

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 113 OF 2021

***(Original Criminal case No. 226 of 2020 of the District Court of
Bunda District at Bunda)***

BETWEEN

MATIMO JOSEPH @ LUTEN APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

A.A. MBAGWA, J.

This is an appeal against both conviction and sentence imposed by the trial District Court of Bunda in Criminal Case No. 226 of 2020.

The appellant, Matimo Joseph Luten was arraigned before the trial court on a charge of rape contrary to sections 130(1)(2) (e) and 131(1) of the Penal Code. It was alleged in the particulars of offence that the appellant on 13th day of November, 2020 at Kiroleli village within Bunda district in Mara region had carnal knowledge of the victim who was aged 11 years. The appellant denied the charge hence the case proceeded to a full trial.

In the endeavours to prove the offence, the prosecution side paraded four witnesses and one exhibit. The prosecution witnesses who appeared before the trial court are the victim, Dorica Japhet, Fatuma Hamadi Hamisi (clinical officer) and Wambura Mgongo. However, Dorica Japhet was declared a hostile witness after the prosecution alleged that her testimony was completely contrary to what she stated at police. In addition, the prosecution tendered one documentary evidence to wit, PF3 (exhibit PE1).

It was the prosecution contention that on 13th day of November, 2020, the victim went to the river to fetch water. As she was coming back, the appellant called her. The appellant pretended that he wanted to send her to buy him cigarette from the centre. As the victim heeded to the appellant's call, he pulled her inside his bed room and had sexual intercourse with her. According to the prosecution evidence in particular of the victim, after raping her, the appellant locked the victim inside the room and left. Then Dorica Japhet came and opened the door for the victim. Upon interviewing her, the victim told Dorica Japhet that she had been raped by the appellant. As such, Dorica Japhet advised the victim to go home and inform her grandparents with whom she was living.

Wambura Mgongo (PW3), the victim's grandfather, while at home, saw the victim crying. On asking her as to what was happening, the victim told him

that she had been raped by the appellant. It was the evidence of PW3 that he took the victim to Nyamswa Police Station where they were issued with a PF3. Thereafter, PW3 took the victim to Nyamswa Health Centre where she was attended by a clinical officer, Fatuma Hamadi Hamisi (PW2). Fatuma testified that on 13th November, 2020 she examined the victim and observed vaginal discharge in the victim's female organ. She also found that the victim's hymen was perforated. However, PW2 testified that she did not observe any blood.

In defence, the appellant stood a solo defence witness. He vehemently denied the allegations leveled against him. He stated that on 14th day of November, 2020, while at the centre, he was arrested and taken to Nyamswa Police Station and later he was submitted to Bunda Police Station. He claimed that he knew nothing about the offence he was charged with. The appellant told the trial court that the case was framed up against him because he was not in good terms with the victim's grandfather (PW3) as he accused him of uprooting his sisal.

Upon conclusion of the case, the trial magistrate was satisfied that the case was proved beyond reasonable doubt. He thus found the appellant guilty and convicted him of rape. Consequently, he sentenced him to thirty-year imprisonment.

Aggrieved by the conviction and sentence, the appellant has approached this court to assail the decision of the trial court. The appellant filed a petition of appeal containing several complaints all of which basically criticize the trial court for entering conviction against the appellant based on insufficient evidence.

When the matter was called on for hearing, the appellant appeared in person to fend for his appeal whilst the respondent/Republic was represented by Nimrod Byamungu, learned State Attorney.

Mr. Byamungu supported the appeal on legal grounds. To start with, he submitted that the victim's testimony (PW1) was received contrary to the law. He said that the witness was 11 years old hence her evidence was to be taken in compliance with section 127(2) of the Evidence Act. Byamungu expounded that the trial magistrate was duty bound to pose some questions before he arrived at the findings that the witness promised to tell the truth. Citing the case of **Makenji Kamura vs. the Republic**, Criminal Appeal No. 30 of 2018, CAT at Mwanza, the learned State Attorney submitted that a mere remark by the magistrate is not proof of compliance with the precondition. Further, Mr. Byamungu referred this court to the case of **Godfrey Wilson vs. the Republic**, Criminal Appeal No. 168 of 2018, CAT at Bukoba at page 13 & 14 where the procedure for recording the evidence

of a child of tender age was underline. He concluded that what is in the PW1's testimony is not enough and the anomaly is fatal whose effect is to expunge the victim's testimony from the record.

Mr. Byamungu continued that having expunged PW1's testimony, the remaining evidence is insufficient to ground the conviction. The learned State Attorney was therefore opined that the offence was not proved beyond reasonable doubt. In fine, he prayed the court to allow the appeal, quash conviction and set aside the sentence.

The appellant, on his part, had little to comment in addition to the respondent's submission. He subscribed to the respondent's position and insisted to be acquitted.

I have dispassionately read the record of appeal, parties' submissions and the grounds of appeal. The main issue for determination of this appeal is whether, the trial court was right to arrive at conviction verdict on the basis of evidence adduced.

To start with the testimony of the victim who was of tender age, it is now a requirement that such witness must promise to tell the truth before his evidence is received. Further, it has been held that before the witness makes a promise, the trial magistrate or a judge should conduct a sort of inquiry by

asking the child some simplified questions and the same must be recorded. See the case of **Geofrey Wilson vs the Republic**, Criminal Appeal No.168 of 2018, CAT at Bukoba. In this case, the record is quite loud that the witness promised to tell the truth and the same was recorded. However, there was no inquiry done by magistrate as directed in the case of **Geofrey Wilson** (supra). As such, PW1's evidence was taken contrary to the law as rightly submitted by the learned State Attorney. Consequently, PW1's evidence is liable to be expunged.

Apart from PW1's testimony, there are other issues in the prosecution evidence which leave a lot to be desired. PW2 Fatma Hamadi Hamis told the court that she works at Nyamswa Health Centre and that on 13th November, 2020 at around 07:00pm attended the victim who came in the company of her grandfather. Fatma proceeded that she examined the victim and thereafter she filled in the PF3 (PE1) which the victim came with. However, the said PF3 (PE1) contains contradictory information with PW2's testimony. Exhibit P1 bears a stamp of Ikuzu Health Centre and not Nyamswa Health Centre. Further, the exhibit is dated 16th November, 2020 whereas PW2 said that she attended the victim and filled the PF3 on the very fateful day i.e., 13/11/2020. Indeed, this fatal contradiction greatly dents the evidence of PW2 and exhibit P1.

In view of the above pitfalls identified in the prosecution evidence, it necessarily follows that it was not safe for the trial court to ground conviction based on such questionable prosecution evidence. I therefore hold that the trial magistrate erred in law to convict the appellant on weak prosecution evidence.

In the event, I allow the appeal, quash conviction and set aside the sentence imposed by the trial court. The appellant should be released immediately unless he is held for other lawful purpose.

It is so ordered

The right of appeal is explained.




A.A. Mbagwa

JUDGE

19/10/2022