IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 118 OF 2013

ORIGINAL CRIMINAL CASE NO. 45 OF 2012

ON THE DISTRICT COURT OF BUKOMBE

AT BUKOMBE

BEFORE: U.S. SWALLO Esq. RESIDENT MAGISTRATE

IBRAHIM S/O KAJORO .....APPELLANT

(Original Accused)

VERSUS

REPUBLIC .....RESPONDENT

(Original Prosecutor)

JUDGMENT

12th June & 18th August, 2014

S.M.RUMANYIKA, J

Ibrahim Kajoro having been charged and convicted on 29.9.2013 for rape Criminal Sections 130(B) (2) (e) and 131 (1) of the

Penal Code Cap 16 RE 2002 (the Act), he suffered a 30 years custodial sentence. He is not comfortable with both conviction and sentence. Hence the 3 ground memorandum of appeal basically:

1. The learned trial magistrate having based the convicted on weak prosecution evidence.
2. The learned trial magistrate having convicted him relying on the PF3. Without the doctor's evidence being tested in court.
3. The trial learned magistrate having not received the victim's evidence. On the imaginary ground that she was due to mental illness incapacitated.

The Appellant appeared in person, while Mr. I. Rweyemamu learned State Attorney represented the Respondents.

Whereas the Appellant had nothing material to add to the memorandum of appeal, Mr. Rweyemamu in his submissions, supported the conviction. However the learned State Attorney quickly attacked the PF3 (exhibit "P1"). As the provisions of section 240(3) of the Criminal Procedure Act, Cap. 20 RE 2002 were contravened. The appellant having been not addressed by the trial court, on his right to have the material medical practitioner in court to defend the documentary.

The learned State Attorney contended that even though the PF3 was expunged, the eye witnesses Pw1 and Pw2 had congent

evidence. Leave alone the Appellant's self implication in the cautioned statement.

Citing the provisions of section 131(h) of the Act, Mr. Rweyamamu was of the view that additional to sustodial sentence, one was liable also to pay fine. But for omission by the Learned trial magistrate. Submitted the learned State Attorney.

It is evident according to the Prosecution, that Pw2 (father of the victim) having found the Appellant naked in the victim's bed room, he raised alarms. Some people arrived, and rode the Appellant to the police station. Whereby charge of rape was laid at his door. Exhibit P1 (the PF3) suggested the girl had been carnally known. That interviewed by Police, the Appellant admitted the offence (Exhibit P2) the cautioned statement.

However, it is on record that the Appellant denied it throughout the trial. Looking at the purported cautioned statement, he simply admits to have got into the victims bed room at the material time. Only requested by her to luminate it with torch and enable the girl make her bed:

.....Mimi nilikuwa chumbani kwake kwa sababu aliniomba tochi ili akatandike nilikuwa na mmulikia tu na wakati natoka ndipo alipokuja baba yake akiwa na fimbo yake

na kuanza kunipiga kwamba nimebaka mtoto wake. Hata hivyo mimi nilimkatalia kuwa mimi sikumbaka .....

(the underline is mine).

Looking at the wording of the Appellant's statement (if any), it can not even be mistaken by any interpreter, to any kind of admission of sexual intercourse or at all, with the victim Vumilia. I will come back to this point shortly herein after. The Appellant might have been half naked yes! But that fact alone could not have proved the charge of rape. Much as the prosecution do not tell in evidence if too, the victim, had her pants down. One had, if anything, just exposed the person of another. A minor and different offence all together.

The victim might have been examined medically and found to have had just one carnally known her. Granted! But how could have the Appellant been connected? Very unfortunately, the material medical man did not come to court so that his evidence on exhibit P1 (PF3) is tested. But what is more, and Mr. Rweyemamu learned State Attorney just argued it very precisely so in my opinion, the Appellant was denied right under section 240 of the CPA, to have the medical man appear in court or not to. The omission renders the exhibit ineffective. It is expunged and it is ordered as such. Ground TWO of the appeal is allowed.

Now, with only exhibit "P2" (cautioned statement) remaining, I will, as said before, reiterate that it does not worth it. Not only the maker (Appellant) admits no ingredients of the charge but also, the Appellant did retract the statement. Just before it got its way to the list of prosecution evidence. One is clearly on record to have said "**I have objection because part of the statement is not mine**". Literally meaning, that the statement was inadmissible because some of its contents were not of his own making.

As such, one having retracted the statement, it was incumbent upon the learned trial magistrate to do enquiries (Case of Seleman Abdallah & 2 Others V R, Criminal appeal no. 384/2008 (CA) (unreported). With a view to establishing it being or not being the making of oneself. Leave alone its legality. But the trial magistrate ignored the crucial procedural requirement. He just admitted the statement as if it was not contested. With such fundamental omission by the trial court, the purported cautioned statement is without any evidential value. It is expunged. Ground ONE of appeal succeeds.

As regards ground No. 3, I will hold that the incapability/competence of a witness in the box to testify is determinable by the trial judge. Some times on consultation with a medical practitioner. Especially when it comes to one's mental barrear. And court declares it as such. Not simply at whilms of the prosecution.

As such none appearance in witness box, of the victim was unjustified. Ground 3 of the appeal is successful.

Yet again on the issue of the learned trial magistrate not on top of custodial sentence imposing the fine. Indeed it was as argued by Mr. Rweyemamu, contrary with the law, section 131(1) of the Act reads:

> Any person who commits rape is, ...liable to .....
>
> and in any case for imprisonment of not less than
>
> thirty years with corporal punishment, and with a fine,
>
> and shall in addition be ordered to pay compensation
>
> of an amount determined by the court, to the person
>
> in respect of whom the offence was committed.....
>
> (emphasis added).

The victim was not bellow sixteen and Appellant above 18 (sections 131(2)). He was, instead of 30 years in jail only, liable to corporal punishment, fine and such compensation for injuries sustained by victim. But as said, charge of rape having been not proved against the Appellant, I will rest the point there.

All said, appeal is allowed. Conviction and sentence by the trial court quashed and set aside respectively. The Appellant to be set free forthwith save for any other lawful cause.

R/A explained.

S.M.RUMANYIKA

JUDGE

24/06/2014

Delivered under my hand and seal of the court in chambers this 18th August, 2014. In the presence of M/s U. Malulu State Attorney, and the Appellant.

S.M.RUMANYIKA

JUDGE

18/08/2014