

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT BUKOBA**

**CRIMINAL APPEAL No. 16/2016**

*(Arising from Original Criminal Case No. 35/2014 in*

*the RM's Court of Bukoba)*

**BETSON HAMIS ----- APPELLANT**

**VERSUS**

**THE REPUBLIC ----- RESPONDENT**

**JUDGMENT**

**23/11/2017 & 9/3/2018**

**KAIRO, J.**

This Judgment was formerly delivered on 23/11/2017 wherein the court quashed and set aside the conviction and sentence by the trial court in Criminal Case No 35/2014 determined at RM's Court of Bukoba. The court reached at the said decision following the Respondent to concur with the grounds of appeal. The court there after went through the court record and joined hands with the parties accordingly. However the court reserved the reasons for the said Judgment to which the same is being delivered herein.

In this appeal, the Appellant decided to impugn the decision of the RM's court following his dissatisfaction with the same. According to record, the Appellant was charged with the offence of defiling an idiot or imbecile c/s 137 of the Penal Code Cap 16 RE 2002 of the laws of Tanzania. It was alleged that on 2/2/2014 at Magoti Kibeta and within Bukoba Municipality, the Appellant did have sexual intercourse with one Jeneroza d/o Kazaura who was an idiot or imbecile. Upon adducement of evidence, the Court found that the Appellant was guilty thus entered conviction and sentenced him to serve fourteen years imprisonment in absentia.

He was aggrieved thus preferred this appeal to challenge both conviction and sentence.

The Appellant first filed three grounds of appeal but later prayed to file additional grounds, which prayer was granted. He thus filed twenty additional grounds of appeal. When invited to make submission orally to amplify the grounds of appeal, the Appellant prayed to submit his written submission instead. The Respondent didn't object and the court accordingly granted the prayer.

According to the submission by the Senior State Attorney he contended that the grounds of appeal have centered on issues of penetration, credibility of witnesses and hearsay evidence. The State Attorney conceded that Pw1's evidence was hearsay. He clarified that during the examination in chief Pw1 who was a mother of the victim testified that he got the information from

one George Kazaura that Generoza was raped when she was gone to Kagondo. Mr. Matuma rightly argued that the proper person to testify in the said circumstances was Jackson Kazaura.

The State Attorney went on that P1 also explained how Generoza conducts herself when he said that *"Generoza sometimes understands things but sometimes doesn't"*.

It means therefore the evidence of Generoza needs to be taken cautiously as to be certain of whether or not Generoza was in a state of understanding what was going on during the incidence.

Mr. Matuma went further to fault the evidence given on the prosecution side asserting that Pw1 conceded when giving evidence in chief that the only person who witnessed was Jackson Kazaura who according to his testimony, he saw the victim and the accused person coming from the toilet and not that he witnessed the actual rape. He went on that the comment by the court at page 9 of the proceedings that Pw1 was avoiding to answer the asked question has affected the witness credibility and denied the court to thoroughly analyze the offence alleged to have been committed by the accused.

When coming to Pw2 who was the victim, she denied to know the meaning of *"truth or false"* when asked during her testimony. It goes that she doesn't know what was false or truth in what she testified. Further to that at page 10 of the proceedings, the court also commented that sometimes Pw2

seems to understand and sometimes she seems to be confused. The court also asked Pw2 who was Pw1 to her (pointing at her mother) and she replied that it was her grandmother while she was her mother. I agree with the Mr. Matuma that the trial court was to be extra cautious to take Pw2's evidence. Besides, the court was to corroborate with other pieces of evidence so as to reach to a just conclusion. Besides it shows that her ability to comprehend and to make proper identification was so small. In my view Pw2's evidence tainted with the pointed out deficient cannot legally be corroborated **[Refer the case of Ally Msitu vrs R [1980] TLR 11 CAT** – which held that, *"It is now well settled that evidence which itself requires corroboration cannot act as corroboration"*. Thus it is unsafe to rely on the evidence of Pw2 which as above pointed out was weaknesses.

The record also reveal that Pw2 when giving her testimony said that it was her first time to have sexual intercourse and added that she felt good (page 10 proceedings). The State Attorney commented that her statement (Pw2) was contrary to what other victim of rape would say on what they experienced; for example pains even if it was not their first time to have sexual intercourse. The court went through the pointed out record and observed that what Mr. Matuma's commented on that aspect to be true. This increases court's doubts whether Pw2 comprehend what she was asked thus creating doubt on her credibility as a key witness in this offence. I am very much aware that matters of credibility of the witness is the domain of the trial court which had the advantage of assessing the demeanor and

evaluate the credibility of the given evidence. However and with much respect to the trial court, the credibility of Pw2 is questionable having in mind her testimony and even the trial court's comment. To say the least, her evidence is unreliable.

Mr. Matuma went on to point out the shortcomings of the evidence adduced. He contended that when Pw2 was ready to testify, the prosecutor informed the court that Pw2 doesn't know Swahili but only Haya tribe. (Page 9 of the proceedings) However when sgnt Eliza (Pw4) was cross examined (the one who took the victim's statement) by the accused during her testimony she said that they used Swahili language (page 15) Mr. Matuma argued that with that contradiction the testimony of Pw4 died a natural death, which argument I concur with. Logic demands that if the victim doesn't know Swahili thus the evidence of Pw4 is doubtful and thus can't be considered by the court. The State Attorney also stated that, the only witness on the prosecution side to prove that Pw2 was raped was Jackson Kazaura who testified as Pw3.

Pw3 in his testimony testified that that he witnessed the victim and the accused coming from the toilet but he doesn't know what transpired in the toilet. In this respect therefore, the person to answer that question was the victim (Pw2), unfortunately his testimony is questionable as above analyzed.

Further to that, another evidence that would have assisted the court to prove whether the victim was raped is PF 3. The court when going through

it, observed the comments of the Doctor who examined the victim *“no sperms seen, no blood stains, no bruises etc”* which in my conviction negate the presence of penetration which is the necessary ingredient in the offence of rape as rightly argued by the Senior State Attorney.

Mr. Matuma also pointed out the procedural irregularities which also made him to support this appeal. He contended that Pw5’s evidence was given in the absence of the accused, now the Appellant (Page 18 proceedings) which action contravenes the principle of natural Justice of a fair hearing. The courts have repetitively decided that, however good is the evidence but where one is denied the right to a fair hearing which is also enshrined in our constitution (Article 13) the same has to be discredited and consequently annulled. **CITE CASE.**

Mr. Matuma also argued that PF3 was tendered and admitted in court in contravention of section 240 (3) of the CPA as the accused was not informed of his right to request the presence of the Doctor who examined the victim. The law provides that, such right can only be waived by the accused. However in the case at hand, the said section 240 (3) of the CPA was not complied with when PF3 was tendered, thus the same is to be expunged from the court record. The court when went through the record finds that the argument by the State Attorney with regards to tendering and admission of the PF3 to be true. However its presence in the court file is not fatal, as was analyzed above that it doesn’t support the signs of penetration.

Another discrepancy pointed out by Mr. Matuma is the change of Magistrates who presided over the case to which I also noted when going through the court record.

According to the proceedings, there were three Magistrates who presided over the case. However it has been observed that section 312 (1) of the CPC was not complied with to justify the change of hands/ presiding Magistrates. The Court of Appeal has persistently condemned such habits. In the case of **Salim Hussein vrs R Criminal Application No 3/2011** the Court of Appeal when faced with similar situation observed that the decision of a case should be given by the presiding Magistrate. And that no judgment is to be written by the Magistrate who didn't hear the case, unless abides to section 312 (1) CPC, short of it the proceedings are rendered a nullity and order retrial. Mr. Matuma however argued that in the circumstances of this case he wouldn't pray for retrial to which I totally agree with him. The reason are not farfetched; that is in the light of what has been analyzed above concerning the prosecution witness its goes without saying that nothing new would ensue to change the position/findings.

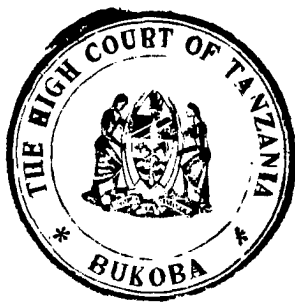
All having done and said, the court has found that this appeal has merit as the prosecution has failed to prove the case to the standard required that is beyond reasonable doubt [ Refer the cases of **Said Hemed vrs [1987] TLR 117 & Mohamed Matula VR [1995] TLR 3**

I therefore quash the conviction and set aside the sentence imposed upon the Appellant unless held for other legal cause.

It is so ordered.

Appeal allowed.

R/A Explained.



  
L.G. Kairo

**Judge**

9/3/2018



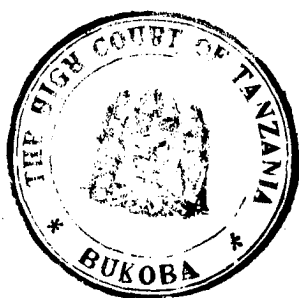
**Date:** 08/03/2018

**Coram:** Hon. L.G. Kairo, J.

**Appellant:** }  
**Respondent:** } Absent

**B/C:** Peace M.

**Court:** The reasons for Judgment which were reserved on 23/11/2017 are ready. The same are read over in the absence of both parties in open court today 8/3/2018.



L.G. Kairo

**Judge**

8/3/2018