**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**(CORAM: JUMA, C.J., MWARIJA, J.A. And MWAMBEGELE, J.A.)**

**CRIMINAL APPEAL CASE NO. 336 OF 2020**

**JOSHUA CHIPAHNA@KIDYANI.....APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of Resident Magistrate's Court of Dodoma)**

**(Hon. G.V. Dudu-PRM Ext. Jurisdiction)**

**dated the 27th day of March, 2020**

**in**

**PRM Criminal Appeal No. 6 of 2019**

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# JUDGMENT OF THE COURT

24th & 26th May, 2021

## JUMA, C.J.:

The appellant JOSHUA CHIPAHNA @ KIDYANI was in the District Court of Kondoa at Kondoa, convicted for the offence of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code, Cap 16 R. E. 2002. According to the particulars of the charge, around 05:30 hours on 02/05/2018, at Chemba village within Chemba District in Dodoma Region, the appellant had sexual intercourse with a then 12-year-old girl who we shall refer to as **TDH**. At the

conclusion of his trial, the trial district court of Kondoa (F.R. Mhina-RM) found the appellant guilty of the offence of rape, convicted and sentenced him to serve 30 years imprisonment on his conviction.

G.V. Dudu, learned Principal Resident Magistrate who heard the appellant's first appeal on extended jurisdiction, dismissed it. Aggrieved with that dismissal, the appellant filed this second appeal to this Court based on seven (7) grounds of appeal.

The victim of that rape, TDH, was under fourteen when she testified before the trial court as PW1. In her testimony, she recalled how, in the morning hours on 2/5/2018, the appellant (who is her step father), walked into her bedroom. He woke her and her brother from sleep and ordered them to follow him to a nearby forest to help prepare charcoal. Once at the charcoal-making place, the appellant told her brother to return back home. Alone with PW1, the appellant ordered her to remove all her clothes. After taking off his trousers, the appellant laid on her and proceeded to rape her. She was in pain and cried out for help. PW1 was still lying on the ground when her mother, Mariam Masui (PW2), arrived, and he let her off. According to PW1, the appellant carried a weapon locally known as "hengo," which he hid in the bush. She also recalls how the appellant followed her and PW2

back home brandishing a bush knife she described as *"sime."* He assaulted her mother for falsely accusing him of rape.

PW2 testified that the appellant is her husband. Before his arrest for rape, they lived together with their three children, including PW1. PW2 explained that PW1 is her daughter, but from another man. PW2 confirms the complainant's account that the appellant woke up PW1 and her brother from their sleep, and asked them to follow him to a nearby forest to prepare charcoal. PW2 rushed to the woods following her daughter's loud cries for help. PW2 testified that she caught the appellant having sexual intercourse with PW1. According to PW2, the appellant followed PW2 and PW1 back home, hit her with a bush knife. All this while, the appellant was complaining why PW1 had refused to have sex with him. Later, PW2 took her daughter to the hospital.

Admand Manuli Chiwanga (PW3), the clinical officer at Chambako Dispensary, received PW1 for treatment on 24/7/2018. PW1 told PW3 that her father (the appellant) had raped her. The Clinical Officer examined the complainant and found that she was no longer a virgin. He filled the medical examination report, which he tendered before the trial court as exhibit P1.

In his sworn testimony, the appellant denied the allegation of rape. He narrated that he no longer lived with his wife PW2, who hates him and fabricated the charge of rape against him. He traced the source of their misunderstanding to his decision to prevent his hitherto wife from marrying off her daughter (PW1), who the appellant regarded to be too young for marriage. He wondered why it took his wife a very long time before taking her daughter to the hospital.

The learned trial magistrate evaluated the evidence and found that the appellant had sexual intercourse with PW1, who could not consent to sexual intercourse under the law because of her age. The learned trial magistrate believed the prosecution evidence that the appellant had sexual intercourse with PW1; hence, he committed statutory rape.

On appeal, the first appellate court dismissed the appellant's appeal, prompting him to file this second appeal.

In his memorandum of appeal, which the appellant filed on 11/01/2021; he urged us to allow his appeal on the following seven grounds, which we paraphrase as follows:

**Firstly,** the appellant complains that evidence of PW1 did not comply with section 127 (2) of the Evidence Act Cap 6 as amended by the Written

Laws Miscellaneous (Amendment) Act No 4 of 2016. **Secondly,** he is concerned over the two-month delay, from 2/5/2018 when the alleged rape occurred and on 24/7/2018 when PW2 reported the incident. **Thirdly,** he faults the evidence of the clinical officer, PW3. He blamed PW3 who, merely inserted his fingers into the complainant's vagina but failed to inform the trial court whether there was any sexual penetration. **Fourthly,** the appellant further blames the medical examination report exhibit P1, whose contents the prosecution did not read out in court. **Fifthly,** the appellant raises an issue with how the two courts below convicted him for rape without the evidence of any police officer or social welfare officer. He wondered why PW2 failed to report the rape to the police, nor did they carry out investigations. In the **sixth** ground of appeal, the appellant complains that the prosecution did not prove its case to the required standard of proof. **Lastly**, he blames the trial and first appellate courts for failing to evaluate his defence.

At the hearing of this appeal on 24/05/2021, Mr. Tumaini Kweka, learned Principal State Attorney; and Ms. Catherine Gwaltu learned State Attorney, represented the respondent Republic. The appellant appeared in person by video link from Isanga Prison. He urged us to let the learned State Attorneys

first submit in response to his seven grounds of appeal. He reserved his right of rejoinder.

Ms. Gwaltu took the lead, stating that she opposed the appellant's appeal. She submitted that we should dismiss the appellant's first ground of appeal, contending that the two courts below wrongly received the evidence of PW1 contrary to the requirements of section 127 (2) of the Evidence Act Cap 6 R.E. 2019 which states:

> *127 (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.*

Ms. Gwaltu referred us to the appeal record on page 10, and argued that PW1 had promised to tell the truth, hence her evidence complied with section 127 (2) of the Evidence Act. For support, she cited the case of **JUMA S/O LWILA @ MASUMBUKO V. R.**, CRIMINAL APPEAL NO. 215 OF 2019 (unreported), where a 13-year-old girl merely promised to tell the truth, and the trial court allowed her to give evidence. The learned State Attorney urged us to disregard what she regarded to be a typing mistake on page 8 of the

record where it appears as if the accused (the appellant), and not PW1, was on the witness box testifying as a child under fourteen.

Next, the learned State Attorney urged us to dismiss the second ground of appeal where the appellant claims that the prosecution claimed that he committed the offence on 2/5/2018. The appellant expressed his surprise because, it took PW2 up to 24/7/2018 to report the rape of PW1. She referred us to page 2 of the record of appeal and submitted that 24/7/2018 is the date when, for the first time, the prosecution read the charge sheet of rape before the trial district court. Ms. Gwaltu submitted that what matters is the evidence that the appellant and PW1 had sexual intercourse on 2/5/2018. As long as both PW1 and her mother (PW2) testified that the appellant raped PW1 on 2/5/2018, the appellant cannot avoid a conviction for rape. In any case, the learned State Attorney insisted that the question when PW2 reported the rape did not in any way prejudice the appellant.

The learned State Attorney urged us to dismiss the appellant's third ground of appeal that faulted the clinical officer (PW3) for failing to state if there was sexual penetration of PW1. She submitted that the clinical officer's role was not to say whether the appellant raped PW1, but what he saw when he examined PW1. She argued further that the prosecution does not rely

solely on the evidence of PW3 to convict the appellant because there is evidence of the victim of rape, PW1. For support, she referred us to the case of **SELEMAN MAKUMBA V. R** [2006] TLR 379, where this Court describes the evidence of the victim of rape as the best evidence.

Ms. Gwaltu conceded to the fourth ground of appeal that PW3 did not read the medical examination report to the appellant after the trial court admitted it as exhibit P1. We should remove it from the record. She added that expunging this report will not affect the appellant's conviction based on the evidence of the victim of sexual offence (PW1) and PW2 and PW3.

The learned State Attorney urged us to dismiss the fifth ground of appeal. The prosecution was not obliged by any law to call the police officer or social welfare officer prosecution witnesses. For support, she referred us to section 143 of the Evidence Act, Cap 6 R.E.2019 which states that no particular number of witnesses is, in any case, required for the proof of any fact.

Reverting to the seventh ground of appeal, Ms. Gwaltu urged us to dismiss the complaint that the trial and first appellate courts did not consider his defence. She referred us to page 20 of the record of this appeal, where the trial court revisited the evidence of the appellant denying he committed

the offence and how he and his wife (PW2) were not in good terms. The learned trial magistrate described the appellant's evidence as weaker compared to prosecution evidence.

When we pressed her whether the trial magistrate's conclusion that the appellant's evidence was weaker amounted to the evaluation of defence evidence, she conceded that the appellant should be convicted on the strength of the case that the prosecution proved but not on the weakness of his defence. The learned State Attorney completed her submissions by pointing out that the prosecution proved its case beyond a reasonable doubt, and we should dismiss this appeal.

Apart from what he had stated in his seven grounds of appeal, the appellant had nothing to add.

After hearing submissions of the learned State Attorney on the grounds of appeal, our determination of this second appeal centres on sections 130 (1)(2) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2019. Under these provisions, sexual intercourse with a girl under the age of eighteen is statutory rape, and it is immaterial whether the girl in question consented to the sexual act or did not.

Both the trial district court of Kondoa and the first appellate High Court at Dodoma made a concurrent finding that the appellant had sexual intercourse with a 12-year-old PW1. The Principal Resident Magistrate (G.V. Dudu—EJ), who sat as the first appellate court on extended jurisdiction, concurred that the victim's (PW1's) evidence was straightforward, clear, and was sufficient to sustain the conviction under section 127 (6) of the Evidence Act, Cap 6 R.E. 2019 which states:

> *127 (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, a****fter 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].

As this Court stated in **VICTORY S/O MGENZI @ MLOWE V. R,** CRIMINAL APPEAL NO 354 OF 2019 (TANZLII), the above section 127(6) of

the Evidence Act, Cap 6 reiterates that there can be no more direct evidence than the evidence of the victim of the crime concerned. In the instant appeal before us, PW1 is both a child of tender years (she is under fourteen years) and a victim of the sexual offence.

In line with the requirements of section 127 (6) of the Evidence Act, that the court must be satisfied the child under the age of fourteen is telling the truth, the first appellate Principal Resident Magistrate was satisfied that PW1 as a victim of the sexual offence was telling nothing but the truth, stated:

> *"The question is whether there were any loose ends in the prosecution case that suggests that PW1 was not telling the truth. In my candid opinion there was none."*

The Court in **WANKURU MWITA V. R.,** CRIMINAL APPEAL NO. 219 OF 2012 (unreported) gave examples of occasions where the Court may interfere with concurrent findings of facts:

> *".... unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; mis-directions or non-direction*

*on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice...."*

With due respect, we agree with Ms. Gwaltu, all the appellant's seven grounds do not give us any cause to interfere with the concurrent finding of facts by the two courts below. The appellant's attempt to cast doubt on the legality of the victim's evidence of the sexual offence (PW1) did not convince us. Although the record appears to be indicating that it was the accused, and not PW1, who was promising to tell the truth, we agree with Ms. Gwaltu that this was an inadvertence since PW1 was in the witness box. The learned trial magistrate indicated that PW1 was testifying under section 127(2) of the Evidence Act, which regulates evidence of children whose apparent age is not more than fourteen.

The learned State Attorney is also correct in pointing out that the weight of evidence to prove a fact does not depend on the number of witnesses. Section 143 of the Evidence Act, which Ms. Gwaltu referred us to, even a single witness can prove any fact. This Court said in **MWITA KIGUMBE MWITA & MAGIGE NYAKIHA MARWA V. R,** CRIMINAL APPEAL NO. 63 OF 2015 (TANZLII), in each case, the Court looks for quality, not the quantity of the evidence placed before it. The best test for the quality

of any evidence is its credibility. It was for the prosecution to determine which witness should prove whatever fact it wanted. Therefore, it was not up to the appellant to direct the prosecution to call either a police officer or a social welfare worker to testify.

In the upshot of all above, we find the appeal to be without merit and dismiss it in its entirety.

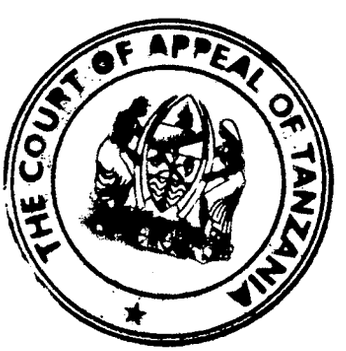
**DATED** at **DODOMA** this 25th day of May, 2021.

I. H. JUMA
**CHIEF JUSTICE**

A. G. MWARIJA
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

This judgment delivered this 26th day of May, 2021 in the presence of the Appellant in person via Video link from Isanga Prison and Ms. Neema Taji, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.




K. D. Mhina
**REGISTRAR**
**COURT OF APPEAL**