

**IN THE COURT OF APPEAL OF TANZANIA  
AT BUKOBA**

**(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 509 OF 2015**

**JOVITUS JOHANSEN..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**(Appeal from the conviction and Judgment of the High Court  
of Tanzania at Bukoba)**

**(Khaday, J.)**

**Dated the 6<sup>th</sup> day of November, 2015**

**in**

**Criminal Appeal No. 39 of 2014**

**.....**

**JUDGMENT OF THE COURT**

16<sup>th</sup> & 23<sup>rd</sup> February 2016

**MMILLA, J. A.:**

On 9.8.2013, the appellant, Juvitus Johansen was charged before the District Court of Karagwe with the offence of rape contrary to section 130 (1) (e) and 131 (3) of the Penal Code Cap 16 of the Revised Edition, 2002. He was tried, convicted and sentenced to a term of 30 years imprisonment. He was aggrieved and unsuccessfully appealed to the High Court of Tanzania at Bukoba (Khaday J). Before that Court however, the sentence

was enhanced to life imprisonment. Still aggrieved, he preferred this second appeal which is against both conviction and sentence.

The facts leading to this case were briefly that, on 21.8.2013 at about 10.00 am, Neema Andrew (PW5), then a pupil at Kambarage Primary school, was on her way to school when she met the appellant. The latter, who was her brother purported that he was also going to that school where he intended to collect some money from one Nelly. Surprisingly, on arrival at a semi finished house at which the appellant was dwelling, the appellant turned on her and dragged her into the said house. He undressed her underwear and raped her. Although the appellant had covered the victim's mouth with his palm, somehow she managed to raise alarm which attracted some people who were not far from the said house. They included PW2 Johnson Joseph and one Diot Derick who were constructing a house near the appellant's residence. They rushed to that house, broke the door and rescued her. The victim told her rescuers that the appellant raped her. They arrested the suspect.

The appellant's defence was that on 17.6.2013 he visited his uncle who was living at Kayanga where he stayed for about two months. He alleged that his uncle chased him away after he refused to sell the farm left to him by his late father, which is why he decided to stay in the said

semi finished house. On 21.8.2013 at about 10.00 pm he came back to his house from the river where he was fetching water. Surprisingly, he found two persons at his place who were joined by his uncle. The latter ordered those persons to arrest him.

When this matter was before us for hearing, the appellant appeared in person and unrepresented, while Mr. Hashim Ngole learned Principal State Attorney represented the respondent Republic.

The memorandum of appeal raised two grounds; **one** that the first appellate court judge erred when he substituted the sentence of 30 years to that of life imprisonment whereas the prosecutrix's age was not proven; **two** that the first appellate court judge erred by failing to consider that the prosecution evidence was loaded with contradictions.

The appellant chose for the learned Principal State Attorney to begin, undertaking to respond thereafter if necessary.

Mr. Ngole's stand was clear that he was supporting conviction, but did not mince words that he was against the sentence which was imposed against the appellant.

To begin with, Mr. Ngole submitted generally that PW5 who was the victim of rape testified that the appellant, whom he knew very well

because he was his brother, was the one who raped her. She said he pulled her into a semi finished house in which he put her on the bed, removed her underwear, undressed his trouser and raped her. Mr. Ngole submitted similarly that the evidence of PW5 was corroborated by that of PW2 who said he saw the victim running away from that house, and that when they went with her to that house he showed them the appellant as the person who raped her. PW3 said the same thing. There was yet the evidence of PW4, Sara Kazimoto who examined the complainant and found some blood and sperms in her female organ, also that he saw bruises thereat.

On his part the appellant insisted that he did not commit the alleged offence, but that PW1 faked the case against him.

After carefully going through the proceedings and judgments of the courts below, the memorandum of appeal and the submission before us, we hasten to say that we agree with Mr. Ngole that the victim girl's evidence was explicitly that the appellant had sexual intercourse with her, a fact which was cemented by PW4 who found some blood and sperms in her female organ, also that there were bruises on that part of the body. That was proof that she was raped. The evidence of PW2 and PW3 was important because it corroborated the evidence of PW5 that she was raped

by no other person but the appellant. As such, we agree with Mr. Ngole that the lower courts correctly found that those witnesses were credible, believable and reliable. In the circumstances, the appellant's appeal against conviction is without merit and we dismiss it.

On the other hand however, Mr. Ngole contended that he was not supporting the sentence which was imposed against the appellant. He challenged that because the charge sheet indicated that the appellant was 18 years of age at the time he committed the charged offence, his sentence ought to have been corporal punishment in terms of section 131 (2) (a) of the Penal Code. Once again, we agree with him.

Certainly, section 131 (2) (a) of the Penal Code precluded a person who may have been 18 years of age at the time he committed the offence of rape, if convicted, from being awarded a custodial sentence. Section 131 (1) and (2) (a) of the Penal Code provides that:-

*"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) ...” [Emphasis provided].*

See also the case of **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013 CAT (unreported).

On the basis of the above, the proper sentence against him ought to have been corporal punishment; therefore the sentence he is currently serving is illegal. We quash it and set it aside.

We ought to have substituted the requisite sentence of corporal punishment in terms of to section 131 (2) (a) of the Penal Code, however since the appellant has been in prison for about two (2) years counting

from the date of his sentence on 30.1.2014, we think that is more than what he deserved. As such, we order his immediate release from prison unless he is held for some other lawful cause.

Order accordingly.

**Dated at Bukoba** this 20<sup>th</sup> Day of February, 2016.

E. A. KILEO  
**JUSTICE OF APPEAL**

S. MJASIRI  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

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

  
E.F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**