

**IN THE HIGH COURT OF TANZANIA  
(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**(APPELLATE JURISDICTION)**

**DC CRIMINAL APPEAL NO. 103 OF 2019**

(Original Criminal Case No. 14 of 2019 of the District  
Court of Iramba at Kiomboi)

**EMMANUEL ERNEST @ MBELEKA .....APPELLANT**

**VERSUS**

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

*12/2/2020 & 26/2/2020*

**JUDGMENT**

**MASAJU, J.**

The Appellant, Emmanuel Ernest Mbeleka was charged with, and convicted of Rape Contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal code, [Cap 16] in the District Court of Iramba at Kiomboi. He was sentenced to thirty (30) years imprisonment.

Aggrieved by the conviction and the sentence thereof, the Appellant has appealed to the Court against the said conviction and sentence thereof. His Petition of Appeal is comprised of four (4) grounds of appeal in which he essentially states that the case

against him was not proved beyond reasonable doubt by the prosecution and that, the burden of proof was unlawfully shifted from the prosecution to the accused.

At hearing of the appeal in the Court on the 12<sup>th</sup> day of February, 2020, the Appellant was represented by the learned counsel, Mr. Fred Kalonga while the respondent Republic was represented by Ms. Rachel Tuli, the learned State Attorney who supported the appeal in the Court.

The Appellant's learned counsel dropped the 2<sup>nd</sup> and 4<sup>th</sup> grounds of appeal and thus submitted on the 1<sup>st</sup> and 3<sup>rd</sup> grounds of appeal.

On the 1<sup>st</sup> ground of appeal the learned counsel submitted that the trial Court erred in law for convicting the Appellant whilst the prosecution failed to prove the case beyond reasonable doubt. That, the charge sheet alleges that the Appellant did rape the alleged victim of crime, Wantongela Nasania (PW1), on the 16<sup>th</sup> day of May, 2018. That, the prosecution side, mostly especially the victim (PW1) testified that she was raped on diverse dates including the day alleged. Thus, the prosecution evidence was not certain on the dates when the offence was allegedly committed.

That, the PF3 tendered by PW4, Dr. Gerald I. Buhonza, shows that medical examination was conducted seven (7) months past the day of the alleged rape and PW4 concluded that, PW1 was 3 months pregnant and that, she had a history of regular sexual intercourse. Thus, it is doubtful if the Appellant did actually rape PW1 on the 16<sup>th</sup> day of May, 2018.

The learned counsel further submitted that section 127 (5) of the Evidence Act, [Cap 6] was violated by the trial Court by treating PW1 as a child of tender age while she was more than 14 years of age. PW1 gave unsworn evidence in the trial Court. That, this is contrary to section 198 (1) of the criminal Procedure Act, [Cap 20].

The Appellant's learned counsel submitted on the 3<sup>rd</sup> ground of appeal, that the trial Court shifted the burden of proof from the prosecution to the Appellant, that he was uncircumcised whilst there was no medical report to that effect. The learned counsel rested his case by praying the Court to allow the appeal, quash conviction and set aside the sentence of thirty (30) years imprisonment.

On her part, the learned State Attorney supported the appeal for the reasons; thus;

That, since PW1 was alleged to be under eighteen (18) years of age it was mandatory for the prosecution to prove her age, and that was not done in the trial Court. That, since according to Ms. Emelesiana Luena (PW2), PW1 mentioned Ally Pandu and the Appellant to have been engaged with her in sexual intercourse, and she was by then pregnant it was imperative to conduct DNA test in order to verify if the Appellant had sexual relationship with PW1.

The Respondent wound up the submissions by stating that the offence against the Appellant was not proved beyond reasonable doubt.

That is all that were submitted by the parties in the Court.

The Court appreciates the submissions by the parties and their reasoning on this appeal. The Court agrees with the parties that the prosecution case against the Appellant was not proved beyond reasonable doubt, it leaves a lot of gaps that affects the credibility of its evidence. PW1 alleged that she was coming from her neighbour's house to collect "*Togwa*" when the Appellant asked her to go to his house. She (PW1) did not even mention who that neighbour is instead she referred to her as "*mama mmoja*." The woman neighbour was not called to corroborate

PW1's story, a thing which impeaches PW1's credibility of evidence as a key witness.

The charge sheet alleged the crime to have been committed on the 16<sup>th</sup> day of May, 2018 but prosecution's evidence was not certain on the date the crime was committed. PW1 testified to have engaged in sexual intercourse with the Appellant on diverse dates. This creates doubt on whether or not the Appellant committed the crime on the alleged date or on diverse dates.


Medical Examination Report (PF3) tendered by PW4 was conducted seven (7) months later and it revealed PW1 to have had regular sexual intercourse and she was three (3) months pregnant. The question remain if really it was the Appellant who raped her on the alleged date how come she was three (3) months pregnant by then. This means she was having sexual intercourse with various men as it was well proved by PW2.

The Court agrees with the learned counsel for the Appellant that it was improper for the trial Court to treat PW1 as child of tender age when adducing evidence, since she was above fourteen (14) years of age by then, thus section 127 (4) of the Evidence Act, [Cap 6] was violated, together with section 198 (1) of the Criminal Procedure Act, [Cap 20] since PW1 gave unsworn evidence in the trial Court.

PW1 alleged the Appellant to be uncircumcised, the trial Court ordered medical examination to be conducted to prove that fact, the examination was conducted but the Report on the same was not tendered as an exhibit before the trial Court. The fact, which creates doubt on the allegations by PW1.

In sexual offences particularly statutory rape the age of the victim must be proved in the trial Court as it was well decided in **Solomon Mazala V. R (CAT) Criminal Appeal No. 136 of 2012 (Dodoma Registry, Unreported)**. In the instant case the age of PW1 who was allegedly fifteen (15) years old was not proved, such omission affects the prosecution case accordingly.

Having so reasoned, the Court is in agreement with both the Appellant and the Respondent's reasoning that the prosecution case in the trial Court was wanting in terms of its proof against the Appellant. The appeal is hereby allowed. The conviction and the sentence against the Appellant is quashed and set aside respectively. Appellant shall be release from prison unless otherwise lawfully held

The seal of The High Court of Tanzania is circular, featuring a central emblem with a scale of justice and a book, surrounded by the text "THE HIGH COURT OF TANZANIA".  
GEORGE M. MASAJU  
**JUDGE**  
26/2/2020