IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLANT JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 39 OF 2013

CRIMINAL CASE NO. 239 OF 2011

OF THE DISTRICT COURT OF KIGOMA

BEFORE: L. G. Buyamba Esq. RESIDENT MAGISTRATE

HUSSEIN JUMA .....APPELLANT

(Original Accused)

VERSUS

THE REPUBLIC .....RESPONDENT

(Original Prosecutor)

JUDGMENT

09th & 14th April, 2014

S.M.RUMANYIKA, J

The appellant Hussein s/o Juma stood charged at Kigoma district court (trial court), for the offence of rape. Contrary to sections 130 (2) (e) & 131 (1) of the penal code cap. 16 RE 2002. Reportedly he had on 14th June, 2011 at about 17.00 hours, at Sibwesa village – Kigoma district, unlawfully, the carnal knowledge of Kasa d/o Mstapha (14).

With the evidence of three witnesses from that end, the learned trial magistrate was satisfied, it appears beyond reasonable doubts, that the charge of rape was proved. The said Hussein Juma was convicted and sentenced to a thirty years custodial term, twelve (12) strokes of the cane on buttocs, also to compensate the victim (Pw1) to the tune of shs. 100,000/= (a hundred thousand only). He is aggrieved. Hence this appeal.

He appears in person, while Mr. Nestory Pascal, learned state attorney appears for the Republic.

A summary of the prosecution evidence witnesses as follows:

Kasa Mustapha (Pw1) a class VI pupil of Sigwesa primary school Kigoma Rural, stated that the appellant on 14/6/2011 at about 17.00 hours hijarked her on her way to a water well. He raped her at his home in neighborhood, while threatening to stab her with a knife. Had she cried for help. That he detained her for three days and raped her three times daily, but only twice on the 2nd day. Then he just released her. She reported the incident to parents. The appellant was arrested a day later. That all this happening, the appellant was lonely. The latter's wife away from home.

Mustapha Hussein (Pw2), father of the victim Pw1 stated that the victim having not returned from the water well thus got missing, he reported it to the local VEO also to the victim's head teacher. But

then, the daughter returned on 16/6/2011 at 22.35 hours whereby she reported the entire incident. She was put to a medical examination. That the appellant was arrested after two days.

Rehema Ramadhani (Pw3) an assistant nurse officer stated that on examination, she noted some bruises in the Pw1's vaginal cavity caused by a blunt object. And the victim felt some pains. She administered her some pain killing tablets cum antibiotics. The material PF3 was admitted as exhibit of even number!

On his part, the appellant, but having intended to call in two defence witnesses, simply raised a defence of alibi. In that he had been since 15.6.011, therefore on the material day/time, away at Kelya to witness certain wedding ceremonies and disco, and arrived at home late at 02.00 hours. Whereby he learnt about the incident from his wife with whom had stayed for four years previously. But only the appellant's co – twin was responsible. That is it.

The defence case was marked as closed. Even before making any inquiries, then a ruling on the fate of Mkapa and Jackson John the defence witnesses ever intended expressly to be called expressly by the appellant! I will come back to this one at a later stage.

There are seven grounds of appeal, but they boil down to only two of them:-

(a) Error in law and in fact by the trial magistrate. Having failed to consider and evaluate the evidence available.

(b) Error in law and in fact by the trial magistrate. Having convicted the appellant on the victim's uncorroborated evidence.

The learned state attorney submitting during the hearing, started attacking the impugned judgment in that it was not a reasoned one. But at the same time, that the charge of rape was, according to the victim's self explanatory evidence and Pw3's evidence, leave alone the material PF3 by itself, proved beyond reasonable doubts.

But examined by the court the learned state attorney submitted that no evidence was led to show that the victim had been detained so that could not attempt any escape, for three days consecutively.

That the appellant's defence of alibi was improperly ignored. Leave alone the intended two (2) defence witnesses who were not caused to testify in court. We will under the circumstances ask for a trial de novo. As the appellant's right to be heard was curtailed. Submitted the learned state attorney.

Essentially, the appellant had nothing material to submit.

The central issue is whether the prosecution had proved the charge of rape beyond reasonable doubts. In fact it was not! The reasons are two: one; whereas the charge sheet alleges specifically that he

committed it on 14/6/011 at about 17.00 hours, the evidence led by the prosecution extends it to the 17th June, 2011 ie. three days consecutively. Two; No evidence was led to show that the victim Pw1 remained guarded if at all, for three days consecutively. And so it was not evident as to why didn't she attempt any cries for help or escape.

On the contradictory dates the rape was committed if any, I will only say that its settled law that evidence lead needs be consistent with the charge and particulars of the offence. Short of which the trial court is left on cross road. As the charge cannot be said to have been proved beyond any shadows of doubts. This point suffices to dispose of the appeal. Therefore for different reason the two grounds would are successful.

However, the fundamental question that follows, is whether the appellant was fairly heard. He was not! I am saying so, because for no reasons at all according to the records, his would be witnesses namely Mkapa and Jackson John never testified in court. There could be good reasons assigned by the appellant for the dispensation of their appearance by the trial court Granted! But the latter should have recorded the same. Rather than treating it as it appears to be. Like one had expressed no intention to have any witnesses in court. By itself, this was a serious breach of fundamental principle of natural justice – Right to be heard. The effects of which are, and this is trite

law, to nullify the whole proceedings. Even where the end results were to remain the same. Had the principles not been breached at all.

Moreover, I promised to go into details of the defence of alibi. Pleaded by the appellant, but just ignored casually by the trial court. whereas I am mindful of the provisions of section 194 (5) of the Criminal Procedure Act Cap. 20 RE 2002, the notice and particulars of the defence should be given before the prosecution closing their case. To enable them prepare, and this requirement the appellant did not fulfill, yet still the trial court was not entitled to just ignore the defence. As if it was nothing or not raised at all.

All attempted and said, I will hold that the impugned judgment, and therefore the conviction and sentence were respectfully premature. The entire proceedings of the trial court are nullified. Conviction quashed and sentence/orders set aside. The Criminal case No. 239 of 2011 to be heard afresh by another competent magistrate other than L.G. Buyamba, RM.

R/A explained.

S.M.RUMANYIKA

JUDGE

12/04/2014

Delivered under my hand and seal of the court in chambers. This 14/04/2014. In the presence of Appellant and Mr. Innocent Rweyemanu State Attorney for the Respondent.

S.M.RUMANYIKA

JUDGE

14/04/2014