IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO 12 OF 2012

[Originating from Criminal Case No: 29 of 2010 at Tanga District court]

RASHID MOHAMED.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

U. MSUYA, J.

The appellant, Rashid Mohamed was charged and convicted of an offence of rape contrary sections 130 (1), 2(e) and 131(2) of the Penal Code [Cap 16 R. E. 2002]. The charge alleged that in March, 2009 at Msambweni area within the city, District Region of Tanga, the appellant carnally knew Mwanamkasi d/o Mohamed Gonya a girly of 16 years old. The trial court found the appellant guilty of the charged offence, convicted him and punished him to serve a sentence of 30 years in jail.

In brief, the prosecution case was that the victim, Mwanahamisi [PW2] is the daughter of Mohamed Hussein [PW1] and Zachia Mussa who are husband and wife respectively. The latter, Zachia Mussa is living at Street Number 9 within the city of Tanga. It is on record that she is living with the victim [PW2]. On 12.02.2010, Zachia Mussa who is currently separated from her husband [PW1] informed her husband that their daughter [PW2] escaped from her home. PW1 decided to report the matter to Mabawa Police Station. On 20.02.2010, the witness [PW1] managed to arrest his daughter who was together with the appellant at Mabawa Ward. PW1 added that the victim [PW2] and appellant were arrested at the home of appellant. Both of them were taken at Mabawa Police Station. PW1 further testified that he interrogated his daughter [PW2] who informed him that she had a love affair with the appellant since 2009. The appellant was later on charged and arraigned in the trial court. He denied the charge. But on the basis of PW1 and PW2's evidence, the trial court found the appellant guilty, proceeded to convict him and sentenced him accordingly.

The appellant was aggrieved with both conviction and sentence. He appealed to this court. Basically, in this appeal, the appellant is challenging the decision of the trial magistrate under the following grounds:

1. That the Honourable Magistrate erred in law by convicting the appellant without sufficient evidence to prove rape beyond reasonable doubt.
2. That the Honourable Magistrate erred in law in convicting the appellant without proof of the age of the victim.
3. That the trial court's judgment does not comply with the mandatory requirements of section 312 (2) of the Criminal Procedure Act [Cap. 20 R. E. 2002].

At the hearing of this appeal, Mr. Ndwela Learned Advocate represented the appellant while the Respondent was represented by Miss Akyoo Learned State Attorney.

In his submission, Mr. Ndwela opted to argue only the first ground of appeal on account that it covers all other remaining grounds of appeal. Mr. Ndwela contended that the offence of rape was not proved as required by law. The Learned Counsel advanced his argument and stated that the evidence that PW2 was having sexual intercourse since 12.02.2009 does not indicate that the element of penetration was proved.The Learned Counsel cited the provisions of section 130 (2) to support his stance. He also referred this court to the decision of Court of Appeal in **the case of Bakari Rashidi V. R, Criminal Appeal No. 308 of 2010, CAT at Tanga [unreported]** to the effect that the element of penetration must be established to prove the charge of rape.

Concluding the point, Mr. Ndwela stated that in the present case, the offence of rape was not proved.

Mr. Ndwela also pointed out that there is a contraction between the evidence of PW1 and PW2 in regarding the place where the appellant and PW2 were found. Substantiating, the Learned Counsel argued that the proceedings on page 9 shows that the appellant was found with PW2 at Mabawa while on cross-examination at page 10 of the proceedings the witness [PW1] adduced that the appellant was arrested in the house of his grandfather at Mabawa and escaped to Magomeni where he was arrested. In that regard, the Learned Counsel urged the court to resolve the issue of contradiction in favour of the appellant. In his conclusion, the Learned Counsel reiterated that the charge of rape was not proved and prayed the appeal to be allowed.

In her reply, Miss Akyoo Learned Counsel supported both the appeal and arguments advanced by the Learned Counsel for the appellant. In addition, the Learned State Attorney cited **the case of Godi Kasenegala V. R, Criminal Appeal No. 10 of 2008, CAT Iringa [unreported]** to the effect that for an offence of rape to be proved it is of utmost important to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place.

She also pointed out that the evidence of PW2 was not corroborated. Elaborating, the Learned State Attorney stated that despite the fact that the best evidence is that of accused person, however, basing on the nature of this case, corroboration from the doctor was important. In conclusion, the Learned State Attorney stated that in absence of evidence proving the element of penetration and the absence of the evidence of doctor indicate that the appellant was erroneously convicted. In that regard, she urged the court to quash conviction and set aside the sentence imposed against the appellant.

Having considered the evidence on record, the ground of appeal together with the submissions of the Learned Counsel and State Attorney I am of the settled view that the only crucial issue to determine in this appeal is as to whether the offence of rape was proved.

It is on record that the victim [PW2] was a woman below 18 years and she was a secondary school student. In that regard, the alleged rape is statutory rape of which the element of consent is irrelevant. Another important element of rape which ought to been proved by prosecution is penetration. Normally this element is assessed by basing on the evidence of the victim. This position of law was emphasized in the **case of Selemani Makumba vs Republic, Criminal Appeal No. 94 of 1999[unreported]** where the court of appeal stated that:

True evidence of rape has to come from the victim, if an adult, that there was penetration and consent and in case of any other women where consent is irrelevant that there was penetration.

From the above decision, the evidence of PW2-victim in record does not expressly indicate that she was raped. As correctly submitted by Miss Akyoo Learned State Attorney, the prosecution witness ought to have adduced evidence in respect of penetration and not simply stating that she had sexual affairs with the appellant. Moreover, the evidence of the victim's father [PW1] on record does not show that actually penetration of the appellant's man organ into the victim's woman organ took place.

In addition, as revealed earlier, it is now settled law that he proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence. In the present case not only that the victim [PW2] did not lead evidence to establish the element of penetration but also the doctor who alleged to have examined her was not summoned to adduce evidence for corroboration purpose.

From the above analysis and taking into account the totality of evidence on record I find that the charge of rape was not proved beyond reasonable doubt against the appellant. In

that regard and as correctly submitted by Mr. Ndwela for the appellant, the appellant was erroneously convicted. The appeal has merit and it is hereby allowed by quashing conviction and setting aside the sentence imposed against him. The appellant should be released from jail forthwith unless is withheld for another justifiable cause. It is so ordered.

U.MSUYA

JUDGE

17/3/2014