incident,

may give corroborative evidence. The reason being that cases of this kind are very rampant within the society. As such, she maintained that, the learned Trial Magistrate ought to have taken the prosecution evidence with caution.

Eventually, Ms. Rosemary for Appellant prayed before this Court that the appeal be allowed in it's entirely and the decision of the Trial Court be quashed, dismissed and the Appellant be set at liberty.

In his reply, the Respondent through Ms. Veneranda Masai, learned State Attorney acknowledged that it is a well-known principle that the duty to prove the criminal charge lies on the prosecution and its standard of proof is beyond reasonable doubt as per *section 3(2)(a) of the Evidence Act [Cap.6 R. E. 2019].*

However, Ms. Veneranda argued that, in proving criminal cases, prosecution side is not legally limited to lay down any number of witness to prove their case against the accused person. Even one witness can prove the same. What the Court looks to is the credibility and reliability of particular witness as per *section 143 of the Evidence Act (supra).* She cited the case of **John Nziku v. Republic,** Criminal Appeal No.181 of 2011 Court of Appeal of Tanzania at Iringa (unreported) wherein at page 9 the Court observed that:

No particular number of witness is required for a proof of any tact it is dependent on the credibility and reliability of their evidence. The number of witness the prosecution summons is exclusively their choice.

Ms. Veneranda submitted that the argument of Appellant's Counsel that prosecution failed to call one Rehema Saidi as witness to testify that she gave Appellant's number to PW1 is unreasonable and baseless. The reason being that, whether or not, she was summoned, she had no any credible evidence as she was not present when the Appellant and PW1 had sexual intercourse. Again, in the whole evidence, the Appellant did not deny the fact that she got PW1's number from Rehema Saidi.

The Respondent Counsel submitted that the prosecution did prove the case beyond reasonable doubt. In doing so, prosecution summoned a number of four witness; PW1 being the victim, PW2 being the teacher who discovered PW1's pregnancy, PW3 being the victim's mother who testified on PW1's age and PW4 the doctor who proved PW1's rape and pregnancy. However, Ms. Veneranda narrated that regardless the evidence of PW2 & PW3 who were not at the scene when PW1 and Appellant had sexual intercourse, the most reliable evidence is that of PW1 who is the victim. PW1's evidence was straight forward and

unshakable. The victim (as seen at page 4 of the typed proceeding), explained the whole process which basically proves penetration as key ingredient in rape cases. She stated:

> *He then forced and took of my clothes. It was skirt, shirt, underpants and tight skin, then accused took off his trouser and boxer then he forced his erected penis to my vagina. We then had sexual intercourse with accused on the bed.*

To cement her argument, Ms. Veneranda cited the case of **Selemani Makumba v. Republic** [2006] TLR 379 in which the Court observed that true evidence in the sexual offences comes from the victim herself. Thus, PW1's evidence was so credible to convict Appellant even without any other evidence.

Furthermore, she argued that, through the evidence of PW1 seem to consent having sexual intercourse with Appellant or agreed to be his lover, legally that does not exonerate the Appellant from guiltiness of rape because the consent is immaterial in case the girl/victim is under the age 18 years. To back up her contenstion, she cited the case of **Selemani Makumba** (supra). She added that, the age of PW1 was proved by her mother (PW3) who tendered the victim's birth certificate

which was admitted as exhibit at page 11 of the proceedings of the trial Court.

Ms. Veneranda further argued that, even penetration was proved by PW4 through **PF3** which was admitted as an exhibit at page 14 of the proceedings. However, she doubted the diligence of the Appellant because when he was given a challenge to shake the prosecution evidence, he failed to do so as he did not ask any material concerning his current allegation. Thus, failure to do so, is equal to admission of what have been testified by prosecution. She cited the case of **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2010, Court of Appeal of Tanzania at Arusha (unreported) at page 5, and the allegation by the Appellant through his counsel in grounds 1, 3, 6, 7 is afterthought in trying to exonerate himself from guiltiness because the penetration which is essential in proving offence of rape was well proved. He neither had evidence to support on how the case against him was fabricated nor did he raise or ask it when PW1 was adducing evidence.

Furthermore, she argued that, the trial Court properly performed its duty by evaluating both prosecution and defence evidence before coming to the conclusion as it can be seen at page 3-7 of the judgement. Each evidence was considered including defence case as

seen at page 9-10 of the judgement. However, the Court was not convinced with defence evidence because it was confusing and unable to shake that of prosecution. Therefore, it was the firm position of Ms. Veneranda that ground 4 and 5 are baseless.

Lastly, she submitted that the Court did convict the Appellant based on the strength of evidence adduced by prosecution which established that the Appellant raped PW1. But the sentence was based on law under *section 131(1) of the Penal Code (supra)* because the Appellant was found guilty of rape.

More to say, Ms. Veneranda contended that the Appellant counsel based her submission on the pregnancy while basically the Appellant was charged with offence of rape. Whether or not PW3 got information about rape late or PW1 failed to inform her mother who impregnated her is irrelevant as the case was not PW1 being impregnated but being raped.

To conclude her submission, Ms. Veneranda submitted that when one goes through the evidence of PW1 at page 4 of trial, the evidence of PW1 that she agreed to be Appellant's lover and they had sexual intercourse two times, in real sense she could not tell that to any one because she consented to it. The issue whether PW1 did consent or

otherwise is immaterial because she was under the age of 18 years and still a student. Ultimately, Ms. Veneranda prayed for this Court to uphold both conviction and sentence of the trial Court and dismiss this appeal.

In her rejoinder, Ms. Wambali reiterated what have been stated on submission in chief. Furthermore, she argued that, the evidence adduced by PW 1, PW2, PW3 and PW4 based on how PW1 got pregnancy and not how PW1 was raped. Wonderfully enough, no witnesses who testified about a person who raped PW1 rather than PW1 herself. But her evidence was uncorroborated and weak because she failed to testify the contents of massage (SMS) which she received from DWI even to mention the phone number used for communication between her and Appellant. Also, there was no reason as to why the Appellant was charged with offence of rape while the witnesses of prosecution side testified about pregnancy. The prosecution side misdirected her by stating that PW4 proved about rape and Pregnancy without stating as to who and when PW1 was raped and impregnated.

Having considered the submissions from both sides, the main issue for determination before this Court is; *whether the prosecution proved their case at the required standard.*

It is the settled principle of law and practice that the prosecution side has the duty to prove their case beyond any shadow of doubts, and

any doubt shall benefit the accused now the Appellant as per *Section 3(2)(a) of the Evidence Act (supra).*

However, to asses if the prosecution side proved the case against the Appellant at the required standard, this Court as the first appellate Court has the duty to wear the shoes of the trial Court and asses the evidence adduced and come out with reasonable verdict. See the cases of **Jongoo v. Republic** [2010] 2EA 171, **Prince Charles Junior v. The Republic**, Criminal Appeal No. 250 of 2014 Court of Appeal of Tanzania at Mbeya at page 13. Failure of the first appellate Court to do so is not acceptable as it was said in the case of **D.R Pandya v. R** [1957] EA 336. In the latter case the Court was of the view that:

> *On the first appeal the evidence must be treated as a whole to a fresh and exhaustive scrutiny and that failure to do is on error of law.*

In resolving the above issue, I shall imperatively visit the law which creates the offence upon which the Appellant was arraigned and convicted for, particularly *Section 130 (2)(e) of the Penal Code (supra),* which provides that:

> *A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following*

descriptions (e) with or without her consent when she is under Eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

Also, the Appellant was charged under *Section 131(1)* of the same law which states that:

Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the Court, to the person in respect of whom the offence was committed for the injuries caused to such person.

As a matter of principle, in rape cases, the prosecution side is required to prove the following ingredients: *First*, there was penetration. *Second,* there was lack of consent; and *Third*, it was the Appellant who committed the act.

Regarding penetration, the law clearly spell it as an important ingredient to prove the offence of rape as per *Section 130(4) of the Penal Code (supra)* which states that:

(4) For the purposes of proving the offence of rape- (a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence...

This requirement of the law was strengthened by the Court of Appeal of Tanzania. With regard to the offence of rape of the child, the crucial issue to be proved is penetration even if sraightly. See the case of **Said Majaliwa v. Republic,** Criminal Appeal No. 2 of 2020, Court of Appeal of Tanzania at Kigoma at page 7 and 14 and **Peter Sagadege Kashuma v. Republic,** Criminal Appeal No. 219 of 2019, Court of Appeal of Tanzania at Dar es-Salaam at page 10. This implies that, in any rape case, especially of the child (one under the age of 18 years), the prosecution side is duty bound to prove penetration.

In her submission, Ms. Veneranda argued that, the Medical Doctor (PW4) proved the penetration in his testimony. Unfortunately enough, there is nowhere in his testimony where he stated the same as seen at page 13-14 of the typed trial Court proceedings.

In this case, the prosecution argued that, the evidence of the victim was enough to convict and sentence the accused now the Appellant. I doubt if it was enough. However, I am aware with the principle that, the best evidence in rape cases is that from the victim. As

explained in the case of **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008, **Selemani Makumba v R** [2006] TLR 379. However, that is the general rule which should have some exceptions regarding the nature of the case and assessment of the entire evidences. If such principle is taken as a Church's dogma, there is a high danger in this Country of convicting boys or men draconianly. Parents or guardians or whoever adult persons who is in hatred with a certain boy can couch a girl to manufacture a fake rape case. The effect thereof may be harsh to the wellbeing of our societies.

As such, it is important to ensure that the Court considers the entire evidences from other credible and reliable witnesses. See the decisions of the Court of Appeal of Tanzania in **Majaliwa Ihemo v. The Republic,** Criminal Appeal No. 197 of 2020**, Shabani Daudi v. R,** Criminal Appeal No. 28 of 2000, **Pascal Yoya Maganga v. R,** Criminal Appeal No. 248 of 2017 (both unreported). For instant in the case of **Majaliwa Ihemo** *(supra)* at page 9, the Court observed that:

> *In sexual related trials, the best evidence is that of the victim as per our decision in Selemani Makumba v. R, [2006] TLR 379. We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important*

points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point.

In the case at hand, this Court is of a settled view that, eventhough PW1 was the victim, her evidence is not reliable due to the following reasons:

First; she did not make any alarm when she claimed to be raped while there is evidence in the record which states that it was her first time for her to have sexual intercourse and she felt pain during the act. So, this Court is left in dilemma on whether she really went to the Appellant and got raped. Seemingly, there is a shadow of doubt as regard to that evidence. At page 4 of the typed trial Court proceedings, she testified that:

I did go to the home of accused...he asked for sexual intercourse. I refused as I never had sexual intercourse before and I was still a student. He then forced and took off my clothes. It was skirt, shirt, underpants and tight skin. Then the accused took off his trouser and boxer and he forced his erected penis to my vagina. We then had sexual intercourse with the accused on the bed. I felt bad...I thus remained silent because it was a shameful act.

From a careful reading between the line of the above PW'1 evidence, it can be discovered that, there are some doubts if really the victim had sexual intercourse with the accused in the room at Kahawa Makambako, which is among of the busiest place. A girl can hardly be raped and remain silent.

Second, as a child who was abused, PW1 did not report the incident to any person including her mother (PW3). PW1 did not even report to her friend Rehema Saidi who claimed to be the connector between PW1 and the accused, now the Appellant. Taking into account the said Rehema Saidi did not come to testify, this leaves some doubts on whether if there were any love affairs between the victim and the Appellant.

Third, there is no firm evidence from the victim. The explanation by PW1 at page 4 of the typed proceedings as hinted above falls short of imagination of an ordinary situation of rape of a girl aged 17 years experiencing sex for the first time. For proving penetration, the Respondent's Counsel made reference to page 14 of the typed proceedings where Exhibit 3 (PF3) was admitted. However, the same exhibit proved that PW1 was pregnant. The same was a finding of 28th July, 2020. Noting that PW1 claimed to have been raped on 19th June,

2020 and never reported or informed any one urgently, the same remain a feeble evidence. More to say, it is doubtful as to who impregnated her. More to say, PW1 told the Court that, she never knew a man before such incidents. This being the case, the ingredient of penetration was crucial to be proved.

Thus, regarding the circumstances of this case, nothing forthcoming from evidence of the prosecution could solidly form the basis for the conviction of the Appellant. Therefore, the entire prosecution's evidence cannot be relied upon.

Further, regarding the issue of consent of the victim, it is immaterial in this case because there is no proof of rape. The prosecution side failed to prove to the required standard as per the law, as to whether the Appellant was the one who committed the offence.

Needless to observe, what has been proved by the prosecution side in this case is the impregnation of the victim and not rape of the victim. The medical doctor (PW4) only proved the pregnancy of the victim as per page 14 of the trial Court typed proceedings. The Matron (PW2) corroborated the same at page 8 of the typed trial Court proceedings. It is even not established beyond reasonable doubt on whether it is the Appellant who impregnated the victim.

Therefore, the question here is; whether the proved existence of the pregnancy of the victim proved the offence of rape? And if so, who is responsible? It is my considered observation that this case was poorly prosecuted.

The assertion that, the Appellant during the trial did not put strong question to shake the credibility of the victim's is irrelevant because the Appellant was not duty bound to prove his innocence as per *Section 110(1) of the Evidence Act (supra).* Also, in the case of **Saasita Mwanamaganga v. Republic,** Criminal Appeal No. 65 of 2005, Court of Appeal of Tanzania at Mtwara (unreported), Court observed that:

> *In criminal case, the burden is always on prosecution to prove the case against the Appellant beyond reasonable doubt. The burden never shifts.*

Under the above circumstances, this Court is of findings that the guilt of the Appellant was not proved beyond reasonable doubt. In other words, the prosecution failed to establish the guilt of the Appellant beyond all reasonable doubt. Their evidence was scant enough to convict the Appellant.

In the upshot, this appeal is hereby allowed. In effect, I proceed to reverse the decision, quash the conviction and set aside the sentence

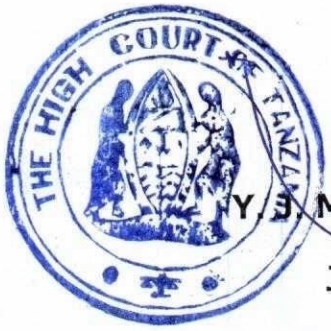
meted out by Resident Magistrate Court of Njombe against the Appellant. The Appellant should forthwith be released from prison unless he is otherwise being held for some other lawful cause. It is so ordered.

Y. J. MLYAMBINA

JUDGE

15/06/2022

Judgement pronounced through virtual Court and dated this 15th day of June 2022 at 09: 40 am in the presence of the Appellant and Counsel Alfred Stephano holding brief of Ms. Rosemary Wambali for the Appellant and Senior Learned State Attorney Ms. Blandina Manyanda for the Respondent. Both parties being stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal explained.



Y. J. MLYAMBINA

JUDGE

15/06/2022