

**IN THE HIGH COURT OF TANZANIA
AT TABORA**

**APPELLATE JURISDICTION
(Tabora Registry)**

(DC) CRIMINAL APPEAL NO. 126 OF 2010
ORIGINAL CRIMINAL CASE NO. 2 OF 2010
ON THE DISTRICT COURT OF URAMBO DISTRICT
AT URAMBO

BEFORE: I.E. NGAILE Esq. RESIDENT MAGISTRATE

ABEID S/O SEIF.....APPELLANT
(Original Accused)

VERSUS

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

10/6/2013-25/6/2012

J U D G E M E N T

I.E. NGAILE Esq. RESIDENT MAGISTRATE
HON.S.B. LUKELELWA, J.

The appellant Abeid Seif was on 13th April, 2010 convicted by Urambo District Court on a charge of Rape contrary to section 130 (2) (e) and 131 (1) of the Penal Code (Cap 16 RE 2002) and sentenced to thirty years imprisonment term. He was also ordered to pay compensation to the victim Nyamizi d/o Madili the sum of T Shs 15,000,000/=.

It was alleged in the particulars of offence that on 28th day of December 2009 at about 19.00 hours at Kaliua Village within Urambo District in Tabora Region the appellant did have carnal knowledge of one Nyamizi d/o Madili a girl of 13 years old.

PW1 Nyamizi d/o Madili told the Court on affirmation on 28/12/2009 at 19.00 hours she was selling Ice cream when the appellant called her and sent her to call PW4 Stella Triphon.

When she came back with PW4 the appellant sent them to take his shoes from one Kachele.

PW1 went on to state that the appellant followed them. Kachele told them that the shoes were with his father, and asked them to follow him. When they reached there the appellant taken with his father, then came back and talked with Stella Privately. Then the appellant Abeid Seif pulled PW1 inside his bedroom, he undressed her underpants and began to have carnal knowledge of her, and at that time Stella had left the place and she did not know what direction she had gone. The appellant threatened her with a sharp object such as a knife and a blender.

After that came PW2 Agatha Sadick and one Zainabu Jumanne who rescued her PW2 Agatha Sadick testified that on 28/12/2009 at 19.00 hours was looking for a young sister of her friend, and she

went at the place where ice cream was sold. She asked one Juma the whereabouts of the ice cream seller. She was told that she had been left with PW4 Stella Triphon. PW2 visited the house of Stella she was told that she was told that she was not there, she went on to look for her when he approached the house of Mzee Seif she heard a cry for help " **Mnisaidieni nakufa amembaka**" PW2 recognized the voice as being that of Nyamizi and it was coming from the room of Abeid.

PW2 knocked on the door and the appellant came out she saw Nyamizi crying.

The appellant was about to beat them when many people gathered there and took Nyamizi to the Police Station. They were given PF3 and they took Nyamizi to Kalua Mission Hospital.

The PF3 was admitted and marked exhibit "A"

PW3 Sr. Teresia Balisimaki is a doctor working at Kaliua Dispensary as an Assistant Medical Officer, having an experience of many years.

PW3 testified that on 28/12/2009 he was on night duty when a girl named Nyamizi Madili came with a PF3 on allegation of rape.

The girl was aged thirteen years old. After investigation PW3 remarked that the victim's vagina had sustained bruises and it was torn, which suggested that she had been raped.

PW4 Stella Triphon told the trial Court that on 28/12/2009 she was a waiter at Kijiweni Pub.

It was raining at about 18.00 hours when Nyamizi Madili came and told her that the Appellant Abeid was calling her.

PW4 she refused to go as she knew the appellant, to be a thief Cruel and rapist. Nyamizi Madili was sent to her twice, and threatened her to beat her and remove her teeth. The third time she agreed to go and when they reached there they sat at the sitting room. The appellant opened the door of his bed room and forced them in to the room. The appellant threatened them with an iron. He then got hold of Nyamizi, and forced PW4 out of the room. She went home and later saw Nyamizi going to hospital.

The appellant told the court in defence that he contested the evidence of PW1, PW2 PW3 and PW4.

The case had been fabricated and Planted on him. That he had been convicted by Hon. Kivamnda at Kaliua primary Court on offence

of stealing and sentenced to one year imprisonment in the year 2009.

On 27/12/2009 the mother of the victim one Zainabu Jumanne is the one who sent PW1 and PW4 and they found the appellant and his father Nzee Seif.

PW2 left and he remained with PW1 the victim.

Then came the incidence of rape. As said by the victims mother.

In convicting the appellant the learned trial Resident Magistrate held that the evidence of PW1, the victim was detailed, and had been corroborated by the evidence of PW4 and that of PW3 who wrote the PF3 exhibit "A".

The learned trial Resident Magistrate held that penetration of the appellant's penis into the vagina of the victim had been proved. Further that the victim who was aged 13 years old and therefore had not attained the age of majority rape was complete regardless as to whether she consented or not as stipulated under section 130 (2) (e) of the penal Code Vol.1 (Cap 16 RE. 2002)

The appellant has raised seven grounds of appeal. Complaining that PW3 the dispensary doctor did not show any sperms but only bruises. The appellant insisted that the learned trial Resident Magistrate erred to disbelieve that the case was fabricated,

Further that there was no water tight evidence to convict him.

I have gone through the evidence as a first appellate Court. I find no evidence of the case being fabricated against the appellant.

PW2 found the appellant in a flagrant delictio, with the victim in his room. Penetration was proved by PW3 Sr. Teresia Balisimaki who examined the victim and prepared the PF3 exhibit A. If the appellant had axe to grind with the mother of the victim one Zainabu Jumanne, who did not give evidence at the trial.

The appellant does not show how the mother of the victim had influenced the evidence of PW2 and PW3.

As regards the evidence of PW1 and PW4 who were aged thirteen years and fourteen year respectively, hence children of tender age as provided under section 127 (5) of the Evidence Act their evidence were wrongly admitted in court without conducting a voire dire test.

The evidence of PW1 and PW4 are hereby expunged from the record.

However this was not fatal to the prosecution case, as the evidence of PW2 and PW3 was sufficient to ground a conviction.

I therefore dismiss the appeal on conviction.

As regards the sentence imposed on the appellant the 30 years imprisonment was the statutory minimum sentence, I leave it undisturbed.

As regards compensation of Shs 15,000,000/= imprisonment imposed on the appellant.

This was excessive, if the learned trial Resident Magistrate felt that the victim deserved that amount of compensation he should have advised the victim to file suit.

I therefore set aside the Shs.15,000,000/= compensation and I substitute thereof compensation of Shs. 300,000/=.

Having so adumbrated, I hereby dismiss this appeal.

Order accordingly.


S.B. LUKELELWA

JUDGE

25/6/2013

Date : 25/6/2013

Coram: S.B. Lukelelwa, J

Appellant: Present

Respondent: M/S Mercy Ngowi –State Attorney who is present

B/Clerk: Mary Mpululu

MS Ngowi State Attorney

The case is coming for Judgement.

S.B. LUKELELWA

JUDGE

25/6/2013

Order: Judgment delivered in Court this 25th day of June, 2013

Right of Appeal explained.

For Judgement



S.B. LUKELELWA

JUDGE

25/6/2013