IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO 323 OF 2017.

(originating from district court of ilala criminal case no.84 of 2016 by hon.Kiyoja, Rm)

SHABAN HUSSEIN.....APPELLANT

VERSUS

THE

REPUBLIC.....RESPONDENT

JUDGMENT:

MAGOIGA J.

The appellant was charged in the District Court of Ilala in Dar es Salaam on one count of rape contrary to sections 130 (1), (2) (e) and 131(1) of the Penal Code, Cap 16 (R.E 2002). He was convicted to 30 years' imprisonment and compensation order of 5 million to the victim.

Aggrieved and dissatisfied by the conviction and sentence has come to this court contesting his innocence armed with 9 grounds of appeal.

The fact of this case are simple and straight forward that on unknown date in July 2015 at Kipunguni B Moshi Bar area within Ilala District in Dar es salaam Region, the appellant did have canal knowledge of one Christina Ibrahim, a girl 9 years of age. The incidence was reported to police and thorough investigation was conducted which led to the arrest of the appellant and eventually was taken to court and charged accordingly, convicted and sentenced, hence, this appeal.

The 9 ground of appeal are coached thus: -

1. That the trial Magistrate grossly erred by convicting and sentencing the appellant on the basis of un-particularized provisions of the Penal Code.
2. That the learned trial Magistrate erred by not assessing huge contradictions within PW1 evidence as regards material facts.
3. That the learned trial Magistrate grossly erred by failing to discern PW1 veracity as it wouldn't have been possible for her not to bleed immediately after the occurrence of the alleged offence.
4. That the learned trial Magistrate grossly erred by failing to note huge contradictions between PW1 and PW2 as to how the alleged offence was detected.
5. That the learned trial Magistrate erred by presuming that the prosecution proved the case where the victim's blood stained clothes were not tendered to cement the allegation to leave no doubt.
6. That the learned trial Magistrate erred by holding to un-procedural visual identification of PW1 against the appellant.
7. That the learned trial Magistrate erred by convicting the appellant where the prosecution did not establish as to how he was arrested to ascertain whether his apprehension has any connection with the offence at hand.
8. That the learned trial Magistrate grossly erred by sentencing the appellant in judgment which lacked sufficient factual and legal points of determining the decision in compliance with mandatory provision of Criminal Procedure Act, Cap 20 (R.E 2002)
9. That the learned trial Magistrate grossly erred by convicting the appellant where the prosecution failed to prove his guilty beyond any reasonable doubt.

When this appeal came for hearing the appellant was unrepresented and read for hearing. The Respondent, Republic was represented by Ms. Selina Kapange, learned State Attorney, who was ready and was supporting the conviction and sentence meted out against the appellant. The appellant submitting on his grounds of appeal was very brief and told the court that he as presented nine grounds of appeal he prays for the court to consider them and eventually set him free. He told the court that in ground 3 it is written PW5 but in fact he was referring to PW1, and

asked the court to allow his appeal and set him free. That was all about the appellant.

On the other hand, the Republic speaking through Ms. Selina Kapange, learned State Attorney submitted that she supports conviction and sentence of the appellant because the Republic proved their case beyond reasonable doubt, after complying with the procedure. Submitting on ground number one of the memorandum appeal that the conviction and sentence was on basis of un-particularized provision of the Penal Code, she said the charge sheet was proper and in order by particularizing the provision with which the appellant was charged. She concluded on this ground by submitting that the provision of section 135(a) (ii) of the Criminal Procedure Act, Cap 20, [R.E 2002] was complied with and was proper.

Submitting on grounds number 2 and 4 jointly on the alleged contradictions between the testimonies of PW1 and PW2, she said that there was no contradiction at all. PW1 explained how she was called by the appellant and ended up raping her and threatening to kill her in case she tells her mother. Further submitting on these grounds she says, PW2 at page 14 of the typed proceedings testified that PW1 told her that the appellant raped her. The later to know the incident was explained that PW1 was afraid until when she was detected by the PW2. According to her nothing contradicting was on record regarding the testimonies of PW1 and PW2.

Submitting on grounds 3 and 5 jointly, which evolve around the penetration and non-tendering of the clothes of the victim said to be with the blood, the learned State Attorney submitted that these grounds are without merits, in particular, charges of rape because in law even a slight penetration is enough to prove the offence of rape. PW1 testified that it was the appellant who raped her, she concluded on this grounds.

On ground number six of the appeal evolving on identification of the appellant, the learned State Attorney was very brief by submitting that PW1 saw the appellant in day light, so issue of incorrect identification does not arise in the circumstances. Further to ground seven of the appeal

which evolve around the arrest of the appellant, the learned State Attorney submitted the issue of arrest was not an issue in this case in lower court and in this appeal.

On further submission on ground number eight of the memorandum of appeal in which the appellant faulty the contents of the judgement as not according to law the learned State Attorney submitted in reply that the trial court's judgment followed all procedure as stipulated in the provisions of section 312 of the Criminal Procedure Act, Cap 20, which explains the contents of the judgment. Lastly but not least to the usual ground number 9 that the Republic did not prove their case beyond reason doubt, the learned State Attorney replied that this ground has no merits and should be dismissed as the Republic discharged their duty according to law. In the fine she invited the court to dismiss this appeal in its entirety. This marked the end of the Respondent's submission.

The appellant had no more than saying he leave it to the court to decide and do justice to him by setting him free. That marked the end of this hearing.

The task of this court, being the first appellate court is, among others, to consider the grounds of appeal and if need be re-evaluating the evidence on record and do justice to the parties. For purposes of disposing this appeal will determine the raised memorandum in the manner the State Attorney did. Starting with the first ground of appeal which its main complaint is that the charge sheet the subject of his trial was not particularized with the relevant provision of the law creating the offence of rape. This prompted this court to see the content of the charge sheet and reproduce it here for easy of reference to let it speak by itself.

CHARGE:

STATEMENT OF THE OFFENCE:

RAPE: contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code, Cap 16 [R.E.2002]

PARTICULARS OF THE OFFENCE:

SHABAAN HUSSEIN on unknown date July 2015 at Kiunguni B, Moshi Bar area within Ilala Dsirict in Dar es salaam Region, did have carnal knowledge of one CHRISTINA IBRAHIM a girl of 9 years of age.

I have produced the contents of the charge sheet above and have equally visited the provision of the Penal Code as cited in the charge sheet I see no defects in charge sheet as alleged by the appellant in his memorandum of appeal. There is no dispute that paragraph (e) of subsection (2) and (1) of section 130 creates the offence of rape where the victim is under age, as is in this appeal. The victim at the time of commission of the offence was only seven years. So this ground as rightly submitted by the learned State Attorney, is baseless. The charge was very specific and it contained all the necessary ingredients as stipulated under section 135 (a) (ii) of the CPA. Hence, this ground is bound to fail.

Coming now to ground 2 and 4 of the memorandum of appeal the appellant's main complaint is that there are many contradictions between the testimonies of PW1 and PW2. He has referred them as huge contradictions. The testimony of PW1 was that she was called by the appellant and asked to bring him water. She obeyed and upon receiving the water, the appellant caught her, undress her and had a carnal knowledge with her in the very room he was painting. This incident occurred in Kipunguni B, near Moshi bar in Ilala district. This court has endeavored to read between the lines and along the lines the testimonies of both PW1 and PW2 and utterly failed to note the huge contradictions raised by the appellant. PW2 testified that she noted some blood stains in the clothes of PW1 and decided to take her to hospital. The FFU hospital it seems did not take the matter seriously and because at that time she knew not of the secret the bleeding was ruled out a bilharzia without proper diagnosis. It was PW2 testimony that after the secret was revealed, the FFU hospital referred her to Amana hospital which revealed a rape to the girl. This ground too stands to fail as well. As correctly submitted by the learned State Attorney there is nothing from the record which suggests huge contradiction of the testimonies of PW1 and PW2.

Coming to grounds 3 and 5 of the memorandum of appeal that if there was rape then bleeding could easily be noted and failure to bring the

blood-stained clothes water down the case for the Republic. The learned State Attorney has submitted in reply that, in a charge of rape, it is not necessary to prove actual injuries but in law a slight penetration is enough to prove the offence of rape. On these two grounds I have tasked my mind a great deal to read and re-read the record and see what transpired and the issue of blood-stained clothes not tendered. According to the testimonies of PW2, she noted the blood stain on the clothes on 24/07/2015. She did not end up there she inspected the victim and proved that the blood bleed was from her vagina. PW2 went on to tell the court that she immediately took the child to hospital. To this moment PW2 was not aware of rape, hence heavily depended on the findings of the doctor who informed her that **may** be it was UTI and noted some dirty items from the vagina. PW2 went to testify that despite being given the treatment the situation worsened and this time she questioned PW1 who revealed that her agony is the result of rape by the appellant. To me this was more than being vigilant on the part of PW2. The complaint by the appellant that the blood stained clothes were not tendered to prove an offence of rape are unfounded in the circumstances. This court finds no merits in this ground too.

In the 6th ground of appeal the complaint of the appellant is that the trial magistrate erred by holding to un-procedural identification of PW1 against the appellant. This ground need not detain this court as correctly submitted by the learned State Attorney in reply that PW1 was with the appellant in a day light, so no need of incorrect identification arises in the circumstances. There is something this court has noted from the testimony of the appellant, that he admits to have been given painting work as alleged by the PW2. This proves that he was in the scene of crime on the alleged date and the question of identification and the time the alleged offence was committed does not arise in the circumstances of this case. This grounds to stands to fail.

More so, in his defense the appellant has raised a defense that PW2 framed him with this case because he was claiming tsh 50000/= balance unpaid after he finished painting. This defense sounds very good but I have revisited the testimony of PW2, in particular, when she was being

cross examined by the appellant and wondered why the appellant did not ask her any question regarding the frame and the failure to pay the agreed but un paid money. This to me remains an afterthought futile exercise on his part and has not shaken the evidence of the Republic to create any reasonable doubt to benefit the appellant.

The 7th complaint of the appellant in his memorandum of appeal was that the trial court erred to convict the appellant where the prosecution did not establish as to how he was arrested to ascertain whether his apprehension had any connection with the offence at hand. This ground will not detain this court too much. PW1 mentioned the appellant as person who raped her as the painter and the appellant admits was the painter and was employed by PW2 on the alleged time of the commission of the offence. How and when he was apprehended was not an issue in the rape case before the district court and this being an appellate court cannot entertain factual matter that were not at issue in the lower court, unless are purely legal issues.

The 8th complaint of the appellant in his memorandum of appeal is that the judgement of the district court did not comply with the manner of composing a judgment. This has prompted this court to visit the provision of section 312 of the CPA and the read the judgment of the lower court in order to gauge, if any, merits can be ascertained thereon. For easy of reference I produce the provision of section 312 hereunder: -

Section 312. Content of judgment Act No. 10 of 1989 s. 2

(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.

(2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty.

(4) Where at any stage of the trial, a court acquits an accused person, it shall require him to give his permanent address for service in case there is an appeal against his acquittal and the court shall record or cause it to be recorded.

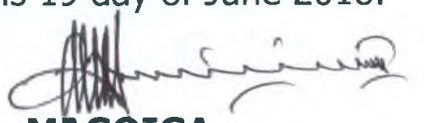
Reading the above provisions of section 312 of the CPA, it is imperative for the judgment to be in writing and in a language of the court, contain point(s) of determination, decision therein, reasons for the decision and it must be dated and signed by the presiding officer. And in case of conviction, the judgment must specify the offence of which and section of the law under which the accused was convicted and the punishment to which he is sentenced. In the instant appeal I have gone through the judgment of the trial court and am satisfied beyond doubt that the lower court judgment contains all the necessary ingredients of the judgment as per the above provision of the law. This ground to stands to fail and I agree with the submission of the learned State Attorney.

The last but not least ground of appeal was that the trial magistrate grossly erred by convicting the appellant where the prosecution failed to prove his guilty beyond any reason doubt as charged. It is trite law and long established principle that in criminal law the Republic have uncompromised duty to prove cases beyond any reasonable doubt. I have read the evidence as whole for the Republic, and I have also read the defense evidence as a whole in the course of analyzing the grounds of appeal as contained in the memorandum of appeal, am of the settled mind that the republic proved their case beyond reason doubt. The five witnesses for the Republic, in particular, that of the victim shows the appellant actually raped her and it is the threats of the appellant that caused a late detection of the offence. However, late but at last the heinous act was revealed and has brought up the appellant to books.

In the upshot, I find this appeal devoid of useful merits and dismiss it in its entirety.

It is so ordered.

Dated in Dar es salaam this 19 day of June 2018.



S.M. MAGOIGA.

JUDGE.

19/06/2018.