IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J. A., MANDIA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO.116 OF 2008

RAMADHANI s/o HAMISI MWENDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(A. D.M. Mwita, J.)

Dated 28th April, 2008

In

Criminal Appeal No. 191 of 2004

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JUDGMENT OF THE COURT

18th & 23rd April, 2013

KIMARO, J.A.:

The District Court of Tabora at Tabora convicted the appellant of the offence of rape contrary to section 130 and 131 of the Penal Code and sentenced him to 50 years imprisonment. His appeal to the High Court partly succeeded. The sentence of 50 years was reduced to 30 years imprisonment.

Still aggrieved, he is before the Court with a second appeal. His memorandum of appeal has four grounds. In the first ground the appellant complains that the evidence of the complainant was not corroborated. The second ground of appeal faults the first appellate court for upholding the decision of the trial court while there was non - compliance of section 240 (3) of the Criminal Procedure Act. In the third ground the appellant wonders why the persons who PW2 said went to the scene of crime and found him naked were not summoned to corroborate the evidence of PW2. As for the fourth ground of appeal the appellants concern is that a death certificate of a witness who was alleged to have died before giving his evidence, one Borafia Swalleh was not tendered in court to prove his death before his statement was admitted in evidence under section 34 B. Lastly, the appellant complained that since the age of the victim was shown to be 16 years, "*voire dire examination*" had to be conducted to ascertain her capacity to testify.

At the hearing of the appeal the appellant appeared in person. The respondent/Republic was represented by Mr. Hashim Ngole, learned Senior State Attorney.

Shortly, the evidence upon which the appellant's conviction was grounded came from three prosecution witnesses. Asha Jarufu (PW1), who was the victim of the offence, Hamisi Salumu (PW2) and No. E. 2036 D/C Paschal (PW3). The victim of the offence, Asha Jarufu, (PW1) testified that on 22nd November, 2004 the date when the offence was committed, she was returning home from school. She was a student at Kazima Secondary School. She was not specific on the time. She was in a company of Amina Haruna and Hija Bias, both schoolmates. On the way, at Ujiji Street, the appellant caught her. He had a stick.

Pretending that the complainant was his daughter and that he wanted to punish her for refusing to go to school, thus scaring people to intervene, the appellant took her to his home, pushed her down, tore her skirt and started to "*sex her*". She said she shouted but the appellant suffocated her and burnt her back with a cigarette. It was then she shouted loudly and people went to rescue her. The persons found her and the appellant naked and they took them out. In a nearby house there was a girl who knew her. She went to inform her father who collected her and took her to Kitete Hospital for examination. A PF3 was tendered and

admitted in Court as Exhibit P1 without following the procedure as the appellant was not afforded opportunity to see it and comment on it before its admission. During cross examination as to why people did not notice when the appellant took the complainant to his house, PW1 reiterated that it was because the appellant was insisting that he was his daughter and was refusing to go to school and that he was going to punish her for that disobedience. She said that the path the appellant used to take her to the house is one which is seldomly used by people.

One of the persons who went to rescue the complainant was Hamisi Salum Babu (PW2). His evidence was that while he was at home, on 22nd November, 2004 at 6.00 p.m., one Gulagya Majuto the Chairman of Mabatini Street and Mustapha Said, the ten cell leader went to him and told him that there was a problem in the house where the appellant was a tenant. The trio went to the house and when Gulafya Majuto pushed the door to open it as it was locked; they found the appellant and the complainant, both naked.

The last prosecution witness was PW3. This witness tendered in Court the statement he recorded in respect of Borafia Salehe who arrested the appellant. The witness died before giving his evidence. The statement of the witness was admitted in court as exhibit P3, but contrary to the procedure, as the appellant was not shown the statement before it was admitted, nor was there compliance with the provisions of section 34 B of the Law of Evidence Act, [CAP 6 R.E. 2002].

In his defence the appellant denied the commission of the offence. He also challenged the prosecution for failure to summon important witnesses to corroborate the evidence of the complainant, like the schoolmates of the complainant who were with her when he took her to his house and the persons who saw them at the scene of crime.

The trial court was satisfied that the offence of rape was proved on the standard required and convicted the appellant as aforesaid. As indicated before, his appeal to the High Court was only successful on the illegality of the sentence that was imposed which was reduced to the statutory minimum of thirty years. The conviction however, was sustained.

As the appellant was called upon to substantiate his grounds of appeal, he insisted that the offence against him was fabricated.

The learned Senior State Attorney, Mr. Hashim Ngole, supported the appeal on the offence of rape. He said that the offence was not proved, as the essential ingredient of the offence of rape, that is penetration, was not proved. He also supported the grounds of appeal by the appellant on the admission of the PF3 (Exhibit P1) and non- compliance with section 34B of the Evidence Act. He prayed that the two exhibits be expunged from the record as the admission of the same was made contrary to the procedure of admission of exhibits.

We are minded that this is a second appeal where the Court's jurisdiction to interfere with findings of fact for the two lower courts is limited to misdirection and non – directions leading to miscarriage of justice to the appellant. See the cases of **Emmanuel Mdendeni V. R.** Criminal Appeal Criminal Appeal No. 86 of 2007, **Musa Mwaikunda V. R.** Criminal Appeal No. 174 of 2006, **and Dickson Joseph Luyana** Criminal Appeal No. 1 of 2005 (all unreported).

We entirely agree with the learned Senior State Attorney that there was a shortfall by the trial Court in the admission of the two exhibits. First, for both exhibits they were not shown to the appellant before admission, and therefore the appellant had no opportunity to cross-examine on them. The appellant was denied his basic right of knowing what was contained in those exhibits and then give his defence on them. Second, section 240(3) of the Criminal Procedure Act, was flouted. The trial Court was duty bound to explain to the appellant that he could have the doctor who examined the complainant be called for cross-examination if he desired. That requirement is mandatory. This was not done. There are now a lot of authorities talking on this requirement. The cases of **Edgar Litimba V. R.** Criminal Appeal No.2 of 2007(unreported), **Wilbard Kimangano V. R.** Criminal Appeal No. 245 of 2002 (unreported) and **Jaffer Juma V. R.** Criminal Appeal No. 104 of 2006(unreported) are among the authorities on the issue. We accordingly expunge from the record the evidence on the PF3.

We also expunge Exhibit P2 from the record for the same reason of non- compliance with section 34B (2) of the Law of Evidence Act. For

exhibit P2 to have been admitted in evidence, the prosecution had first to prove that the entire requirements laid down in the section were satisfied. What are the requirements? One, the maker of the statement could not be called as a witness because he is dead, unfit because of bodily or mental condition, he was out of Tanzania, or reasonable steps were taken to secure his attendance but failed. Two, the prosecution must also show that the maker of the statement signed it. Three, the statement must also contain a declaration of the person who made it, that it is true to his knowledge and belief, and that it was made while the maker knew that it would be tendered in court as exhibit and he would be liable for perjury if the maker wilfully stated something in the statement which he knew to be false or he did not believe it to be true. Four, a copy of the statement must be given to the accused person before it is produced in evidence. Five, there should be no notice of objection served by the accused person to the prosecution within ten days after receipt of the copy of the statement. Six, if the statement is made by a person who cannot read it must be proved that it was read to him before he signed it.

The record is silent that the above requirements were complied with, hence the justification to have it expunged from the record.

Responding to ground four of the appeal, the learned Senior State Attorney said that it had no substance because the death certificate of Borafia Salehe was tendered in court before the trial Court was asked to receive his statement. We indeed agree with the learned Senior State Attorney that the death certificate was tendered in court before the prosecution made the prayer to have his statement admitted in evidence. The record of appeal at page 26 shows that on 26th July, 2006 before PW3 tendered in court the statement of Borafia Salehe, he tendered in court his death certificate. This ground therefore has no merit.

The learned Senior State Attorney correctly submitted that ground five of the appeal was new and was not raised by the appellant in the High Court. The petition of appeal by the appellant to the High Court at page 43 to 44 of the record of appeal does not contain that ground. But even if it was raised in the High Court it would have failed because section 127 (2) and 127(5) requires the court to conduct "*voire dire*" examination for a

child witness whose apparent age is not more that fourteen years. The child witness in this case (PW1) was sixteen years and so the requirement of "voire dire" examination was not applicable to her. See the cases of **Leanard Mdemu V R.** Criminal Appeal No. 81 of 2008 (unreported), **Augustiino Lyanga V R.** Criminal Appeal No. 105 (unreported) and **Wilberd Kimangano V. R.** Criminal Appeal No. 235 of 2007 (unreported). All cases show the circumstances under which "*voire dire* "examination has to be conducted.

Coming now to the ground of appeal which the learned Senior State Attorney supported, that the prosecution did not prove the charge of rape against the appellant on the standard required; Mr. Hashim Ngole said the offence of rape was not proved as there was no evidence of penetration. In the case of **Burton Mwipabilege V. R.** Criminal Appeal No.200 of 2009, the Court held:

> *"Time and again, it has been said by this Court that, it is not enough for the victim of rape to say that she was "raped." She must always go further*

and allege that there was penetration, however slight."

Under section 130(4) (a) of CAP 16 penetration is an essential ingredient of the offence. See also the case of **Mahona Sele V R.** Criminal Appeal No. 188 of 2008 (unreported). In this case the complainant (PW1) gave evidence that she was raped. The appellant's concern is that the circumstances of this case required the complainant's evidence to be corroborated. He wondered why her two schoolmates who were said to have been in her company were not summoned to corroborate her evidence that she was taken by the appellant. He also questioned why the witnesses who accompanied PW2 to the scene of crime were not summoned to corroborate his evidence on how the appellant and complainant were found at the scene of crime.

On our part we agree with the appellant that the circumstances under which the offence was committed required corroboration of the evidence of PW1 Asha Jarufu, the complainant, and PW2, Hamisi Salumu Babu. We say so because of the circumstances under which the complainant was taken by the appellant and forced to go to his house. She

said she was taken by the appellant who had a stick and he pretended to be his father, and that he was going to punish her for not going to school. The complainant knowing that the appellant was not his father, she would have naturally seriously protested to the appellant's action. This does not seem to have happened.

The complainant said after she was saved from the ordeal that befell her, she was taken to a nearby house where a girl who knew her went and informed her father. Her father went and collected her and took her to hospital for examination. The Court wonders what prevented the prosecution from summoning the complainant's father to give his testimony on how he was informed of the abuse his daughter went through, or the girl who went to inform him where the complainant was, and the condition of the complainant when the girl saw her. PW2 was accompanied to the scene of crime by Gulafya Majuto and Mustapha Said. There was no explanation given why the witnesses were not summoned to back up his evidence on how the appellant and the complainant were found at the scene of crime.

The difficulty in sustaining the offence of rape is compounded by the circumstances under which PW2 said he found the appellant and the complainant. What he told the trial court was:

> *"The accused was a tenant in the house. We went into the house. The Chairman pushed the door as it was closed. We met a naked girl crying. The Chairman arrested them and sent them to Police Station. The accused also was naked. I did not know the girl."*

After expunging from the record the evidence on the PF3 more evidence was required to corroborate the evidence of the complainant. Such evidence would have come from her father, her schoolmates who were with her when the appellant whisked her away pretending to be his father, and the other persons who went to the scene of crime. The evidence of her father was vital. That would have corroborated the evidence of the complainant that the appellant was not his father but a culprit. That would also have shown the circumstances under which the complainant was found. Short of that evidence, we agree with the learned

Senior State Attorney that the offence of rape was not proved. Time and again the Court has reiterated that under the law it is the prosecution who have to prove the case against the accused beyond reasonable doubt. Authorities on this point are numerous. We thus allow the appellant's appeal for the offence of rape, quash the conviction and set aside the sentence imposed on him.

The learned Senior State Attorney urged the Court to find the appellant guilty of the offence of sexual harassment contrary to section 138D of the Penal Code because the evidence on record establishes that offence. He referred the Court to the case of **Kayoka Charles V R** Criminal Appeal No. 325 of 2005 CAT TABORA (unreported). The response by the appellant on this point was that he is not guilty of any offence and that everything was concocted against him.

Section 138 (1) of the Penal Code provides:

> *"Any person who, with intention, assaults or by use of criminal force, sexually harass another person, or by use of words or actions cause sexual annoyance or harassment to such other*

person, commits an offence of sexual harassment and is liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding two hundred thousand shillings or to both the fine and imprisonment, and may also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for any injuries caused to that person."

We agree with the learned Senior State Attorney that the evidence by the prosecution proves the offence of sexual harassment. That evidence comes from the complainant on how she was taken by the appellant to the house in which the offence was alleged to have been committed. She was forcefully taken there by the appellant under pretext that he was her father and he wanted to punish her for not going to school. She also testified on how the appellant tore her underclothes. PW2 confirmed that she was found naked and crying. This evidence sufficiently proves the offence of

sexual harassment contrary to section 138D of the Penal Code. We find him guilty of that offence and convict him.

The maximum sentence for the offence is five years. In this appeal the appellant has already served seven years imprisonment more than the maximum sentence he would have served if he was convicted of the offence that was established by the evidence that was led by the prosecution and the defence. For this reason, in this case we will not impose any sentence. Instead, we order his immediate release from prison unless he is held for any other lawful purpose. It is ordered.

DATED at **TABORA** this 20th day of April, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL