IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: KIMARO,J.A., LUANDA,J.A., And JUMA,J.A.)

CRIMINAL APPEAL NO. 225 OF 2014

DIOCLES WILLIAM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Bukoba)

(Khaday, J.)

dated 29th May, 2014

in

H/Court Criminal Appeal No.23 of 2011

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JUDGMENT OF THE COURT

23rd & 24th February 2015

KIMARO, J.A.:-

Diocles William, the appellant in this case was convicted of raping Frola Christian, a girl aged 12 years. The appellant was charged under section 130 (2) (e) and 131 (2) (a) of the Penal Code. The appellant was

charged in the Court of Resident Magistrate at Bukoba. He was sentenced to imprisonment for thirty years and twelve strokes of the cane.

The appellant was aggrieved by the conviction and the sentence and he filed his first appeal in the High Court which was dismissed. Still aggrieved, he filed this second appeal in this Court.

He contends that he was wrongly convicted. He faulted the first appellate court for sustaining the conviction and the sentence while the prosecution witnesses were not credible and their evidence was not consistent. He also challenged the sentence of corporal punishment that was imposed on him in addition to the sentence of imprisonment.

Before us the appellant appeared in person to defend his appeal. He had no legal services of an advocate. Mr. Hashim Ngole, the learned Senior State Attorney appeared to represent the respondent /Republic.

Before determining the grounds of appeal, we will scrutinize the evidence that was led in the trial which culminated into the conviction of the appellant.

The charge sheet shows that the offence was committed on 11th July, 2010. It was the testimony of the complainant Frola Christian (PW4) that on the date the offence was alleged to have been committed, she was at home playing with one Justice Richard (PW5). At 4.00 pm the appellant went to their house. He told PW4 to accompany him to his house promising to give her shillings one hundred. On the way the appellant took her to a thicket and fell her down making her lay supine. He lay on top of her and took his phallus and threatened PW4 to cut her with a machete if she refused to touch it. He also threatened to cut her if she revealed the incident to Justine (PW5). The appellant then took off PW4's underpants and put his penis in her vagina and raped her. After that incident the appellant went away.

PW4 said she felt pains when the appellant raped her. And blood came out of her vagina. She went back home holding her underpants in her hands and reported the incident to her mother. She was then taken to Mugana Hospital for treatment. In cross-examination by the appellant, the witness, PW4 reiterated what she said in examination in chief emphasizing that she did not raise alarm because the appellant threatened to cut her

with the "*panga*". She also repeated that the incident was reported to her mother who checked her private parts.

Anastazia Christian (PW1) the mother of Justice Richard (PW5) testified that PW5 called her and informed her about the rape incident. She in turn called Immelda Christian (PW2) the biological mother of the complainant and informed her about the rape incident. She went to the house of PW1 where the complainant was and found the complainant crying. The two, meaning PW1 and PW2 checked the complainant's private parts and found the hymen ruptured and blood was coming from the vagina. Justice Richard (PW5) corroborated the evidence of PW4 that on the date of the incident he was playing with the complainant when the appellant came and told her to go to his house so that he could give him shillings one hundred (Shs 100/=). He then decided to go back home and went to the river to wash his clothes. While he was still at the river, the complainant followed him. She was carrying her underpants in her hands and was crying. She informed PW5 that the appellant raped her. The two, that is PW4 and PW5 followed the mother of PW5 at her house and reported the incident of the rape to her. The two witnesses said they

examined the private parts of PW4 and found out that her hymen was ruptured and blood was coming from her vagina. All witnesses, PW1, PW2, PW4 and PW5 knew the appellant before. He was living in the neighborhood. The other prosecution witness was Dr. Eliudu Nyonyi (PW3). He was a doctor at Mugana Hospital. He testified having received PW4 as a patient who complained of having been raped. Upon examining her private parts he found fresh wounds at the ridges of her private parts. Her hymen had also been ruptured. His conclusive medical evidence was that the complainant was raped. The PF3 he filled indicating the findings of his examination was admitted in court as exhibit P1.

In his defence the appellant admitted knowing the mother of the complainant. He said on that day he went to the house of the mother of the complainant (PW2) to drink "*pombe*." However he denied the commission of the offence. When cross-examined on why PW5 said he knew him, he had no meaningful answer to the question.

The trial court was satisfied by the evidence led by the prosecution to support the charge of rape against the appellant. Both PW1 and PW2

examined the private parts of the complainant (PW4). They found the hymen ruptured and blood coming from the vagina. PW3 confirmed in his medical examination of the complainant that PW4 had bruises in her vagina and the hymen was ruptured. He found the defence of the appellant having no merit.

The learned judge on first appeal was satisfied that the trial court made a correct finding that the appellant raped the complainant and dismissed the appeal.

Before us the appellant had nothing to add to his grounds of appeal. He only insisted that he did not commit the offence and prayed that the appeal be allowed, the conviction quashed and the sentence be set aside.

On his part the learned Senior State Attorney supported the appeal and the conviction. At first he was of the view that the grounds of appeal were new but upon reflection he was satisfied that ground one of the appeal covered all the grounds that were raised in the High Court. As he went through the evidence that was produced by the prosecution and the defence at the trial, he said the evidence left no doubt that the offence of

rape was committed and that it was the appellant who committed it. He specifically referred to the evidence of PW4 the complainant and said it proved the offence of rape and the rest of the prosecution witnesses, mainly PW1, PW2 and PW3 corroborated the evidence of the complainant on the commission of the offence of rape. That of PW5, the learned Senior State Attorney said, corroborated the evidence of the complainant that it was the appellant who committed the offence.

Regarding the corporal punishment imposed on the appellant, the learned Senior State Attorney said that it is also the prescribed penalty for the offence of rape as provided for by section 131(1) of the Penal code Cap 16 of the Laws.

The issue before the Court is fairly simple. The only question before us is whether the offence of rape was proved and whether it was proved that it was the appellant who committed it. Stating with the question whether the offence of rape was proved, we do not hesitate to say that the evidence on record sufficiently proved that the offence of rape was committed. The testimony of PW4 was that:

"On 11.07.2010...I was at home playing with justine who is a boy child...during that time the accused who is here in court (pointed at the accused) did come home and told me to go with him at his house where he could gave (sic) me Shs 100/=. Along the way he took me to the thicket and fell me supine. He lied on top of me and took out his phallus and told me had I refused touching it would cut me with a machete...I then hold (sic) his erect penis. He took off my under pants and put his penis in into my vagina and started raping me. Having gratified his passion (sic) he left a way (sic) and I also went home. I felt pains as it was my first time to sleep with a man. I held my under pants and went home. Blood was coming from my vagina. At home I found justine present. I also told my mother of the event."

With a slight penetration of the penis into the vagina the offence of rape is proved to have been committed. Section 130 (4) (a) reads:

"For purposes of proving the offence of penetration

however slight is sufficient to constitute the sexual

intercourse to prove the offence."

Cases decided by the Court on this point are many. The cases mentioned below are some of the decisions given by the Court. **Seleman Makumba V R** Criminal Appeal No.94 of 1999, **Alfeo Valantino V R** Criminal Appeal No.92 of 2006, **Ally Mlawa V R** Criminal Appeal No. 77 of 2006 and **Mathayo Ngalya @ Shabani V R** Criminal Appeal No. 170 of 2006 all unreported.

In the present appeal the evidence was abundant that the offence of rape was committed because apart from the evidence of PW4 which shows her vagina was penetrated by a penis, the evidence of PW1, PW2, and PW3 corroborated the evidence of PW4 that her vagina had bruises and the hymen was ruptured. So the issues of the commission of the offence of rape was proved by the prosecution.

The other issue is whether it was the penis of the appellant which penetrated the vagina of the complainant. The appellant denied being the one who committed the offence although he admitted being at the house from where the complainant was picked and taken to the thicket where the offence was committed. The testimony of the complainant on this point is clear. She testified that she was taken from their home while she was playing with PW5 and was promised by him that he was taking her to his house to give her shillings 100/=. But instead of taking her to his house he took her to the thicket and raped her. The evidence of PW5 corroborated the evidence of PW4. The offence was committed at 4.00pm. It was daytime with sufficient light to identify the appellant without any problems. Another better part of the evidence of the two witnesses is that PW4 and PW5 knew the appellant before as he was living in the same village. The appellant also admitted that he knew the mother of the complainant and he was at her house on the date the offence was committed although he said he was there for another purpose. As we put the evidence of the prosecution and the defence on the scale of truth, that one of the prosecution weighs more than that of the appellant. We say so because there was no reason given by the appellant to show why the

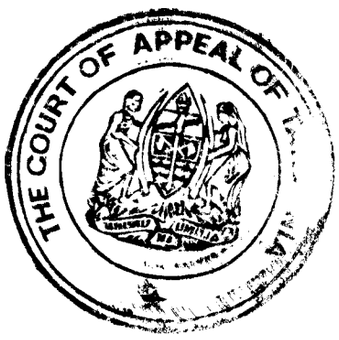
offence of rape should have been framed against him. He was seen by PW5 taking PW4 from her home. PW5 heard him telling PW4 that he was taking him to his house to give him shillings 100/=. PW4 returned holding her underpants in her hands and she reported to PW5, PW1 and PW2 that she was raped. As already shown earlier in this judgment, the offence of rape was proved to have been committed. The evidence left no doubt that it was the appellant's penis which penetrated the vagina of the complainant.

We find no reason for interfering with the finding of the first appellant court that it was the appellant who committed the offence of rape.

Regarding the sentence of corporal punishment of twelve strokes that were imposed on him, we entirely agree with the learned Senior State Attorney that section 131(1) of the Penal Code provides for a punishment of corporal to an accused person convicted of the offence of rape in addition to imprisonment. This ground of appeal also lacks merit. In the final result we dismiss the appeal in its entirety.

DATED at BUKOBA this 24th day of February 2015.

N.P. KIMARO
JUSTICE OF APPEAL



B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL