IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO. 54 OF 2012

Original Lindi District Court at Lindi

Criminal Case No. 254 of 2007

Before:C.E. Qollo, Esq; RM

KAITANI DAUDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last Order – 29/7/2013
Date of Judgment – 31/7/2013

JUDGMENT

KIBELLA, J.

The appellant Katani Daudi appeared before the District Court of Lindi at Lindi, in Criminal Case No. 254 of 2007 facing with the charge of Rape contrary to section 130 and 131 of the Penal Code [Cap.16 R.E 2002]. It was alleged against him that on 27th May, 2007 at about 15:00 hours at Kitandi village within Ruangwa District at Lindi Region, he [appellant] did have carnal knowledge of Prisca d/o Oigen a girl of 12 years old.

The appellant denied the charge. After a full trial which involved five prosecution witnesses and one defence witness, the trial court was satisfied of the guilt of the appellant and convicted him as charged. The sentence of thirty (30) years imprisonment being the mandatory one was

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to pay Tsh.200,000/= as compensation. Aggrieved by the conviction and sentence, he lodged this appeal protesting for his innocence.

Undoubtedly, this is a first appeal. In law, a first appeal takes the form of re-hearing. This court therefore is entitled to re-evaluate the entire evidence and arrive at its own conclusions of facts [see ***Peters Vs. Sunday Post [1958] EA 424]***. To achieve the same I will start by briefly giving summary of the testimony which was relied by the trial court in convicting the appellant.

It was PW.1's account that on 27th May, 2007 at around 3.00 p.m while she was at home with her friend, the victim [PW.4] came but she was dirty all over her body. She told them that she was at the forest making lover with a person whom she could not mention his name, they inspected her private parts and found some sperms and they took her to her mother. Later her mother and PW.3 [his father] one Oigen Ngonyani took the victim to the Hospital Ruangwa where they were received by PW.5 Bakari Saidi who told the trial court, that, he examined the victim, and found no injuries in her vagina and filed a PF.3 to that effect. Later eight (8) suspects were arrested by PW.2 Police Officer in connection with the offence, and that the victim was called and required to identify the rapist, and she was able to identify the appellant as the only person who raped her.

The record further shows that the victim [PW.4] was unfit to testify by reason of being dumb. However she recorded to have testified through his mother who was the translator, and that in her testimony she insisted that it

was the appellant who raped her and that the sperms found in her vagina was that of the appellant.

In his defence, the appellant denied involvement in commission of the offence. He challenged the identification testimony of the victim on the ground that, the victim pointed him at identification parade because she knew him as they are neighbours. Also that the victim had a mental disorder, unfit, and that the same was witnessed by the Doctor [PW.5], for that reason she might have mistaken in pointing the appellant as the rapist.

Basing on the above testimony the trial magistrate was satisfied that the prosecution discharged the burden of proving the charge against the appellant beyond reasonable doubt and disbelieved the appellant. The appellant still believe that he is innocent and he preferred this appeal through his memorandum of appeal which contain a total of eight grounds of appeal which mainly centres on the following three grounds:-

1. That the trial, court erred in relying on the testimony of PW.1, PW.2, PW.3 which was a hearsay testimony.
2. That the identification of the appellant at the identification parade was improper as the victim was of unsound mind and not new to the appellant.
3. That the PF.3 did not prove that the appellant raped PW.4.

During the hearing of the appeal, the appellant appeared in person, unrepresented, and he had nothing to add or say in support of his appeal. The respondent republic was represented by Ms. Mangu learned State Attorney.

At the outset, Ms. Mangu supported the appeal on the ground that there was no evidence of penetration. That there is nowhere in the record where the PF.3 was admitted in evidence to prove that there was penetration, which is one of the ingredient of rape. Apart from failure to prove penetration Ms. Mangu also viewed that PW.4, victim, of rape who was said to be 12 years old her testimony was received contrary to section 127(2) of the Evidence Act, [Cap.6 R.E 2002] which requires a ***voire dire examination*** to be conducted before receiving such testimony. She went on requesting this court to expunge the testimony of PW.4.

She further submitted that, having expunged the testimony of PW.4 victim, the remaining testimony that of PW.1, PW.2 and PW.3 is a hearsay testimony which has no evidential value. She also viewed in her submission that even the age of PW.4 complainant was not established by evidence so as to constitute a statutory rape. That neither her parent nor, her teacher testified as to the age of the victim. On sentence, she viewed that the same could have been legally imposed if the conviction was proper.

Having gone through the record, the issue for determination is whether the evidence on the record is too sufficient to uphold the appellant's conviction.

I will start, by considering the shortcomings, or irregularities committed by the trial court in receiving the testimony of PW.4, Prisca Oigen, the complainant. It is on the record, that the said victim was allegedly aged 12 years old, and therefore under section 127(5) of the

Evidence Act, she was a child of tender age. Being a child of tender age, the reception of her testimony is governed by section 127(2) of the Evidence Act, which provide:-

> "Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of oath, his evidence may be received though not given upon oath or affirmation if in the opinion of the court, which opinion must be recorded in proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence and understands, the duty of speaking the truth."

The trial court could only address the above provision by conducting a "***voire dire***" examination. See also the case ***of Lazaro Stephano Vs. The Republic, Criminal Appeal No.9 of 2013 CAT at Tabora [unreported] at page 10*** which held:

> "under the provision of section 127(5) a child of tender age is one whose apparent age is not more than fourteen years. For such a witness, it is mandatory first, to ascertain the competence of the witness to testify. After being satisfied on the competence, the trial court will then determine whether or not the evidence should be received on oath/affirmation or not."

In our case the trial court did not address the requirement of section 127(5) of the Evidence Act, quoted herein and therefore, the evidence of PW.4 which was received without conducting "***voire dire"*** must be expunged from the record.

However even after discounting the testimony of the complainant, I wish to state that the testimony of PW.4 was not only received without

conducting "***voire dire***" but also it was irregularly received through her mother. I am saying so because the record is apparent that, the victim [PW.4] was dumb, meaning that she testified by signs through the translation of her mother. For easy reference the trial court proceedings at pg.8 reads:-

> **"PP:** PW.4 is dumb she can't talk anything but her mother knows how she can understand the situation.
> **XD by PP**: PW.4 knows nothing; she doesn't understand even the question. The mother tried to help the situation but we have the PF.3 Exhibit PF.3 tendered as the exhibit."

However on the subsequent date, the trial court proceeding at page 10 further reads:-

> **"PP**: The case is for hg, I have witnesses today who is the translator for the victim.
> **PW.4:** Prisca Oigen Ngonyani, twelve years of age Ruangwa District, Christian."

Thereafter the trial court recorded the testimony of PW.4 Prisca Oigen Ngonyani, but the alleged translator's name was not recorded, neither, did she translate the alleged testimony under oath. It is now well settled principle that when a witness testifies through an interpreter or translator as the case may be, the said interpreter or translator, must do so while he is under oath. Meaning that he must swear /affirm so as to abide on the duty of interpreting or translating nothing but the truth. In this case that was not done, and failure of the same was a fatal irregularity.

With regard to the PF.3, I agree with Ms. Mangu that, the PF.3 was not admitted in evidence. The trial court proceeding quoted herein shows

that the PF.3 was tendered but it does not show if at all it was admitted. And therefore the PF.3 was not part of the prosecution testimony.

Having discounted the testimony of PW.4, and the PF.3 what we are left with is the testimony of PW.1, PW.2, PW.3 and PW.5. The testimony of PW.1 and PW.3 was a hearsay one; such testimony as rightly argued by Ms. Mangu, had no evidential value. The testimony of PW.5, could only establish that the victim was raped but it could not establish that it is the appellant who raped the victim. Again since the PF.3 which PW.5 alleged to have prepared was not admitted in evidence, even a proof that the victim was raped fall short. On PW.2's testimony, the Police Officer who claims to have conducted an identification parade and that, the victim pointed the appellant as rapist, I must say with due respect, that that such purported identification parade was improper, because the victim knew the appellant even before the incidence, and identification parade are only conducted to strangers.

In the result, I find that, the appellant was wrongly convicted and the sentence imposed on him was improper. The conviction and sentence are hereby quashed and set aside, respectively. It is ordered that, the appellant, must be set free forthwith unless held for other lawful cause.

Appeal allowed.

R.M. Kibella,
Judge
31/7/2013

Order: Judgment delivered in chambers today 31st July, 2013 in the presence of the appellant in person as well as in the presence of Ms. Mangu, learned State Attorney for the Respondent Republic.

Right of Appeal fully explained.

R.M. Kibella,
Judge
31/7/2013