IN THE HIGH COURT OF TANZANIA
AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

CRIMINAL APPEAL NO. 110 OF 2007

(ORIGINAL CRIMINAL CASE NO. 133 OF 2000 OF THE DISTRICT COURT OF NZEGA DISTRICT AT NZEGA)

BEFORE: A.A. RUTECHURA,ESQ., SENIOR DISTRICT MAGISTRTE

SALUM MASANJA @ MADUHU ..... APPELLANT
(Original Accused)

Versus

THE REPUBLIC ..... RESPONDENT
(Original Prosecutor)

J U D G M E N T

28/09/2008 & 24/04/2009

MAKURU, J.

On 11th September, 2000, the appellant was charged before the District Court of Nzega at Nzega with rape, contrary to sections 130 and 131 of the Penal Code as repealed and replaced by sections 5 and 6 of the Sexual Offences Special Provision Act, No. 4 of 1998.

He was convicted and sentenced to thirty (30) years term of imprisonment, twelve (12) strokes of corporal punishment and ordered payment of shillings 15,000/= as compensation to the victim of rape. The appellant was aggrieved by the decision of the trial court, hence this appeal.

At the trial, the evidence against the appellant was essentially based on two aspects: First, the evidence of Nshoma Kisinza (PW1) and Shija Kaji (PW2). Second, the PF.3 of the victim of rape (PW1) which was tendered as Exhibit P.1.

On 05th September, 2000 at around 17.00 hrs Nshoma Kisinza (PW1), a standard two girl aged about 10 years old while coming from the wall to fetch water she met the appellant who requested to be given water to drink. The appellant was given water in a pail. According to PW1 the appellant got hold of her and dragged her towards the bush, forcefully undressed her and raped her. She did not raise alarm as the appellant threatened to kill her. She testified before the trial court that the whole exercise was painful, she was injured and she bleed from her private parts. She further testified that she knew the appellant before the incidence as Salum Masanja who resided at Lukelesha's house. The appellant was taking care of Lukelesha's cattle. Lukelesha was PW1's uncle.

When PW1 returned home she did not report the incidence fearing the appellant. Her auntie, Shija Kanjikalulu (PW2) noticed blood stains on PW1's legs. She interrogated PW1 who told her that she has been raped by the appellant. Further examination proved that Nshoma was bleeding from her private parts, she was injured and her hymen ruptured. Consequently the appellant was arrested and taken to the Village Executive Officer (V.E.O), who testified as PW3.

The matter was reported to the Police Station where PW1 was issued with PF.3 and was taken to hospital to be examined and treated. The PF.3 was tendered in court as Exhibit P.1.

In his defence, the appellant denied any involvement in the offence. He admitted to have been responsible in taking care (grazing) Lukelesha's cattle and that he knew PW1 who was residing near Lukelesha's house. It is on record that when the offence was committed the appellant was 17 years old.

The trial court conducted a ***voire dire*** examination in respect of PW1. It accepted that PW1 was too young to know the nature of oath but possessed sufficient intelligence to justify reception of her evidence as she understood the duty of speaking the truth. After giving due consideration to her

evidence the trial magistrate was convinced that PW1 spoke nothing but the truth. Since it was not disputed that PW1 was raped, the trial magistrate overruled the possibility of mistaken identity as PW1 testified to the effect that she knew the appellant prior to the day of incident. The appellant also admitted to have known PW1 before the incidence. As the offence was committed at around 17.00 hours, there was sufficient day light so that there was no question of PW1 mistaking someone else for the appellant.

The trial magistrate also found that the appellant had sexual intercourse with PW1 without her consent. He also believed the evidence of PW1 which was materially corroborated by PW2 who saw the blood stains on PW1's legs, examined her and found her private parts injured. There was also further corroboration from the PF.3 (Exhibit P.1) which clearly stated that PW1 ***"was raped, 9 hours ago. Bleeding from vagina, had tear on lower side vaginal orifice, toned (sic) hymen."***

Although the appellant denied the charge, after due consideration of the prosecution evidence and the defence, the learned trial magistrate held that the prosecution has proved its case beyond a reasonable doubt and the appellant was convicted accordingly.

In the memorandum of appeal the appellant has preferred 8 grounds of appeal which have been deduced into four grounds as follows;-

1. ***The learned trial magistrate erred in law in holding that the prosecution has proved its case beyond a reasonable doubt.***

2. ***The learned trial magistrate erred in law and fact in believing the evidence of PW1 while her credibility was highly questionable and her evidence was not corroborated.***

3. ***The Medical Report does not pin point that the appellant had Carnal knowledge of the victim (PW1).***

4. ***The PF.3 (Exhibit P.1) tendered in court was hearsay evidence because the doctor was not summoned to prove the contents.***

The appellant appeared in person, unrepresented. The respondent Republic was advocated for by Mr. Mutakyawa, learned State Attorney.

In supporting the conviction Mr. Mutakyawa responded to the four grounds of appeal.

In regard to the first ground that the learned trial magistrate erred in law in holding that the prosecution has proved its case beyond a reasonable doubt, Mr. Mutakyawa submitted that the trial court properly considered the testimony of PW1, PW2 and the contents of the PF.3. He was further of the view that PW2's evidence and the PF.3 corroborated PW1's evidence.

On the second ground regarding the credibility of PW1, Mr. Mutakyawa submitted that the trial court considered and believed PW1's testimony. The trial court was better placed to hear and assess the credibility of the witness. To support his submission he cited the case of ***Omari Mohamed V. R.*** (1983) T.L.R. 52 where it was held:

> ***"(ii) the trial's finding as to credibility of a witness is usually binding on an appeal court on the record which call for reassessment of their credibility."***

He concluded by submitting that in the case at hand, this court is bound by the decision of the trial court as for as the demeanour and credibility of a witness is concerned.

Mr. Mutakyawa argued grounds 3 and 4 together. He contended that the prosecution was not obliged to call the doctor as a witness at the trial. To substantiate his contention he referred this court to the decision in the case of ***Seleman Makumba V. Republic No. 94 of 1999 C.A.T. AT Mbeya Registry (unreported)*** where it was held:

> ***"We are of the firm view that once PW1 and PW2 were believed and the question of mistaken identity eliminated and there were no circumstances or evidence which could give rise to doubt in the mind of the trial court, we find no justification for interfering with the concurrent finding of the two lower courts that PW1 was raped and that person who raped her was the appellant .... A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove there was rape, ... True evidence of rape has to come from the victim.***

In the present case, Mr. Mutakyawa submitted that the learned trial magistrate believed the evidence of PW1 and PW2 and he eliminated the possibility of mistaken identity. PW1, the victim of rape testified to the effect that she was raped by the appellant. Her evidence is corroborated with PW2's evidence and the PF.3.

prosecution has failed to prove its case beyond a reasonable doubt and that PW1 was not a credible witness and her evidence was not corroborated. The trial magistrate believed PW1 and PW2 as credible witnesses. He also eliminated the possibility of mistaken identity as the appellant was raped at about 17.00 hours when there was still light, she knew the appellant prior to the incidence and the appellant admitted to have known PW1 before the incident. PW1's evidence was also corroborated with PW2's evidence and the PF.3 (Exhibit 1).

There are no circumstances or evidence which could give rise to doubt in my mind that PW1 was raped and the person who raped her was the appellant. I find no justification for interfering with the findings of the trial court.

Regarding the third and fourth grounds of appeal, I agree with Mr. Mutakyawa's submission that the true evidence of rape has to come from the victim (PW1) that there was penetration. In the case at hand, the PF.3 helped to show that there was sexual intercourse but does not prove that there was rape. Since there is proof that there was penetration and PW1 did not consent to the act, that was rape notwithstanding that the doctor was not called to testify in court. Likewise, it is the victim of rape (PW1) who is supposed to pin point his assailant, who is the appellant in this case, and not the doctors report. The appeal against conviction therefore, fails.

As was rightly pointed out by Mr. Mutakyawa, section 131 of the Penal Code clearly provides that a boy who is of the age of eighteen years or below, and a first offender should be sentenced to corporal punishment only.

Section 131 regarding the punishment for rape reads as follows:

> ***"(1) Any person who commits rape is, except in 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 the amount determined by court ....***
>
> ***(2) Notwithstanding the provision 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."***

In the case under consideration, the offence was committed in 2000 when the appellant was 17 years old. He was supposed to be sentenced to corporal punishment only. The trial court overlooked this legal requirement. The sentence of thirty (30) years imprisonment which was imposed on the appellant and the order for payment of shillings 15,000/=as compensation to the victim of rape were therefore illegal.

This court cannot allow the illegal sentence to stand, having been made aware of the illegality. I therefore invoke the revisional powers of this court under section 373(1) (b) of the Criminal Procedure Act to quash the sentence of thirty (30) years imprisonment and the order for compensation to the victim of rape. As the appellant was sentenced to twelve (12) strokes of corporal punishment, six (6) on entering and six (6) after serving the sentence, I order the immediate release of the appellant after administering the six (6) strokes of corporal punishment.

The appeal against conviction is dismissed but the appeal against sentence is partially allowed.

C.W. MAKURU
JUDGE
24/04/2009