

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA SUB REGISTRY)**

AT IRINGA

CRIMINAL APPEAL NO. 12 OF 2023

*(Original Criminal Case No. 8/2023 of the District Court of Wanging'ombe
before Hon. J.E Muhoni, SRM.)*

SALUMU MAGESA MIGO	APPELLANT
	VERSUS	
REPUBLIC	RESPONDENT

JUDGMENT

30th May & 24th July, 2023

I.C MUGETA, J:

The appellant was arraigned before the District Court of Wanging'ombe for the offence of rape contrary to section 130(1)(2)(e) and 131 of the Penal Code [Cap. 16 R.E 2022]. Upon full trial he was convicted and sentenced to the mandatory sentence of 30 years imprisonment. The facts giving rise to the appellant's arraignment and conviction can be briefly stated as follows:

The victim, who testified as PW1, was at the material time a standard seven pupil at Kijombe Primary School in Njombe Region. On 14/01/2023 she went with her mother (PW2) to the hospital for pregnancy test as preparation for her commencement of secondary education. The results



showed that she was pregnant. PW2 reported the matter to the Ward Executive Officer (PW4). Upon interrogation, the victim named the appellant as the one responsible for her pregnancy. Following that information, the matter was reported to the police station. The appellant was arrested and charged as shown above. The victim testified that the appellant, who was her teacher, had had sexual intercourse with her twice at his residence. His defence was that he was not present at school on the dates the victim said they had had sex. In short he raised the defence of alibi without notice.

The appellant is discontented with the trial court's decision. He has filed his appeal with nine grounds of complaints. All the grounds, however, can be consolidated into one major complaint that the prosecution failed to prove the charge beyond reasonable doubt. The grounds for the complaint are: **one**, that the evidence of PW1 was recorded contrary to the law. **Two**, that penetration was not proved. **Three**, that the age of the victim was not proved. **Four**, that there are contradictions in the evidence of PW2 and PW4 and **five**, that the charge did not disclose the date and time the offence was committed.

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The appellant is represented by two advocates. These are Theresia Charles and Masimo Cosmas, learned advocates. The respondent is represented by Rehema Ndege and Muzzna Mfinanga, learned State Attorneys.

On the 1st complaint, Theresia Charles argued that the evidence of PW1 was recorded contrary to section 127(2) of the Evidence Act [Cap. 6 R.E 2022]. That the victim being a child of tender age, the trial court ought to have inquired whether she understood the meaning of oath first before administering oath. She cited the case of **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018, Court of Appeal – Mtwara (unreported) to support her argument that a child of tender age must be tested to determine if she/he understands the nature of oath before she takes oath. Due to this irregularity, she urged the court to expunge the evidence of PW1 from the record. After expunging the testimony of PW1, in her view, the rest of the prosecution evidence is hearsay which has no probative value. On this, she cited the case of **Lyongo Hamisi @ Gembe v. Republic**, Criminal Appeal No. 135 of 2017, Court of Appeal – Tabora (unreported).



On the 2nd complaint, the learned advocate submitted that pregnancy is not sufficient proof of penetration. She argued that the two PF.3s filled in by PW3 and PW5 just shows that the victim was pregnant but did not prove penetration as required in rape cases. To support her contention that pregnancy is not sufficient proof of penetration, she cited the **Lyongo Hamisi @ Gembe** case (supra).

Submitting on the 3rd complaint, Mr. Masimo Cosmas faulted the prosecution for failure to prove the victim's age. He submitted that the victim's age was only stated in the charge sheet and when she was giving her personal particulars which is not part of the evidence. He referred the court to the case of **Peter Bagumba @ Cherehani v. Republic**, Criminal Appeal No. 251 of 2019, Court of Appeal – Mwanza (unreported) which held that age of the victim ought to be specifically proved by evidence.

On the 4th complaint, Theresia Charles submitted that the evidence of PW2 and PW4 had contradictions as PW2 testified that she took the victim to hospital on 14/01/2023 then reported the incident to the Ward Executive Officer who testified as PW4. However, PW4 testified that it was on 16/01/2023 when he received information on the incident. She urged the court to resolve the doubt in favor of the appellant as held in **David**

Antony Mzuka v. Republic, Criminal Appeal No. 297 of 2021, Court of Appeal – Mtwara (unreported). And lastly, she submitted that the charge is not clear because it did not disclose the date and time the incident occurred.

The learned State Attorneys Rehema Ndege and Muzzna Mfinanga resisted the appeal. The whole appeal was argued by Muzzna Mfinanga. She submitted on the 1st and 2nd complaints jointly, arguing that the victim's evidence was recorded in compliance with section 127 of the Evidence Act only that the inquiry on her appreciation of the meaning of oath was not reflected on the proceedings. Regarding penetration, she argued that the best evidence in sexual offence is that of the victim per section 127(6) of the Evidence Act [Cap. 6 R.E 2022] and the case of **Selemani Makumba v. Republic** [2006] TLR 379. Therefore, in her view, the victim was credible as she testified that she had had sexual intercourse with the appellant. She contended further that the victim is entitled to credence as held in **Goodluck Kyando v. Republic** [2006] TLR 363. In her views, pregnancy is sufficient proof of penetration and the victim named the appellant as responsible with it. She argued further that, PW3 and PW5 proved penetration by establishing the victim's pregnancy

which was proved by the PF.3s which were admitted without objection from the appellant. She distinguished the **Lyongo Hamisi @ Gembe** case (supra) with the present case as in that case pregnancy was discovered after 5 months thus doctors could not have proved penetration.

On the 3rd and 5th complaints, she submitted without elaborations that the age of the victim was proved. That the victim also proved the place and how the offence was committed.

In rejoinder, the appellant's counsel reiterated her submissions in chief.

I shall determine whether the prosecution proved the case against the appellant beyond reasonable doubt on the complaint that the evidence of the victim was illegally admitted.

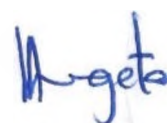
I agree with the learned State Attorney's contention that in sexual offences, the best evidence is that of the victim. However, that principle cannot be applied in the present case as the victim's evidence was taken in contravention of section 127(2) of the Evidence Act. According to her evidence she was aged 14 years when she testified. Section 127(4) defines a child of tender age to mean a child whose apparent age is not more than

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fourteen years. Therefore, the victim fell in the category of children of tender age. According to section 127(2) a child of tender age may give evidence with or without taking oath or affirmation. A child of tender age giving evidence without taking oath or affirmation must, however, make a promise to tell the truth and not to tell lies. He who takes oath shall do so upon a court's finding that she understands the nature of oath.

The victim in the present case gave her testimony under oath. However, the record is silent on whether the court was satisfied that she understood the nature of oath. Lack of that statement vitiates her evidence. I, thus, agree with the appellant's counsel that the procedure used to take the evidence of the victim contravened section 127(2) of the Evidence Act. I, consequently, expunge the victim's testimony from the record. Without evidence of the victim, I hold, the remaining evidence on record is hearsay except the evidence of PW3 and PW5 who proved that the victim was pregnant. No other witness incriminated the appellant as having had sexual intercourse with the victim.

For the foregoing, I see no reason to consider the remaining complaints. Doing so shall be just for academic purposes.



I allow the appeal, quash the conviction and set aside the sentence.
The appellant shall be released from prison unless held for any lawful cause.



I.C. Mugeta

I.C. MUGETA

JUDGE

24/7/2023

Court: Judgment delivered in chambers in the presence of the appellant,
Theresia Charles, advocate for the appellant and Herbert
Ishengoma, State Attorney for the Respondent.

Sgd. I.C. MUGETA

JUDGE

24/7/2023