

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 288 OF 2008

TLATLA SAQWARE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Arusha**

(Bwana,J.)

dated the 25th day of March, 2008

in

Criminal Appeal No. 66 of 2005

JUDGMENT OF THE COURT

4th & 7th October, 2011

MSOFFE, J.A.:

The courts below were satisfied that the appellant was employed as a herdsman by PW2 Lazaro Mchuno and resided in this witness's compound for a period of two years. On 16/12/2000 in the evening the appellant returned home from grazing and found the complainant PW1 Balibina Lazaro alone at the homestead. It was around 7.00 p.m. at the time. The appellant told PW1 to give him keys to the residential house. PW1 told him that she did not have the keys. The appellant then held PW1 and pushed her to the ground, stripped off her underwear and inserted his penis into

her vagina. She felt severe pains and screamed for help. PW5 Veronica Joseph (PW1's mother) heard PW1 screaming for help and accordingly went to the scene where she saw the appellant in *flagrante delicto* having sex with PW1. On seeing PW5 the appellant took to his heels and ran away. PW5 examined PW1 and saw her vagina bleeding with some sperms in it. The incident was reported to the police at Endasak where PW1 was given a PF3. PW4 Audifas Maronga, a Clinical Officer at Hanang District Hospital, attended PW1. According to him:-

...I examined the complainant's vagina and found bruises on her vagina thus around the labia majora. Her hymen was ruptured on one side. There was swelling in the vagina indicating that there was penetration in the vagina. Medical examination also revealed that the victim was nine (9) years ...

Basically, on the basis of the above evidence the District Court of Hanang (Kimario, PDM) convicted the appellant of rape contrary to **Section 130** and **131** of the Penal Code, as amended, and sentenced him to life imprisonment. The appellant appealed to the High Court at Arusha

where Bwana, J. (as he then was) upheld the conviction and sentence. The appellant is still aggrieved, hence this second appeal.

In this appeal, the appellant essentially has three grounds of complaint. **One**, the sentence of life imprisonment offended the provisions of **Section 131 (2) (a)** and **(b)** of the **Penal Code** (Cap 16 R.E. 2002). **Two**, the courts below erred in not taking into account the contradictory nature of the evidence of the witnesses on the date on which PW1 was examined in hospital. **Three**, the prosecution witnesses were not credible enough to justify the conviction in question.

The complaint in the first ground of appeal rests on the provisions of **Section 131(2)(a)** (*supra*) where it is evident that where the offence is committed by a boy who is of the age of eighteen years or less, if a first offender, then the sentence is corporal punishment only. In this sense, the appellant wishes to impress upon us that since he was 16 years of age at the time then he ought not to have been sentenced to life imprisonment. Apparently he raised the point in the first appeal where it was held that **sub-section 3** thereof covers offenders of all ages. Before us Mr.

Ponsiano Lukosi, learned Senior State Attorney for the respondent Republic, reiterated that the position taken by the judge on first appeal is correct in law. With respect, we agree with him. The **sub-section** reads:-

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

In this case, there was no dispute that PW1, the victim of the rape, was 9 years old at the time. That being the case, the sentence meted on the appellant is correct in law.

Of course in saying so, we are aware that the word "*whoever*" appearing under the **sub-section** has now been deleted and substituted by the words "*a person other than a person referred to under sub-section 2*" by virtue of **Section 177(b)** of **The Law of the Child Act, 2009**, but this does not help the appellant because when the offence was committed on 16/12/2000 this Act had not come into force; and at any rate, this Act has no retrospective effect.

On the second ground, like Mr. Lukosi, we too find no contradiction in the evidence of the prosecution witnesses. The witnesses were consistent that PW1 was taken to Endasak police station and eventually to hospital. PW3, in particular, was clear that PW1 was at first taken to the police station, then to the Endasak dispensary, before she was finally taken to Hanang Government Hospital where, according to PW4, she was examined on 18/12/2000. So, going by the evidence of these witnesses, we see no contradiction by them on the date PW1 was actually examined in hospital.

As stated above, the third and final ground of appeal is an attack on the credibility of witnesses attached by the courts below. With respect, as correctly submitted by Mr. Lukosi, this ground has no basis. The above evidence, if we may repeat here, shows that PW1 was believed by the said courts. PW1 was materially supported by PW4 and PW5 on the rape in question. We find no basis for faulting the courts below on the credibility they attached to these witnesses. At any rate, as was stated by this Court in **Omari Ahmed v. Republic** (1983) TLR 52, the trial court's findings as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a

reassessment of their credibility. In this case, we are satisfied that no circumstances exist for us to interfere with the credibility that was attached by the lower courts to the prosecution witnesses.

For the foregoing reasons, this appeal has no merit. We hereby dismiss it.

DATED at ARUSHA this 5th 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