IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 39 OF 2009

NASSIBU S/O ABDALLAH.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Kaduri, J.)

dated the 31st day of October, 2008
in
Criminal Appeal No. 115 of 2008

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JUDGMENT OF THE COURT

12th & 17th September, 2013

MANDIA, J.A.:

The appellant was charged with Rape c/s 130 (1) (2) and (c) and (b) of the Penal Code. The District Court of Maswa at Maswa convicted him and sentenced him to thirty years in jail. He preferred an appeal to the High Court of Tanzania at Tabora where his appeal was dismissed in its entirety, hence this second appeal.

Evidence led during the trial showed that on 20/11/ 1998 PW1 Grace d/o Raphael agreed to go with her boyfriend to Mtama Guest House where they rented Room number 4 and spent two days engaging in sex. Two days later, on 22/11/1998, PW2 Manrad Malale who is a brother to PW1 Grace d/o Raphael, led policemen to Mtama Guest House room number 4 and had both Grace d/o Raphael and the appellant arrested and taken to the Police Station where charges were preferred against the appellant. At the time the girl was involving herself in the escapades mentioned above, she gave her age as fourteen years and that she was a Form 11 student at Maswa Girls Secondary School. Despite being fourteen years of age the evidence of PW2 Grace d/o Raphael was not subjected to voire dire examination as required under section 127 (2) of the Evidence Act, chapter 6 R.E. 2002 of the laws.

In his defence, given under oath, the appellant who was aged nineteen years testified that he started proposing to the complainant on 20/10/1998. One month later, on 19/11/1998, he took the complainant to Sibuka to watch Video, after which he took her to Mtama Guest House where they "spent time" until 22/11/1998 when his girlfriend's brother

sent policemen to arrest them. The love-struck teenager even volunteered information during cross-examination that during their stay at Mtama Guest House he used to buy food for her lover at a local hotel and sent it to her at the Guest house, and that he planned to send her home on 22/11/ 1998 which is the very day they were arrested.

The memorandum of appeal lodged by the appellant in this court discloses three grounds of complaint, namely:-

1) that the learned appellate judge erred in upholding the convicted entered in the trial court while knowing that the victim consented to the sex act.
2) that the age of the girl and the fact that she was a school girl was not proved
3) that the evidence of the victim was not subjected to voire dire examination as required under section 127(2) of the Evidence Act, Chapter 6 R.E. 2002 of the laws.

At the hearing of the appeal the appellant appeared in person, unrepresented, while the respondent Republic was represented by Ms. Jane Mandago, learned State Attorney. The learned State Attorney did not support the conviction and sentence entered by the trial court and

supported by the first appellate court. As pointed out by Ms. Jane Mandago, the only evidence which the court relied upon to found the conviction as the evidence of PW1 Grace d/o Raphael who gave her age as fourteen years on the date of trial. At her age PW1 was subject to the provisions of Section 127 (2) and 127(5) of the Evidence Act, Chapter 6 R.E 2002 of the laws. As a child of tender years as defined in Section 127(5) of the Act, the witness should have been subjected to Section 127 (2) if the Act, which means her evidence should have been preceded by the test on whether she was possessed of sufficient intelligence to justify the reception of her evidence, and whether or not she understood the duty of speaking the truth, and also whether or not she understood the nature of an oath which would have made the court receive her evidence though not on oath or affirmation. This is the test known as voire dire examination. There are a myriad authorities which expound the rule that where voire dire examination is not conducted the evidence of a child of tender years is not receivable in court, and where received it should be expunged - See **Godi Kasenegala Versus The Republic,** Criminal Appeal No. 10 of 2008 (unreported), **Harrison Mwakabinga versus The Republic,** Criminal Appeal No. 196 of 2009 (unreported) and **Mohamed**

Sainyeye versus The Republic, Criminal Appeal No. 57 of 2010 (unreported).

Accordingly, we expunge the evidence of PW1 Grace d/o Raphael from the record. Having expunged the evidence of PW1, there is no other prosecution evidence upon which the charge of rape can be based. It is true according to the record that the appellant, in a show of misplaced bravado, gave evidence in defence which showed that he had engaged in sexual relations with PW1 Grace d/o Raphael, and that he seemed to be proud of it. This being the case, however, we have to point out that a Criminal Prosecution cannot be proved through the defense if there is no evidence at all from the prosecution to show that an offence has been committed. - See **Kanisilo Lutenganija vs. The Republic**, Criminal Appeal No. 25 of 2010 (unreported) and **Jabil Mohamed vs. The Republic,** Criminal Appeal No. 103 of 2013 (unreported). In this case both the girl and the appellant were taken straight from the Guest House they had lodged in to the Police Station and form there the appellant was taken straight to court. No effort was made to examine the girl, medically or otherwise to prove an essential element of the charge of rape; that is,

penetration. - See **Hassani s/o Amiri versus The Republic**, Criminal Appeal No. 304 of 2010 (unreported). Maybe the prosecution relied on the fact that both PW1 Grace d/o Raphael and the appellant were admitting that sexual penetration took place, but in this situation where the evidence of PW1 has been expunged, the only evidence in proof evaporates into thin air. The conviction entered against the appellant, and upheld by the first appellate court, cannot therefore be allowed to stand. We therefore quash the conviction and set aside the sentence. The appellant should be released from custody forthwith unless he is held on some other lawful cause.

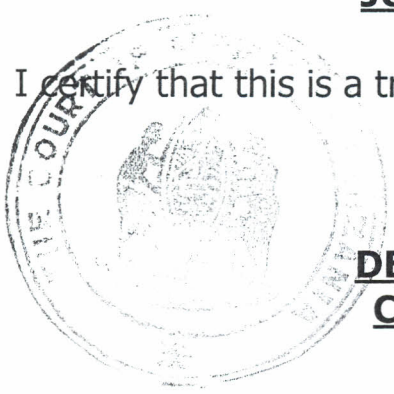
DATED at TABORA this 16th day of September, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. K. MMILLA
JUSTICE OF APPEAL

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



Z. A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL