

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)**

AT MTWARA

CRIMINAL APPEAL NO. 66 OF 2021

*(Originating from Criminal Case No. 23 of 2021 of Tandahimba District
Court at Tandahimba)*

SELEMANI ALLY SEIFU.....APPELLANT

VERSUS

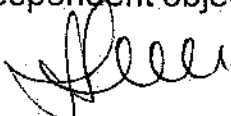
THE REPUBLIC..... RESPONDENT

JUDGMENT

Muruke, J.

Selemani Ally Seif was charged before the District Court of Tandahimba with an offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 R.E 2019, he was convicted and sentenced to thirty (30) years imprisonment and ten (10) cane strokes at the beginning of the sentence. Being dissatisfied, he filed present appeal raising eight grounds in the main petition of appeal and four additional grounds makes total of 12 grounds.

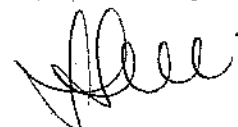
On the date set for hearing, respondent was represented by Enosh Kigoryo State Attorney, while the appellant appeared in person, he thus prayed for his grounds to be received as his submission in chief, and reserve his right to make rejoinder if need arise, prayer which was not objected by respondent counsel. Court then, asked learned State Attorney to submit replying grounds of appeal. Counsel for the respondent objected

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the appeal, supported conviction and sentence meted by trial court. He joined grounds 2 and 3 of the petition of appeal filed on 23/09/2021, then submitted that, complaint on ground two is on non-compliance of section 127(2) of the Evidence Act, Cap 6 R.E 2019. According to the trial court records, at page 4 and 5 court did conduct inquiry to witness who was aged 10 years. At page 5 of the typed proceedings shows that, victim promised to speak truth but not lie. In addition, PW1 affirmed, be it as it may, the procedure of PW1 affirming did not in any way violate the procedure, or cause any injustice.

On grounds 1,4,6,7 and 8 he submitted that, there was enough evidence by the prosecution, and that prosecution did prove the case beyond reasonable doubt. At the trial court, appellant was accused of raping PW1, who was 10 years, thus, statutory rape. To prove that offence first is age of the victim. PW1 (victim) in the cause of inquiry she said she is aged 10 years. In the preliminary hearing one of the issues not disputed was the age of the victim as seen at page 2 of the trial court proceedings. Second issue is penetration, PW1 victim at page 5 of the proceedings she said how appellant penetrated her. Evidence of victim was direct and clear. Not only PW1 (victim), but also Doctor PW3 proved that PW1 was penetrated. Then PW1 victim proved it is the appellant. At page 13 of typed proceedings, appellant then accused just denied the offence there was no challenge of PW1 and PW3 evidence. Ground 5 State Attorney submitted that; it is true appellant did not admit the offence, at trial court. However, by not admitting the offence did not exonerate the appellant, because prosecution paraded evidence that grounded conviction.

On ground one of the additional ground, he adopted what he submitted on ground 2 and 3 of the petition of appeal. And further submitted that looking at the coherent of the evidence of PW1 the victim, aged 10 years,

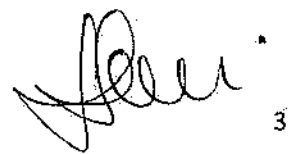
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and relationship with the victim, she testified telling the truth as seen at page 5 of the trial court proceedings. Thus, evidence of PW1, (victim) was strong to ground conviction. On ground 3 of the additional grounds of appeal, Respondent counsel submitted that, according to page 11 of the trial court typed proceedings shows that exhibit P1 PF3 was ready out loudly. Ground 4, Learned State Attorney adopted what he submitted on ground 1,4,6,7 and 8 of the petition of appeal.

In rejoinder, appellant submitted that, prosecution side did not arraign proper witnesses namely mama Asanati, Mama Juma who are neighbours.

Having heard both appellant and respondent, gone through grounds of appeal and the evidence on records, it is not disputed that at the time she was raped, PW1 was aged 10 years, thus statutory rape. To prove statutory rape, two elements must be exist, **first** is the age of the victim, **second** is penetration and availability of evidence to ground conviction. Age of the victim is very important to determine the proper punishment to impose to the accused. It can be proved by the victim, parents, school teacher where the victim was registered or medical practitioner or any other relatives who has, a knowledge on when victim was born. In the case of Issaya Renatus Vs. The Republic, Criminal Appeal No. 542 of 2015 CAT (unreported) at Tabora, the court held: -

We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(1)(2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of birth certificate.



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It was on the record that, at the time victim testify, she was a student of standard one at Chiumo Primary School. Likewise, when the trial court recorded her evidence conducted an inquiry to see the credibility of the victim. Moreover, at the Preliminary Hearing, the appellant did not dispute the age of the victim. All these facts indicated that the victim was under the age of 18 years.

It is settled law that penetration however slight is sufficient to constitute sexual offence. In the case of **Omary Kijuu Vs. The Republic, Criminal Appeal No. 39 of 2005** (unreported) Court of Appeal at Dodoma at page 8 held;

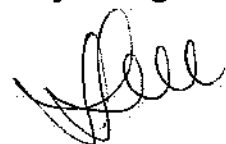
"..... But in law, for the purposes of rape, that amounted to penetration in terms of section 130(4) (a) of the Penal Code Cap. 16 as amended by the sexual offences special provisions Act 1988 which provides: For the purposes of proving the offence of rape- penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."

It is principally that, the best evidence in rape cases is from the victim as reiterated in various cases including the case of **Stephano Shabi Vs. Republic, Criminal Appeal No. 217 of 2019** when referring the case of **Selemani Makumba Vs. 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."

The victim at page 5 of the trial court typed proceeding testified that: -

As usual, on 19/03/2021, I slept on my bed but in single room. When reached the high night, I saw the accused leaving his bad to my bed while naked. Later on, he put off my clothes and ordered me to put apart my things.



He then took his penis and inserted into my vagina. I felt pain and cry but that did not help me.

The above piece of evidence of PW1 victim is supported by the testimony of Dr Magret Michael Msafiri (PW3) from Tandahimba District Hospital who examined the victim after being taken to hospital. She testified at page 10 of the typed proceedings that: -

In physical examination, I saw bruises and blood stain in the inner part of her vagina. I think the same was caused by blunt object.

During cross examination PW3 the doctor responded that;

I found her with bruises and blood stain in the inner part of her vagina. The bruises, blood stain in her inner part of the vagina together with loss of hymen at her age suggests that she was raped.

The appellant complained further that, the procedure of recording the evidence of the victim especially section 127(2) of the Evidence Act, Cap 6 R.E 2019 was not followed. The record is clear that at the time of giving evidence the victim was at the age of 10 years. Section 127(4) of the Act, defines who is a child of tender age as follow;

"For the purpose of subsection (2) and (3), the expression of tender age means a child whose apparent age is not more than fourteen years."

So, because at the time she gave her evidence PW1 was a child of tender age, the procedure for taking her evidence is provided under section 127(2) of the evidence Act, which state that: -

"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."

I have critically reviewed the evidence on record, at the trial court when the victim testified, the trial court conducted inquiry and the victim

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promised to speak the truth not lies. At page 4 and 5 of the typed proceedings trial court recorded as follows: -

PROSECUTION CASE OPEN

PW1. Flavian Salum, 10 years of age, student at Chiumo Primary School.

INQUIRY

Qn: what is your name?

Ans: my name is Flavian Salum

Qn: are you schooling?

Ans: yes, I am schooling at class one at chiumo Primary School

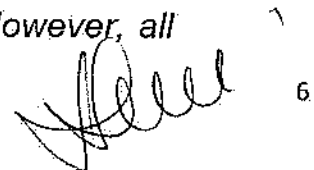
PW1: promise to 4speak truth but not lies; affirmed

EXAMINATION IN CHIEF

Then the trial court proceeded recording the evidence of the victim. The procedure of recording the evidence of the victim was followed as laid down under section 127(2) of the Evidence Act. The victim as a child of age 10 years old, promised to speak the truth not lies.

Another complaint is the failure by the trial court to convict and sentencing the appellant relying on exhibit P1 (PF3) tendered by PW3 unprocedural. It is a requirement of law that, once a document tendered as exhibit, once admitted in court, the contents of that documents should be read over in court to the existent accused can hear and understand. Failure to do so, is fatal and the only remedy is to expunge such document from the record. In the case of **Gode Cleoplace Vs. The republic, Criminal Appeal No. 41 of 2019**(unreported), the court stated that: -

"Apart from the prosecution witnesses who testified in court, there were three exhibits which when tendered before trial court and admitted namely, the certificate of seizure, valuation form and inventory form. However, all



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these documents were tendered but not read in court to allow the appellant to know the contents and challenge them. This procedural error is contrary to the agreed principles of laws which have been stated by the higher court."

Similar principle was stated in the case of **Mbaga Julius Vs. The republic, Criminal Appeal No. 131 of 2015**(unreported) at Bukoba, court stated that;

"Failure to read out documentary exhibits after their admission renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record."

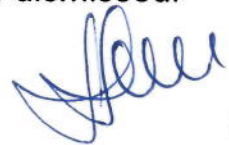
In this appeal, the prosecution tendered exhibit P1 (PF3) as recorded at page 10 and 11 of the proceedings. The said exhibit was tendered by PW3 Dr Magret Michael Msafiri, parts of her evidence is quoted as follows: -

Lastly, I filled PF3 and gave them. This is the PF3 in which I filled it. I pray to tender it.

Accused. No objection

Court: the said PF3 is shown and read over in loud voice and received as exhibit P1.

With due respect, looking on the procedure shown above, the trial court adhered to the required principle of admitting exhibits. After admission of the PF3 the document was read loudly in court for the appellant to understand the contents of the PF3 to afford him to make his defense or any objection. Moreso, the appellant never objected the PF3 or raise any question at the time when the PF3 was tendered by PW3. Thus, exhibit P1(PF3) was properly admitted. In totality, prosecution proved its case beyond reasonable doubt. This appeal has no merits, it is dismissed.



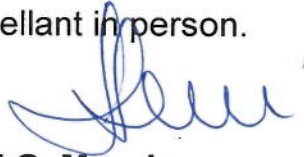


Z.G. Muruke

Judge

29/07/2022.

Judgment delivered in the presence of Wilbroad Ndunguru State Attorney
for the respondent and the appellant in person.



Z.G. Muruke

Judge

29/07/2022.