

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 590 OF 2015

BIKO EMMANUEL APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court of Singida
at Singida)**

(W.E. Lema, PRM (Ext. Jurisdiction))

dated the 4th day of December, 2015

in

PRM. Criminal Appeal No. 42 of 2015

REASONS FOR JUDGMENT OF THE COURT

18th & 20th April, 2016

KILEO, J.A.:

On 18th April 2016 we allowed the appeal by Biko Emmanuel, quashed the conviction entered against him, set aside the sentence imposed and ordered his immediate release from prison unless he was otherwise held therein for some lawful cause. We reserved our reasons which we now give.

On 30th day of August 2013 the appellant appeared in the District Court of Singida at Singida to answer to a charge of rape contrary to sections 130 (1) and 131 (1) of the Penal Code. He was convicted and sentenced to serve 30 years imprisonment. He appealed to the High Court which transferred his appeal to be determined by a Resident Magistrate with Extended Jurisdiction pursuant to section 45 (2) of the Magistrates Courts' Act, Cap 11 R. E. 2002. He lost his appeal and came before this Court on a second appeal.

The facts that came to light at the trial and which formed the basis of the appellant's conviction are briefly to the following effect:

On the material date at around 9.00 hours the victim of the crime (PW1) was sent home from school as she had no money. On her way back she met the appellant who grabbed her and raped her. The appellant was not known to the victim and by way of identification she claimed that the appellant had put on a light blue trouser and black sweater with a mixture of black and red colours on the sleeves. The day following the incident, after being probed, PW1 disclosed to her parents, PW1 and PW3 that a young man who wore a light blue trouser and black sweater was the one

who raped her. PW4, WP 8847 investigated the matter and also tendered in court as exhibit PE1, the sweater which the appellant had allegedly donned at the time of the commission of the crime. Also there was medical evidence (Exhibit PE2) tendered by PW5, a doctor who examined the victim. According to PW5 the victim's hymen was ruptured and she also had bruises on her vagina.

Maintaining his innocence at the trial, the appellant claimed that he was on his way home when he was arrested by PW1, taken to the police station and charged for an offence he had not committed.

At the hearing of the appeal the appellant appeared in person with no legal representation. The respondent Republic was represented by Ms. Beatrice Nsana, learned State Attorney. The appellant filed a memorandum of appeal comprising of seven grounds, however, he basically impugned the decision of the first appellate court for sustaining a conviction which was founded on a weak prosecution case.

The appellant being a lay person did not have much to say apart from imploring us to adopt his grounds of appeal.

After abandoning a Notice of Preliminary Objection that the respondent had filed earlier on, Ms. Nsana went ahead and supported the appeal against both conviction and sentence. The learned State Attorney was of the opinion that bearing in mind the fact that the appellant was not known to the victim before the incident it could not be said, in the circumstances of the case, that there was watertight identification.

The learned State Attorney opined also that since the victim did not immediately disclose to her parents that it was the appellant who molested her then her evidence became suspect.

Regarding the sweater which was tendered in court as an exhibit purportedly to link the appellant to the crime, the learned State Attorney argued that there was no evidence tendered in court to show how the sweater came to be produced in court and as matters stood there was no link between the sweater and the commission of the crime.

As for sentence, Ms Nsana submitted that a sentence of thirty years imprisonment ought not to have been imposed as the appellant, according to the evidence on record, was a child at the time of the crime.

The record shows that the appellant was not known to the victim prior to the incident. The matter revolved around the issue of visual identification. It has been said time and again that evidence of visual identification is of the weakest kind and must be treated with circumspection before it forms the basis of a conviction. (See the renowned case of **Waziri Amani vs. Republic** [1980] TLR 250.)

In this case the only identifying mark that the prosecution depended on was a black sweater with a *'mixture of black and red colours on the sleeves'* that the appellant was alleged to have worn at the time of the incident. As rightly pointed out by the learned State Attorney, there was no link between the sweater, the commission of the crime and the appellant. It is unclear how the sweater came to be produced in court. PW4 who tendered the sweater as an exhibit did not explain how it got into her hands. Moreover, the sweater was not placed before the victim for her to identify and relate it with the appellant. It was indeed dangerous to rely on the sweater as a mark of identification.

The fact that the victim slept over the matter before she disclosed the identity of her assailant to those who were close to her, is another aspect of the matter that should have given the subordinate courts reason

to take the evidence of the victim with caution. At least one would have expected that the child would have been probed to determine why she did not immediately describe the appellant to her parents.

As for the sentence there is no doubt that it was unlawful. Though the charge sheet did not disclose the age of the appellant, however when giving his evidence he said that he was 16 years of age. At the end of his testimony the trial magistrate gave an order that he be subjected to medical examination so as to get an expert opinion as to his age. There was no record of medical evidence tendered in court in compliance to the trial magistrate's directions, yet strangely enough, the trial magistrate, in her judgment gave the age of the appellant as 18 years. It is not clear how she arrived at that age. Be it as it may, even if we were to assume that the appellant was 18 years old at the time of the commission of the crime, still the sentence of 30 years imprisonment was unlawful.

Section 131 (2) of the Penal code bars imprisonment for boys of 18 years or less in cases of conviction for rape unless they are recidivists. The provision states:

"131. (1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall—

(a) if a first offender, be sentenced to corporal punishment only;

(b).....

(c)"

It is on record that the appellant had no record of previous convictions. Since the trial magistrate decided that he was eighteen years (in spite of the appellant's own statement of his age which was not challenged) the sentence of thirty years imprisonment imposed clearly violated the provisions of section 131 (2) of the Penal Code as cited above.

It was in the light of the above considerations that we allowed the appeal by Biko Emmanuel and ordered his immediate release from prison unless he was held therein for some lawful cause.

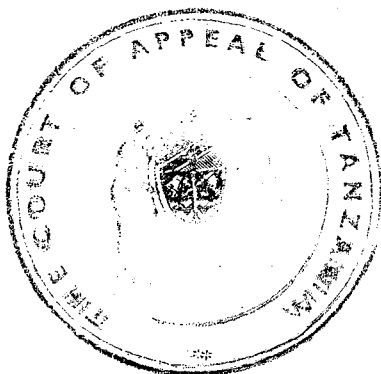
DATED at **DODOMA** this 19th day of April 2016

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL