

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

DC. CRIMINAL APPEAL NO. 33 OF 2022

(Originating from Urambo District Court in Criminal
Case No. 92/2018)

HAJI SHABANI @ SAIDAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of Last Order: 03/06/2023

Date of Judgment: 27/07/2023

MATUMA, J.

The appellant stood charged in the District Court of Urambo for rape
Contrary to section 130(1) (2) (e) and 131(1) of the Penal Code Cap. 16 R.E.
2002.

He was alleged to have had carnal knowledge with
one Neema Nsanze a girl of six years on the 25/02/2018 at about 23:30
hours at Kaswa - Ulyankulu within Urambo District.

After a full trial the appellant was found guilty, convicted and
sentenced to thirty (30) years imprisonment term.

Aggrieved with such conviction and sentence the appellant has preferred this appeal with a total of six grounds out of which the respondent conceded two relating to illegal admissibility and reliance to exhibits P1 and P2 the Cautioned Statement and PF3 of the victim respectively.

The two documents were not read after their respective admission in evidence contrary to the laid down procedure in the case of ***Robinson Mwangisi & Another Versus The Republic (2003) TLR 218.***

The Cautioned Statement exhibit P1 was further recorded extremely out of time Contrary to the provisions of section 50(1) (a) of the Criminal Procedure Act Cap. 20 R.E. 2022.

This is because the appellant was arrested on 26/02/2018 at 10:00 hours but his Cautioned Statement recorded on 11/03/2018 at 14:02 hours.

Having gone through the records of the trial court I am satisfied that indeed the two documents were illegally admitted in evidence and therefore could not be relied to convict the appellant. They are liable to be expunged as I do hereby do. They are accordingly expunged from the records.

The appellant withdrew the six ground relating to none compliance of section 231(1) of the Criminal Procedure Act and thus necessitated to argue three grounds;

- i. That the prosecution case was not proved against him beyond reasonable doubts.

- ii. That the evidence of the victim who was the child of tender age (6 years) has not taken in accordance to the law.
- iii. That the defence of the appellant was considered at all by the trial court.

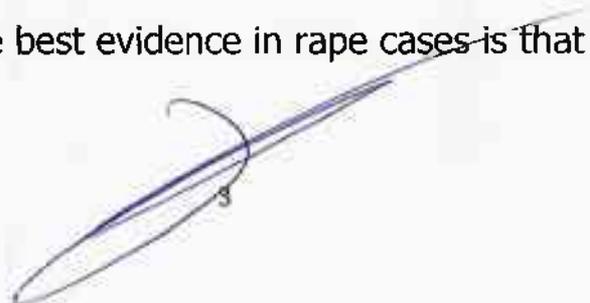
At the hearing of this appeal, the appellant was present in person while the respondent was represented by Nurdini Mmary and Aneth Makunja learned State Attorneys.

In the 1st ground the appellant argued that the prosecution witnesses gave contradictory evidence. In the 2nd ground supra the appellant submitted that the victim gave her evidence without promising to tell the truth nor to undertake not to tell lies. Finally he complained that his defence was not considered.

Mr. Mmary learned State Attorney was of the argument that the prosecution case was proved beyond reasonable doubts as the evidence of the victim alone was sufficient to convict.

The learned State Attorney referred this court to the evidence of PW1 the mother of the victim who testified to the effect that she inspected the victim and found sperms. He also referred to the evidence of PW4 the healthy officer who examined the victim girl and established that there was penetration into her vagina.

The learned State Attorney citing out the case of ***Emmanuel Mawanga versus The Republic***, Criminal Appeal no. 519 of 2017 insisted that the best evidence in rape cases is that of the victim.



He however conceded that the victim gave her evidence without promising to tell the truth. Instead, the trial magistrate conducted a voire dire test which is no longer in place. Even through, the learned State Attorney urged this court to find that by necessary implication the victim gave a true evidence despite of having not promised to speak the truth. He denied the allegation that the defence case was not considered.

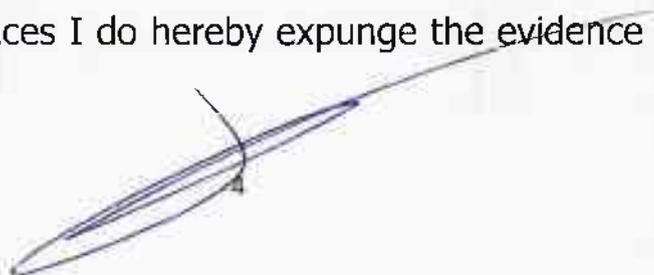
Having heard the parties for and against this appeal, I agree with the learned State Attorney that the best evidence in rape cases or comes from the victim herself.

In the instant matter as complained by the appellant and conceded by the learned State Attorney, the evidence of the victim was recorded contrary to the law.

The learned trial magistrate did not comply to the requirements of section 127 (2) of the Evidence Act Cap. 6 R.E. 2022 and the guidelines given by the Court of Appeal in the case of **Godfrey Wilson versus The Republic**, Criminal appeal no. 168 of 2018. What she did was to conduct a voire dire test which is no longer in place as was rightly argued by Mr. Mmary learned State Attorney.

Since the evidence of the victim was given in contravention to the law the same is valueless and cannot be acted upon as it was held in the case of **Godfrey Wilson** supra and that of **Issa Salum Nambaluka versus Republic**, Criminal Appeal no. 272 of 2018.

In the circumstances I do hereby expunge the evidence of the victim from the record.



What now remains is the evidence of PW1, PW3 and PW4. The evidence of PW1 and PW3 are all hear says. They gave evidence in accordance to what they heard from the victim. Such evidence cannot stand alone to find a conviction.

Even though as rightly complained by the appellant the two witnesses gave contradictory evidence to that of the victim. They thus either exgrated what the victim told them or the victim lied to them.

Since I have expunged the evidence of the victim I cannot see the need to address the inconsistencies.

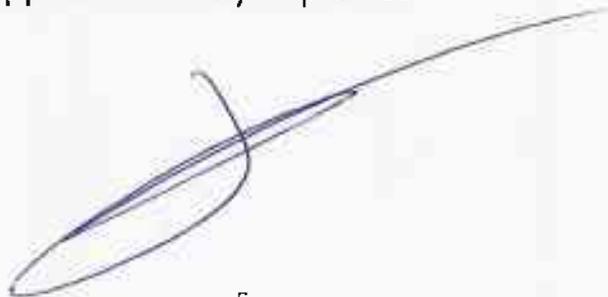
What remained is thus the evidence of a clinical officer which do not establish the identity of the assailant.

Under the circumstances, the major complaint of the appellant to the effect that the prosecution case was not proved beyond reasonable doubts is found to be true.

I thus find that the prosecution case was not proved to the required standard and thus the appellant was wrongly convicted.

His conviction is hereby quashed and the sentence of thirty years set aside. I order the appellant's immediate release from custody unless otherwise lawfully held for some other lawful cause.

Right of further appeal is hereby explained.



It is so ordered.



MATUMA

JUDGE

27/07/2023

Court: Judgment delivered in the presence of appellants in person and Aneth Makunja learned State Attorney for the Republic.

Right of appeal explained.



MATUMA

JUDGE

27/07/2023