

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(MTWARA DISTRICT REGISTRY)**  
**AT MTWARA**

**CRIMINAL APPEAL NO 67 OF 2023**

*(Originating from Newala District Court at Newala in Criminal Case No. 107 of 2022)*

**KABURIWAZI MOHAMED YASSIN.....APPELLANT**

***VERSUS***

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

*18<sup>th</sup> & 30<sup>th</sup> October 2023*

**LALTAIKA, J.**

The appellant herein **KABURIWAZI MOHAMED YASSIN** was arraigned in the District Court of Newala at Newala charged with the offence of Rape c/s 130(1) and 131 of the Penal Code Cap 16 RE 2022.

When the charge was read and explained to the appellant (then accused) he pleaded not guilty. This necessitated conducting of a full trial. After the trial, the learned trial Magistrate (IM Sotter) was convinced that the prosecution had proved its case at the required standard. He proceeded to convict the appellant as charged and sentenced him to a 30 years' imprisonment term.

The appellant is dissatisfied with the conviction and sentence hence this appeal based on eight grounds of appeal as reproduced hereunder:

1. *That the prosecution side didn't prove its case beyond reasonable doubts.*
2. *That the trial magistrate did not comply with the mandatory provision of section 127 (2) of the Tanzania Evidence Act, 1967.*
3. *That the manner in which the proceedings at the trial Court were conducted was irregular or/ and improper.*
4. *That there was no proof of penetration in respect of the alleged offence.*
5. *That the appellant never confessed to having committed the alleged offence.*
6. *That the trial Court having failed properly to examine, evaluate and analyze evidence on record.*
7. *That, the evidence adduced by PW2 and PW3 are totally fabrication for the purpose of connecting appellant to the crime.*
8. *That the corroborate (sic!) evidence used by the trial court to find conviction was not concrete.*

When the appeal was called for hearing on the 20<sup>th</sup> of October 2023 the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, appeared **through Mr. Hurubano, learned State Attorney.**

The appellant, not being learned in law, indicated that he had nothing to add to his expounded grounds of appeal accompanying the memorandum of appeal. He, however, reserved his right to a rejoinder.

Mr. Hurubano, arguing against the **1<sup>st</sup> ground argued together with the 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> grounds** clarified that the complaint was lack of proof of the case beyond reasonable doubt. He argued that to prove a rape case, the prosecution needed to establish two elements namely age of the victim and penetration.

The learned State Attorney asserted that according to section **127 of the Evidence Act** the second element namely penetration can be proved by the victim. He referred this court to page 7 of the trial court's proceedings where the victim mentioned her age. He emphasized that in addition to the victim, PW4- a medical doctor also stated that the victim was 14 years old.

On the second element, Mr. Hurubano asserted that the victim had proved to the court that the appellant had carnal knowledge. Narrating from the lower court's proceedings, Mr. Hurubano asserted that the appellant was a witch doctor who had planned with the victim's grandmother to attend her by removing a "mark" from her body that was supposedly put there by witches.

Mr. Hurubano argued that on **17/11/2022** while the victim was washing her clothes, the appellant passed by their house. He asked her the whereabouts of her mother. The victim responded that her mother was in the neighbouring house.

Later, the victim, under the direction of her grandmother and the appellant, was tasked with bringing water to them using a lavatory bucket. The appellant then removed his shirt and ordered the victim to wash it. He took the water used for washing the shirt, mixed it with clean water, and instructed the victim to take a shower.

During this time, the appellant inquired about who was teaching her witchcraft. The victim responded that she didn't know but had once seen a person in black clothes, to which the appellant claimed that the same person was responsible for the witchcraft.

In the evening, the appellant informed the victim that he needed to sleep with his wife. On the following day (18/11/2022), the victim was called and coerced into undressing. Subsequently, she was forced to sit on a pot as if she were in a toilet, with the grandmother holding her hands. The appellant inserted his fingers into the victim's private parts, causing her to lose consciousness. Following this, the appellant began marking her face, supposedly attempting to remove the witchcraft.

Mr. Hurubano asserted that the prosecution had proved the offence of rape beyond reasonable doubt emphasizing that PW4, a medical doctor, after examining the victim, confirmed the truth of her account, a fact corroborated by PW2 and PW3. With such a passionate submission, Mr. Hurubano prayed that the grounds of appeal are dismissed for lack of merit.

**On the second ground, along with the additional ground of appeal,** Mr. Hurubano argued that there was a complaint about the prosecution's failure to comply with section 127(2) of the Evidence Act Cap 6 RE 2022. He asserted that the ground had no merit, emphasizing that a girl of tender age is not supposed to take an oath but rather to prove to the court that he/she will tell the truth. He cited the CAT case of **WAMBURA KIGINGA v. R. Crim Appeal No 301** of 2018 CAT Mwanza, where even though PW1 did not take an oath, she promised the court that she would tell the truth.

Concerning **the third ground**, Mr. Hurubano mentioned that the complaint was about irregularities in the manner in which proceedings were conducted. He pointed out that the appellant did not specify the irregularities

and expressed the opinion that there were no such irregularities. He further stated that, if any irregularities existed, they could be **cured by section 388 of the CPA**, which stipulates that irregularities cannot vitiate the decision.

On the sixth ground, Mr. Hurubano addressed the complaint about the trial court's inability to evaluate evidence, disagreeing with it. He argued that the learned trial magistrate had sufficiently evaluated the evidence. In the event that the court made a finding to the contrary, he referred to the case of **LEONARD MWANASHOKA V. R.** Crim Appeal No 228 of 2014, stating that the first appellate court has the power to re-evaluate evidence.

In conclusion, Mr. Hurubano highlighted that, based on the proceedings and evidence presented, the appellant, who was 50 years old at the time, had caused a 14-year-old girlchild to suffer due to sexual assault and witchcraft. To caution the society, he prayed that the lower court's sentence be upheld.

**In a rather brief rejoinder**, the Appellant expressed his uncertainty about what to say and conveyed his hope that the court would grant him freedom. He asserted that he was not alone during the alleged incident, as he was accompanied by his wife, who had not been summoned. The appellant prayed for the court's assistance, emphasizing that the imposed sentence was excessively harsh. Additionally, he reiterated that being with his wife meant he could not have engaged in carnal knowledge with the victim.

**I have dispassionately considered** the grounds of appeal, rival submissions, and the lower court's records.

This is one of the cases that show how child sexual abuse can be perpetrated through witchcraft. I appreciate the learned trial magistrate's dedication to record the evidence of the victim with amazing details and a picturesque language. The legal position that in sexual offences the evidence of the victim is sufficient to ground conviction could easily apply here.

In short, the appellant with his fearful name which translates "open grave" was a witchdoctor in Newala District. The victim was a 14-year-old girlchild and a Form One student (name of the school withheld to protect privacy.) She was living with her grandmother and great grandmother. Her mother remarried and lived with her husband (the victim's stepfather) in a neighbouring village.

It appears that one day the appellant passed through the victim's home and met her washing clothes. The picturesque language of the learned trial magistrate suggests that the appellant developed a lustful sexual feeling towards the girlchild. He asked the whereabouts of her mother and the victim pointed to a nearby house of one of her aunties. The appellant was unable to contain his lust. He looked for the relatives of the victim until she found both the grandmother and great grandmother. The two grannies, so the records suggest, were stern believers in the appellant's sorcery powers. They believed everything he said.

Banking on the respect that he commanded from the old ladies, the appellant claimed that the victim, who he had seen washing clothes, was

being used for witchcraft by unknown spirits. The appellant suggested he was given the deal of freeing her up from demon possessions. It is so sad how the mere encounter between a 50-year-old man with the victim took twists. It involved unimaginable actions of sacrificing a hen, washing the body of the victim using unidentified liquids and culminated towards rape.

To prove rape, penetration is crucial, and section 130(4) specifies that even slight penetration constitutes the offense. In the case of **MATHAYO NGALYA @SHABANI VS REPUBLIC**, Criminal Appeal No. 170 of 2006 (unreported) the Court of Appeal stated as follows on penetration.

*"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) 14, 15 of section 130 (4) of the Penal Code ... provides: for the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence." For the offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence".*

The victim had given a detailed account of the ordeal. PW4 had also indicated that the victim's vagina had bruises suggesting it was penetrated by a blunt object. I have no hesitation in endorsing the finding of the lower court on this element.

As for the age of the victim, in **ISSA AMIR @ KOSHUMA VS REPUBLIC** (Criminal Appeal 120 of 2020) [2022] TZCA 195 (16 March 2022) at page 8 the Court of Appeal of Tanzania stated that: -

"..., this Court has consistently maintained that evidence as to proof of age may be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate (See **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 and **Issa Reji Mafita v. Republic**, Criminal Appeal No. 337 'B' of 2020 (both unreported))"

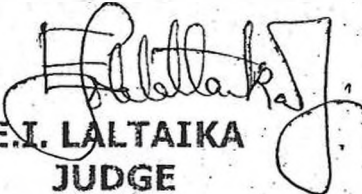
I have also evaluated the evidence of the appellant and I find no merit worth exonerating him from the allegations. The assertion that he was with his wife and therefore unable to commit the vice is unfounded. I checked the proceedings and there is no doubt that he tricked his wife into leaving the place, so he was the only adult present in the premises when he raped the victim. The prayer for reduction of the sentence is equally misguided because the trial court imposed the minimum sentence.

I must say that I have seen how forcefully the appellant (then accused) argued in the trial court that he was a *bona fide* traditional medicine practitioner and that he had all the necessary permits. Unfortunately, such a license does not extend to raping a young girl after subjecting her to unimaginable fear and falsehood.

Premised on the above, this appeal is hereby dismissed entirely. Judgement and orders of Newala District Court are upheld.

It is so ordered.




  
E.I. LALTAIKA  
JUDGE  
30.10.2023



## Court

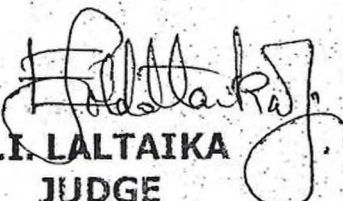
Judgement delivered under my hand and the seal of this court this 30<sup>th</sup> day of October 2023 in the presence of Mr. Steven Aron Kondoro, State Attorney for the respondent and the appellant who has appeared in person, unrepresented.



  
E.I. LALTAIKA  
JUDGE  
30.10.2023

The right to appeal to the Court of Appeal of Tanzania is fully explained.



  
E.I. LALTAIKA  
JUDGE  
30.10.2023