IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CRIMINAL APPEAL NO. 2 OF 2012

(Originating from Criminal Case No. 316 of 2007

of the District Court of Iringa District

at Iringa

Before G. J. Mhini – R.M.)

ROMANUS MAKWELA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Date of last Order 24.7.2013

Date of Judgement 30.8.2013)

**JUDGEMENT**

MADAM SHANGALI, J.

The appellant Romanus Makwela together with one Leza Makwela were jointly charged with and convicted of the offence of Rape contrary to Section 130 (2) of the Penal Code by the District Court of Iringa in Criminal Case No. 316 of 2007. Leza Makwela who shall be referred to hereafter as the 2nd accused opted to jump bail immediately after trial and before the pronouncement of

judgement. Nevertheless upon conviction, the trial District Court passed a sentence of life imprisonment against all accused persons while directing that the sentence against the 2nd accused shall commence on the date of his arrest.

Dissatisfied with that decision the appellant has filed this appeal intending to challenge both conviction and sentence against him. The case for the prosecution was based on the testimonies of PW.1 Lidya Magubika, the grandmother of the victim, PW.2 Nasma D/o Kisumbe a young girl of five years old and the very victim, PW.3, Mwanaheri Kisumbe a neighbour, PW.4 Corporal Dickson, PW.5 Nickson Mdegelo, the medical doctor and PW.6 Corporal Godon.

In brief the prosecution evidence reveals that on 6/7/2007 at unknown time PW.2 complained to PW.1 that she had been attacked by the appellants. It is not apparent on the testimony of PW.2 in the actual nature of attack, but PW.1 claimed that she decided to inspect PW.2's private parts and discovered some bruises and remains of sperms around her vagina. PW.1 who was familiar with the appellant reported the matter to the village Chairman who started to hunt for the culprits. The appellant and second accused were apprehended on the following day and straight taken to the Police Station. At Police Station PW.2 was issued with a PF.3 for medical examination. Upon the medical examination conducted on 7.7.2007, PW.5 confirmed that he discovered that PW.2 had internal bruises in her vagina and there was a slight penetration of

the penis in the vaginal sides. It is not clear on how PW.5 proved that the bruises around PW.2's vagina and the alleged slight penetration were caused by a penis.

In her testimony PW.3 stated that on 8.7.2007 at about 8.00 hours she was summoned by PW.1 who informed her how PW.2 was raped on 7.7.2007 by the appellant and 2nd accused. She also claimed that while at PW.1's place the Village Executive Officer asked her to inspect PW.2. That upon her inspection she discovered that PW.2 had some bruises around her vagina. The testimony of PW.3 raises eyebrows in regard to the dates and truth of the matter. The offence is alleged to have been committed on 6/7/2007. The matter was reported at the police on 7.7.2007 and eventually PW.2 was taken to hospital for medical examination on 7.7.2007. Surprisingly, PW.3 gave evidence on what transpired on 8.7.2007 trying to show that PW.2 was taken to the police station and hospital after 8.7.2007.

Then there is the evidence of PW.4 Corporal Dickson who claimed to have recorded the cautioned statement of the 2nd accused Exhibit P.1 and the evidence of PW.6 Corporal Godon who claimed to have recorded the cautioned statement of the appellant Exhibit PE.3. All these confessional statements were wrongly admitted and used in convicting the appellant and 2nd accused because they were not read over before the court during trial and the accused persons had no chance to challenge its contents.

Now let me turn to the mother of all problems in this case. The testimony of PW.2, the principle witness. On 27.11.2007 the trial District Court conducted voire dire examination against PW.2 and was satisfied that the child does not understand the nature of oath but she possessed sufficient intelligence to testify. She was then allowed to testify without oath. PW.2 claimed that the two accused persons did "*rubbish act to her*" "*walinifanyia kitendo kichafu*". Then she remained silent, broke down and started to cry. The case was then adjourned to 17.01.2008. On 17.01.2008 the trial District Court conducted another voire dire examination and eventually once again allowed PW.2 to testify without oath. However, PW.2 refused to respond to the public prosecutor's examination in chief. The matter was adjourned again to 25.2.2008. On 25.02.2008 PW.2 testified without oath and claimed that accused persons did rubbish thing to her. She stated that it was Romanus (the appellant) who pulled his penis and inserted it in her down parts (*aliniingiza chini*).

The question is whether one could seriously in the legal sense rely on the above temperamental evidence and bless the convictions against the appellant and the 2nd accused.

Before going further let me turn to the defence evidence. In his sworn but very brief defence the appellant who claimed to have been 18 years of age categorically denied to have committed the alleged offence. He also disowned the caution statement exhibit PE.3. Likewise the second accused who testified to have been 16

years of age totally and completely denied to have committed the offence. He stated that he was unceremoniously arrested by the police on 7.6.2007 and connected with the alleged offence. He also stated that the first accused/appellant is his physical brother. He denied to have witnessed the appellant raping PW.2. He also denounced the caution statement Exhibit P.1.

In this appeal the appellant has filed about 5 grounds of appeal which may legally be condensed to only one main ground namely whether the prosecution evidence managed to prove the charge beyond all reasonable doubt against the appellant. Mr. Mwita, learned State Attorney who represented the respondent/Republic decided to challenge the appeal and therefore supported the decision the trial District Court. In his submission Mr. Mwita argued that the evidence of PW.2 was corroborated by the evidence of PW.1, PW.3, PW.4, PW.5 and PW.6 including the caution statements of the appellant and 2nd accused person.

With due respect to the learned State Attorney there is no viable or credible evidence in this whole case. I have already shown several weaknesses and short comings on the evidence of each prosecution witness including the caution statements which were admitted and acted upon contrary to the law.

The testimonies of PW.1 and PW.3 are far from the rank of credible evidence because they were tainted with contradictions and exaggerations. PW.5 also infected his testimony with exaggerations

when he claimed that the bruises around PW.2's vagina and the alleged slight penetration were caused by a penis. How did he confirm that such bruises and penetration were caused by a penis only and not anything else. As I have pointed above even the two caution statements Exhibits P.1 and PE.3 have no evidential value because they were not read over before the trial court to enable the accused persons to understand what was being laid against them. As a result they were not able to defend themselves or reply anything against the caution statements.

Regarding to the temperamental evidence of PW.2, I am convinced that, that evidence was a semifinished evidence in the sense that the witness failed to respond to the prosecution questions and also failed to cooperate with the trial District Court forcing it to adjourn the proceedings three times. In my considered opinion the circumstances indicate that PW.2 was highly distressed and not willing to testify. Even the accused persons were not afforded ample time and opportunity to cross-examine her and test her credibility. Until now it is not clear what sort of evidence this witness could have adduced if she was calm and responsive as required before the court. It must be noted that the best evidence in rape cases is that of the victim. Therefore the convictions against the appellant and his co-accused person was based on mere conjecture from the rape case story.

There is yet another dimension in this matter. The charge sheet ranked the appellant 19 years old and the second accused 18

years old when the offence was committed in 2007. During their defences in February, 2009 the appellant stated in his sworn defence that his age was 18 years and the second accused stated his age to be 16 years old. Neither the prosecution nor the trial District Court took pain to verify or prove the age of the accused persons. Section 131 (2) (3) of the Penal Code as amended by the Sexual Offences (Special Provision) Act No. 4 of 1998 and the Law of the Child Act No. 2 of 2009 provide for a lesser sentence to a boy who is of the age of eighteen years or less. Therefore the trial District Court grossly erred for not ascertaining the age of the accused persons especially the appellant before sentencing them.

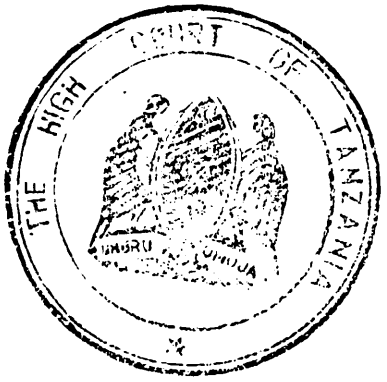
On the foregoing, I am satisfied that this appeal is meritorious. I hereby allow the appeal, quash the conviction against the appellant and set aside the life imprisonment sentence imposed against him. The appellant should be released from custody immediately, unless held on another different lawful matter.

It is so ordered.

M. S. SHANGALI
JUDGE
30.8.2013

Judgement delivered todate 30/8/2013 in the presence of the

appellant in person and Mr. Mwenyeheri learned State Attorney for the respondent/Republic.




M. S. SHANGALI
JUDGE
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