IN THE HIGH COURT OF TANZANIA

AT DODOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 2 OF 2012

(Original Criminal Case No. 408 of 2010 of the District Court of Singida District at Singida)

SAID IDD..... APPELLANT

(Original Accused)

VERSUS

THE REPUBLIC ..... RESPONDENT

(Original Prosecutor)

J U D G M E N T

03/10/2012 &10/10/2012

KWARIKO, J:

Before the District Court of Singida at Singida the appellant herein was originally charged with **Rape contrary to sections 130 (1) (2) (e)** and **131 (1)** of the **Penal Code Cap. 16 Vol 1 of theLaws R.E. 2002.** It was alleged by the prosecution that the appellant SAID s/o IDD had on the 06th day of October, 2010 at about 05:00 hours at Kibaoni Area within the Municipality District and Region of Singida unlawfully have sexual intercourse with one **ROSEMARY d/o JEREMIAH** a girl aged **four (4) years.** The appellant denied the charge hence the prosecution brought three witnesses to prove the same.

Briefly stated the prosecution evidence reveal that on 5/10/2010 one **JULIANA PETRO, PW1** had agreed with the appellant to make love in the former's one roomed apartment. The two slept in the bed and the victim, PW1's daughter **ROSEMARY d/o JEREMIAH** slept in the same room. After the two had sexual intercourse PW1 fell asleep. According to PW1 the appellant woke up and took the girl out and raped her and abandoned her in the market place. That the appellant returned and woke-up PW1 where he wondered why she was asleep while her child was not home.

Thereby, PW1 also wondered as to how could someone have taken her child away whilst was in the same room. She raised alarms where neighbours, including ten cells leader came. They could not find the girl and decided to retire. The girl returned home in the morning and upon inspection it was found that she had been raped. The girl pointed to the appellant as the person who raped her. The appellant was taken to police and formerly booked. **PW2, No. E 4998 DCPL MOHAMED** took down PW1's statement.

The girl was taken to hospital and upon examination by **DR. DAMAS SIMBU, PW3** she was found with a bruised vagina. According to PW3 the bruises may have been caused by a blunt object. A PF3 was admitted in evidence.

In his defence the appellant did not deny that he had slept with PW1 on the fateful night. He denied that he ever raped the girl. In the first place he denied to have ever found any girl in PW1's home when he was welcomed to have sexual intercourse with PW1. He said that while asleep there he was awaken by noises outside. When he woke-up PW1 was not there and shortly he saw her and the neighbours and that is when he learnt that PW1's daughter was missing. He explained his mission there to the ten cells leader who asked him to remain calm. When the girl returned later and said that she had been raped he was suspected and taken to the police where he stayed for five days before he was sent to court on 11/10/2010. He denied the allegations.

In its judgment the trial court found that the case against the appellant though circumstantial but it had been proved beyond doubts. It was held that the fact that the appellant was the one who woke up PW1, door was not closed and the girl could not have personally have opened it, the girl pointed to the appellant and penetration proved, were enough to ground conviction against the appellant. Thus, the appellant was found guilty as charged, was convicted and sentenced to life imprisonment.

The appellant was not satisfied with the trial court's whole decision hence brought this appeal. The appellant raised about six grounds of appeal which essentially raise two major complaints. These are: **firstly,** that the prosecution evidence did not

prove that the complainant was raped and **secondly,** the prosecution did not prove that the appellant was guilty of the offence charged.

When the appeal was called for hearing the appellant appeared in person and he did not have any clarification to make on the grounds of appeal. He left to the respondent to submit his stance in respect of his appeal before he could say anything. Luckily, the respondent, Republic through Ms. Shio learned Senior State Attorney supported the appeal. Ms. Shio gave her reasons for her stance which will be referred shortly.

The court has gone through the evidence tendered before the trial court, the decision thereon, the grounds of appeal and the submission made by the learned State Attorney. It is the opinion of this court that this appeal has merits.

As for the first complaint by the appellant as to whether the evidence by the prosecution proved that the complainant was raped, the court agrees with both parties that there was not enough evidence to that effect. In order to prove the offence of rape penetration of male organ into the victim's sex organ should be proved (see section 130 (4) (a) of the Penal Code). In this case there is the evidence of PW1 who said the girl had been raped. PW1 did not explain what had been done in the girl's private part to constitute rape. PW1 did not explain what she saw in the girl's body which suggests that the girl had been penetrated. No any witness from PW1's neighbours who came to support PW1's evidence as to what they saw in the girl's body after she returned home.

The evidence of the medical doctor, PW3 could not be of any significance as he only testified that he found bruises in the victim's vagina. No further explanation had been tendered to show that the bruises were caused by a male sex organ, penis, to constitute penetration and thus rape. In the absence of any explanation from the victim or any witness that they saw the girl being penetrated it would not be definitely said that the blunt object referred by PW3 had been a penis. No any laboratory examination was carried into the girl to confirm that she had spermatozoa in her private parts. Had there been proof of the spermatozoa in the girl's vagina then one would have said that there had been penetration by male organ.

Secondly, even though it was proved that the girl had been raped, the question which follows is whether the appellant was the rapist.

Again the court is in agreement with both parties that the only witness against the appellant was PW1, the girl's mother. According to the evidence on record, PW1 had been recorded to testify that the appellant had taken the girl out and raped her while herself (PW1) was sleep. The questions which have not been answered by the prosecution are; How PW1 saw the appellant take away the child while she was in her sleep? And what did PW1 do when she saw the appellant take out the child? How did she know that the appellant took the child to the market place to rape her while she was asleep in her home? Why did she keep quite if she saw the appellant take her baby out? And what steps did she take after she had seen the appellant taken her daughter out? All these questions had not been answered in the prosecution evidence and they raise serious doubts in the prosecution case against the appellant. PW1 did not even prove that the girl was at home when she invited the appellant in.

As rightly submitted by Ms. Shio learned State Attorney the prosecution did not prove the distance between PW1's home and the alleged market place. In fact there had not been any proof that the girl had been taken to the market place. PW1 testified that after the girl had returned home she pointed to the appellant as being her rapist. This girl had not been paraded in court to testify and be viewed by the court. Even if the girl was aged only four years, she should have been brought in court and whether or not she could have been able to testify it was the duty of the court to decided and record the findings. Had the girl been brought in court it could have been easy to see her reaction towards the appellant and the court must have learnt something in that respect. Thus, it was an error on the part of the prosecution and the trial court to keep the victim of the offence out of the court proceedings. Also, no any neighbour or ten cells leader testified to support PW1's evidence that the girl had pointed the appellant as her rapist.

Further, the police did not explain what the appellant said after arrest in respect of the allegation before they took him to court. No evidence was tendered by PW2 to show that the appellant was ever interrogated soon after he was taken in restraint. PW2 only testified that he took witnesses' statements. The appellant also ought to have been interrogated to get his side of the story on record before he was brought to

the court. In fact the police erred in law to keep the appellant in their custody for five consecutive days before they took him to court.

For the foregoing, this court finds that the prosecution evidence did not prove the case against the appellant beyond reasonable doubts. The appellant's appeal is thus allowed, conviction is quashed and sentence is set aside.

The appellant is ordered to be released from custody unless otherwise lawfully held.

It is ordered accordingly.

(M.A. KWARIKO)

JUDGE

10/10/2011

Judgment delivered in court today in the presence of the appellant and Ms. Magesa learned State Attorney. Ms Judith court clerk present.

(M.A. KWARIKO)

JUDGE

10/10/2011