

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBA DISTRICT REGISTRY)**

AT BUKOBA

CRIMINAL APPEAL NO. 100 OF 2021

(Originating from Criminal Case No. 44 of 2021 of District Court of Biharamulo at Biharamulo)

FROLIAN JOEL----- APPELLANT

VERSUS

REPUBLIC----- RESPONDENT

JUDGEMENT

Date of Last Order: 23/02/2022

Date of Judgment: 04/03/2022

Hon. A. E. Mwipopo, J.

The appellant namely Frolian Joel being aggrieved with the decision and sentence of the Biharamulo District Court in Criminal Case No 44 of 2021 filed this appeal. The appellant was charged in the District Court for the offences of Rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2019. The particulars of the offence reveals that on 23rd March, 2021, at about 21:00 hrs at Biharamulo Town within Biharamulo District in Kagera Region did have sexual intercourse with one WW (the name of the victim is withheld for the

purpose of protecting her), a girl aged 11 years old. The prosecution called a total of 5 witnesses and tendered one exhibit to wit a PF3 – Exhibit P1 to prove their case. The appellant testified on oath in his defence. The trial Court after hearing the prosecution and defence cases convicted the appellant for the offence charged and sentenced him to serve thirty years in jail. The trial Court also ordered the appellant to compensate the victim a sum of Tshs. 500,000/=.

As it was stated earlier, the appellant was aggrieved by the decision of the District Court and filed the present appeal against the said decision. In his petition of appeal, the Appellant has raised a total of five grounds of appeal as provided hereunder:-

- 1. That, the trial magistrate erred in law and facts by relying mainly on hearsay evidence which is completely bad in law and expert evidence which did not link the appellant with the crime he stands convicted with.*
- 2. That, the trial magistrate erred in law and facts by admitting procedural irregularities and apprehension of the accused and evidence which amounted to conviction and sentencing the accused.*
- 3. That, the trial Magistrate erred in law and facts by not setting out the reasons for the decision reached contrary to the requirement of the law.*
- 4. That, the trial Magistrate erred in law and facts to convict the appellant by relying on the prosecution evidence which did not prove their case*

beyond reasonable doubt; instead they left a lot of doubt behind the matter at hands.

The appellant who appeared in person prayed for his grounds of appeal which are found in the Petition of Appeal to be considered by the court and the court to allow his appeal.

In response, Ms. Happiness Makungu, State Attorney appearing for the Respondent, opposed the appeal. She submitted on the first ground of appeal that the trial court in its judgment relied on the testimony of the victim of the incident to reach decision. The victim's evidence was supported by PW3 who also saw the incident as it is provided in page 13-16 of the typed proceedings. It was PW3 who informed victim's mother about the incident. Also the PW4 expert testified that the victim was not virgin.

In the second ground of appeal, the Counsel for the Respondent submitted that she have not come across any procedural irregularities in the proceedings of the trial court. Then, she submitted on the appellant's third ground of appeal that the trial court properly raised issues and determined the issues. The trial Court provided its reason for reaching decision as it is seen from page 10 of the judgment. The trial court considered defence evidence before convicting the appellant. Thus, the trial court made proper analysis of the evidence available before reaching its decision.

On the last ground of appeal, the Counsel said that the evidence of the victim prove that it was the appellant who raped her. The court found that the victim is a credible witness. Also, the age of the victim was proved by victim's mother. This evidence proved all ingredients of statutory rape to the required by the Law which is beyond reasonable doubt. Thus, the trial court rightly convicted the appellant.

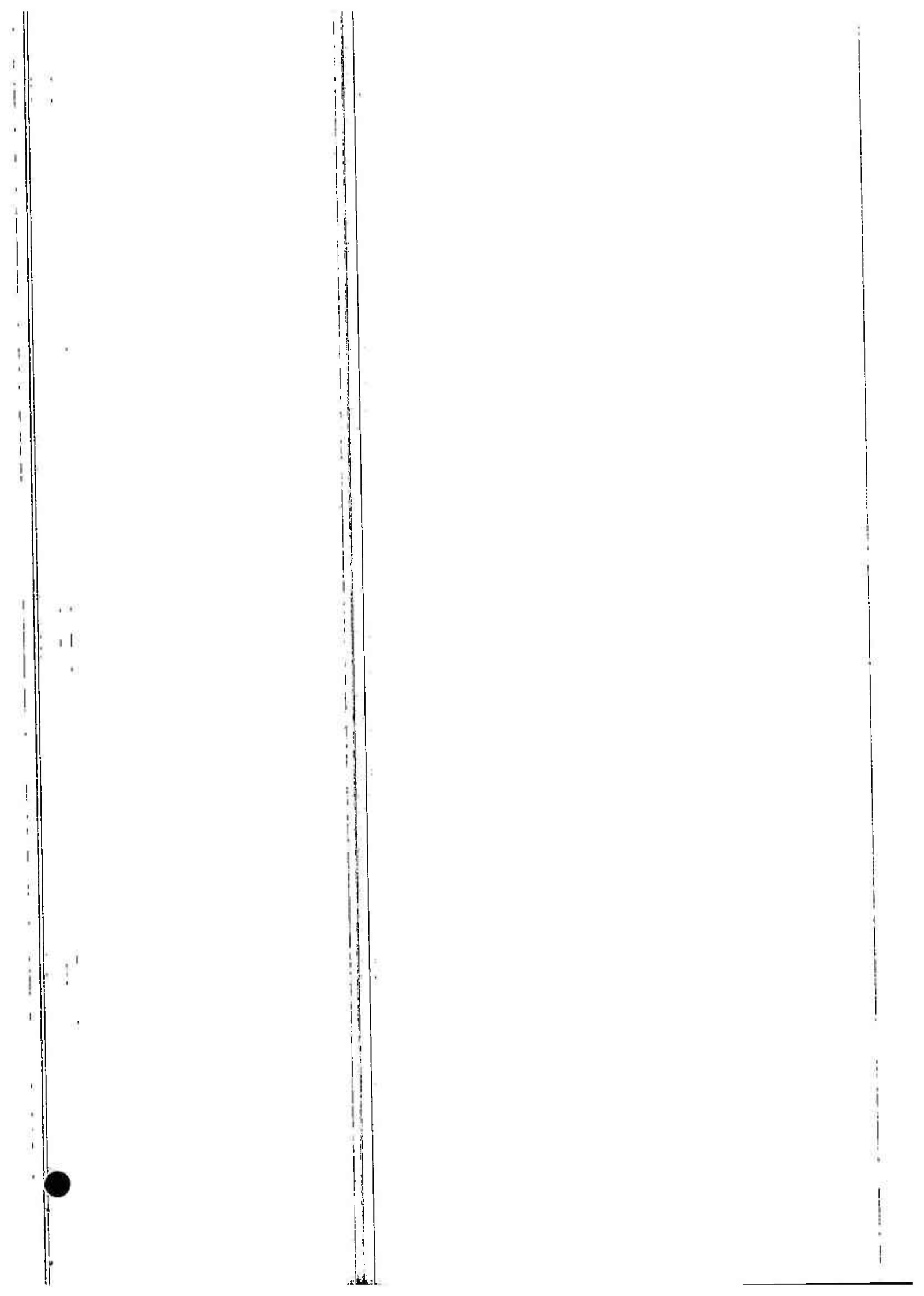
After considering the submissions by both sides and the record of appeal, the Court is called upon to determine whether the appeal has merits.

In determination of the appeal all the grounds of appeal will be considered. This being the first appeal, I'm aware that the Court main task is to re-evaluate the entire evidence adduced in the trial Court and subject it to a critical scrutiny and arrive at an independent decision on the grounds of appeal raised by the appellant.

I will start with the determination of the appellant's first ground of appeal that the trial Court relied in hearsay evidence to convict the appellant. As it was argued by the Counsel for the respondent, the trial court relied on the testimony of the victim of the incident to reach its decision. This is found from page 10 to 13 of the typed judgment. The trial Court found that victim's evidence was supported by other evidence which proved that it was the appellant who raped the victim. Thus, this ground is devoid of merits.

In the second ground of appeal, the alleged procedural irregularity is not clear as the petition of appeal is silent on it. But, going through the record of proceedings, the Court did not find any procedural irregularity as it was alleged by the appellant. On the issue that his apprehension was not proper, the arrest of the appellant is found in the testimony of PW1 and PW5. PW1 testified that after she received the information about the incident and interrogate the victim, she reported the matter to the police. The police gave PW1 a PF3 and she took the victim to Wivina District Hospital for checkup. After the checkup, the PW1 took the PF3 back to the police who arrested the appellant. PW5 in his testimony he said that the appellant was arrested on 29th March, 2021 at Kasusura Market. The same was stated by the appellant in his testimony. Despite the facts that there was delay for 3 days in his arrest after PW1 alleged to have reported the matter to the police, the said delay was not inordinate. Thus, this ground has no merits.

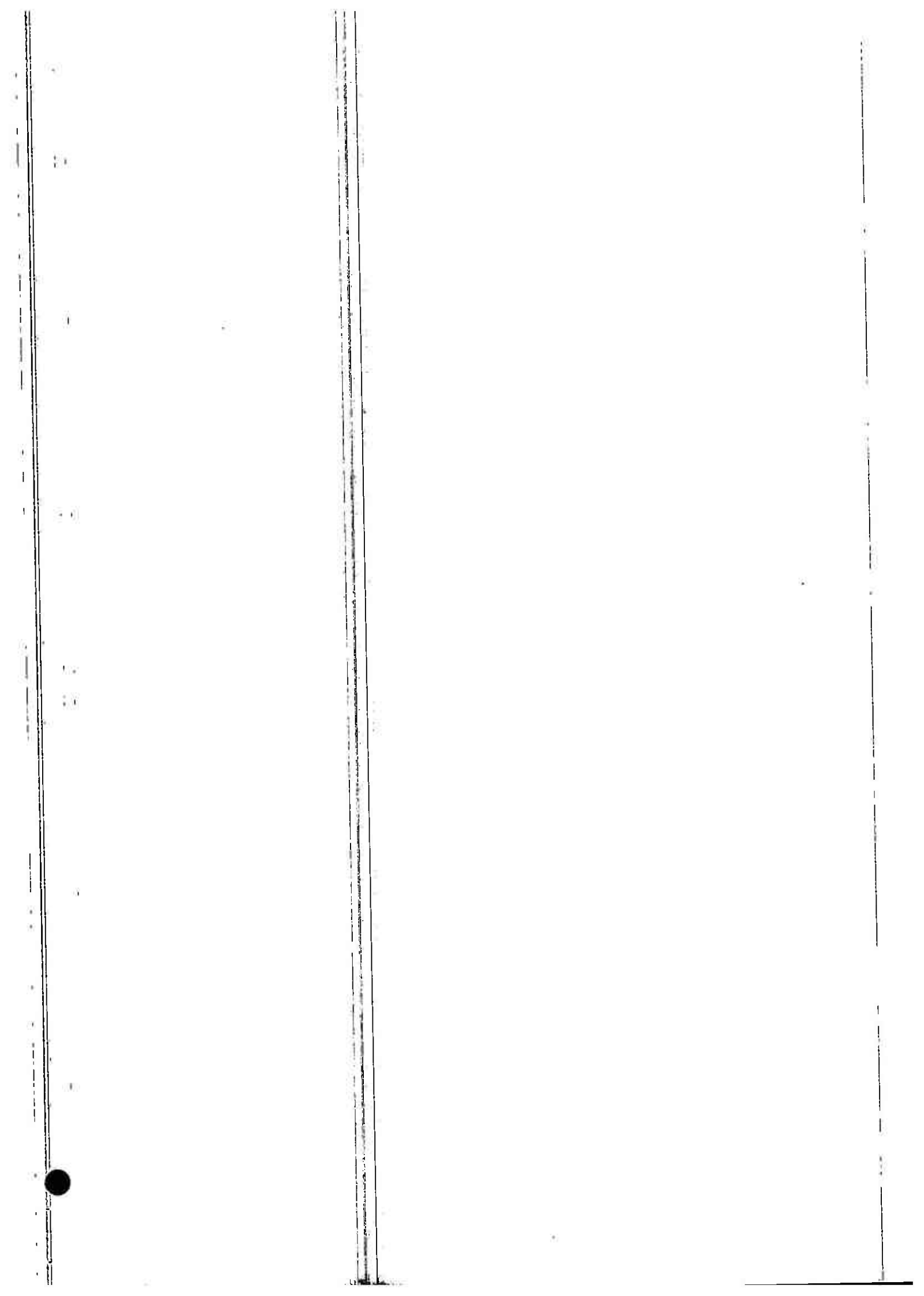
The appellant's third ground of appeal is that the trial Magistrate erred in law and facts by not setting out the reasons for the decision reached contrary to the requirement of the law. The counsel for respondent reply to the ground was that the trial court properly raised issues and determined the issues before it. I perused the said judgment and I'm satisfied that trial Magistrate evaluated all the evidence adduced in Court and reached its decision. The trial Court said in the judgment that the evidence of victim – PW2 proved that it was the appellant who



committed the offence and that evidence is corroborated by testimony of PW3 and content of Exhibit P1. The trial Court considered defence evidence and was satisfied the same raises no doubt at all as PW3 delayed to inform PW1 about the incident because she was hesitant to tell her as they are not close. As result, she has to tell PW1's friend whom they decided to go together to tell the PW1 about the incident. Also, PW2 said that she did not tell her mother – PW1 about the incident as the appellant threatened her not to tell anybody about the incident otherwise he is going to beat her. Thus, the trial Court properly provided the reason for its decision in the judgment according to the law. For that reason, the 3rd ground of appeal has no merits.

The appellant's last ground of appeal is that the prosecution failed to prove their case without doubt. Looking at the evidence in record, the same prove that the appellant committed the offence of rape to the victim. In proving the offence of statutory rape under section 130 (1) and (2) (e) of the Penal Code, Cap. 16, the prosecution has duty to prove that there was penetration and the victim was under the age of 18 years. The trial court found that the victim is a credible witness and she proved the offence.

In the present case the age of victim was well proved by the testimony of victim's mother – PW1 that the victim was born on 1st February, 2010. This means that at the time of incident she was below the age of 18 years. The victim's age

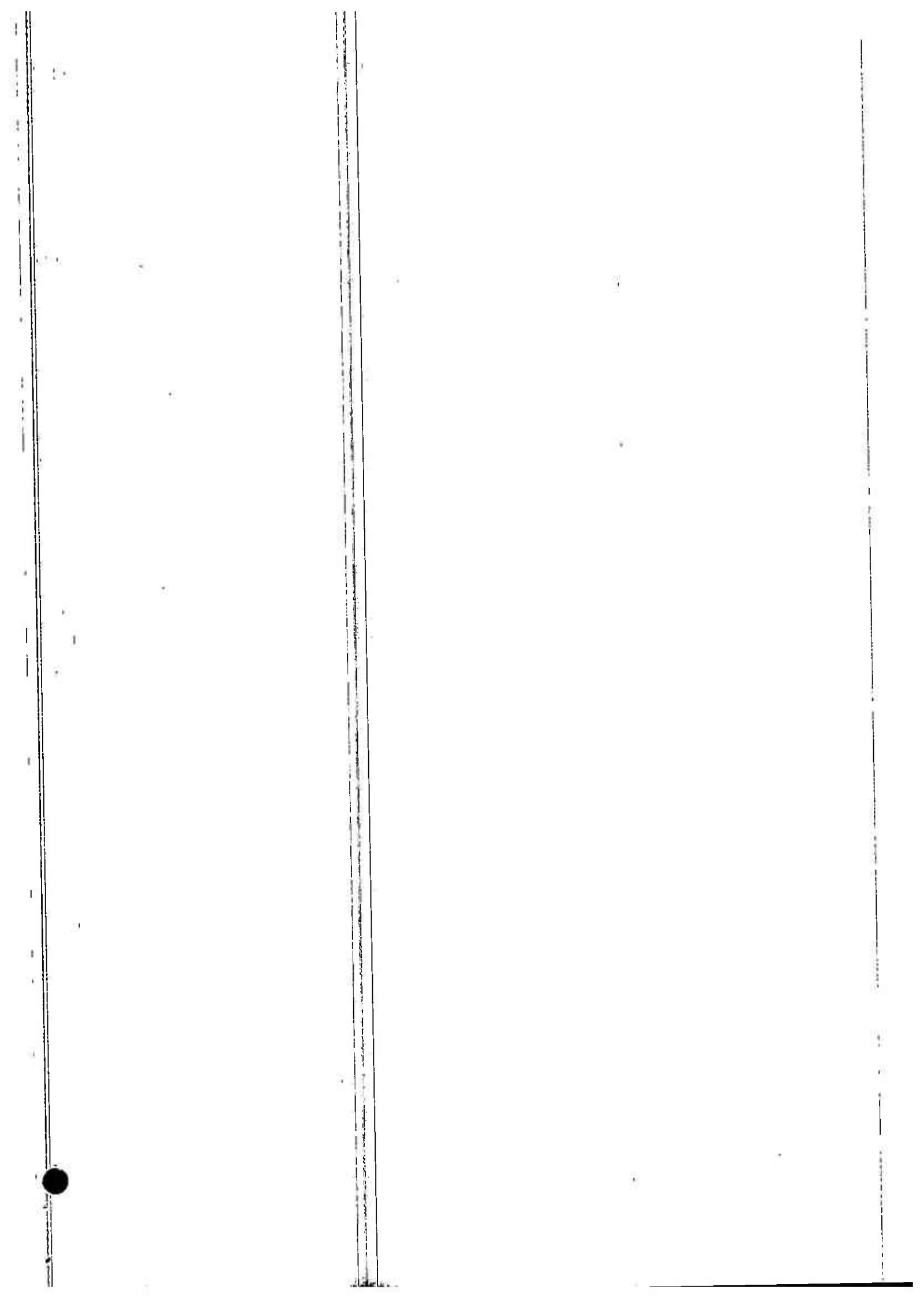


may be proved by her or his testimony, the testimony of her/his parents, relatives, medical practitioner or documentary evidence and the trial Court may make findings on the age of the victim. This was stated by the Court of appeal in the case of **Issaya Renatus V. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (Unreported). Thus, the first element of the offence of statutory rape which the age of the victim to be below the age of 18 years was proved.

The second important element to be proved in a charge of rape offence is presence of penetration. It is a settled principal of law that the best evidence in rape cases is that of the victim. In the case of **Selemani Makumba v. Republic**, [2006] TLR 379, the Court of Appeal held that:-

"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 woman where consent is irrelevant, that there was penetration."

In this case, the victim's (PW2) evidence found in page 12 of the typed proceedings. The proceedings shows that PW2 testified without oath after she promised to tell the truth to the Court in accordance with section 127(2) of the Evidence Act, Cap. 6, R.E. 2019. Currently, 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. This position was also



stated by the Court of Appeal in the case of **Msiba Leonard Mchere Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015, (unreported).

PW2 testified that on 23rd March, 2021 at night hours the appellant arrived in their room while PW2 and her young brother were asleep, the appellant waked her up, undressed her and inserted his penis in her vagina. At that time victim's mother was still at her work place. She said that it was not the first time the appellant did the act to her. This evidence from the victim proved that the appellant penetrated the victim. The evidence by PW2 is supported by testimony of PW3 who saw during the incident that the appellant was in top of the victim and informed the victim's mother – PW1 about the incident. Also, the Exhibit P1 prove that the victim was used to have sex and she is not virgin. Thus, the evidence proved without doubt that appellant did rape the victim on the date of incident. Thus, the grounds of appeal No. 4 has no merits.

Therefore, I find all grounds of appeals are devoid of merits and as result the appeal is dismissed accordingly. The decision of the trial Court is upheld.



A.E. Mwipopo

Judge

04.03.2022

The Judgment was delivered today, this 04.03.2022 in chamber under the seal of this court in the presence of the Appellant and the counsel for the Respondent. Right of appeal explained.



A handwritten signature in blue ink, appearing to be 'A. E. Mwipopo', written over a horizontal line.

A. E. Mwipopo

Judge

04.03.2022