IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 402 OF 2016

(Originating from Kinondoni District Court at Kinondoni, Criminal case No. 354 of 2015

GODFREY EVARIST KIVAMBA.....APPELLANT

VS.

REPUBLIC .....RESPONDENT

JUDGEMENT

MWENEMPAZI, J.

In the trial court, the District Court of Kinondoni, the appellant was charged and convicted with the offence of rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code. It was alleged and proved by the prosecution that the appellant on the 8th day of August, 2015 at Goba area within Kinondoni District in the Region of Dar es Salaam did have carnal knowledge with Winfrida Joseph Ngowi, a girl of 12 years old. He was sentenced to serve a term of 30 years imprisonment. The

appellant is now appealing against conviction and sentence. In the petition of appeal, the appellant registered five grounds of appeal. The first and second grounds seek to challenge the judgement that the trial Magistrate had incurably erred in points of law whereby the judgement reached was defective as it did including conviction on its findings, instead of was separated from and set aside as an order, the act which is wrong and its contrary to the required procedure of law under the Criminal Procedure Act, Cap. 20.

The third ground complain that the trial magistrate erred in law and fact by convicting the appellant there being no person who had witnessed the appellant rape the alleged victim (PW2) and Exhibit P! (PF3) does not link the appellant with the crime, further nothing substantive had corroborated PW2 allegations against the appellant. The forth ground is that the trial magistrate erred in law and fact by failing to evaluate evidence adduced and considering that PW3'S testimony lack proper explanation as to how she came to observe penetration. There were no bruises nor semen in medical examination. Therefore, the prosecution failed to prove the case beyond reasonable doubt.

When that the appeal was called up for hearing the appellant entered appearance in person and the Respondent Republic was represented by Haiku Tumu, learned State Attorney. The appellant in his submission simply prayed that the Court in dealing with his appeal should consider the grounds of appeal filed

and do justice to him. He would like to join his family. The Respondent on the other side were supporting conviction and sentence. The learned State Attorney asked this court to allow her to submit on the first and second ground together. She stated that, the judgement which the appellant is trying to fault that it was no written according to law, was properly written according to the provisions of section 312 of the Criminal Procedure Act, Cap. 20 of the Laws. The provisions of law require the judgement to have a short summary of evidence, points of determination, analysis of evidence, decisions on the points and reasons for the decision made, it must be dated and signed.

On the third ground, the learned State Attorney submitted that the event took place within the room occupied by the appellant. The law believes the best evidence is that of the victim. This was decided in the case of ***Tumaini Mtayomba vs. Republic***, Criminal Appeal No. 217 of 2012, Court of Appeal of Tanzania(Unreported). In the current case proceedings, the evidence of PW2(the Victim) was watertight, the same was corroborated by other witnesses like PW3, doctor who examined the victim and the PF3 admitted by the court as Exhibit P1, and the evidence of the mother of the victim. All corroborated what has been testified in court by PW2. The appellant in the forth ground sought to challenge the evidence of PW3 the doctor who conducted medical examination and testified the same in court. His testimony was on the things he observed after examination

of the victim. Under the law the appellant was supposed to cross examine the witness during hearing of the case.

In the fifth ground, the appellant raises the issue of contradiction of the evidence prosecution witnesses PW2 and PW5 on the actual time the alleged crime occurred. The learned State Attorney submitted to the effect that it is true that there was discrepancy but the same did not go to the root of the case; the same does not affect the ingredient of the offence. Evidence tendered by witnesses PW1 -PW5 was clear and watertight. It proved the case beyond reasonable doubt.

The appellant opted to exercise his right of rejoinder by stating that he was residing at the area where there were many neighbors. But this case was known to the few only even the ten-cell leader did not know. There was also contradiction on time and place where the victim was found. Whether in the appellant's room or outside the room. The issues in this matter is whether the victim PW2, Winfrida Joseph Ngowi was raped and Whether it is the appellant who raped her. According to the evidence available on record, PW2 herself testified in court that on the date 8th day of August, 2015, at about 6:30am she went outside to release chicken from their hut. When the appellant saw her, he called her and noting that he was being ignored, he grabbed the kid by the hand forced her to his room. While in there, laid her on the bed, undressed her and himself then he proceeded to insert his penis in the vagina of the victim. During the act, at first the appellant was covering her

mouth with the palm of his hand and then he removed the palms that is when she(PW2) was able to scream for help. This made the appellant fear and left her. In her testimony, the girl explains the act to be painful (It *really pained a lot*) She went out where she met her mother. Being a child of tender age, she will be competent to testify in court if the criteria in section 127(2) of the Evidence Act, Cap. 6 before being amended are fulfilled. The same provides as follows;

> "*Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation,* ***if in the opinion of the court, which opinion shall be recorded in the proceedings****, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth"*

In this case, the magistrate has to conduct *voire dire* procedure and then proceed to record the testimony of the child as prescribed by law. In this case page 9 to 10 of the proceedings show that the trial magistrate did question the child, and give remarks that: -

> ***"the child is 13years, she is aware of the meaning of telling the truth in Court. She can take oath"***

The witness PW2 after *voire dire* had been taken testified in court. She was cross examined by the accused(appellant) and the court. She stuck to her guns. Her response to the questions was firm. Her confidence could not be shaken as to raise any doubt that she had the experience she was testifying to in court. There are no reasons to fault the logical flow her story. The evidence of PW5, mother of the victim, PW4 and PW3 had the necessary weight of corroborating what PW2 had testified in court. Leave alone what the witness PW1 testified in court that he is the one who arrested the appellant and sent him to the police station for further legal measures.

In the opinion of this court, the prosecution proved this case to the required standard. There is no reason to interfere with the findings of the court. Therefore, the appeal by the appellant fails and it is accordingly dismissed.

T. M. MWENEMPAZI

JUDGE

26/6/2018