IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 59 OF 2013

(Appeal from the decision of the District Court of Sumbawanga in Original Criminal Case No. 155 of 2002)

GERALD CLAUD @ ASHENGA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

18th June & 27th August, 2014

JUDGMENT

MWAMBEGELE, J.:

In the District Court of Sumbawanga, the appellant Gerald Claud @ Ashenga was arraigned and convicted of the offence of rape contrary to section sections 130 (1) and (2) (e) and 131 of the Penal Code, Cap. 16 of the Revised Edition, 2002 as amended by the provisions of sections 5 and 6 of the Sexual Offences (Special Provisions) Act, Cap. 101 of the Revised Edition, 2002. He was alleged to have raped one Tatu Pesapesa PW6; a dumb woman aged twenty. Upon conviction, he was sentenced to a term of thirty-five (35) years imprisonment and twelve strokes of the cane. The appellant was also ordered to compensate the victim Tshs. 200,000/=. That was more than ten years ago; it was on 11.02.2003 to be exact.

Dissatisfied with the conviction and sentence, the appellant has appealed to this court filing six grounds of complaint which have been presented in a discursive style and which I paraphrase as under:

1. THAT I didn't commit the alleged serious offence as established by the crown witness during the trial and I pleaded not guilty to the charged offence.

2. THAT the learned trial district magistrate erred on point of law in find that the PW1 and PW2 and PW3 gave a true and credible testimony.

3. THAT the learned trial district magistrate totally erred on pint of law in convicting the appellant while that knowing that the offence of rape was not proved as required standard of proof for example.

    a. Semen decked in complaint vagina to show that she was raped.

    b. There is no even slight penetration seen by the medical doctor. This alone prove that the rape was not committed at all in conformity with the afore points vide the cases of ***Said Hamisi Vs R*** Criminal Appeal No. 175 of 2012 (CAT) ***Mshindo Mrisho Vs R*** Criminal Appeal No. 273 of 2009 (CAT) ***Daniel Busigill Vs R*** Criminal Appeal No. 293 of 2010 (CAT) and in the case of ***Kayoka s/o Charles Vs R*** Criminal Appeal No. 325 of 2007 Also ('Jnreported) Tabora Registry.

4. THAT the evidence of PW1 and PW2 should not have been received as they are tender age and no *voire dire* examination was conducted hence the learned district magistrate went contrary with the decision of the highest court in the case of ***Godi Kasenegala Vs R*** Criminal Appeal No. 10 of 2008, ***Kinyua. Vs R*** (2002) 1 KLR 256 the learned trial district magistrate was supposed to record the examination child of tender age also in the case of ***Mathayo Ngaiya @ Shabni Vs R*** Criminal Appeal No. 170 Of 2006 (Unreported) It said that the essence of the offence of rape is penetration the male organ into the virginal. My lord judge in the presence case there is no even penetration which was shown or proved therefore the conviction of the appellant was injustice at all.

5. THAT the prosecution side did fail to prove the rape properly as required standard of proves that is to say to prove the ingredients of the offence my lord judge. The Law is clear to this accordance with section 112 and 113 of the evidence that The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence an less it is provided by law that the proof of that fact shall lie on any other person (Emphasis is under may scored.

6. That having regard to the totality of the evidence on record and circumstance under the evidence given the guilty of the appellant had not been provide beyond all reasonable doubt as required by the

law hence the conviction of the appellant was injustice at all. Lastly I wish to be present at the hearing of this appeal. WHEREFORE, the appellant humbly pray that this appeal be allowed conviction and sentence be set aside and order to any immediately release from the prison wall.

The appellant fended for himself when this appeal was argued before me on 18.06.2014. Mr. Mwandoloma, learned State Attorney, represented the respondent Republic. The appellant did not have much to add to his memorandum of appeal earlier filed which he opted to adopt and rely on as arguments of his appeal. The learned State Attorney did not support the appeal. He was of the view that, in the light of evidence adduced at the trial, the case was proved to the required standard; that is, beyond reasonable doubts. The learned State Attorney submitted that the appellant was caught *in flagrante delicto* by Odeta Cyprian Zombe PW1 and Zubeta Oswald Msongela PW2 who found him performing on top of the victim Tatu Pesapesa PW6. On being found in that state, the appellant threatened to hurt anyone who moved closer to them as he claimed the victim was his wife. The victim, as well, testified that the appellant forcibly had sexual intercourse with her which connoted that there was penetration as there is no sexual intercourse without penetration, the learned State Attorney opined. The learned State Attorney submitted in conclusion that the totality of these testimonies was enough evidence upon which the appellant could be convicted.

In rejoinder, the appellant came up with a different episode altogether. He claimed that the whole case has been cooked against him; that he never had sexual intercourse with PW6 neither forcibly nor with consent. He submitted that the victim never came to testify in court and that it was only the interpreter who was seen in court and that he never testified.

Before going into answering the question whether the conviction was apposite, let me, firstly, consider the defences brought to the fore by the appellant. First, is the appellant's episode to the effect that he has been framed; that all the evidence adduced by the prosecution against him has been cooked. With utmost due respect to the appellant, I am not able to swim the appellant's current as I do not find the episode as plausible. First, at the trial these defences did not arise. No trace of them could be seen in defence. What the appellant said when called to defend himself was just:

"I did not commit the offence. That is all."

And to make matters worse, on his part, nothing to the effect was suggested in cross examination; he did not cross examine any of the prosecution witnesses on the point. The record shows that he asked only some questions in cross examination but they were not about being framed. The framing episode did not even surface in the memorandum of appeal; it just surfaced before me when arguing the appeal and, ostensibly, was when the appellant was given audience to rejoin. I think, the appellant's episode respecting his being framed is an afterthought and

has been raised in fruitless attempts to save his sinking boat. I therefore reject it.

Secondly, the appellant complains that the court record has some flaws in that the victim was not called to testify, despite the fact that the court record shows that she did. Upon this complaint, this court read to him what transpired during the trial court on 20.111.2002 when the victim Tatu Pesapesa testified as PW6 with the help of one Juma Mlima; an interpreter who was duly affirmed to translate from sign language into Kiswahili and *vice versa*. The appellant simply retorted that the court record does not speak the truth.

I have given due consideration to this complaint by the appellant but my conscience tells me that his complaint, honestly, is devoid of truth and must be rejected. The gist of the appellant on this score is to impeach the court record. It is the law in this jurisdiction founded upon prudence that a court record should not be lightly impeached and that there is always a presumption that a court record accurately presents what happened. On this stance, I wish to borrow a leaf from a civil case of ***Halfan Sudi Vs Abieza Chichili*** [1998] TLR 527 wherein, the Court of Appeal, relying on what it earlier stated in ***Shabir F. A. Jessa Vs Rajkumar Deogra*** Civil Reference No. 12 of 1994 (unreported) held:

> "A court record is a serious document; it should not be lightly impeached".

And, restating what the High Court of Uganda (Bennett, Ag. CJ) stated in ***Paulo Osinya Vs R*** [1959] EA 353, the Court of Appeal added:

> "There is always a presumption that a court record accurately presents what happened".

On the strength of the foregoing authorities which bind me, I dismiss the appellant's complaint to the effect that the court record does not depict the truth.

Thirdly, the appellant also complains that he ought to have examined by a medical personnel with a view to observing that he also had sperms and bruises to substantiate that he indeed raped the victim. This complaint, afraid, will not detain me for two simple reasons. First that the PF3 tendered had no useful support for the prosecution case in that it was done one day after the incident and secondly, it is not always that forcible sexual intercourse must be accompanied with bruises. In any case, the fact that he was not medically examined did not prejudice the appellant. Neither, in my considered view, would it vitiate the merits of the prosecution case.

But was the case proved to the standard against the appellant? Let me attempt to answer this question. In rape cases, as in the present one, the best evidence is that of the victim herself [see: ***Godi Kasenegala*** Criminal Appeal No. 10 of 2008 (CAT Iringa unreported), ***Khamis Samwel Vs R***, Criminal Appeal No. 320 of 2010, and ***Burundi s/o Deo Vs R***, Criminal