

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MWANZA  
AT MWANZA**

**CRIMINAL APPEAL NO. 41 OF 2023**

**PETRO NGELEJA.....APPELLANT**  
***VERSUS***  
**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*15<sup>th</sup> June & 23<sup>rd</sup> June, 2023*

***Kilekamajenga, J.***

The appellant was charged with the offense of rape contrary to **section 130(2)(e) and 131 (3) of the Penal Code, Cap. 16 RE 2019**. The charge shows that, on 04<sup>th</sup> June 2022 at 10:00 hours at Misambo Village within Magu District in Mwanza Region, the appellant raped a girl of six years. The prosecution was prompted to parade five witnesses after the appellant pleaded not guilty to the charge. PW1 who was just a passer-by witnessed the appellant raping the victim near a sisal at 10 am. She (PW1) called other people who were passing-by and arrested the appellant and took him to the police station. At that time, the victim had blood stains on her pants and vagina. PW1 went further and informed the victim's father about the incident at Nyanguge. PW2 who was the victim told the court that the appellant undressed and lied on her causing pain in her vagina. She identified the appellant as the person who raped her. PW3, being the father of the victim, confirmed that the victim was six (6) years old and



that he was informed about the rape of her child by PW1 along the road. PW3 went home and found the victim sleeping; he took her to the police station and the appellant was later arrested. PW4 was the Medical Officer who examined the victim. He also confirmed that the victim he examined was six years old. Upon examination, PW4 observed blood stains and that the victim had no hymen and was perforated. He tendered the PF3 to couple his evidence which was admitted as exhibit P1. PW5 investigated the case and interrogated the appellant who confessed to have raped the victim. He tendered the appellant's cautioned statement which was admitted as exhibit P2. In his defence, the appellant confirmed to have been arrested on 04<sup>th</sup> July 2022; he further alleged to have been tortured and forced to confess and that he signed some papers without knowing their contents.

The final trial of the case led to the conviction and sentence of the appellant; he was sentenced to serve thirty (30) years in prison together with 'hard work' and corporal punishment. Resentful with the decision of the trial court, the appellant preferred an appeal before this court with seven grounds which are coached thus:

- 1. That, no penetration was proved.*
- 2. That, s. 127(2) of TEA (Cap. 6 RE 2022 was not complied due to the fact that the victim did not promise to tell the truth.*

3. *That, the incidence (sic) took place in a public area why was not (sic) even raised an hue for help (sic).*
4. *That, the trial magistrate failed to comply s. 210 of CPA (Cap. 20 RE 2022).*
5. *That, the presiding magistrate unreasonably failed to mirror and consider my defence.*
6. *That, the age of the victim was not proved as required by law.*
7. *That, the prosecution failed to prove the offence beyond all reasonable doubt.*

When defending the appeal, the appellant who was unrepresented urged the court to adopt the grounds of appeal and set him at liberty. In his belief, the case was doctored because he worked as a herdsman for somebody called Mariam who had grievances with the victim's mother. On the fateful day, he was in the bush and a person unknown arrested him.

In rebuttal, the learned State Attorney, Mr. Adam Murusui prodded for the dismissal of the appeal while urging this court to confirming the conviction and sentence meted against the appellant. Expounding on the second ground, the counsel acknowledged on the irregularity of failure to record the victim's promise to tell the truth. However, such failure did not mean that the victim's evidence was fallacious nor lacked authenticity. In his view, the victim's evidence ought to benefit from the provisions of section 127(6) of the Evidence Act, Cap. 6 RE

2022. The counsel's argument was fortified with the principle of the law stated by the Honourable Court of Appeal in the case of **Wambura Kigingira v. Republic**, Criminal Appeal No. 301 of 2018, CAT at Mwanza (unreported). Furthermore, the victim's evidence was reinforced by the testimony of PW1 who was an eye witness to the victim's rape. PW4 examined the victim and found stains of blood, ruptured hymen and clear penetration. Such pieces of evidence prove the offense of rape even when the victim's evidence is expunged. The counsel referred the court to the case of **Dafa Mbwana Keddy v. Republic**, Criminal Appeal No. 65 of 2017, CAT at Tanga (unreported) arguing that an eye witness who saw the appellant in *flagrante delicto* gives good evidence. He prodded the court to dismiss this ground of appeal.

When addressing on the first ground, the counsel stressed further that, the evidence of PW1 when considered in-line with section 127(6) of the Evidence Act, it is sufficient to warrant the conviction. Also, the evidence of PW1 who saw the appellant raping the victim answers the third ground. The fourth ground lacks merit as section 210 of the Criminal Procedure Act was complied. On the fifth ground, the trial magistrate considered the appellant's evidence and there was nothing to fault the prosecution evidence. The counsel further resisted the sixth ground because the age of the victim was proved by the victim's father (PW3.) According to the case of **Bore Cliff v. R, Criminal Appeal No. 193 of**

**2017**, the age of the victim may be proved by the parent, guardian or relative. On the last ground, based on the evidence of PW1, PW2, PW3, PW4 and PW5 the counsel believed the case was proved beyond reasonable doubt.

When rejoining, the appellant did not raise any substantial argument worth noting.

In this case, the appellant raised seven grounds which I stand to address them accordingly. On the first ground, the appellant alleged that penetration was not proved. I have already displayed the evidence adduced during the trial. PW1 found the appellant raping the victim; she called the assistance of passer-by and apprehended the appellant. PW1, being the only eye witness of the incident, observed blood gushing from the victim's vagina. The dripping of blood from the victim's vagina was clear evidence that the victim who was young and sustained injury after her vagina was perforated. The victim was later taken to the Medical Officer (PW4) for further examination who also confirmed that the victim's hymen was perforated. He also observed blood stains as a sign that the victim's private part was penetrated. The evidence at hand does not leave any doubt that the victim was penetrated and sustained injury.

On the second ground, the appellant argued that section 127(2) of the Evidence Act was not complied when the trial court recorded the victim's evidence. In response to the appellant's argument, the learned State Attorney was of the opinion that, the anomaly could be cured by sub-section 6 of the same section. He further argued that, even in failure to comply with the law, the evidence proving rape is beyond reasonable doubt as PW1 found the appellant in *flagrante delicto*. In addressing this ground, I take the discretion to reproduce section 127 (2) and (6) for further discussion. The two sub-sections provide:

*127.-(1) N/A*

*(2) 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 any lies.*

*(3) N/A*

*(4) N/A*

*(5) N/A*

*(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, **after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits**, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth. (Emphasis added).*

The above provisions of the law obliges the trial court before recording the evidence of a child of tender age to ensure that the child promises to tell the truth and not lies. I visited the proceedings of the trial court and found non-compliance of the above provision of the law. The trial magistrate did not record whether PW2 promised to tell the truth before giving her testimony something which may lead to expunge of the victim's evidence. The learned State Attorney urged the court to cure the anomaly with section 127(6) of the Act. However, subsection (6) specifically allows the trial court to assess the credibility of a child and apply the evidence even if such evidence is not corroborated. In the case at hand, the victim's evidence who was just six years was just brief though she was able to identify the appellant. Subsection 6 may not be relevant in the case at hand as the victim did not give further account of the event apart from confirming that she was raped by the appellant. Furthermore, the victim's evidence was coupled with the testimony of an eye witness (PW1) and PW4 who examined the victim. Even if the victim's evidence is expunged, the court cannot jettison the good evidence of PW1 who witnessed the appellant in *flagrante delicto* and participated in his arrest. Therefore, this ground is devoid of merit and I hereby dismiss it.

On the third ground, the appellant argued that, if the incident happened in a public place, the victim could have called for help. I find no reason to be detained with this ground as the evidence clearly shows that, PW1 spotted the appellant raping the victim at sisal plant at around 10 hours. She (PW1) sought assistance from passer-by and the appellant was arrested. On the fifth ground, the appellant impugned the decision of the trial court for failing to consider his defence. The ground impelled me to visit the trial court's proceedings; the appellant's evidence did not raise any substantial information to shadow the prosecution's evidence. This ground also has no merit.

On the sixth ground, the appellant alleged that the age of the victim was not proved. I have displayed the evidence which shows that, the victim informed the trial court about her age; she was six years old when she was raped. Her father (PW3) also confirmed the victim to be six years old. The Medical Officer (PW4) also confirmed that the victim was around the age of six years. In my view, the victim's age is not even an issue because the age of six years is not at the border line. Proof of age may be so pertinent where the victim's age is at the margin before attaining the age of majority. In this case, the victim's age is too far below the age of majority.



On the last ground, the appellant impugned the trial court's decision as the case was not proved beyond reasonable doubt. As indicate above, the prosecution case relied on the evidence of five witnesses; PW1 was an eye witness of the incident of rape; PW4 confirmed that the victim was raped; PW5 investigated the case and interrogated the appellant who confessed to rape the victim. The prosecution evidence was reinforced with two exhibits; the PF3 form which was admitted as exhibit P1 and the appellant's cautioned statement which was also admitted as exhibit P2. The evidence does not leave any doubt that the appellant raped the victim causing serious injury. I have no hesitation to declare that the prosecution evidence proved the case beyond reasonable doubt. I hereby dismiss the appeal and uphold the decision of the trial court. Order accordingly.

**DATED** at **Mwanza** this 23<sup>rd</sup> day of June, 2023



**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**23/06/2023**



**Court:**

Judgment delivered this 23<sup>rd</sup> June 2023 in the presence of the appellant and the learned State Attorneys, Messrs Ibrahim Idd Salimu, Sileo Mazurah and Adam Murusui. Right of appeal explained.



**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**23/06/2023**

