**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**(DAR ES SALAAM REGISTRY)**

**CRIMINAL APPEAL NO. 337 OF 2017**

*(Originating from The District Court of Temeke at Temeke, Criminal Case No 31 of 2016 Before: Hon. A. Tarimo– SRM Dated 26th September, 2016)*

**ULILO HASSAN---------- APPELLANT**

***VERSUS***

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

**JUDGMENT**

**Last order date:** 8th June, 2018
**Judgment date:** 18th June,2018

**MLYAMBINA, J.**

In the Temeke District Court the appellant herein was charged and convicted of rape contrary to Sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 (R.E.2002) and sentenced to serve 35 years imprisonment and pay a fine of 5 Million Tanzanian Shillings. Being aggrieved with such decision, the appellant preferred this appeal against the conviction and sentence on the following grounds; -

1. That, the SRM barely erred in law and in fact by convicting the appellant as charged before, despite the fact that the charge preferred against him was incurably defective as the

provision of law he was charged with does not correlate to the entire evidence adduced by the prosecution witnesses.

2. That, the learned trial Magistrate grossly erred in law and fact when he relied on a PF3 (noted as exhibit P1 and P2) in which its contents were filled by disqualified doctor and the same was not done in the government hospital contrary to the procedure of law.
3. That, the learned trial Magistrate erred in law and fact by convicting the appellant based on PW3's (a Clinician) testimony despite the fact that the major elements of pens penetration into the victims' virginal was not proved beyond reasonable doubt, and the same is exemplified at line 15 on the proceedings when PW3's was close examined by the accused.
4. That, the SRM erred in law and fact in convicting the appellant while relying on incredible exhibit P3 (a pant smeared with blood stains) and admitted in court un-procedurally since the appellant was not undertaken a DNA test in order to attest whether or not such blood correlate with the appellant's blood.
5. That, the SRM erred in law and fact by convicting the appellant and hence imposed a huge sentence to him which was not specified on the provision of punished statute as the result prejudiced to the appellant's mental faculty.

6. That, the learned trial Magistrate miserably erred in law and fact by convicting the appellant merely relying on the prosecution evidence which is lacking a corroborative testimony from other independent witnesses whom their presence in court was very important.
7. That, the learned trial Magistrate erred in law and fact by convicting the appellant based on incredible evidence from the prosecution witnesses whose evidence had glaring lies and above all PW1 and PW2 were witnesses who had an interest to serve.
8. That, the learned trial Magistrate erred in law and fact by convicting the appellant while relying on PW3's testimony who claimed that she failed to detect any sperms from PW1's virginal because she (victim) had already taken shower and washed her pant whilst PW1 never gave such evidence, worse still piece of evidence was eroded by PW2 when she tendered a blooded stained pant.
9. That, having regard on the record of this instant case, the SRM erred in law and fact when she failed to detect a huge contradiction to the effect that PW1 claimed to have been treated at Malawi Hospital whilst PW3 (Doctor) claimed to be working at Yombo dispensary, hence giving us a room to conclude that it was a cooked evidence. (See on the (PW1 and PW3) examination in chief).

10. That, the findings of the SRM was wrong arrived at, as the convicting Magistrate miserably had failed to critically analyse and evaluate the defence case (DW1, DW2 and DW3 and to come up into a conclusion in the same manner as to that of the prosecution witnesses, hence the defence case was not considered at all.

WHEREFORE,

a. The appellant prayed that the Court be pleased to allow this appeal, quash the conviction and set aside the sentence and the order of the compensation and set the appellant free at liberty.
b. The appellant prayed to be present at the hearing of this appeal.

During hearing of the appeal, the appellant been a layman prayed for this Court to consider all his grounds of appeal, the conviction and sentence be quashed and set aside so that he can be set free and join his family which is suffering at Tunduru.

The learned State Attorney one Christin Joas supported the conviction for the reason that the respondent was legally charged as per the law, that is Section 130 (1) (2) (e) and 131 (1) of the Penal Code.

The learned State Attorney conceded that PF3 was tendered by the Clinical officer instead of a Medical Doctor and the victim must be examined before the referral hospital. In this case the victim was examined before the dispensary. For that regard, the learned State Attorney prayed the PF3 be expunged.

On the issue of victim evidence, the learned State Attorney submitted that, in rape cases, the best evidence is that of victim as per Section 127 (7) of the Tanzania Evidence Act (TEA) which states: -

> *"In Criminal proceedings involving Sexual offences the only independent evidence is that of the Child of tender age of the victim of sexual offences, the Court shall receive the evidence."*

It was the view of the learned State Attorney, the victim proved beyond reasonable doubt. On sentence, the learned State Attorney prayed be reduced to 30 years as per Section 130 (1) (2) (e) and 131 (1) of the Penal Code (*supra*).

In rejoinder, the appellant simply denied to had committed the offence and prayed justice be done by setting him at liberty.

I have carefully considered both parties arguments and the available records. I should first observe that, the court of Appeal had these to say in **Shida Joseph V.Republic, Court of**

**Appeal of Tanzania (CAT), Criminal Appeal No. 293 of 2012 (unreported) at Page 5:-**

*"The question whether an appellate Court can interfere with the sentencing discretion exercised by a trial court has been a subject of numerous decisions of this court (See, for instance;* ***SWALEHE NDUGAJILUNGU V.R; Criminal Appeal No. 84 of 2002 (CAT unreported), SILVANUS LEONARD NGURUWE V.R., [1981] T.L.R 66....****the law is well settled that an appellate court will only interfere with the sentence discretion of the trial court where:-*

*a) The sentence imposed is manifestly excessive or it is so excessive to shock.*
*b) The impugned sentence is manifestly inadequate.*
*c) The sentence is based on a wrong principle of sentencing.*
*d) The trial Court over looked a material factor.*
*e) The sentence has been based on irrelevant considerations.*
*f) The sentence is plainly illegal.*
*g) The time spent by the appellant in remand prison before conviction and sentencing was not considered."*

In this case, the sentence imposed to the appellant is manifestly excessive. Section 131(1) of the Penal Code (supra) gives a bottom line limit of sentence for not less than 30 years imprisonment. It states; -

> *"Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case* ***for imprisonment <u>of not less than</u> 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 for the injuries caused to such person." (emphasis added).*

It is our humble findings that the trial Court ought to have given justification as to why it arrived to 35 years imprisonment. Though we observe that the phrase "*not less than*" should be interpreted to be the minimal sentence but not limited to" the trial Court must give justifiable reasons on imposing sentence more than the prescribed minimal sentence. In absence of such viable reasons, we find the 35 years imprisonment was in access.

On the charge point, the records speak voluminous that the appellant herein was charged and convicted of rape contrary to Sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16

(R.E.2002). I find nothing wrong for the appellant to had been charged under such provisions of law. Worse, there is nothing strong been submitted by the appellant to prove that he was charged under improper law.

As correctly argued by the learned State Attorney, the statutory law as coined under Section 127 of TEA (*supra*) is that the best evidence in rape cases is of the victim. The Court of Appeal of Tanzania in the case of **Ismail Ally vs The Republic, Court of Appeal of Tanzania Criminal Appeal No. 212 of 2016 at Mtwara (unreported)** cited with approval the case of **Selemani Makumba vs Republic (2006) TLR 379** which had the same holding in principle.

Concerning PF3 issue, with due respect to the learned state Attorney, I find untenable the contention that PF3 should be tendered by the Clinical officer instead of a Medical Doctor. Indeed, I find no justification the learned State Attorney contention that the victim must be examined before the referral hospital. As it was discussed in the case of **Ismail Ally vs The Republic** (*supra*), the important thing in tendering PF3 document is to be in compliance with Section 240 (3) of the Criminal Procedure Act, Cap 20 and that the accused must be given a chance to cross examine that witness. In **Ally Ismail case** (supra), the PF3 was filled by the Clinician as it was in the

present case, indeed, the PF3 was tendered by the Clinician as it was in the instant case, yet the Court of Appeal found it to be a valid exhibit.

Been guided by the findings in the case of **Ismail Ally** (*supra*), I find nothing wrong for the PF3 been filled and tendered by the clinician and not a Medical Doctor. Above all, the appellant had no objection during its tendering.

Concerning the 8th and 9th grounds of appeal, the records reveals true that PW1 claimed to have been treated at Malawi Hospital whilst PW3 (Doctor) claimed to be working at Yombo Dispensary. It is also true PW3's claimed that she failed to detect any sperms from PW1's virginal because she (victim) had already taken shower and washed her pant piece of evidence. However, in our found view, as observed earlier, in rape cases the best evidence is that of the victim. The appellant failed to challenge the victim's evidence with certainty.

We further observe that, even if there were some inconsistences on part of the testimony of PW3 and that of PW1 and PW2, such inconsistences did not go to the substance of the best evidence. The Court of Appeal of Tanzania in the cited case of **Ally Ismail case** (*supra*), cited with approval its own earlier decision in the case of **Dickson Elia Nsamba Shapwata and Another vs**

**the Republic, Criminal Appeal No.92 of 2[illegible] (unreported)** in which the Court *inter alia* stated that; -

> *"minor contradictions, inconsistences, or discrepancies do not affect the case of the prosecution because they do not corrode the credibility of a party's case as does material contradictions and discrepancies."*

In the premises of the above, the appeal is partly allowed on one ground of excessive sentence. The trial conviction is sustained, the appellants sentence to pay TZs Five (5) Million compensation is sustained. But the appellant's sentence instead of 35 years imprisonment is reduced to 30 years imprisonment as per Section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 (R.E.2002).

**Y. J. Mlyambina**

**Judge**

**18/06/2018**

Dated and delivered this 18th day of June, 2018 in the presence of the appellant in person and learned State Attorney Monica Ndakidemi for the respondent.

**Y. J. Mlyambina**

**Judge**

**18/06/2018**