IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY AT TABORA

MASC. CRIMINAL APPLICATION NO. 4 OF 2007

(In the matter of an application for Extension of time to file the Notice of Appeal to the Court of Appeal (T) out of time Under Section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002)

AND

In the matter of the High Court Criminal Appeal No. 35 of 1998

MARCO KILATUNGWA.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

REASONS FOR JUDGMENT

26th June,08 & 23rd Feb.09

MUJULIZI,J.

The Appellant, **MARCO S/O KILATUNGWA** was convicted by the District Court on 9/04/1998, on one count of: Defilement of a girl aged below fourteen years Contrary to Section 136 (1) of the Penal Code Cap. 16 Vol. 1 of the Laws. He was sentenced to a twenty years jail term, plus twelve strokes-corporal punishment.

The appeal is against conviction and sentence.

Although the appellant had filed a total of nine grounds of appeal, the Respondent Republic, ably represented by Mr. Kakwaya learned State Attorney did not support the conviction. It won't therefore be necessary to dwell into the merits of the grounds.

I was in agreement with the reasons given by the Respondent Republic. Consequently, I allowed the appeal and gave consequential orders on 21/07/2008, and reserved my reasons for later.

These are the reasons;

As correctly submitted by Mr. Kakwaya, learned State Attorney;

1. The charge sheet claimed that the offence was committed on 16/02/1998, without more particulars as to time.

In **SIMON ABONYO V.R.** Criminal Appeal No. 144/2005 CAT @ Mwanza (Unreported), the Court held; page 6.

> *"From the charge, the accused is made aware of the case he is facing with regard to the time of the incident and place so that he would be able to martial his defence."*

In the case before me time was of the essence and non specification thereof prejudiced the appellant in his defence.

According to P.W.1, the complainant, she was first defiled on 16/12/1997, and that the appellant continued to do so on several times thereafter. PW.2 testified that he saw the Appellant sleeping in the same room and same bed with the complainant (PW.1) on 28/02/1998. But P.W.1 herself, contradicted this evidence by saying that she did not have Sexual intercourse with the Appellant on that day.

PW.2, alleged further that the Appellant had already turned PW.1 into being his wife since 16/12/1997.

The inconsistency in the dates of actual defilement was therefore not determined and did not tally with the date of the charged offence. It would therefore have been extremely difficult for the Appellant to come up with a clear defence. The charge was not supported by the evidence.

2) PW.1, in her testimony stated that on 16/12/1997 there were other children, who, after hearing the scuffle had gone to call the Appellant's late wife. But no evidence was called to corroborate that version of events. In R.V.

KELKRS' – "*Criminal Procedure*" – Fourth Ed. 2002 at page 499, the learned author observes:

"In Case a Court finds that the prosecution had not examined witnesses for reasons not tenable or proper, the Court would be entitled to have an adverse inference against the prosecution."

This, considered in the context of the Appellant's version of the events ought to have created doubts in the veracity of the prosecution witnesses.

3) Exhibit P-3-the Medical Examination Report did not corroborate the prosecution's case either.

Although the learned trial Magistrate concluded that on the basis of that exhibit the victim had lost her virginity, but this *per se* does not support the victim's allegation that she had not engaged in any other sexual activity with any other man. But, sexual intercourse is not the only known or possible cause for the loss of virginity.

Moreover, the PF.3 form shows that it was made on 03/03/1998. But according to the charge sheet the operative date for the count charged is 16th February, 1998, when the appellant was arrested.

The victim claimed to have been found infested with a venereal disease. In the circumstances it was necessary to subject the Appellant to medical examination to find out whether he had corresponding venereal disease in order to prove whether or not he had infested the disease or he had been infected so as to corroborate the allegations of sexual intercourse with the victim.

In his defence the Appellant categorically stated that he had volunteered to the test. But it was never taken.

On the basis of R.V. Kelkrs' principle, the prosecution's failure to make efforts to have this crucial evidence, cast a dark shadow of doubt rendering a conviction based on P.W.1's inconsistent story unsafe.

Order accordingly.

A.K. MUJULIZI

JUDGE

23/02/2009

Date: 23/02/2009

Coram: Hon. A.K. Mujulizi,J.

Appellant: Absent

Respondent: Represented by Miss Kitali the State Attorney for the Republic

B/C: Mzige, RMA.

Reason for judgment read out in the presence of Miss Kitali for the Respondent Republic.

A.K. MUJULIZI

JUDGE

23/02/2009