IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK,J.A.,MUSSA,J.A., And JUMA, J.A.,)

CRIMINAL APPEAL NO. 149 OF 2013

SELEMAN RAJABU .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Mwangesi, J)

Dated 17th day of April, 2013
in
Criminal Appeal No. 11 of 2008

JUDGMENT OF THE COURT

12th & 16th September,2014

MBAROUK, J.A.:

In the District Court of Sengerema at Sengerema, the appellant, Seleman Rajabu was charged with the offence of rape contrary to sections 130 and 131 of the Penal Code as amended by section 6 (3) of Act No. 4 of 1998 of the Special Offences Special Provisions Act. Having pleaded guilty, the District Court convicted and sentenced the appellant to life imprisonment.

His appeal before the High Court of Tanzania (Mwangesi, J.) at Mwanza was dismissed in its entirety, hence this second appeal.

To appreciate what transpired leading the appellant to be convicted and sentenced to life imprisonment, let us briefly examine the court proceedings at the trial court on 9-6-2003.

"Date : 9/6/2003

Coram : J.D.Mayaya PDM

Pros : Amon A/Insp

Accused :

B/Clerk

Court : Charge read over and explained to the accused person and who is asked to plead thereto:

Plea : It is true, as a local Doctor directed me to have sexual intercourse with a young girl.

EPG J.D. Mayaya PDM
9/6/2003

FACTS:

The accused person is called Seleman Rajabu. He is a peasant and he lives in Ilenza village. On 4/6/2003 at about 7.30 pm in Ntama Island the accused person found a girl called Buyage Said, a girl

aged seven (7) years playing with other girls of her age. Accused caught that girl by her hand requested that girl to follow him (accused). The accused person led that girl near a well where the accused requested that girl to have sexual intercourse with him promising to give her some money. The girl slept in the grass and accused person entered her thighs and penetrated his penis into the vagina of that girl. The girl was badly injured. The accused person went away after doing so. Accused never even paid that girl. The girl returned home and informed her mother what had happened. The parents reported the matter to village leader. Accused was arrested within the same night. That at the time of his arrest he was found wearing a shirt which was red with blood which blood did bleed from the girls vagina the Accused person on interrogation accepted to had raped that girl. That is all I have the shirt in question I pray to tender it as exhibit.

Court : Received as exhibit P.I.

Accused : The facts are true and correct. I did so because one Local Doctor after fate telling told me that I had to have sexual intercourse with a daughter of my sister below the age of eight (8) years so that

I should become rich. I fornicated the complainant through he is not the daughter of my sister.

Court : Upon accused acceptance of the prosecution facts I find accused person guilty and I do convict him as charged.

J. D. Mayaya PDM.
9/6/2003 ".

He was then sentenced to life imprisonment.

Having examined what transpired at the trial court leading to the appellant's conviction and be sentenced to life imprisonment, let us now examine what the appellant preferred in his memorandum of appeal which contained one major ground of appeal with a set of four other points, namely:-

1. That, the trial court and the first appellate court failed to consider that the charge of rape was not proved beyond reasonable doubts, for the reason that:-
   (a) The PF 3 was not tendered to prove penetration.
   (b) The Plea of guilty was ambiguous.

(c) There was variance of dates between that is found in the charge sheet and that which is found in the facts read in court.

(d) Exhibit P. 1 – the T-Shirt which contained blood stains was wrongly tendered because there was no proof of or blood group of the victim or human being.

At the hearing of the appeal, the appellant fended for himself and opted to allow Ms. Bibiana Kileo, learned State Attorney, who represented the respondent/Republic to reply to his grounds of complaints first.

From the outset, the learned State Attorney resisted the appeal. In her reply, the learned State Attorney submitted that, as far as the appellant pleaded guilty to the charge, the complaints raised by him in points (a) (b) and (d) have no merit. In support of her argument she

cited to us the decisions of this Court in the case of **Fadhil Ally V. Republic,** Criminal Appeal No. 22 of 2005 and **Constantine Deus @ Ndunjai V. Republic,** Criminal Appeal No. 54 of 2010 (both unreported). The learned State Attorney urged us to find that there is nothing to fault the decision of the first appellate court.

In her reply to point (c) of the appellant's grounds of complaint, the learned State Attorney conceded that there is such a variance of dates when the offence was committed. She said, in the charge sheet it appears that the offence was committed on 5th May, 2003, whereas in the facts read in Court it is shown that the offence was committed on 4th June, 2003. However, she submitted that such a variance is curable under sections 234(3) and 388 of the Criminal Procedure Act (the CPA) and we agree with her to that effect. In support of her argument, the learned State Attorney cited to us the decision in the case of **Damian Ruhele V. Republic,** Criminal Appeal No. 501 of 2007 (unreported), where this Court stated as follows:-

> "The complaint in the second ground has merit in the sense that it is true that the charge sheet

reflected that the date of incident was 23/4/2002 whereas in the evidence of PW1 it was stated that the incident took place on 23/3/2002. However, as correctly submitted by Mr. Hilla, this was probably a slip of the pen. At any rate, the variance in dates was curable under section 234(3) of the Act which reads:

> (3) variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof".

In his rejoinder, the appellant mainly reiterated what he has stated in his ground of complaints. In addition to that he claimed not to have understood anything during his trial, which we think it as an afterthought.

It is our considered opinion that the provisions of section 360(1) of the CPA should be our starting point in reaching to our decision in this appeal. The same reads as follows:-

> "S.360(1) No appeal shall be allowed in the case of any accused who has pleaded guilty and has been convicted on such plea by a subordinate court except to the extent or legality of the sentence".

In the circumstances, in terms of section 360(1) of the CPA as the appellant pleaded guilty to the charge, he only had a right to appeal against sentence.

In the instant case, as pointed earlier, the record shows that the appellant pleaded guilty by stating that "It is true". In addition to that, he went on further by stating that a local doctor directed him to

have sexual intercourse with a young girl so as for him to become rich. Also when the summary of facts were read to him, the appellant agreed that the facts were true and correct. We are increasingly of the view that the appellant understood the nature of the charge and that is why he pleaded guilty to charge of rape.

For that reason, we find no reason to fault the decision of the trial court which was affirmed by the High Court. To be more specific, the conviction based on his own plea of guilty was justified and properly affirmed by the first appellate court. Even the sentence of life imprisonment imposed on the appellant we have no doubt that the trial court properly sentenced him and there is no reason to fault the decision of the first appellate court on sentence too. This is for the reason that, the victim was a seven (7) years old girl at the time of the commission of the crime. This is in compliance with section 131(3) of the Penal Code which mandatorily states as follows:-

> "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".

All in all, we are of the opinion that, this appeal is devoid of merit. The sentence of life imprisonment imposed upon the appellant was statutorily minimum, hence we have no powers to vary it. In the event, we accordingly dismiss the appeal in its entirety.

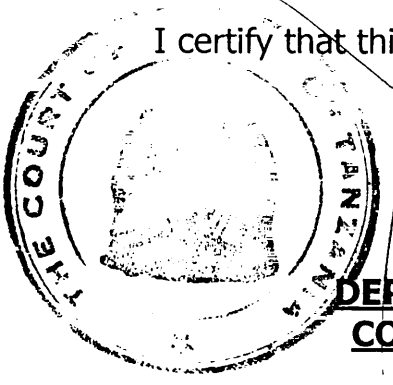
DATED at **MWANZA** this 15th day of September, 2014.

M. S. MBAROUK
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL