

TANZANIA / JUDGMENT

# mosses william vs republic

## 2021 tzhc 7627 3 december 2021

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3 December 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY  
OF BUKOBA AT BUKOBA CRIMINAL APPEAL No. 70 OF 2021 {Originating from Criminal Case  
492/2016 of Karag we District Court) MOSSES WILLIAM .....  
APPELLANT VERSUS REPUBLIC..... RESPONDENT

### JUDGMENT

Date of last order: 25/11/2021 Date of Judgment: 03/12/2021 KHekamajenga, J. The appellant before this court is Mosses William who was convicted and sentenced to serve thirty years in prison for the offence of rape contrary to Section 132 (1) (2) (a) and 131 (1) of the Penal Code, Cap. 16 RE 2019. Aggrieved with the decision of the trial Court, the appellant raised seven grounds of appeal challenging his conviction and sentence. Due to the reasons that I will state here below, I find no reason to reproduce the grounds of appeal advanced by the appellant. The hearing of this appeal brought the presence and professional legal services of the learned State Attorney, Mr. Joseph Mwakasege whilst the appellant, being a lay person, appeared in person and without representation. Before the hearing commenced, the learned State Attorney prompted the Court on the blatant legal irregularities in the case. He raised two legal issues and I invited the Court to address them in its decision. First, when the appellant was charged in Court, he was 18 years old. The charge and proceedings at page 11 show that the appellant was 18 years old when he committed the offence. He urged that, under Section 131 (2) (a) of the Penal Code, the appellant was supposed to sentence to corporal punishment. Mr. Mwakasege was of the view that the decision of the trial Court was against the law. Second, in this case, the victim (PW1) was 14 years old and under Section 127 (2) of the Evidence Act, Cap. 6 RE 2019, she was supposed to promise to tell the truth and not to tell lies before giving evidence. Mr. Mwakasege fortified his argument with the case of Masanja Makunga v. Republic, Criminal Appeal No. 378 of 2018, CAT at Dar es Salaam. Third, there is no evidence proving the age of the victim and therefore there was injustice in the determination of this case. Based on the illegalities pointed above, the counsel urged the court to allow the appeal. On his part, the appellant had nothing to add to the learned State Attorney's submission. In the instant appeal, there are two important legal issues which may determine the appeal. First, as well argued by the learned State Attorney that, the appellant was 18 years old when he committed the offence. Even when the case was being tried, the

proceedings still show that the appellant was a child under the law. Under the law, especially the Penal Code, the appellant, being the first 2 offender, was supposed to be sentenced to corporal punishment. For clarity, the law specifically provides that: 131 (2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall

- (a) if a first offender, be sentenced to corporal punishment only. However, the above provisions of the law must be read together with the provisions of the child Act, Cap. 13 RE 2019. Specially, Section 119 (1) of the Act which provides that: 119 (1) Notwithstanding any provisions of any written law, a child shall not be sentenced to imprisonment.
- (2) Where a child is convicted of any offence punishable with imprisonment, the Court may, in addition or alternative to any other order which may be made under this Act:
  - (a) discharge the child without making any order. In the case at hand, the trial Court was supposed, after convicting the appellant, obtain information about the appellant and thereafter pass an appropriate sentence which unfortunately, does not include imprisonment or corporal punishment. Second, the other anomaly blatant in this case is based on how the testimony of the victim was recorded. Under Section 127 (2) of the Evidence Act, Cap. 6 RE 2019, the child of tender age, that means 14 years old or below, was supposed 3 to promise to tell the truth before taking an oath. In this case, this procedure was violated something which faulted the evidence or testimony of the key witness (PW1). I therefore find merit in this appeal and allow it. The appellant should be released forthwith unless held for other lawful reasons. Ntemi N. Kilekamajenga JUDGE 03/12/2021 Judgment delivered this 03rd December 2021 in the presence of the appellant present in person and the learned State Attorney, Mr. Joseph Mwakasege. Right of appeal explained. Ntemi N. Kilekamajenga JUDGE 03/12/2021 4

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