

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**CRIMINAL APPEAL NO 3 OF 2018**

**(Original Criminal Case No 139 of 2017, of Morogoro RM's Court  
Morogoro)**

**MIKIDADI SALUM.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

Date of last Order: 2/5/2018

Date of Judgment: 16/5/2018

**Munisi, J.**

The appellant, Mikidadi Salum stood arraigned before the Resident Magistrate Court of Morogoro for the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 RE 2002. It was alleged that on the 24/2/2017, at Matunda area, Mvomero Village within Mvomero District in Morogoro Region, appellant had unlawful carnal knowledge of one Asia Adam a girl of 14 years old. To prove the allegation, prosecution summoned six witnesses and relied on two exhibits; the PF3 and a clinic card. The appellant defended himself in person and did not call any witness. At the conclusion of the trial, the court was satisfied that the prosecution had proved its case to the required standard and convicted the appellant as charged. A sentence of 30 years' imprisonment was imposed on him together with an order to pay the victim a

compensation of Shs 200,000/=. Aggrieved by the decision, appellant has preferred the present appeal comprised of seven grounds of appeal which upon scrutiny, they are all factual revolving around one main issue; i.e. the sufficiency and the credibility of the evidence that the magistrate used to ground the conviction

On 2/5/2018 when the appeal was called on for hearing, the appellant appeared in person unrepresented while Miss Veronica Mtafya, learned State Attorney appeared for the respondent, Republic.

Appellant who was fending for himself prayed to adopt and rely on the substance of his petition of appeal. On her part Miss Mtafya, learned State Attorney opted to support the conviction and sentence on the ground that the prosecution evidence was overwhelming. Arguing the grounds cumulatively, she contended that the evidence of the victim PW4 when read together with that of PW5, the doctor who examined her, proved beyond doubt that PW4 was raped. She added that the facts show clearly that appellant was well known to the victim and on the material day he had gone to the house where PW4 lived with her grandfather. She thus argued that the appeal lacked any merit and prayed for its dismissal.

The appellant had nothing useful to say apart from insisting that he did not commit the offence and prayed for acquittal.

I have considered the submission by the learned State Attorney which was made in response to the grounds filed by the appellant challenging the sufficiency of the evidence to support the conviction entered. The magistrate after considering PW4 and the doctor's evidence, was satisfied that PW4 was raped and that the rapist was the appellant. In answering the issue whether the victim was carnally known, the magistrate observed:

*"The victim herself evidenced before this court that, after she felt so much pain that caused her to remove the cloth that the*

*accused had covered her eyes with, she witnessed the accused's penis penetrating into her vagina."*

Equally, for the 2<sup>nd</sup> issue whether it is the appellant who raped PW4, the magistrate observed thus;

*"...this court finds that the accused himself pleaded not guilty to the charge but then the evidence adduced by the prosecution plus the exhibits admitted by this court adding to the victim's testimony who is the credible witness in this matter, points out that it was the accused who took away the victim from PW1 and PW2 and that the victim saw him insert his penis into her vagina....."*

The issue is whether the finding by the magistrate that PW4 was raped by the appellant is supported by the evidence and by the law. It is settled law that in rape cases, the evidence of the victim is the best evidence to prove the alleged rape, see the cases **Selemani Mkumba V Republic, Criminal Appeal No 94 of 1999** and **Ally Mkong'oto V Republic, Criminal Appeal No 133 of 2009** (unreported). It is not disputed from the evidence presented that on the material day the appellant who allegedly is a witchdoctor visited PW1's residence to attend to a sick person and in the course of performing his charms that is when he is alleged to have raped PW4. The issue is whether being the only person who was present during the alleged rape, PW4 gave sufficient and good evidence proving that she was raped. As to how she got raped, PW4 told the court thus:

*"...he gave me the calabash he told me to go to another place so as to pick the medicine. He took me to the tree. It was about 20 paces from the place where we left our grandfather he told me to reclining that tree I wore the singlet skirt and the underpants.*

*He told me to close my eyes then he started moving around he closed my eyes with the piece of cloth. He took my skirt and pulled it upwards and he toured (sic) my underpants I heard*

*something knocking me to my private parts that thing was soft and that thing was put into my vagina. By that time, he was speaking some words which I did not understand. I felt so painful in my vagina so I removed that cloth which was covered my face. When I looked on what was going on I saw his penis in my vagina. So I wanted to make noise but the accused covered my mouth with his hand. And he continued on inserting his penis into my vagina. I tried to resque (sic) myself and I went away at home..."*

From the excerpt of PW4's testimony, it is not clear how the rape took place as according to her she was told to recline on the tree then she felt her dress being pulled up and something soft being put on her vagina. From her explanation, it is not clear whether there was any penetration because according to her she rescued herself and ran home when her assailant was penetrating his penis in her vagina. With respect, PW4's account on how the rape took place is unclear considering that at no point did she say she was forced to lie down. It is thus puzzling how the rape took place while she was standing up. The Court of Appeal in a number of its decisions has insisted that clear account of how the rape took place must be given, see the case of **Mathayo Ngalya @ Shabani V Republic, Criminal Appeal No 170 of 2006** (unreported). PW4 claimed that her under pant was torn but that piece of evidence was not supported by anybody else or even the same been tendered in court. Another disturbing fact is the alleged penetration, if she was raped standing, it beats one's imagination how the rape took place. In addition, despite the alleged pain and a claim that the rape was her first sexual experience, she managed to run back home without any difficult in walking. To say the least, her evidence on how the rape took place leaves a lot to be desired. Miss Mtafya invited the court to find that PW5's testimony supported the claim that PW4 was raped. PW5 told the court, thus:

*"I examined her and I found that she has bruises on the vagina and her clothes had the dust. When I made per vaginal*

*examination I found that there was blood and sperms. According to my examination I found that there was penetration thereafter I filled the PF3 and they went to police station."*

I have closely considered the above explanation on how the doctor conducted his examination. With due respect to the account given, I am not impressed by the same. It is just too casual and suspect for any serious expert. From his testimony, he said he was in the night duty shift so his examination must have been done during the night. Among the things he noted on the victim was a dusty skirt, clearly this piece of evidence is at variant with the other witnesses who did not talk about it at all, further if PW4 reclined on the tree during the alleged rape, it is incomprehensible how the skirt got the dust unless she was raped somewhere else. Again, looking at PW5's testimony, it is not clear how he examined the victim and satisfy himself that she had been penetrated forcefully and filled up his findings within such a short period of his examination. It is also not clear how he came to the conclusion that there were sperms in PW4's vagina. Without clear explanation of how he came up with the findings, his evidence is of less value as it lacks foundation and remains to be unsubstantiated statements. It follows that the evidence of PW5 does not improve in anyway PW 4's evidence on the issue of penetration. The Court of Appeal in the case of **Simon Lucas V Republic, Criminal Appeal No.286 of 2013** (unreported) emphasized that in rape cases penetration is one of the key ingredients which must be proved. As nobody witnessed the alleged rape and PW4's evidence is full of potholes which could not be filled even with the assistance of PW5's evidence, the lingering doubts have to be resolved in favour of the appellant. I am thus inclined to the view that had the magistrate considered the evidence of PW4 and PW5 critically, she would have found that they lacked sufficient evidential value to establish conclusively that PW4 was on the fateful day raped by the Appellant.

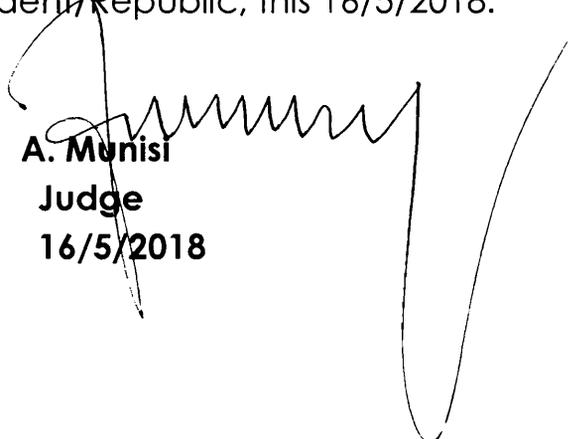
Consequently, I find the appeal to have merit and I allow it. Accordingly, I quash the conviction, set aside the sentence imposed together with the order thereto and direct the appellant to be released from prison forthwith unless otherwise lawfully held.

It is so ordered.



**A. Munisi**  
**Judge**  
**16/5/2018**

Judgment delivered in Chambers in the presence of the appellant in person and in the presence of Miss Monica Ndakidemi, learned State Attorney for the respondent/Republic, this 16/5/2018.



**A. Munisi**  
**Judge**  
**16/5/2018**