IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 406 OF 2015

MOHAMED SELEMAN @ HANGO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a decision of the High Court of Dodoma at Dodoma)

(Kalombola, J.)

dated the 22nd day of July, 2015
in
DC Criminal Appeal No. 22 of 2014

JUDGMENT OF THE COURT

11th & 13th April, 2016

JUMA, J.A.:

The appellant MOHAMED SELEMANI @ HANGO, who had been charged together with one MUHIDIN RASHID with the offence of gang rape c/s 131A (1) (2) of the Penal Code, Cap. 16, was alone convicted by the District Court of Iramba District at Kiomboi for the offence of rape contrary to section 130 (1) (2) (e) of the Penal Code. The trial magistrate (C.P. Singano-RM) invoked section 131 (3) of the Penal Code and sentenced the appellant to serve life imprisonment. Incidentally, this

section 131 (3), is a special provision creating punishment where the victim of rape is a girl of under the age of ten years. The appellant's first appeal to the High Court was dismissed on 22nd July, 2015 by the High Court of Tanzania at Dodoma (Kalombola, J).

The particulars of the charge of gang rape alleged that at round noon on 19th June, 2013, the appellant and his co-accused had carnal knowledge of Tatu d/o Rajabu, a six year old girl. After conducting a *voire dire* examination on the complainant (PW2), the trial magistrate made a finding that although the complainant had understood the questions and was able to respond accordingly, she did not understand the meaning of oath. The trial magistrate allowed PW2 to give evidence without affirmation.

In her testimony, PW2 informed the court that the appellant was familiar to her, for they were neighbours. He would occasionally visit her home to purchase buns (maandazi) which her mother baked for sale. PW2 recalled what transpired that material day. The appellant took her hand and led her to the nearby bushes where he removed her clothes, including her under pants. He then forced her onto the ground. He strangled her neck as he lay on top of her, pressing her waist.

The complainant's father Rajabu Ntinda (PW1) recalled that on 19/3/2013 he was at home repairing his house when one of his daughters, Pili Rajabu, came at home to report that one young man going by the name of HANGO had taken the complainant to a nearby bush. PW1 conducted initial search at the nearby water source. He decided to raise an alarm. A search party finally found the complainant at a nearby farm. The complainant was injured and unconscious when her father and other members of the search found her. The complainant was first taken to the nearby police station where she was given a Police Form No. 3 (PF3) to take with her to the hospital.

S/SGT Nemes (PW4) was at Iguguno Police Station when the complainant was brought at the station by her parents. PW4 recalled that the complainant was still unconscious and her clothes torn off. He issued the Police Form No. 3 (PF3) to enable the complainant to be taken to the nearby hospital. PW4 testified that when the complainant regained her senses, she mentioned the appellant as the person who raped her. This is the information which was behind the police looking for and arresting the appellant. PW4 further testified how he recorded the appellant's cautioned

statement wherein the appellant confessed that he raped the complainant. The appellant did not object when PW4 tendered the cautioned statement which was admitted as exhibit P2.

Sospeter Gwanchele (PW3) a medical officer at Iguguno Roman Catholic Dispensary recalled how he attended the still unconscious complainant when she arrived in a motor cycle. He examined and treated her. He tendered as evidence the PF3 (Exhibit P1) which he filled after examining and treating the complainant. In so far as his medical examination report is concerned, PW3 told the trial court that the complainant had been raped.

When he presented himself as a witness (DW1) in his own defence, the appellant's age was recorded as 12 years. The learned trial magistrate subjected him to a *voire dire* examination before he was allowed to testify after affirmation. In his very brief evidence as, the appellant flatly denied to have been at the scene of rape when it occurred. He expressed his surprise when the police came over at his home and arrested him for a crime he did not commit.

In this second appeal, the appellant advanced a total of eight grounds of appeal which may be summarised to cut off repetitions. In their essence, all the grounds of appeal contend that the offence of rape was not proved by evidence and faulted the two courts below for failing to grasp the evidence of the victim whose complaint was assault, but certainly not rape for which the appellant was convicted and sentenced. He raised doubt with the issue of penetration by contending that the blood mentioned by the prosecution witnesses flowed from the victim's bleeding nose and head, but certainly not from her vagina.

At the hearing of the appeal, the appellant appeared in person, and unrepresented. Mr. Evod Kyando, learned State Attorney, appeared for the respondent Republic. In arguing his appeal, the appellant was brief, basically he urged us to do justice to his grounds of appeal which should translate to his appeal being allowed, quashing of his conviction and setting aside the sentence of life imprisonment.

Responding to the grounds of appeal, the learned State Attorney submitted that the conviction of the appellant was proper but the sentence which the trial court imposed, and which the first appellate court later on

approved, was illegal. He urged us to interfere with the sentence of life imprisonment which should now be varied so as to comply with what the law prescribes.

Expounding why he opposes the appeal against the appellant's conviction, Mr. Kyando insisted that the evidence on record proved beyond reasonable doubt that the complainant was raped and that it was the appellant who committed the act of rape by penetration. The learned State Attorney referred us to the evidence of PW2 who testified both as a child of tender years and as a victim of the rape as proving rape committed by the appellant. He also referred us to evidence of PW3 who testified on how he received the complainant and upon examination concluded that she had been raped. The learned State Attorney similarly referred to the medical examination report which PW3 prepared after examining the complainant and tendered as exhibit P1.

Illustrating why he thinks the sentence of life imprisonment should not remain to stand, Mr. Kyando referred us to the information in the Charge Sheet where the appellant on page 1 of the record is presented before the trial court as a seventeen (17) year old accused. He argued that

although the age of the appellant has variously been expressed to be 17 years and later as 12 years, he was all the same a boy of under the age of eighteen years and should not have attracted a punishment of life imprisonment under section 131 (1) of the Penal Code. Instead, the two courts below should have resorted to the punishment for rape provided for under section 131 (2) (a) of the Penal Code which covers the appellant who was a first offender:

> *131.-(1) Any person who commits rape is, except in the cases provided for in 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) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;

(c) if a third time and recidivist offender, he shall be sentenced to life imprisonment pursuant to subsection (1).

To rectify the illegal sentence, the learned State Attorney urged us to invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act (AJA) to impose the sentence of corporal punishment provided under section 131 (2) (a) of the Penal Code befitting a boy of under the age of eighteen who is convicted for rape as a first offender. He hastened to submit further, that because the appellant has for two years served an illegal term in prison, the Court should be minded to order his immediate freedom in lieu of the corporal punishment.

This being a second appeal, we are reminded not interfere with concurrent findings of facts by the trial court and first appellate Court *"...unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; mis-directions or non-*

or have occasioned a miscarriage of justice..": **Wankuru Mwita vs. R.**, Criminal Appeal No. 219 of 2012 (unreported).

The main issue for our determination arising from the support of the conviction by the learned State Attorney is whether the two courts below so misapprehend or misapplied the evidence on record that they wrongly found the offence of rape established instead of the offence of assault, which the appellant claims was disclosed by the evidence on record.

We think, Mr. Kyando is fully entitled to support the conviction because the offence of rape was clearly proved as against the appellant and H.H. Kalombola, J. was right on first appeal to conclude that the conviction of the appellant was correct. The complainant (PW2) gave a very detailed account about her ordeal during broad day light till she lost consciousness. She recovered whilst undergoing treatment before the medical officer (PW3). The complainant not only excluded the appellant's co-accused, but her evidence proved beyond reasonable doubt that it was the appellant who committed the offence of rape. As this Court said in **Benjamini Nziku vs. R.**, Criminal Appeal No. 151 of 2010 (unreported)—

"...the best witness to the offence of rape is the victim herself..." Excerpts from the evidence of PW2 say as much:

> *"...I know the person standing before the court as Hango. I do not know the other one wearing a coat. On the day he held my hand on the way. He took me to the bushes....He was beating me on the face. He removed my clothes. It was a dress, he tore it up. He removed my underpants. He was strangling my neck. He fell me down. He later laid on me. He fell on me. He was strangling me. He pressed my waist. The second accused was not present."*

The evidence of the complainant was corroborated by the medical officer (PW3) who gave an equally detailed account on how the complainant was received, examined and treated. It is not true, as the appellant would like us to believe, that the complainant had merely been assaulted and was only nose-bleeding. According to PW3, the complainant— *had bruises and she was bleeding from injuries on the back and on her face. Her vagina had bruises and was bleeding from within...* In his medical determination, which he filled in the medical examination

report (exhibit P1), PW3 was pertinent that the complainant had been raped. In his evidence, PW3 stated:

> *"...I remember receiving a girl child by the name Tatu Rajabu... She was brought by a motorcycle. It was about a quarter to 14:00 hours when she was brought she had no consciousness (sic)...*
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> *..I examined her from her face to the whole body. On the face she had bruises and she was bleeding from ... injuries on the back and face. I examined her on her vagina and found that she was bleeding from therein and there were bruises. A child's vagina must have all the parts intact. She must have her hymen and she should not be bleeding since no menstruation. .... and her vagina was penetrated. There was a hole in it. I knew that the victim was penetrated by penis which was forced into her. I could not find sperms because there was full of blood. At about 16:00 hours, the victim regained consciousness and we were talking to her. I filled the information in the PF3..... and since she was becoming too weak, they referred her to the Regional Hospital for more attention..."*

eighteen who are convicted of rape is quite settled. In **Benjamini Nziku vs. R.** (supra) the appellant, whose age was shown as 16 when he testified was charged with rape contrary to sections 130 and 131 of the Penal Code Cap.16 – R.E. 2002. He was convicted by the trial District Court of Njombe and sentenced to thirty (30) years imprisonment. His first appeal was dismissed by the High Court. On his second appeal the Court, while sustaining his conviction made the following observations on appropriate sentence:

> *"...Since the record shows that he was or could have been 16, and since he had no previous convictions he should have been given the benefit of the doubt and treated under section 131(2)(a) of the Penal Code.."*

In the upshot of our foregoing findings, we dismiss the appellant's appeal against his conviction. We invoke the Court's power of revision under section 4 (2) of the AJA and we hereby set aside the sentence of life imprisonment. Because the appellant has partly

served two years of the illegal sentence, belated imposition of corporal punishment prescribed by section 131 (2) (a) of the Penal Code would not be to the best interests of justice. We instead order the immediate release of the appellant from custody, unless he is otherwise held lawfully.

It is so ordered.

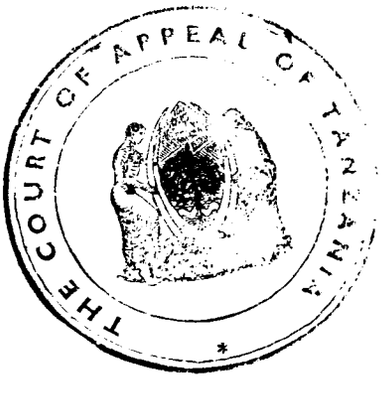
DATED at **DODOMA** this 12th day of April, 2016.

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