IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 80 /2005
ORIGINAL MTWARA D/COURT CR.C. NO. 4/2005
BEFORE M.C. MTEITE, ESQ R/MAGISTRATE

JACKSON ALOYCE @ MMOLE - - - - - - - - -APPELLANT

VERSUS

THE REPUBLIC - - - - - - - - - - -RESPONDENT

Date of Last Order: 22/8/2006
Date of Judgement: 17/11/2006

JUDGEMENT

SHANGALI, J.

The appellant JACKSON S/O ALOYCE @ MMOLE is appealing against the decision of the District Court of MTWARA in criminal case No. 4 of 2005. In that case the appellant was charged with the offence of Rape c/s 131 of the Penal Code as amended by section 5 and 6 of the Sexual offence Provisions Act No. 4 of 1998. At the end of the trial, the District Court convicted him and sentenced him to serve a life imprisonment with a corporal punishment of twelve (12) strokes of the cane. The appellant was aggrieved by that decision and has now appealed to this Court against both conviction and sentence.

The salient facts of the case as has amply been demonstated in the Lower Court record may conveniently be stated as follows; In the night of 19/5/2004 at about 10.00 pm, PWI, Penina D/O Ulazu aged 14 years was sent by her mother PW2, Rehema D/O Lukas to purchase paraffin at the shop. While on her way home PWI met the appellant and one Victor who started to harass her and eventually chased her intending to apprehend her. PWI managed to run back home and straight went inside their house. PW2 inquired from the appellant and Victor as to why they were chasing PWI and

the appellant claimed that they were owing her Tsh.2,000/=. PW2 decided to pay them Tsh.2000 and both appellant and his colleague went away.

Later on in the middle of the night PWI, PW2 and PW3 Agatha D/O Lukas who were asleep inside the house heard shouts of people from outside and PW2 decided to open the door. Suddenly the appellant and his colleague pushed her aside, entered the house brandishing knifes and demanded for PWI. PWI decided to hid under the bed but the appellant and his colleague searched the house using their tourches and managed to trace her and dragged her outside at the banana plantations. At that juncture PW2 and PW3 were prevented from getting outside the house by Victor who stood at the door brandishing his knife while the appellant ravished PWI outside. PWI complained that the appellant assaulted her violently and that during the intercourse with her he (appellant) wore a condom. PWI, PW2 and PW3 claimed that they tried to shout for help but nobody appeared to offer them an assistance. The matter was reported at the Police Station in the same night where PF3 was issued. On the next morning PWI was taken to the hospital where she was examined and treated. The PF3 was tendered in Court and admitted as Exibit PI.

In his sworn defence, the appellant gave a very short defence to the effect that he was arrested, interrogated and charged with this offence of which he categorically denied to have committed.

The trial magistrate was satisfied with the prosecution evidence hence conviction and sentence against the appellant.

In his memorandum of appeal the appellant has listed eight (8) grounds of appeal which may conveniently be summarized to only three main grounds of appeal namely; one, that the trial magistrate based conviction on the evidence of PWI, PW2 and PW3 who were close relatives without considering the possibility of such close relatives to fix a case in order to incriminate the appellant; two, that PF3, exibit PI is short of any medical expert information as to whether PWI was raped or not or found with any human sperms; and three; whether the prosecution case was proved beyond all reasonable doubt.

Together with the above complaints from the appellant there are other issues which requires this courts attention. The first one is the fact that there is no evidence whatsoever to prove the age of the PWI, and if that evidence is available no VOIRE DIRE test was conducted by the trial Resident

Magistrate in terms of section 127(2) of the Tanzania Evidence Act 1967. PWI, being a child of tender years as claimed was straight forward sworn and her testimony recorded.

Mr. Luena, Learned State Attorney who appeared for the Republic/Respondent supported the conviction and sentence imposed against the appellant and submitted that there was water tight prosecution evidence establishing the offence of rape against the appellant. He conceded that voire dire examination was not conducted on PWI to determine her capacity to understand the nature of on oath as provided by the law. He referred the count to the cases of **ROMAN MAKINI VS R (1980) TLR 149** and the case of **DHAHIRI ALLY VS. REP (1989) TLR 27** where it was held that voire dire examination is compulsory and that non compliant with that mandatory position of the law renders the trial a nullity.

The Learned State Attorney observed that since there is enough prosecution evidence against the accused person the court should order re-trial under section 388 of the Criminal Procedure Act, 1985. The question is whether there is sufficient and cogent prosecution evidence against the accused as insisted by the Learned State Attorney to warrant a retrial order.

Starting with the first ground of appeal raised by the appellant I entirely agree with him that the trial Magistrate erred in giving credence to the evidence of three close relatives (PW1,PW2,PW3) without warning himself of the dangers there of. The possibility of the doughter (PW1), mother (PW2) and aunt (PW3) to fix a case in order to incriminate the appellant is not far fetched; that possibility should have been considered and resolved to clear the air on the issue of partisan evidence. Further more the prosecution of the case in the trial District court is silent on several issues which ought to have been resolved. For instance if the offence was Committed at Mdenga area where several people were living why the prosecution decided to rely on only three close relatives as witnesses without any other independent witness to support the claims and give credence to the evidence of the three relatives. Again, if the incident happened on 19/5/2004 why was the appellant arrested on 4/1/2005 and if PWI,PW2 and PW3 did shout for help what prohibited other people to respond to their alarm; Then, why PW2 claimed that she witnessed PWI being raped while both PW2 and PW3 stated that they were prevented to get out of the house by Victor who was brandishing a knife at their door. It must be remembered that the alleged incidence happened in the middle of the night and the

record is silent on how PW2 and PW3 managed to witness the assault in the dark.

The second ground of a appeal is in regard to the relevance of the PF3, Exibit PI in this case. Having perused the said Exibit PI, I entirely agree with the appellant that the said PF.3 has nothing relevant to assist the prosecution side because it reveals nothing to substantiate or support the charge of rape or Sexual assault. It simply speaks of "headache" rated as "harm" and inflicted by "Arm/penis". In general there is no sufficient evidence to prove the charge to the required standard provided by the law.

One more intereshing issue is the way the trial Resident Magistrate announced the sentence against the appellant. In his sentence order the trial magistrate declared;

"SENTENCE

> .....section 6 of the Sexual Offences (Special Provision) Act, No. 04/1998 which replaces S.131(1) Tanzania Penal Code provides that any person who commits rape to be punished with imprisonment for life. And I order that the accused to suffer (12) twelve corporal punishment..."

From the abstract it appears that the appellant was not sentenced to life imprisonment but only sentenced to corporal punishment of twelve (12) strokes of the cane. Mr. Luena, Learned State Attorney submitted that although the sentence was confusing the appellant was correctly sent to prison to serve life imprisonment as shown in the committal warrant issued by the trial Court and signed by the trial Resident Magistrate. I would prefer to distance myself from the Learned State Attorneys proposition because what actually determines the fate of the accused person after conviction is the sentencing order. Committal warrant is a subsequent procedure intended to put the sentence into implementation. In otherwards it is a mere directions from the Court to the Prison Authority to receive the convict and make sure that convict serves his sentence in accordance to the law – see section 327 of the Criminal Procedure Act, 1985. Once the sentencing order is wrong or ambiguous it can not be salvaged by the context or information

in the Commital Warrant. Therefore the sentence order is supposed to be precise and clear without inviting any ambiquity on the face of it.

Now, considering the circumstances of this case and the available prosecution evidence together with the grounds of appeal raised by the appellant, I am of the view that for the interest of justice a retrial should not be ordered. The Principles upon which a retrial should be ordered were clearly pronounced in the case of **MANJI VS. REP (1966) EA, 343** and echoed in the case of **RAJABU RAMADHANI VS. R. (1980) TLR No. 50,** that,

> "...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a re-trial should be ordered; each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interest of justice requires it and should not be ordered where it is likely to cause an injustice to the accused person..."

As I have said above, since I have already considered the issue of insufficiency of the prosecution evidence as raised by the appellant it is obvious that any attempt to order retrial will amount to giving the prosecution chance to mend their linen and fill-up the gaps revealed in this appeal. That would definitely be unfair to the appellant.

For the foregoing reasons the appeal is hereby allowed, conviction quested and the sentence if any imposed against the appellant set aside. The appellant is to be released from prison forthwith unless held on a different matter.

It is so ordered.

THE HIGH COURT OF TANZANIA

M.S. Shangali
JUDGE
17/11/2006

Judgement delivered todate 17/11/2006 in the presence of Mr. Ntwina Learned State Attorney for the Republic and the appellant in person.

M.S. Shangali
JUDGE
17/11/2006