**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB-REGISTRY**

**AT MBEYA**

**CRIMINAL APPEAL NO. 6397 OF 2024**

***(Originating from the District Court of Mbeya at Mbeya in Criminal Case No. 50 of 2023)***

**JOHNWELL EDWARD MWAMBOYA.....APPELLANT**

**VERSUS**

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

## JUDGEMENT

***Date of last Order: 29th April, 2024.***

***Date of Judgment: 13th May, 2024.***

**KAWISHE, J.:**

In the District Court of Mbeya at Mbeya the appellant, Johnwell Edward Mwamboya, stood charged with the offence of rape contrary to sections 130 (1), (2)(e) and 131(1) of the Penal Code [Cap 16 R. E 2019]. It was alleged that on diverse dates between January and February, 2023 at Makunguru area within the District and Region of Mbeya, the appellant did have carnal knowledge of one XY (name withheld) a child of 7 years old. The accused denied to have committed the offence. At the conclusion

of the trial the appellant was convicted and sentenced to life imprisonment and pay the victim Tzs. 1,000,000/= as compensation.

Aggrieved with the conviction and sentence, the appellant preferred appeal before this court with six grounds, which are reproduced below regardless of grammatical errors:

1. *The Honourable Senior Resident Magistrate erred both in points of law and facts when she convicted and sentenced the appellant to serve a sentence of life imprisonment while the offence of rape.*
2. *That the trial court when presided by Hon J.P. Rupia the learned Senior Resident Magistrate on 22-06-2023 erred both in points of law and facts when he took for granted that the appellant did not object to the tendered PF 3 as exhibit "PE-1".*
3. *That after the learned Senior Resident Magistrate Hon J.P. Rupia had disqualified himself to proceed with the hearing of the case on the reason that he had a family ties with the accused family, that trial court erred in law not ordering the case to be heard afresh by the succeeding Magistrate.*
4. *That the appellant was not informed his rights of proceeding to hear the case at the time when the case was heard by another Senior Resident Magistrate, Hon. M. Mtengeti.*
5. *The Honourable Senior Resident Magistrate Hon. T. Mlimba, erred both in points of law and facts when she invoked the provisions of Section 214 of the Criminal Procedure Act, Cap. 20 RE; 2022 and proceeded to hear the case before her suo motto without affording an opportunity to the appellant to be*

*heard as to whether he was ready to proceed with the case or the case be heard afresh.*

6. *That the case was not proved beyond reasonable doubt against the appellant.*

As per the records available the brief facts of the case run as follows; that the accused stood charged with the offence of rape contrary to section 130 (1), (2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2022]. That the incident took place at different times at Makunguru area within Mbeya District. The victim is XY. That on the incidence date the victim was taken by Geofrey (Teacher) to his tuition centre and had canal knowledge several times. That after the evil act, the victim was ordered to return home and did sex several times on different days. That the incidence was reported to the victim's mother and the victim proved to have had sex with the accused. The facts further reveal that, the matter was reported to police and the accused was arrested. Upon interrogation the accused denied the allegations.

The appeal was objected by the Respondent/Republic. Before this court the appellant enjoyed the services of Mr. Simon Mwakolo, learned counsel while, the Respondent was represented by Ms. Julieth Katabaro, learned State Attorney.

When the appeal was called for hearing, Mr. Mwakolo started by stating that they filed six grounds but have decided to disband the 2nd and the 4th grounds and remain with the 1st, 3rd, 5th and 6th grounds in this appeal. When arguing he decided to combine and argue together the 1st and 6th grounds and the 3rd and 5th together.

Mr. Mwakolo started with the 3rd and 5th grounds. He was questioning the matter where Hon. Rupia, Senior Resident Magistrate disqualified himself after he had heard 8 witnesses and ordered the defence case to proceed. That the learned Magistrate stated that, he disqualified himself because he came to realise that the accused person was a family friend together with his brother. That he disqualified himself under regulation 9 (1) (a) to (c) of the Code of Conduct and Ethics of Judicial Officers GN NO. 1001 of 20th November, 2020. That the regulation is in line with the reasons of the magistrate at page 37 of the typed proceedings, he stated that: *"it has come to my knowledge though late the accused person is a family friend together with his brother. For the interest of justice, I have decided to disqualify myself from proceeding with this matter."* Mr. Mwakolo argued that the evidence of the trial magistrate who had heard the witnesses should have not been used to convict the accused. That

upon the matter being returned to Hon. Mlimba who decided the matter without giving the accused right to be heard whether he was accepting to proceed with the earlier taken evidence or not as per section 214(1) of the Criminal Procedure Act [Cap 20 R.E 2022]. He insisted that the that section has three subsections. He recited what Hon. Mlimba recorded: *"Court: PP is informed the transfer of the case, the parties are addressed in terms of section 214 of the CPA, I will proceed where the predecessor ended."*

Mr. Mwakolo averred that the magistrate should have told them which subsection she addressed them from as the accused was unrepresented. That she should have asked the parties whether to proceed or not. That the denial of the right to be heard is reflected in the judgment nothing was said on the defence. She should have summarized the witnesses' evidence and state whether agreeing or disagreeing with them. The right to be heard is a constitutional right as per article 13(6) of the Constitution of the United Republic of Tanzania, 1977 as amended. He supported his submission by case of **Haji Mradi vs. Linda Saidik Rupia,** Civil Appeal No. 24 of 2016 the Court of Appeal.

After submitting on the 3rd and 5th grounds, Mr. Mwakolo kicked on the 1st and 6th grounds of appeal. He summarized them to be the prosecution did not prove the case beyond reasonable doubt. Mr. Mwakolo carefully, attacked the charge sheet. He argued that, it states that the incident happened in Makunguru Area within the District and Region of Mbeya. That the prosecution had 8 witnesses but none of them stated that the incident occurred in Makunguru. That the victim was taken to the place of incident but never mentioned Makunguru, they mentioned Mwenge Primary School.

Mr. Mwakolo asserted that rape cases are very sensitive, any person can fabricate a case and one be seen to have committed rape. That he expected that the court could have tested the credibility and demeaner of the witnesses PW1 to PW8. He banked on evaluation of the victim's evidence first. He referred the case of **Elipidius Rwezaula vs. Republic**, Criminal Appeal No. 107 of 2020 HC, the court held that, in cases of this type is to access the credibility of the victim vis-à-vis the evidence of other witnesses. He further argued that the convicting magistrate was not in a position to determine the evidence as it was done by Hon. Rupia. He referred the case of **Ibrahim Ahmet vs. Halima Gulet** (1968) HCD 76,

the *weight of evidence is the best judged by the court before which that evidence is given and not by a tribunal which merely reads a transcript of evidence:* where the court quoted the case of **Ali Abdallah Rajab vs. Saada Abdallah Rajab and others** (1994) TLR 132 where it was stated that: *"the decision of this case was wholly based on the credibility of the witness. The learned trial magistrate saw and heard the witnesses as they testified. He was therefore in better position to assess their credibility than this court which merely reads the transcript of record."*

Mr. Mwakolo, averred that there was another error in this case at hand. The evidence stated that the act occurred on 25th February, 2023, but PW6 stated that they reported the incident on 6th March, 2023. They never said what transpired in between. That there was a delay of almost two weeks, leads to the fact that the case was fabricated. He boosted his position with the case of **Abel Masikiti vs. Republic,** Criminal Appeal No. 24 of 2015. In the case at hand, they stated in the charge sheet that the incident occurred in January and February, among the witnesses no one mentioned whether the act occurred in January. That they mentioned February and went to hospital in March. He added that the charge sheet does not state specifically when the incident occurred hence, denied the

accused his right in defence, that he could have raised defence of alibi. The court stated that it is the duty of the prosecution to state when the act occurred in the charge sheet which requires the accused to respond. That if there was variance or uncertainty could amend the charge under section 234 of the Criminal Procedure Act.

In concluding his submission Mr. Mwakolo made the following summary. That the appellant deserves to be set free for the following reasons. Changing of the magistrate who listened to the witnesses should have started afresh to record the evidence, the trial magistrate did not give the accused right to be heard under section 214 of the CPA whether to proceed or not, that the charge sheet stated that the incident occurred in Makunguru but no witness mentioned Makunguru. The magistrate never saw the victim and other witnesses. Due to those errors the charge sheet was not proved, therefore, he prayed to the court to quash the sentence and order to pay Tzs. 1,000,000 and the appellant be set free.

In reply appellant's counsel, Ms. Katabaro, learned State Attorney without a blink of the eye stated that they support the conviction and sentence of the appellant under section 130(1), (2)(e) and 131(1) of the

Penal Code [Cap 16 RE 2022]. Where the court after heard both sides, convicted and sentenced the appellant to life imprisonment and pay a fine of Tzs. 1,000,000/= as compensation.

Ms. Katabaro argued that the issue of Hon. Rupia disqualifying himself on family ties, as he referred regulation 9(1)(a) to (c) of the Code of Conduct of Ethics for Judicial Officers GN. 1001, the appellant's counsel supports what the magistrate did as a lawful act. He stated that: *"It has come to my knowledge though late that the accused person is the family friend together with his brother. For the interest of justice, I have decided to disqualify myself from proceeding with this matter."*

From that quote, Ms. Katabaro insisted that what was stated by the Hon. magistrate does not mean that he had knowledge that the accused in either way had a friendship with his brother. The statement shows that, at that time is when he realized the existing relationship.

Ms. Katabaro reacted to the claim that the appellant was not afforded the right to be heard when the matter was transferred from Hon. Rupia to Hon T. Mlimba. That the learned counsel referred section 214 of the Criminal Procedure Act [Cap 20 R.E 2022] where he stated that the Hon.

Magistrate while addressing such order to the parties of the case, did not afford the appellant chance to respond whether the case to continue or start afresh. In objecting that reason she read the cited section. After reading the section aloud in court, Ms. Katabaro argued that the section shows clearly that where the matter is transferred from one magistrate to another with the same jurisdiction in the matter, the magistrate in discharging the duty may continue from where the other magistrate stopped, if he feels necessary may resummon the witnesses and hear the matter afresh. She bolstered her submission by citing the case of **Flano Alphonce Masalu @ Singu and 4 others vs. Republic,** Criminal Appeal No. 366 of 2018 CAT at Dar es Salaam and **Khamis Abdrahakim vs. Republic,** Criminal Appeal No. 423 of 2018 Court of Appeal at Bukoba. From the principles established in the cases she cited she submitted that the Hon. Magistrate addressed the parties in terms of section 214 of Criminal Procedure Act [Cap 20 R.E 2022] and stated that would proceed from where the predecessor ended. That she made her decision as per the law thus, the appellant was afforded the right to be heard. She argued that the submission made by the appellant's counsel that the trial court acted suo motto is misleading this court. She added that by so doing the

magistrate did not prejudice the rights of the appellant. She prayed to the court to dismiss the 3rd and 5th reasons for lack of merits.

Reacting on the 1st and 6th grounds as they were combined and explained together, she decided to click on the 1st ground. Where the appellant stated that the trial court erred by convicting the appellant and sentence him to life imprisonment while it is an offence of rape. In the charge sheet, the accused was charged for the offence of rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2022]. The cited sections are clear that any person who had carnal knowledge with a girl under 18 years with or without consent if convicted shall be sentenced to life imprisonment. That the girl in this case is of 7 years old as per the charge sheet. The age of the victim was also testified by the mother of the victim, PW3. At page 16 of the proceedings, she testified that the victim was born on 12th September, 2016. She added that, this showed that by that time the girl was of the age of 7 years. She added that Proof age can be by the mother of a victim, referred the case of **Andrea Bulali vs. Republic**, Criminal Appeal No. 95 of 2020 and **George Claude Kassanda vs. DPP** Criminal Appeal No. 376 of 2017 (2020). She insisted that the first reason that, the sentence was not proper, it lacks merit, the

trial magistrate punished the accused/appellant in accordance to the law and the charge sheet is clear on the provisions under which the appellant was charged.

Replying to the 6th ground that, the prosecution did not proof the offence of rape beyond reasonable doubt. Ms. Katabaro submitted that in proving the offence beyond reasonable doubt, it is the duty of the prosecution to prove the elements of offence. She cited the case of **Mosi Chacha @ Iranga and Mokiri Chacha vs. Republic,** Criminal Appeal No. 508 of 2019, where they referred the case of **Andrew Lonjine vs. Republic**, Criminal Appeal No. 50 of 2019. Ms. Katabaro argued that with the matter at hand, it is important to prove the elements of the offence where, the appellant before this court was charged with rape. She added that as per section 130(4) of the Penal Code, "*(4) For the purposes of proving the offence of rape- (a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;"* that one of the elements is penetration. At the trial court the evidence given by the victim, PW4 at page 19 of the typed proceedings. She quoted: *"We entered his school (kishule) and inside he told me to wear off the clothes, I rejected and said will kill me. I felt bad and afraid I then removed my tight and long*

*dress as well as the pant. He then started playing with my pants and entered his dudu into my urinating part. I then felt bad and pains....*" Ms. Katabaro argued that from this evidence shows that there was penetration. That the victim told the court that the appellant inserted his manhood into her urinating parts. She did not name the proper names of the parts. That such usage of the words is recognized by the courts of law. She fostered her argument by citing the case of **Hassan Bakari @ Mama Jacho vs. Republic,** Criminal Appeal No. 103 of 2012 where the Court was of the view that it is not easy for a child of tender age to name her private parts due to customs and traditions of our society. That in this case at hand PW4 used *dudu* and urinating parts to mean penis and vagina respectively.

Ms. Katabaro averred that the evidence of the victim on penetration, was corroborated by PW6 a Medical Doctor, who testified before the trial court that he discovered that there was no virgin but her anus was intact. With this evidence of the doctor showed that the girl had no hymen and given the fact that she is a girl of 7 years, it shows clearly that she was penetrated.

Ms. Katabaro on the place where the incident took happened replied that, the appellant's counsel stated that the prosecution did not prove the case as the prosecution witnesses did not tell where the incident occurred. She stated that referring to the evidence of the victim who stated before the court that the act happened in the school of the appellant. That the victim did not name the place but knew the place and took her father to the scene of crime. She stated to have gone to teacher Jof's Kishule". Although she did not mention the name of the place but managed to take her father to the place of the incident that is the school of mwalimu Jof. That the victim's evidence is corroborated by Inspector Mayala who was the arresting officer in the case. Inspector Mayala told the court that the victim led them to the school of the appellant. From her age, it was not easy for her to state by her mouth the scene of crime, but from her evidence she managed to take them to the area of crime.

On the issue that Hon. Magistrate did not determine the demeanor of the witnesses, leading to wrong decision. That the Republic in proving the offence of rape against the appellant, summoned 8 witnesses, PW1 the father of the victim, in his evidence testified before the court that he asked the child if she can remember the person who was doing such bad action

and replied yes. She said yes and named teacher Jof. That the child took them to around Mwanjelwa Market at the said teacher Jof's Centre. That she said the incidence was taking place in the class but they found the centre closed around 16.00 PM". Ms. Katabaro insisted that the evidence by the PW1 shows that the victim managed to identify the culprit by naming him, teacher Jof. She added that this evidence is corroborated by the evidence brought by the appellant DW2. Who during examination stated that, at the time of arrival the day care of mwalimu Jof her neighbour was closed. That they came to her place because the day care was closed at that moment. The purpose of their visit was to see mwalimu Jof and not her." That the evidence of DW2 corroborates the evidence of PW1 the victim's father that she victim took them to the scene of crime and the defence witness testified that, when they arrived, the day care of mwalimu Jof was closed. That with those reasons, the Respondent is of the view that the prosecution proved the offence beyond reasonable doubt.

Responding on the last issue as raised by the appellant's counsel, that the raping occurred in different days between January and February, Ms. Katabaro argued that there was no place in the evidence it was proved the date of the incident. She added that in the charge sheet, at the facts of

the offence they stated that the rape occurred in different dates of January and February, 2023. That the stance is supported by the evidence of the victim, who told the court that, *"I was going to teacher Jof at Uwanjani Area, and I do not remember how many times. He was telling me to wear off my clothes and then he was entering his dudu into my urinating point."* This shows that raping was a recurrent act to the victim on different times. To tell the court that they did not tell the exact day so that the appellant could defend himself, the charge sheet stated that the act occurred in different dates in January and February, 2023, there was no single date mentioned.

Ms. Katabaro also reacted to the allegation by the learned counsel that the victim was examined on 6th March, 2023 and did not give reasons why that delay. That, why she was not taken to hospital when they discovered the raping. She argued that in the evidence of PW1 the victim's father testified that they reported the incident to the police and given a paper to take to the hospital. That he did not know the procedure. He had to inform the victim's aunt a teacher at Njombe. That she came after few days and then they went with the child to the hospital and later returned at Mbeya Police Gender Desk where they were given a paper to go and arrest

teacher Jof." Ms. Katabaro, relying on the reasons she has adduced, prayed to the court dismiss the appeal. She concluded that, the best evidence in rape cases comes from the victim. The victim testified how the rape occurred and identified the appellant as the rapist. The offence of rape is secret and happens between two persons, the victim's evidence proved the offence beyond reasonable doubt and was corroborated by the other seven witnesses.

In rejoinder, Mr. Mwakolo, appellant's counsel agreed on the provisions of the law that the court was correct to convict, sentence and order paying compensation. He added that it is true that the law states so as per section 131(1), that a person who rapes a girl under the age of 18 years is punished with life imprisonment. Mr. Mwakolo took an about turn and attacked the submission made by Ms. Katabaro. He argued that the counsel came with the issue of penetration to support the conviction. That the appellant penetrated his *dudu*. Mr. Mwakolo submitted that when we translated *dudu* is worm. If they wanted to mean *dudu* is penis as the State Attorney said, the victim should have stated. He averred that the trial magistrate brought extraneous matters; the victim did not mean penis.

Mr. Mwakolo reiterated his submission in chief and stated that all the witnesses stated in Mwanjelwa, no one stated Makunguru. Save for the victim whom they claim to be under age of 18, the other witnesses should have mentioned Makunguru. That failure to match the name in the charge sheet is fatal. That they stated the act happened in *Kishule* the complaints did not refer to Makunguru, it was somewhere else, why not mentioning Makunguru, the trial magistrate erred in the conviction. Mr. Mwakolo while quoting the State Attorney who referred section 214 of the Criminal Procedure Act, and the case of **Khamis** (supra) and **Flano** (supra) which are distinguishable from the case at hand. Also, refuted the reasons for the delay in taking action by stating that the ignorance of the law is not an excuse. He refuted that the testimony of PW1 and PW7 was corroborated by DW2. That all the witnesses stated that it happened in Mwanjelwa. He added that, since, the learned State Attorney has not responded to their issues, such as the defence case was not considered that means that she conceded with the grounds. He argued that the prosecution failed to prove the offence beyond reasonable doubt. He prayed that the punishment meted on the appellant be quashed and that appellant is eligible to be set free if it pleases the court.

I have deeply followed the long and rival submission made by both counsel for the parties. I have also perused the records available. The main issue is whether prosecution proved the case beyond reasonable doubt. in answering it, there are three sub-issues to be responded to. Which are:

***One***, whether the trial magistrate denied the accused/appellant the right to be heard?

***Two***, whether there was a variance between the charge sheet and the prosecution witnesses' testimony?

***Three***, whether the defence evidence was evaluated?

It has to be noted that, the appeal initially had 6 grounds. Since the appellant's counsel disbanded the 2nd and 4th grounds, I not consider them.

Basing on the submission made by both parties, on the application of section 214 of the CPA, the law is very specific in this issue, section 214 (1) of the Civil Procedure Act [Cap 20 R.E 2022] (the CPA) provides that:

> *"Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings* ***is for any reason*** *unable to complete the trial or the committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal*

*proceedings, as the case may be, and the magistrate so taking over* ***may act on the evidence or proceeding recorded by his predecessor and may,*** *in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings".[Emphasis is mine].*

Literally, the quoted sections provides that, 'at any time' 'for any reason' when the predecessor magistrate is not able to complete the trial, any magistrate with the jurisdiction may take over and continue the trial, and the successor magistrate 'may act on the evidence or proceedings recorded by his predecessor,' and may in case of the trial "may if it is necessary re-summon the witnesses and recommence the trial." Therefore, in this case at hand in my opinion, the record shows that the predecessor magistrate adduced reasons for the failure to complete the trial. He recused himself to proceed with the case, on the reason that he is having a family relationship with the accused/appellant's brother. Therefore, the reason for the failure of the predecessor magistrate to complete the trial was adduced accordingly. Hence, the successor magistrate was to proceed with the matter. In deliberating on the appellant's counsel claim that the appellant should have been asked whether to continue or start afresh, the law does not provide the necessity of the successor magistrate to ask the parties if they are ready to proceed with the case or not. The successor magistrate

has the jurisdiction to proceed with the matter by providing reason as in this case at hand she stated the reason. But it is the discretion of the trial magistrate to act on the recorded evidence by the predecessor magistrate or not, unless otherwise it is his/her discretion to re-summon the witnesses and start the matter afresh. Therefore, as submitted by the Respondent's counsel, the trial magistrate exercised the discretionary powers vested to her and informed the parties that she was continuing from where the predecessor ended. The important thing is that, the parties to be addressed as per the requirements of section 214 of the CPA. From that, the parties were addressed as per the law.

Digesting on the cases cited by the respondent's counsel, starting with the case of **Flano Alphonce Masalu @ Singu** (supra), it was held that:

> *"...he was aware of the provisions of section 214(1) of the CPA as he recorded that he had addressed the accused in terms of the said section. He noted down that he had taken over the case following the transfer of Hon. H.S Riwa PRM to a new station and that he would start from where his predecessor ended".*

In the above quoted case, the learned magistrate fully complied with the dictates of the law. The same as in this case at hand the successor magistrate complied with the provision of the law.

The issue to be determined is whether the appellant has been prejudiced by the act done by the successor magistrate in this case at hand. Under section 214(2) of the CPA provides that:

> *"Whenever the provisions of subsection (1) apply, the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial".*

Therefore, the law is very trite that the conviction passed by the successor magistrate would be set aside by the high court if it is only proved that the accused has been materially prejudiced. The same was held in the case of **Khamis Abdrahakim** (supra), and in **Abdalla Bakari vs. Republic**, Criminal Appeal No. 268 of 2011, it was held that:

> *"First it should be noted that the requirement to resume witnesses, and /or recommence the trial, is the discretionary s.214(1). He would do so if he considers to be necessary. In this case, it seems that the magistrate did not find it to be necessary. Did that prejudice the appellant? After due consideration, we are of the settled view that it did not".*

Thus, in my view, the same as in this case the appellant's counsel failed to state how the appellant has been prejudiced by the act of the successor magistrate to proceed with the matter.

Briefly, on the issue that the appellant was not given the right to be heard, it is not fatal as the law does not provide so. Hence, the counsel's allegation that the appellant should have been asked whether to proceed or not, is a new version of its kind. For those reasons, and since the accused/appellant was informed of the transfer of the case file and given the discretion on the successor magistrate to continue as per section 214 of the CPA, the first issue is answered in the negative. As a result, the grounds raised by the appellant have no merit. Therefore, I concede with the respondent's counsel submission. Consequently, the 3rd and the 5th grounds are dismissed.

The 1st and 6th grounds of appeal were argued jointly. That the trial magistrate erred to convict the and sentenced the appellant to serve life imprisonment for the offence of rape, while it was not proved beyond reasonable doubt. The appellant's counsel argued that in the charge sheet it is stated that the incident happened in Makunguru Area within the

District and Region of Mbeya. No prosecution witness mentioned Makunguru. He cited the case of **Elipidius Rwezahula vs. Repuiblic,** (supra) which cited the case of **Abrahim Ahmet vs. Halima Gulet** (1968) HCD 76 and the case of **Abdallah Rajab vs. Saada Rajab and others** (1994) TLR 132. He also claimed that the evidence stated that the act occurred on 25/2/2023, but PW6 stated that they reported the matter on 6/3/2023. He also cited the case of **Abel Masikiti vs. Republic,** (supra). That in the charge sheet it was stated that an act occurred between January and February, 2023 but no witness testified that an act occurred in January they mentioned February and they went to the hospital on March, 2023. That The remedy was to amend the charge as per section 234 of the CPA. As a result, the appellant's counsel faulted the trial court to have convicted and sentenced the appellant while the offence of rape was not proved. As the Respondent's counsel argued that, section 130(4) of the Penal Code [Cap 16 RE 2022] states that:

> *"For the purposes of proving the offence of rape- (a)* ***penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence****;" [Emphasis added].*

The provisions of the cited section were interpreted in the case of **Omary Kijuu vs. Republic** (Criminal 39 of 2005) [2007] TZCA 9 (22 June 2007).

This section suggests that, as long as there was penetration the deepness is immaterial. However slight, is sufficient to constitute sexual intercourse necessary to the offence. Now, did the prosecution prove penetration? The answer is drawn from the evidence of the victim and the medical doctor. The Respondent's counsel submitted that, the victim testified in court that teacher Jof used to call her from uwanjani area, (playground) where she often plays with her mates. That he took her to his school (kishule) ordered her to wear off her clothes, inserted his *dudu* into her urinating point. She testified that she felt bad and pain. She confirmed that the appellant penetrated his manhood into her female genital organs. That the medical doctor proved that she had no hymen. That suggests that there was penetration. From the evidence of the victim the Court has set the principle which has been relied upon in cases of rape. See the case of **Selemani Makumba vs. Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006) where the Court stated 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."*

See also the case of **Ally Mpalagama vs. Republic**, Criminal Appeal No. 213 of 2018, CAT at Mtwara.

Since, the victim demonstrated good understanding on the requirement of telling the truth and that the trial court believed in her understanding, her evidence deserved credibility. See the case of **Omary Mohamed vs. Republic** [1983] TLR 52 where it was held that:

> *"The trial Court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances which call for reassessment of their credibility."*

From that excerpt, I neither have any reason to interfere with the finding of the trial court on the credibility of the victim as a witness who was sure of the commission of the rape. With the authorities cited and the evidence given by the victim and the medical doctor, the question is answered in affirmative that, penetration was proved.

Reverting on the main issue that in the charge sheet it is stated that the incident happened in Makunguru Area within the District and Region of Mbeya but the prosecution witnesses save for the victim who took them to the scene of crime, the rest none of them mentioned Makunguru. The appellant's counsel lamented that the appellant was prejudiced. That the charge was fatally defective and should have been amended. The prosecution witnesses only mentioned Mwanjelwa Market and Mwenge

Primary School. Did this prejudice the appellant? The appellant's counsel cited the case of **Abel Masikiti** (supra) where the Court of Appeal found out that the variance in the date of commission of the offence rendered the charged unproven. The respondent's counsel replied that the charge sheet stated in January and February, 2023 it did not mention a specific date. In my view, the case **Abel Masikiti** (supra) is distinguishable due to the fact that, in that case there was variance of dates between what was on the charge sheet and the evidence adduced. The charge sheet in the case at hand did not mention a specific date. It stated clearly that the offence was committed in January and February, 2023. Thus, the appellant's counsel argument does not hold water.

The charge sheet states that the act was committed in Makunguru Area but none of the prosecution witnesses mentioned Makunguru as per the appellant's counsel submission. That, they all mentioned Mwanjelwa Market. I asked myself why all the prosecution witnesses mentioned Mwanjelwa while, the charge sheet reads Makunguru. In the course of perusing the record available, I found out that DW2 in her evidence stated that she resides in Makunguru-Mwanjelwa. In addition to that DW2 is a neighbour to the appellant's day care (school). The same place where the

victim took her father and the investigator of the case. The same place where the victim testified that the rape occurred several times at different days. In my view, the place where the incident took place was well known to the appellant. From the information of DW2 the appellant's day care (kishule) is located at Makunguru-Mwanjelwa. In addition, the prosecution some of the prosecution witnesses are residents of Makunguru; PW1 the victim's father at page 11 of the trial court proceedings shows that he resides at Makunguru, PW3 the mother of the victim resides at Makunguru at page 15 of the trial court proceedings, and PW5 is a resident of Makunguru at page 22 of the trial court proceedings. Given the testimony of those prosecution witnesses, and ability of the victim identifying the place, in my view, the appellant's learned counsel claim on the variance between the charge sheet and the testimony needed amendment, I found it not fatal because the appellant was not prejudiced. The scene of crime was known to him.

The appellant's counsel lamented that the rape occurred in February, 2023 but the matter was reported in March, 2023 almost two weeks later and no reasons adduced for the delay. Does the delay prejudice the appellant? The respondent's counsel replied that the victim's father stated

the reasons for the delay in taking action. That after they reported the incident to the police, they were given a paper to go to the hospital. They called the victim's aunt who is a teacher at Njombe. That the aunt came later. This led to the delay but still went to police and hospital respectively. The delay in taking action was due to illiteracy of what to do in such a situation. In addition, the appellant when cross examined during the trial, the victim's father in his testimony at page 12 of the trial court's proceedings shows that there were occasions of trying to resolve the matter amicably. This is also supported by the appellant's testimony at page 45 of the trial court's proceedings. He stated: "*I went with my friend to talk with the victim's (sic) parent.*"

The appellant's learned counsel further argued that, the appellant's defence was not analysed at all and since the respondent's counsel did not reply to it, means she conceded. I deeply scrutinized the trial court's judgment and realized that the learned magistrate just summarized the defence evidence at page 5 but did not analyse it as she did to the prosecution's evidence. Thus, the submission by the appellant's counsel requires substantive response. Whether unfortunately or purposely, the respondent did not respond to the issue raised, it has not been disclosed. If

this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. See the case of **Abel Maskiti** (supra) at page 9, cited by the appellant's learned counsel. But this being the first appellate court it is entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own decision. See the case of **Makubi Dogani vs. Ngodongo Maganga** (Civil Appeal 78 of 2019) [2020] TZCA 1741 (21 August 2020) at page 11 and 12 which cited the case of **Jamal A. Tamim vs. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 and **Leopold Mutembei vs. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development & Another,** Civil Appeal No. 57 of 2017 (both unreported). See also **Philipo Joseph Lukombe vs. Faraji Ally Saidi,** Civil Appeal No. 74 of 2019 and **Tanzania Sewing Machine Co. Ltd vs. Njake Enterprises Ltd,** Civil Appeal No. 15 of 2016 (unreported). From the position set by the Court of Appeal, this court shall exercise its power to re-evaluate the defence evidence very cautiously because the trial court was at a better position to see, hear and appreciate the evidence.

As per the proceedings of the trial court, during the trial of the of the case, the defence marshalled two witnesses. DW1 the accused/appellant, denied to have committed the offence and never knew the victim. He defended himself that he is a teacher but the victim is not one of his pupils. Also, alleged that the victim never mentioned his residence. That towards the end of February, 2023 his neighbour, DW2 called and informed him that some people came to his day care looking for him. He added that, they were looking for mwalimu Jof of Kambarage. That the next day his neighbour revealed that scenario. That after a week he received a call from his fellow teacher that he was need at his school, he went to the day care and found the victim, parent and inspector Mayala who arrested him. That at the police station he was interrogated and denied to have raped that victim.

When cross examined by the State Attorney, the appellant agreed that he owns a day care/kindergarten school. He insisted that the victim did not mention his residence. He also agreed that the victim touched him in court but he did not understand what she meant. Further he agreed to be known as mwalimu Jof. He continued to respond that the victim showed

her parents and inspector Mayala his school, the place. That he with his friend went to see the victim's parents.

DW2 was Ms. Naomi Mikota, resident of Makunguru-Mwanjelwa. She testified that she knows mwalimu Jof. That he is her neighbour who owns a day care. That the victim with parents and inspector Mayala visited her house because mwalimu Jof's school at that time was closed. DW2 added that they were looking for mwalimu Jof. That Mwalim Jof told her that those people who were looking for him returned after a week.

Having summarized the defence evidence of the appellant, it is time to evaluate the same. Since the trial magistrate evaluated the prosecution's evidence, I will not re-evaluate it. The main question is whether the defence evidence shook the prosecution evidence.

The appellant in his defence denied to have committed the offence but never denied to own the day care (kishule). That he is also known as mwalimu Geofrey. That the victim showed the other witnesses the house where the alleged rape was committed. DW2 as well testified that Jof is her neighbour at Makunguru-Mwanjelwa and owns the day care. That victim accompanied with inspector Mayala and her parents visited her house

because they were looking for Jof. That it was the victim who led them to the day care of mwalim Jof. Since mwalimu Jof had left the school due to time, they visited her and she call mwalimu Jof.

When cross examined the appellant agreed that the victim touched him but did not understand what she meant. That he is also known as mwalimu Jof. He added that he went to the victim's parents to talk to them. In anyway, did the general denial exonerate him from the allegations? The victim did not mention his residence, and the victim when testifying, the appellant cross examined her. The victim replied that, he told her that his name is teacher Jof. This is in line with the appellant's reply during cross examination that he is also known as mwalimu Jof. The victim added that the appellant used to call her when she was playing with her fellows at the playground (uwanjani) and entered his *kishule,* that he used to enter his *dudu* into her urinating point. Quoting part of her reply: "*... you entered your dudu to me several times and you were giving me biscuits and sweets. I am telling the truth.*" That every time they did the act the appellant gave her sweets and biscuits.

In my view, the defence did not shake the evidence of the prosecution on the following reasons. I may disregard the evidence of the other six witnesses and consider the victim's testimony and that of the medical doctor. The victim told the court that the appellant inserted his manhood into her female organ (he inserted his *dudu* into my urinating point), that she felt bad and pain. The doctor examined her and found out that she was penetrated and she had no virgin. Since, the victim was eloquent in testifying and was consistent in her testimony, as well, during cross examination by the appellant, she was consistent about the appellant's behaviour of calling her to his *kishule*/day care and had sexual intercourse several times at different days. Also, the victim named the appellant, mwalimu Jof at the earliest possible when asked by her father who did the act to her. She led her father and later inspector Mayala to the appellant's day care. As per DW2, the appellant's day care (kishule) is located at Makunguru-Mwanjelwa, that is the place where the raping took place several times and at different days. In addition, the victim identified appellant before the trial court. The appellant's denial that he did not know the victim neither taught her is far from denting the victim's evidence. I have no doubt that the victim knew the appellant well as he used to call

her to his school several times and raped her. She could not mistake him as she identified the place (kishule) where she had been raped several times. Her evidence as per the scene of crime, Makunguru-Mwanjelwa rymes with that of DW2, a neighbour of mwalimu Jof, next to the appellant's day care.

It is my considered opinion that, although the trial court did not evaluate the evidence of the defence side, still the defence could not shake the testimony given by the prosecution. Mr. Mwakolo stated that the use of the word *dudu* meant worm. That the victim did not mean that the appellant inserted his manhood into her female organs. As Ms. Katabaro argued, due to custom and traditions, such a tender age girl could not name the organs by their exact names. See the case of **Hassan Bakari @ Mama Jacho vs. Republic,** (supra). With regard to the case law cited, I am of the view that, although the trial court summarized the evidence of the defence side without evaluating, and given the evaluation I made, still the defence evidence did not dent the prosecution's evidence. I found it that the prosecution case was proved beyond reasonable doubt.

In the circumstances, I think that the learned trial magistrate cannot be totally faulted in her judgment. Only the claim that non-evaluation of

the evidence of the defence side succeeded which has been remedied by re-evaluation. Therefore, I see no merit in the grounds of appeal which I dismiss. In the upshot, the appeal lacks merit and is hereby dismissed. In consequence thereof, the conviction and sentence meted by the trial court is upheld.

It is so ordered.

Right of appeal explained to any aggrieved party.

Dated and Delivered at **MBEYA** this 13th day of May, 2024.

**E. L. KAWISHE**

**JUDGE**

The Judgement delivered this 13th day of May, 2024 in the presence of Mr. Simon Mwakolo, learned counsel for the Appellant and in the presence of Mr. Augustino Magessa learned State Attorney for the Respondent.

**E. L. KAWISHE**

**JUDGE**

**13/5/2024**