IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL APPEAL NUMBER 10 of 2011

(Originating from District Court at Temeke Criminal Case No. 704 of 2007-J.A. Nzota-SDM

MOHAMED MAVUKILO.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 07-10-2011
Date of Judgment: 07-10-2011

JUMA, J.:

This is an appeal against the decision of District Court at Temeke in the original Criminal Case Number 704 of 2007 wherein the Senior District Magistrate J.A. Nzota had on 20 the September 2007 found the Appellant (Mohamed Mavukilo) guilty of the offence of rape contrary to section 130 (e) and 131 (i) of the **Penal Code**. Appellant was on 21st September 2007 ordered to serve a sentence of 30 years in prison and to suffer a total of 24 strokes of the cane. In addition, the trial court ordered the Appellant to pay compensation of TZS 2,000,000/= to the victim of the alleged rape.

The charge alleged that on 26th May 2007 at 7:00 hrs at Yombo Machimbo in Temeke Municipality Dar es Salaam the Appellant had sexual intercourse with a ten-year old girl, Rehema d/o Eliasa. Being aggrieved, the Appellant preferred this appeal.

The Petition of Appeal shows on 24th September 2007 i.e. three days after receiving his sentence, this Appellant lodged his Notice of Intention to Appeal. He received a copy of the judgment of the trial court three years and three months later on 21st January 2011.

It is obvious from the grounds of appeal that the Appellant prepared his own petition of appeal. I have for the purposes of this appeal paraphrased his grounds of appeal to read:

1. That the trial court erred in law to rely on the evidence of PW 2 and PW3 to prove that the Appellant had raped Rehema.
2. That evidence of PW 2 and PW3 was contradictory, while PW1 claims that PW1 was informed that the Appellant would invariably touch Rehema's buttocks before both going into the toilet for sexual

intercourse, PW3 on the other hand testified that she found the Appellant and Rehema having sex.

3. That evidence PW4 who tendered caution statement indicates that even the prosecution had some doubts with evidence of PW2 and PW3 so much as to rely on Caution Statement.
4. Age of the girl (Rehema) was not proved in Court.
5. Trial magistrate erred to admit the PF3.
6. Several provisions of the law of Evidence were not complied with.

The facts giving rise to the case were as follows:-

Appellant and Eliasa Nuru Mavukilo (who testified as PW1) are half brothers, sharing a father. Rehema, who is PW1's daughter, lived with his father and the Appellant. Upon his return on 24 May 2007 from Kigoma, PW1 was informed that the Appellant used to visit his house, touch Rehema's buttocks and both would disappear into the toilet for sexual intercourse. Upon receiving the information on the illicit sexual liaison PW1 confronted his daughter with that information. The daughter allegedly agreed that indeed she had had sexual illicit sexual encounters with the Appellant.

On the following day i.e. on 25th May 2007 PW1 reported the incident to Police. He was given the Police Form (PF) to take his daughter to Temeke Hospital. The Court admitted the PF-3 form as exhibit P1 with the accused person just saying that "it is a PF-3."

PW3-Zainabu Juma is the person who informed PW1 of the on-going sexual relationship between Rehema and the Appellant. According to PW3 'Rehema and accused were committing adultery in the latrine' PW3 allegedly found Rehema with her skirt raised and accused had opened his zip raping Rehema. PW3 did not question the Appellant, but despite PW3's presence Appellant went on with his illicit act. That after 1 ½ weeks the PW1 returned.

Medical evidence in support of the prosecution consisted of a medical examination report- PF-3. This PF-3 was tendered, not by a Medical Officer who carried out the examination but by PW1 the complainant's father. Det/Cpl Anna testified as PW4. She is the one who took the caution statement from the Appellant wherein the Appellant had told him that he had had sexual intercourse with Rehema

twice. The caution statement was admitted as Exhibit P2. On his part, the Appellant gave unsworn testimony as DW-1. He categorically denied having had any sexual relationship with PW2.

When this appeal came up for hearing on 7th October 2011 the respondent Republic was represented by Ms Tumaini Mfikwa, the learned State Attorney. The appellant Mohamed Mavukilo appeared in person and basically relied on the grounds covered in his Petition of Appeal. Ms Mfikwa supported the appeal contending that the trial magistrate failed in its legal duty under section 240 (3) of the **Criminal Procedure Act, 1985** to inform the Appellant that of the Appellant's right to call the medical doctor who filled the exhibit P1 (PF3) to come and testify. The learned State Attorney supported her position by drawing my attention to a decision of Shangwa, J. in **Fredrick Abias Vs The Republic, Criminal Appeal No. 200 of 2007 at DSM**.

I have considered the submission of the learned State Attorney to support this appeal. All the same, it is still a legal duty of this court of first appeal to reconsider the

evidence adduced at the trial court in light of ingredients of the offence for which the appellant was charged, convicted and sentenced. It is also the duty of this court of first appeal to re-evaluate evidence in light of the ingredients of the offence and come up with its own conclusions regarding whether the Appellant committed the offence of rape.

I should perhaps begin by looking at the provisions of the law. Both the judgment of the trial court and the charge sheet that is dated 11th July 2007 indicate that the section under which the appellant was charged and convicted is:

> *"Rape c/s 130 (e) and 131 (i) of the* ***Penal Code, Cap. 16 R.E. 2002****"*

But on my closer examination, the proper provisions should rather have been section 130 (2) (e) and 131 (1) of the Penal Code which provide:

> *130-(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
> *(a)...*
> *(b)...*
> *(c)...*
> *(d)...*

(e)- with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

***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.*

I must express my doubts whether there was enough evidence on record to show that the Appellant had sexual intercourse with Rehema as tenuously alleged by PW3. It is hard to believe why the Appellant could still continue having sexual intercourse with Rehema even after PW3 had found them in the act.

Neither PW3 nor PW2 was clear about the exact date when the alleged rape occurred. The record only shows that PW2 stated that she did not know the meaning of oath. As a result, the testimony of PW2 amounted to an unsworn evidence of a child which required corroboration. Even

though section 127 (7) of the **Law of Evidence Act, Cap 6** provides that a trial court may convict on uncorroborated testimony of the victim of a crime, but this court on appeal is not convinced by the corroborative veracity of the evidence of Zainabu Juma (PW3).

The actual age of PW2 was not resolved by evidence levelled against the Appellant. The age was an important ingredient of the offence since the entire criminal case lined up against the Appellant was founded on section 130-(2) (e) of the **Penal Code** emphasizing the unlawfulness of having sex with a girl or a woman under eighteen years of age.

There is another aspect of the case which in my opinion makes the conviction and sentence meted out against the Appellant to be regarded as unsafe. The charge sheet alleges that it was on 26 May 2007 when the appellant allegedly committed the offence at 07:00 hours. But the father of the alleged victim (PW1) returned back from Kigoma to Dar es Salaam on 24th May 2007 when he was informed of the alleged rape which had taken place in his absence. PW1 reported that rape on 25th May 2007 yet

the charge sheet shows that the offence was committed on 26th May 2007 i.e. a day after reporting the rape to Police! PW3 testified that the alleged rape was taking place between 1st and 5th May 2007.

From the foregoing; I am in full agreement with the learned State Attorney that this appeal should succeed. I hereby allow the appeal, consequent upon which the conviction is quashed and the sentence of 30 years imprisonment, 24 strokes of the cane and TZS 2 million shillings compensation are all set aside. The appellant is accordingly set at liberty.

I.H. Juma,
JUDGE
07-10-2011

Delivered in presence of Mohamed Mavukilo (Appellant) and Ms Tumaini Mfikwa (State Attorney).

I.H. Juma,
JUDGE,
07-10-2011