IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 284 OF 2008

ATHUMANI BAKARI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Chocha, J .)

Dated the 26th day of March, 2008
i n
Criminal Appeal No. 63 of 2006

JUDGMENT OF THE COURT

3RD & 10TH October, 2011

MJASIRI, J.A.:

The appellant Athuman Bakari was charged with and convicted by the Arusha District Court of the offence of rape contrary to section 130 (1) and (2) (e) of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was sentenced to 30 years imprisonment. His first appeal to the High Court (Chocha, J.) at Arusha was dismissed, hence this second appeal.

In this appeal the appellant preferred seven (7) lengthy grounds of appeal. He also filed written submissions in support of his appeal. The said grounds of appeal revolved around the following salient issues:-

1. *The trial Court erred in law in accepting the evidence of PW1 who categorically stated that she did not know the meaning of oath and duty of telling the truth.*
2. *The appellant was wrongly convicted on the evidence of PW2, PW4, PW5 and PW6 contrary to the requirements under section 289 (1) and (2) and section 192 (1), (2) and (3) of the Criminal Procedure Act Cap 20 RE:2002.*
3. *The prosecution failed to produce any evidence to prove that PW1 was 17 years old.*
4. *The lower courts wrongly relied on the PF.3 report contrary to section 240(3) of the Criminal Procedure Act.*
5. *The cautioned statement of the appellant was wrongly admitted in evidence contrary to the requirements under section 50 of the Criminal Procedure Act.*
6. *Failure by the first appellate Court to evaluate the evidence of the trial court.*

At the hearing of the appeal the appellant was unrepresented and the respondent Republic was represented by Ms Javeline Rugaihuruza, learned State Attorney.

The background to this case is that PW1 a sixteen year old girl disappeared from her home for a period of two days. At the time she was missing she was in a guest house with the appellant. The appellant had checked in a guest house in the Arusha Municipality. According to the evidence of Brenos Shirima (PW2), a guest house attendant, the appellant spent the first night alone at the guest house and the second two nights with PW1. It was the prosecution case that while PW1 was at the guest house with the appellant he had sex with her without her consent. The appellant was subsequently arrested and charged with the offence of rape. He denied committing the offence. According to him PW1 was at the guest house with the appellant of her own free will.

At the hearing of the appeal Ms. Rugaihuruza did not support the conviction. She submitted that the prosecution failed to establish the offence of rape. PW1 gave an unsworn statement and her evidence needed corroboration.

On the cautioned statement of the appellant, she stated that the statement was wrongly admitted in Court as section 50 of the Criminal Procedure Act was not complied with. The said statement should therefore be expunged from the record.

In relation to the PF. 3 report, the learned State Attorney submitted that it cannot be acted upon as section 240 (3) of Criminal Procedure Act was not complied with. The appellant was not informed of his right to have the doctor called as a witness in order to give him the opportunity to cross examine him.

According to her, the only evidence linking the appellant with the offence of rape is the testimony of the appellant. PW1 having stated that she does not understand the nature of oath and duty of speaking the truth, her evidence is not sufficient to convict the appellant.

We on our part entirely agree with the submissions made by the learned State Attorney. Taking into consideration the non-compliance with

sections 50 and 240 (3) of the Criminal Procedure Act, we only remain with the evidence of PW1.

Indeed, we found it rather strange that PW1 who was seventeen years old was subjected to a *voire dire* examination by the trial magistrate. The requirement to carry out a *voire dire* examination is when the evidence of a child of tender age is given in Court. The relevant part of the record (page 12) is reproduced as under:-

> ***"PW1**:- Jackline d/o of Urassa age 17 years, I do not know the meaning of an oath; I do not know the meaning of saying the truth.*
>
> ***Court**:- This witness is allowed to give evidence as she knows the meaning of saying the truth".*

Following these remarks PW1 proceeded to make an unsworn statement. As PW1 was 17 years old when she gave her testimony, what is the legal status of her unsworn statement?.

The law is settled on the requirements for giving evidence in Court. According to section 198 (1) of the Criminal Procedure Act, Cap 20 RE

2002 all witnesses have to give their testimonies under oath or affirmation.

Section 198 (1) provides as under:-

(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act.

The only exception to this rule is when a child of tender age gives testimony in Court. Section 127 (2) and (5) of the Evidence Act, Cap 6, RE 2002 provides as follows:-

(2) Where in any criminal cause or matter ***a child of tender age*** *called as a witness does not,* ***in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation,*** *if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth.*

(5) For the purposes of subsections (2), (3) and (4), ***the expression "child of tender age" means a child (whose apparent age is not more than fourteen years).***
(Emphasis supplied).

In view of the legal position, what then is the status of the evidence of PW1 which has not been given under oath? We have no doubts in our minds that the evidence of PW1 has no evidential value and cannot be used to ground a conviction of rape. PW1's evidence cannot be corroborated by any other evidence as there is nothing to corroborate.

In a criminal case, the burden is always on the prosecution to prove the case against an accused person beyond reasonable doubt. The burden never shifts.

Given the status of the evidence of PW1, we are satisfied that such evidence is not sufficient to establish the guilt of the appellant. Had the courts below considered the evidentiary value of PW1, they would have come to the inevitable finding that it was not safe to sustain the conviction.

For the foregoing reasons, we hold that the appellant's conviction was not proper. We accordingly allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment. The appellant is to be released from prison forthwith unless he is otherwise lawfully held. It is so ordered.

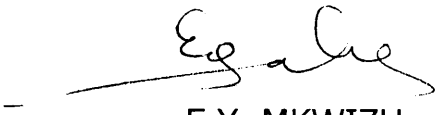
DATED at Arusha this 7th day of October, 2011

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL