IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL APPEAL NUMBER 36 of 2011

MATATIZO WAZIRI HABIBU .....APPELLANT

VS

REPUBLIC.....RESPONDENT

(From The District Court of Kibaha in Criminal Case Number 115 of 2009-H.R. Mareng-RM)

JUDGMENT

Date of last Order: 07-11-2011
Date of Judgment: 08-12-2011

JUMA, J.:

Matatizo Waziri Habibu (appellant) is appealing to this Court against his conviction and ten years prison sentence for the offence of attempted rape contrary to section 132 (1) of the **Penal Code, Cap. 16**. Particulars of the offence for which appellant was convicted and sentenced state that on 8th day of May 2009 at 16:00 hrs at Mlandizi 'B' within Kibaha District in Coast Region he attempted to rape one JOYCE D/O NERBATI a 9 years old girl.

Appellant's grounds of appeal may be summarized as follows:

1. That the trial court erred by accepting the hearsay evidence PW1, PW3 and PW4 as a basis of proof of the case against him.
2. That the trial court erred by relying on the evidence of the victim of the alleged crime who was the only eye witness.
3. That the statement of a witness who did not testify was wrongly admitted as exhibit evidence P2.
4. The trial court erred in law and fact by failing to evaluate the claim by the appellant that he is a victim of an earlier misunderstanding between appellant's and the victim's mothers.

The prosecution case in brief is that the appellant pulled the 9-year old girl into a disused building and forcefully undressed the girl's underwear. Before he could proceed to have any sexual intercourse, the girl shouted for help. It was at this point when one Hassan Twalipo interrupted the full completion of the offence of rape the appellant was about to commit. The following morning; PW3 Detective Mwanahamisi, a police officer who investigated the offence visited the scene of crime where she retrieved the girl's underwear which was still at the scene of the alleged crime. The garment was admitted as

exhibit P1. Hassan Twalipo did not testify to give the trial court an eyewitness account of how he interrupted the appellant from completing the offence of rape. Instead, the trial court allowed the admission of a statement which Hassan Twalipo had made to a police constable Peter Ulenguzi (PW4). This statement by Mr. Twalipo was admitted by the trial court as exhibit P2 under section 34B of the **Law of Evidence, Cap. 6**. The trial court found the evidence of the victim (PW2), her mother (PW1) and evidence of exhibits trustworthy for purpose of proof. Appellant's grounds of appeal in essence contend that the prosecution did not prove the offence of attempted rape beyond reasonable doubt.

From the foregoing and as a court of first appeal, this Court has the legal duty to reconsider the evidence adduced at the trial court in light of ingredients of the offence of attempted rape and come up with its own conclusions. This Court on first appeal shall always bear in mind the fact that trial District Court of Kibaha was better placed to hear, to see and check the demeanour of witnesses. This Court is also aware that it is the prosecution, through its four witnesses and Exhibits P1 and P2 which had a legal duty to prove all ingredients of the offence of

attempted rape beyond reasonable doubt. Where in my re-evaluation I find any doubt in the prosecution case, I shall resolve that doubt in favour of the Appellant.

I propose to evaluate first the evidence of an eye-witness Hassan Twalipo which was admitted in his absence as Exhibit P2. The issue for my determination here is whether the learned Resident Magistrate properly directed himself to section 34B of the **Law of Evidence Act, Cap 6** regarding the issue of admissibility as evidence of statements of witnesses who cannot be brought to testify. I must with due respect point out from the very outset that my perusal of both the hand-written and word-processed records of proceedings of the trial court, left me in a very serious doubt whether the statement allegedly made by the missing witness Hassan Twalipo was properly admitted to prove that he responded to a scream by the victim of the alleged attempted rape and found both the Appellant and his victim with their respective pants down.

The Police Constable Peter Ulengazi [PW4] was a police constable who testified that he is the officer who took down the statement of Hassan Twalipo. I must also point out that the records show that the trial court admitted this statement as

Exhibit P2 without even asking the Appellant if he had any objection to its admission. According to PW4, he recorded this Statement on 8th May 2009. This was the very day when the offence of attempted rape was allegedly committed. The prosecutor who was leading PW4's evidence did not disclose under which law or section of the law he sought to admit the statement of the missing Hassan Twalipo. It was on page 5 of his judgment where for the first time the learned trial Resident Magistrate discloses that the statement of Hassan Twalipo (**Exhibit P2**) was admitted under section 34B of the **Law of Evidence Act**. The relevant section 34B states:

> ***34B***.*-(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*
>
> *(2) A written statement may only be admissible under this section–*
>
> *(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he*

cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.

The records of proceedings of the trial court do not show any attempt by the prosecution to comply with conditions of

admissibility of statements under the above-cited section 34B of the Evidence Act by explaining why this crucial witness could not be found and what reasonable steps prosecution had taken to procure the attendance of Hassan Twalipo. Records show that on 11th August 2009 the prosecuting Sgt Ramadhani had asked the trial court to issue an arrest warrant on Mr. Twalipo who was served with summons but disobeyed the court order. In my understanding, the statement of a witness who could not be found cannot be admissible under section 34B of the **Law of Evidence Act, 1967** where this witness who though within the local jurisdiction of the trial court declines to honour the summons to come and testify.

Section 34B which the learned trial Resident Magistrate cited as supporting the admission of **exhibit P2** required the prosecution to satisfy the conditions set down under paragraph (b) of section 34B-(2). One such condition was proving that the extra-judicial statement attributable to the missing witness was in fact signed by Mr. Twalipo who made it. It is my finding that there is no evidence to show that Mr. Hassan Twalipo could not be found and brought to testify at the trial court. There is also no evidence to prove that the extra-

judicial statement that was admitted as exhibit P2 was signed by Mr. Twalipo.

There are several decisions of the Court of Appeal which have settled the legal proposition that all the cumulative conditions mentioned in paragraphs (a), (b), (c), (d), (e) and (f) of section 34B (2) of the **Evidence Act, 1967** must be satisfied before a statement of a missing witness can be admitted. In the case of **Mhina Hamisi Vs. R, Criminal Appeal No. 83 of 2005 at Tanga (unreported)** the Court of Appeal of Tanzania citing its earlier decisions in the case of **Goodluck Maganga v. Republic, Criminal Appeal No. 50 of 1999 (unreported)** and **1. Swalehe Kalonga @ Swale 2. Makoye Zeni Zongolo v. Republic, Criminal Appeal No. 46 of 2001 (unreported);** stated that the provisions of section 34B of the **Evidence Act, 1967** are cumulative and all the paragraphs have to be satisfied and none can stand on its own. That section 34B applies where the maker cannot be available under the circumstances mentioned under sub-section (2) above. From the settled authorities, the learned trial magistrate should not have admitted the Exhibit P2 under section 34B of the **Law of Evidence**.

In my re-evaluation of evidence, it is still not clear why the police officer (i.e. PW3 Det. Mwanahamisi) who investigated the offence on 9th May 2009 a day after the offence been committed testified that she interrogated the appellant who was in custody yet failed to mention the existence of a statement (Exhibit P2) which Hassan Twalipo had allegedly made earlier on 8th May 2009 to Constable Peter Ulengazi (PW4). It is also important to note that neither PW3 nor PW4 testified on when and how the Appellant was arrested.

I have taken a few moments to re-evaluate the evidence of PW1 Ms Naomi Charles, who is the victim's mother. The learned trial magistrate found Appellant's claim that he was framed up by PW1 to be unfounded because the appellant failed to raise it while cross-examining the victim's mother. According to Ms Naomi Charles, it was two boys who escorted her tearful daughter back home after the alleged attempted rape. The boys told her that it was the appellant who had attempted to rape her daughter. Although PW1 mentioned two boys, but it is not clear from the evidence if the missing witness Hassan Twalipo was one of the two boys who escorted PW1's daughter back home after her alleged ordeal. Yet, when her daughter

Joyce Nerbati testified as PW2 she mentioned only one person who came to her rescue. During her cross examination PW2 insisted that only one person showed up when she shouted for help. Again, PW1 did not mention if her tearful daughter had no pants on when she was escorted home by the two boys. One would assume that a mother concerned with health and well being of her daughter after her ordeal would closely check her daughter to determine if she had any scratches or injuries and in the process she should surely have found if her daughter left her pants at the scene of crime. With due respect, the learned trial Resident Magistrate should have closely weighed and evaluated all these missing links in the prosecution case in light of the allegation by the appellant that he was framed up.

With my foregoing doubts on prosecution's case, there remains the evidence of PW2. I have no doubt in my mind that in law, in terms of section 143 of the **Law of Evidence Act, Cap. 6**, the evidence of a single witness whose credibility is not adversely affected by any other evidence appearing on the record of the trial court can form the basis of conviction. In my re-evaluation, evidence of PW2 can also sustain a conviction of

attempted rape under section 127 (7) of the **Evidence Act, 1967** which provides:

> *Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.*

After assessing the credibility of the evidence of PW2 on its own merits I find the conviction of the Appellant to be unsustainable. I do not agree with the learned trail Magistrate that the prosecution had proved the offence of attempted rape beyond reasonable doubt. The benefit of doubt I have identified in my judgment shall operate in favour of the Appellant. I hereby allow the appeal, consequent upon which the conviction is quashed and the sentence of 10 years

imprisonment is set aside. Otherwise the appellant is accordingly set at liberty.

I.H. Juma
JUDGE
08-12-2011

Delivered in presence: of Appellant and Ms Kitaly (State Attorney) for Respondent

I.H. Juma
JUDGE
08-12-2011