IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUNUO, J.A., LUANDA, J.A., And MJASIRI, J.A.

CRIMINAL APPEAL NO. 77 OF 2007

ALLY MLAWA ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Othman, J.)

dated the 8th day of March, 2005
in
(DC) Criminal Appeal No. 73 of 2004

JUDGMENT OF THE COURT

13TH & 21st July, 2010

MUNUO, J.A.:

Ally Mlawa, the present appellant was convicted of rape c/s 130 and 131 as amended by the Sexual Offences Act No.4 of 1998. The prosecution alleged that on the 7th May, 2001 at about 19.00 hours at Mahongole Village within Mbarali District in Mbeya Region, the appellant had carnal knowledge of Siwema d/o Jumanne without her consent.

Siwema Jumanne was aged 15 years at the material time. She disappeared from home. Her brother traced her but she fled and went to her grandmother's home. She ultimately surfaced and admitted that the previous evening she spent the night with her boy friend, the appellant, and that they had had sexual intercourse several times. Subsequently, the appellant was arrested and charged with the present offence. The appellant denied the charge saying he did not have sexual intercourse with the complainant.

The trial court convicted the appellant on the ground that P.W.2 Siwema truthfully admitted that she had had sexual intercourse with the appellant several times including the 7/5/2001, the subject of the rape charge. Aggrieved, the appellant unsuccessfully appealed to the High Court. Othman, J. as he then was, upheld the conviction and sentence. The High Court held that:-

"From the evidence tendered by the prosecution, and after considering the defence evidence and submissions the case against the appellant was proved beyond reasonable doubt. There was the credible evidence of P.W.2 who the trial court rightly considered to be telling the truth. That evidence was sufficiently corroborated by the testimony of P.W.1, a disinterested party. The evidence of P.W. 3 and P.W. 4 supplemented all the aforementioned evidence. There is no material from which the court can infer that this whole story was put on the appellant by the village as he claims. Accordingly, I dismiss the appeal, and confirm the conviction and sentence imposed on 29/5/03 by the Mbarali District Court."

Aggrieved by the decision of the learned judge, the appellant instituted this second appeal.

In this appeal, the appellant appeared in person. The respondent Republic was represented by Ms Zainabu Mango, learned State Attorney. The appellant filed three grounds of appeal faulting the trial court for not complying with the provisions of section 240 (3) of the Criminal Procedure Act, 1985 Cap. 20 R.E. 2002. In ground two, the appellant criticized the trial court for not finding his defence probable, which he contended threw doubt on the prosecution evidence so the trial court should have found him not guilty of the offence charged. On this, the appellant cited the case of **Henry Mpangwe and Two Others versus Republic** (1974) LRT 50 in which the appellant was acquitted because his defence cast doubt on the prosecution evidence. In the third ground of appeal the appellant complained that he was erroneously convicted on the uncorroborated and insufficient evidence of P.W.2, Siwema Jumanne. At the hearing the appellant had nothing to add to his grounds of appeal.

Ms Zainab Mango, learned State Attorney, supported the appeal. She correctly submitted, in our view, that since the trial magistrate did not comply with the provisions of section 240 (3) of the Criminal Procedure Act, Cap. 20 R. E. 2002, which require the trial magistrate to inform the appellant his right to summon the medical doctor who prepared the PF3 of the complainant for cross-examination, the evidence relating to the PF3, Exhibit P1, should be expunged from the record. We hereby expunge the PF3 evidence from the record.

On the evidence adduced by the prosecution, the learned State Attorney contended that the evidence of PW2 and PW4 is contradictory in that the former said she was a girl friend of the appellant and that the latter was arrested while they were strolling along the road. On the contrary, Ms Mango contended, P.W.4 Michael Mlamata stated that he found P.W.2 and the appellant sitting on a mat in his room, which the mother of the appellant denied.

Furthermore, the learned State Attorney argues, there was no evidence to prove that complainant and the appellant had sexual intercourse on the material day or that the appellant raped the complainant.

The issue before us is whether the appellant had carnal knowledge of the complainant without her consent.

We noted in the facts of this case that the complainant, Siwema Jumanne, was fifteen years of age at the material time. Her father, P.W. 3 Jumanne Magomba, deposed that Siwema was born in 1986. During the trial she was in Std. VI at Mangole Primary School. We are mindful of the provision of section 130 (2) (e) which state, *inter-alia:-*

> "130 (2) A male person commits the offence of rape if he has sexual intercourse with a girl

or a woman under circumstances falling under any of the following descriptions:-

(a).....

(b).....

(c).....

(d).....

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

In this case the complainant was below 18 years of age. She was, furthermore, not married to the appellant. Although the appellant denied carnally knowing the complainant, she admitted the same at page 8 of the record of appeal by stating:

"……three days later in the evening I went to him (and) found him there, there was a girl who resides there. He was inside. He asked me to go to sleep and I yielded and went to bed. The house has four bedrooms and a sitting room. We slept on the mat….He was having sexual intercourse with me. That was not my first time but it was the first time having sexual intercourse with me….I had sexual intercourse with him several times and we were meeting at his home……..

…He made five rounds (alifanya mara tano) on that day. It was 20.00 hours. He then told me to go home and refused, he then escorted me but on the way I met my brother who was after me. The accused was caught and I ran away…..I went to sleep at my grandmother's. My grandmother asked me to go back home. I

did not awaken my grandmother. I slept in the kitchen.

In the morning I went home and found the accused seated at home. There was father, grandfather, mother, grandmother and brother....

In view of the above confession by the complainant, the learned judge rightly upheld the conviction as demonstrated supra. The appeal is devoid of merit.

With regard to the sentence, the learned State Attorney submitted that under the provisions of section 131 (1) (2) (a) of the Penal Code, Cap. 16 R. E. 2002, the appellant was 17 years of age when he carnally knew the complainant. The sentence should have been corporal punishment, the learned State Attorney observed.

Section 131 of the Penal Code provides for the punishment of rapists thus:

> "131 (1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of who the offence was committed by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.
>
> (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;

(b) If a second time offender, be sentenced to imprisonment for a term of twelve months with corporal punishment;

(c) If a third time and recidivist offender, he shall be sentenced to life imprisonment pursuant to subsection(1)

(3)Notwithstanding the preceding provisions of this section whoever commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.

We are satisfied that being 17 years when he raped the victim, the appellant should, as the learned State Attorney submitted, have been sentenced to corporal punishment as stipulated under the provisions of section 131 (2) (a). The District Court imprisoned the

appellant to thirty years imprisonment on the 25th April, 2003, some 7 years and three months ago. Under the circumstances, we are of the settled mind that the term he has served meets the justice of the case so we shall not impose corporal punishment on him. We accordingly dismiss the appeal against conviction. We order that the appellant be released from prison if he is not detained for other lawful cause.

DATED at MBEYA this 15th day of July, 2010.

JUSTICE OF APPEAL

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I certify that this is a true copy of the original.

I. P. Kitusi
SENIOR DEPUTY REGISTRAR