IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO 98 OF 2015

(Appeal from the judgment of the District Court of Kibaha in Criminal Case No.24 of 2000 dated 7 May, 2004)

ABDALLAH SELEMANI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

28 Feb. & 13 March, 2018

DYANSOBERA, J:

Abdallah Selemani, the appellant, was convicted by the District Court of Kibaha for an offence of rape contrary to Section 130 and 131 of the Penal Code, Cap 16, R.E 2002 and was sentenced to thirty (30) years imprisonment. Aggrieved by the trial Court's decision, he has appealed to this Court protesting his innocence.

The facts which lead to the appellant's conviction and incarceration can be summarized thus. The appellant and Rhoda Sinyakala PW1 (the victim) were both the residents of Migude –Kidongo Zero Village within Bagamoyo District. They were neighbours. One day, the appellant was going to Ruvu and was asked by PW1 (the victim) to buy her slippers. Three days later the appellant came to the victim's house without slippers.

When asked by PW1 why he did not bring the slippers, the appellant replied that he had left them at his home and asked PW1 to accompany him in order to get her slippers, she refused, but later on agreed. They went together at the appellant's home where he subsequently grabbed PW1, lied her on bed, undressed her and started carnally knowing her.

PW 1 reported the incident to her aunt whom they were living together. The appellant was later arrested and arraigned in court.

In his defence, the appellant denied to have raped the victim claiming that she was his girlfriend.

On the basis of the above facts, the appellant was convicted and sentenced to thirty years imprisonment hence this appeal.

The appellant has raised the following grounds of appeal in his memorandum of appeal. These are,

1. That the learned trial magistrate grossly erred in law and fact by convicting the appellant for the offence of rape where by the victim was not emphatic in her testimony as to what the appellant did to establish the main ingredient of rape.

2. That the trial magistrate erred in law and fact to convict the appellant relying on the evidence of PW1 who is of tender age without conducting intelligence test (voire dire test).

3. That the trial magistrate erred in law and fact to convict the appellant relying on PF3 which was tendered in Court without following the procedure.

4. That the magistrate grossly erred in law and fact to convict the appellant relying on the evidence of PW1 without corroboration.

5. That the trial magistrate erred in law and fact for convicting the appellant relying on the evidence of PW3 who alleged that the appellant confessed to have committed the offence without tendering in Court the said caution statement to substantiate his allegation.

6.That the trial magistrate erred in law and fact to convict the appellant relying on hear say evidence of PW2 without assessing her credibility considering that she is of the same blood with the victim.

7.That the trial magistrate erred in law and fact to convict the appellant and pass sentence upon him in the case which lacked legal and factual points for determination contrary to the provisions of the law.

8. That the trial magistrate erred in law and fact by not drawing an adverse inference against the prosecution side for failure to summon the local government leader of the village.

At the hearing, the appellant appeared in person /unrepresented while the republic /respondent was represented by Ms.Neema Mbwana leaned state attorney. The learned state attorney told the Court that she had no case file thus unable to proceed. The appellant prayed the Court to proceed with the hearing.

The respondent had no case file but the Court had to proceed with the hearing of this appeal for the reason that it had taken long time. The appellant had nothing in additional to what he had preferred on his

memorandum of appeal and so prayed this Court to adopt them. Although the appellant preferred eight grounds but for the purpose of this appeal the Court shall condense them into three grounds, as provided hereunder:-

1. That the trial Magistrate erred in law and fact to convict the appellant without conducting intelligence test (Voire Dire Test).
2. That the trial Magistrate erred in law for convicting the appellant relying on the PF3 which was tendered without following the procedure.
3. The prosecution did not prove the case beyond reasonable doubt.

In response to the first ground, it is common that at the material time when PW1 was raped, she was fourteen years old. Therefore in terms of Section 127(5) of the Evidence Act, she was a child of tender age although the law that is Section 127(1) of the Evidence Act generally does not prohibit a child from giving evidence in criminal case.

Further there are pre conditions which must be complied with before receiving his /her evidence. These pre conditions are provided for under Section 127(2) of the Evidence Act (Supra).This provision imposes the duty on the trial magistrate or judge to investigate whether child witness knows the meaning of an oath so as to give evidence on oath or affirmation.

In the instant appeal the learned trial magistrate did not conduct Voire dire test. She sworn her and took her evidence, this in my view was contrary to Section 127(2) of the Evidence Act (Supra) as rightly observed by the appellant. The requirement of voire dire test for the children of tender age was underscored in the case of **Jafason Samwel V R Criminal Appeal**

No 105 of 2006 CAT at Arusha and the case of **Alfeo Valentino Republic** Criminal **Appeal No 92 of 2006** CAT at Arusha (Both unreported).Inthe view of the case of **Kimbute Otiniel V Republic Criminal Appeal No 300/2011 CAT** (Unreported) the omission by the trial Magistrate to conduct voire dire leads the Court to the conclusion that the evidence of PW1 was wrongly received and acted upon. I accordingly discount it.

Regarding the complaint that the appellant was convicted basing on PF3 which was admitted without following the procedure. The Court has noted it is true as rightly observed by the appellant, the procedure related with the admissibility of the PF3 at the trial Court was tainted with serious irregularities.First, the admissibility of PF3 did not comply with the mandatory requirement of **section 240(3) of the Criminal Procedure Act**.

The appellant was not explained his rights to cross examine the doctor who prepared the PF3 beside it was improper for the appellant to tender the same since it was PW4 Peter Kusinga the medical doctor who had the mandate to tender it in Court. That was underscored in the case of **Alfeo Valentino V Republic Criminal Appeal No 92 of 2006 CAT at Arusha**.

In the view of the above authority the PF3 reflected in Court as exhibit P1 is hereby expunged from record.

What follows before this Court is the issue whether the remaining evidence are sufficient to sustain the appellant's conviction.

In addressing the above issue the Court shall draw its attention on the evidence of PW2 Pili Daimon, PW3 C1485 Coplo Jimmy Mlandizi and DWI the appellant.PW2 who is the aunt of the victim told the Court how PW1 came along breeding and complaining to her that she had been raped by the appellant.PW2 reported the matter to the ten cell leader.PW2's evidence corroborated with that of PW3 Coplo Jimmy Mlandizi.

PW3 testified to the extent that he was the one who arrested the appellant. He also added that during the interview with the appellant declined to have raped PW1 but admitted he slept with the victim because she was his long time girlfriend.Onthe other side the appellant when cross examined by the prosecution side admitted PW1 used to sleep at his home and she used to leave in the morning .

The above chain of testimonies provides collaborative and strong evidence enough for the conviction of the appellant .In the case of **Edward Joseph V Republic Criminal Appeal No 272 of 2009 CAT at Tabora (unreported)** at page 12 the Court cited with approval the case of **Mohamed Haruna @Mtgeni VRepublic Criminal Appeal No 259 of** 2007(Unreported) the Court had this to say:-

> "if the accuse person in the course of his defence gives evidence which carries the prosecution case further,the Court will be entitled to take into account such evidence of the accused in deciding on the question of his quilty"

In the view of the above authority, the appellant's admission that he used to sleep with PW1 and that she was his girl friend is a clear evidence that the appellant committed an offence.

Further in the case of **Issa Ramadhan V Republic Criminal Appeal No 409/2015 CAT at Dodoma (Unreported)** the Court under scored the legal position that a Court can arrive at a conclusion without the testimony of the victim of the crime. Also the case of **Abdullah Eliasi V Republic Criminal Appeal No 115 of 2009** the Court had the view that conviction can be sustained independent of the evidence of the victim.

The Court having expunged the evidence of the victim, it has been satisfied that the evidence of PW2, PW3, PW4 and DWI are sufficient for the appellant's conviction and this calls for the conclusion that the prosecution proved the case beyond reasonable doubt.

For the fore going reasons, the appeal is hereby dismissed.

W.P. Dyansobera

JUDGE

13.3.2018