IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 155 OF 2009

RICHARD MARKUS TEMBO ..... APPELLANT

versus

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of

Tanzania at Mtwara)

(Mipawa, J.)

dated the 25th day of May, 2009
in
Criminal Appeal No. 2 of 2008.

JUDGMENT OF THE COURT

23rd & 30th September 2011.

BWANA, J.A.:

The appellant, Richard Markus Tembo, was charged with and convicted of the offence of Rape contrary to Sections 130(1)(2)(e) and 131 of the Penal Code, Cap 16 (R.E.2002). The trial court, the District Court of Lindi at Lindi, sentenced him to serve the mandatory minimum thirty (30) years imprisonment. His first appeal before the High Court was unsuccessful hence this second one.

Before us the appellant was unrepresented by counsel while the respondent Republic was represented by Mr. Prudens Rweyongeza, learned Senior State Attorney, assisted by Mr. Ismail Manjoti, State Attorney.

The facts of this case as discerned from the record are that on the 3rd June 2007, Semeni Bakari, PW1 then aged 12 years, while on the way from her grandmother's house, was held up by the appellant who removed her underwear and raped her. It is alleged that when this barbaric act took place, she was in the company of other children, Zainabu and Rajabu. We must be quick to note at this early stage that neither child was called to testify, the provisions of section 143 of the Evidence Act, notwithstanding. PW2, an adult person who happened to be passing by and who knew the appellant before, saw the latter raping PW1. He raised an alarm but the appellant managed to run away. However, he was later apprehended and taken to the police. Meanwhile PW1 was taken to hospital where she was medically attended to and a PF3 report, Exhibit P1, was

prepared. That report shows that she had bruises in the region around her female parts. Again, we must note here that the provisions of section 240(3) of the Criminal Procedure Act (the CPA) seems not to have been complied with.

The respondent Republic declined to support the conviction at the hearing of the first appeal. They have the same stand before us as well. We will consider their reasons shortly. At the time of the alleged commission of the offence, PW1, as stated earlier, was a child of tender age. Her evidence, therefore, as required under section 127(2) of the Evidence Act, should have been received after the conduct of a *voire dire* examination. Such examination was not conducted in the instant case. The end result is as per a number of decisions of this Court that such evidence be discarded or taken as unsworn evidence which requires corroboration.

Before the High Court and before us, counsel for the respondent Republic submitted, and correctly so in our view,

that since a *voire dire* examination was not conducted the evidence of PW1 should be discarded. If not then it should be corroborated in terms of section 127(7) of the Evidence Act.

Corroboration, another issue raised during this appeal, would have been provided by either the evidence of PW2 or the medical report. However, both did not satisfy the requirements of the law. Mr. Rweyongeza did concede that PW2's evidence has material contradictions which make it unreliable. We agree with that observation. That being the position, his evidence cannot be used to corroborate PW1's evidence. Neither do we need further evidence to corroborate what PW2 said. Evidence which itself needs corroboration cannot be used to corroborate another evidence.

We are left with the PF3. It is stated above that the said report was tendered without the trial magistrate complying with the requirements under section 240(3) of the CPA. The maker of the report, that is, the medical doctor who examined PW1, did not testify in court as a witness.

Consequently, the report, Exhibit P1, should be expunged from the record, as settled law provides. Having done so, there remains no evidence in support of the conviction.

All in all, and for the reasons stated herein above, this appeal succeeds. The conviction by the trial court as upheld by the first appellate court is quashed, and the sentence of thirty years imprisonment is set aside. We order that the appellant be set free forthwith unless otherwise lawfully held.

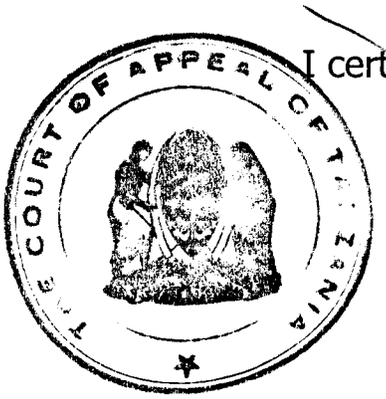
DATED at MTWARA this 26th day of September, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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



M. A. Malewo
DEPUTY REGISTRAR