IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL NO.40 OF 2017

(Original Criminal Case No. 182 of 2015 of the District Court of Chato District at Chato before Hon. Kato Esq Resident Magistrate)

SIYAJALI S/O JUMANNE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Last Order Date: 19/02/2018

Judgment Date: 13/04/2018

JUDGMENT

MAKARAMBA, J.:

The Appellant, **SIYAJALI S/O JUMANNE**, is aggrieved by the decision of the District Court of Chato at Chato in **Criminal Case No. 182 of 2015** dated **03/03/2016** before **Hon. Kato, *Esq* DRM**. He has appealed against it before this Court on six grounds, which I propose to traverse in the course of this Judgment, and I shall therefore not set them out at the outset. In this appeal, the Appellant fended for himself unrepresented. He prayed that the grounds of appeal in the Petition for Appeal be entered and recorded as forming part of his submissions in chief. This Court duly granted the prayer and invited M/s Gisela Alex, learned State Attorney for the Republic to make a reply.

Briefly, the Appellant was arraigned before the District Court of Chato on a charge of rape contrary to the provisions of section **130(1)(2)(a)** and section **131(1)** of the **Penal Code [Cap.16 R.E 2002].** After the hearing, the Appellant was convicted and sentenced to thirty (30) years in jail. The prosecution alleged before the trial Court that, on **22/05/2015** at **20:00 Hrs.** while at **Isabilo Village**, a girl aged **14 years** (*whose identity cannot be revealed but will simply be referred to as **FD – the victim***) and her mother (**PW2**) went out for a video show where the Appellant was a **DJ.** It was alleged further that at **23:00 Hrs**. of the same date, she **(FD)** felt tired of watching video show and asked her mother to let her go back home, to which her mother agreed and she went back home alone. However, on her way back home the victim met with the Appellant who demanded to have sexual intercourse with her to which she refused. It is alleged that the Appellant forcibly undressed her underpants and had sexual intercourse with her without her consent for which she felt a lot of pain and she started crying. It is alleged that the Appellant threatened her with a piece of stick that if she continues crying, he will kill her with that stick. Thereafter she went back home and reported the incidence to her mother (*whose identity cannot be revealed but will simply be called **FL***). On the same night, her mother reported the incidence to the Village Chairman one **Makuke Kurambuka,** who arranged for some village "*sungusungu*" who successfully arrested the accused on the same night at around **00:00 Hrs.** They took the Appellant on a motorcycle to the Buseresere Police Station. While on their way to Buseresere Police Station, the motorcycle suffered a breakdown. The Appellant managed to

escape and they failed to re-apprehend him during that night. The "*sungusungu*" however, proceeded to the Buseresere Police Station and reported the incident. On **25/05/2015** the Appellant was arrested by Police Officers, was interrogated, and his Cautioned Statement was recorded. The Appellant was arraigned before the Chato District Court on a charge of rape, was convicted and sentenced to **30 years** in jail.

The first ground of appeal concerns the issue of consent and the age of the rape victim. It would appear that the rape victim was underage although there is no indication in the Court record of her exact age. The learned trial Magistrate proceeded with the matter on the assumption that the rape victim was **14 years of age**. Be it 14 years of age or otherwise the issue of the age of the rape victim was of no consequence in this case given that the charge against the Appellant had been brought under the provisions of **section 130(1) & (2) (a)** of the **Penal Code [Cap.16 R.E. 2002**] where the issue of the age of a victim of rape does not arise. It would have been an issue had the accused person been charged under the provisions of **section 130(2) (e)** of the **Penal Code Cap.**16 R.E. 2002 which provides that;

> *"130 (2). A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> .....
>
> *(e)* ***With or without her consent*** *when she is* ***under eighteen years of age****, unless the woman is his wife who is*

fifteen or more years of age and is not separated from the man."

The law in Tanzania under **section *130 (2)*** *of the* ***Penal Code Cap.16 R.E. 2002*** states very clearly that, where a male person has sexual intercourse with an underage girl **with or without her consent**, unless the woman is his wife who is **fifteen years** or more years and is not separated from the man, commits the offence of rape. This is what is popularly known as "**statutory rape**." The instant case does not fall under the ambit of **section *130 (2)*** *of the* ***Penal Code Cap.16 R.E. 2002,*** and therefore the issue of consent arises.

Since in the instant case, the Appellant was charged under the provisions of **section 130(1) & (2) (a)** of the **Penal Code [Cap.16 R.E. 2002**], the prosecution had to prove the essential ingredients of the offence of rape, namely; **penetration <u>and</u> no consent**, as it was lucidly exemplified in the decision of the Court of Appeal of Tanzania in the case of ***Moses Norbert Achiula v. R., Criminal Appeal No. 63 of 2012 (unreported)***. The Court sitting at Mbeya stated at page 8 of its Judgment citing with approval another decision of the Court of Appeal in ***Selemani Makumba vs. Republic, Criminal Appeal No. 94 of 1999*** (unreported) where the Court stated that:-

"True evidence of rape has to come from the victim, if an adult, that there was ***<u>penetration</u>*** *and* ***<u>no consent</u>*** *and in case of any other woman where consent is irrelevant that* ***<u>there was penetration</u>.*** *" (The emphasis is of this Court)*

On the authority of ***Moses Norbert Achiula v. R.*** *(above),* in a case of rape in any other case where consent is irrelevant, as in the instant case, the prosecution has to prove that there was penetration. In the instant case, according to the trial Magistrate the victim was a 14 year-old girl. If this is so, then the Appellant ought to have been charged under the provisions of **section 130(2) (e)** of the **Penal Code Cap.16 R.E. 2002** instead of **section 130(1) (2) (a) of the Penal Code [Cap.16 R.E. 2002]** under which consent is irrelevant and therefore it must be proved that there was penetration.

The issue is whether the prosecution managed to establish the essential ingredients of the offence of rape under **section 130(1) (2) (a) of the Penal Code [Cap.16 R.E. 2002]** beyond any reasonable doubt. In the instant case, the prosecution had to prove that there was penetration, that is, whether the Appellant had carnal knowledge of the victim. It is now settled law as per the decision of the Court of Appeal of Tanzania in the case of ***Abdallah Manyamba v. R., Criminal Appeal No. 126 of 2005 (XAT)(Mtwara)(unreported)*** where the Court stated at page 4 of the Judgment that; *"penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence."*

As per the evidence of **PW1 (the Victim)** on **22/05/2015** at **22:30 Hours** while on her way home from watching a video show, she met with the accused person who demanded to have sexual intercourse with her, to which PW1 refused. The Appellant forcibly undressed the victim's underpants and had sexual intercourse with her without her consent. That, **PW1** raised alarm but the Appellant threatened her that he

will kill her using a piece of stick that he was brandishing if she continues raising alarm. **PW1** claims that she felt a lot of pain during the act of forced sexual intercourse on her by the Appellant. **PW1** was medically examined and according to the **Medical Doctor (PW7)** who examined her, sperms, bruises and blood were found in her vagina. According to the **PF3,** some bruises and sperms were seen in **PW1's vagina,** which proves that there was penetration.

There is also the evidence of **PW4,** a Police Officer with **Force No. E:4265, D/CPL Jishosha** who interrogated the Appellant and that the Appellant told him (PW4) that he (the Appellant) had fell in love with **PW1** for a long time period and had sex with her on several occasions including on the fateful night. On her part, **PW1** stated that she knew the Appellant a long time ago because he had a love affair with her friend. **PW1** stated further that, even on the material day she saw the accused person at the video show where the accused person was a DJ. **PW1** stated further that, she properly identified the Appellant to be the person who had raped her on the material night. On the evidence on record, this Court finds as indeed the trial Court found, that on **22/05/2015** at **Isabilo** Village the accused person had carnal knowledge of the accused person. The issue however is whether the victim consented to the sexual intercourse.

According to **PW1**, the Appellant had sexual intercourse with her without her consent because she was threatened by a piece of stick the Appellant was holding and that he will kill her if she continues screaming. **PW2** stated that, immediately after **PW1** had reported the incident to her, the victim named, **Siyajall Jumanne**, (the Appellant) as the person who

had raped her. **PW2** stated further that after having asked the Appellant about the incidence, the Appellant admitted to having sexual intercourse with **PW1** since she was her fiancée.

According to **PW3**, the **Hamlet Chairman**, the Appellant alleged that the victim was her fiancée and that he has had sexual intercourse with her on several occasions. According to **PW4,** E.4265 **D/CPL Jishosha**, after having interrogated the Appellant, the Appellant stated that, **PW1** consented to have sexual intercourse with him. That the Appellant told **PW4** that, **PW1** was her fiancée and that they had a longtime love affair. **PW4** produced before the trial Court the Cautioned Statement of the Appellant, which was admitted in evidence as **Exh.P1,** wherein it is shown that, the Appellant fell in love with PW1 and that PW1 had consented to have sexual intercourse with the Appellant.

In reply, M/s Gisela stated that, the **PF3** and the testimony by **PW7** show that there were bruises on the victim's private parts thus exemplifying lack of consent.

On the evidence on record and particularly the testimonies of **PW2**, **PW3** and **PW4,** this Court finds that, **PW1** and the Appellant were lovers and had engaged in a longtime love affair. It seems that the trial Court convicted the Appellant/Accused person on the basis of the argument that, **it was an offence for the accused person to have sexual intercourse with an underage girl (below the age of majority).** According to the learned trial Magistrate, **PW1** was **14 years** old hence the accused had committed statutory rape. With due respect to the learned trial Magistrate, it is not clear to this Curt as from which evidence the

learned trial magistrate unearthed the fact of the victim being of 14 years of age. Apparently, the record shows that the learned trial Magistrate even mistakenly conducted a *voire dire* test before receiving in evidence the sworn testimony of PW1 although she was not below the apparent age of 14 years for which the law requires the conduct of a *voire dire* test.

In any event as I have pointed out earlier in this Judgment, the Appellant was not charged under the statutory rape provisions in the Penal Code but under the provisions which require consent as one of the essential ingredient of the offence of rape. The prosecution therefore ought to have proved lack of consent. On the evidence by **PW2, PW3, PW4** and the **Cautioned Statement of the accused** (**Exh.P1**), it is highly doubtful if indeed the Victim did not consent to have sexual intercourse with the accused person.

It is for the above reasons, the first ground of appeal is hereby allowed.

In the second ground of appeal, the Appellant stated that, the victim and her witnesses were relatives. According to the Appellant, the prosecution could have summoned independent witnesses to corroborate the victim's evidence. In her reply, M/s Gisela stated that, the Village Chairman, the Police Officer and Medical Doctor who corroborated the victim's evidence do not have direct relationship with the victim. M/s Gisela was of the view that, the second ground of appeal lacks merits and prayed that the same be dismissed.

I am at one with the submissions of M/s Gisela that the second ground of appeal is bereft of any merits. In establishing its case against the

accused, the prosecution called seven (7) witnesses namely; the victim **(FD)** as **PW1**, the victim's mother (**FL**) as **PW2**), **Makuke s/o Kurambuka** as **PW3**, **E:4265 D/CPL Jishosha** as **PW4**, **Daud Machunde** as **PW5**, **Inspector Isunja as PW6** and **Doctor Anthony Magambo** as PW7. Of the seven (7) prosecution witnesses, only PW1 and PW2 are relatives but the rest are not. **PW2** was a crucial witness because in relation to PW1 she played the following roles; first she is the mother of the victim, secondly, she was living with PW1 and thirdly, it was to her PW1 first reported the rape incidence, and fourthly, she is the one who then reported about the rape incidence to the Village Chairman. These roles will make PW2 even though she was the victim's mother a competent and compellable witness since she had crucial evidence about the alleged rape offence. The question of partisan witnesses does not therefore arise in this case. This will make the second ground of appeal to be devoid of merits. It is accordingly dismissed.

The third ground of appeal was on the conduct of the victim before and after the event which the Appellant argues that it does not indicate or reflect any rape offence. In reply M/s Gisela stated that, in convicting the Appellant, the trial Court concentrated on the evidence of the victim being carnally known without her consent. There is no evidence on record before the trial Court, to support this ground of appeal. The only fact on the conduct of PW1 before the event as evident at page 7 of the typed proceedings of the trial Court is that, before the accused took her to the bush, they had stood for a long time, although it is not stated why they

were doing in the long they stood together. This will make the third ground of appeal to lack in merits. It is accordingly dismissed.

In the fourth ground of appeal, the Appellant stated that, the trial Court based its decision on the evidence of **PW7**, a Medical Doctor, without having shown his medical qualification. According to M/s Gisela, it is true that, the evidence of **PW7** as at page 16 of the typed proceedings of the trial Court shows that the Medical Doctor, **PW7**, graduated as a Medical Officer and had eight (8) years of experience having worked since **2008**. PW7 was therefore competent to examine the victim for the rape offence. It is for that reason; the fourth ground lack in merits. It must be dismissed.

In the fifth ground of appeal, the Appellant maintains that the Cautioned Statement was wrongly recorded beyond the prescribed time limits. M/s Gisela replied that, such objection was an afterthought since the accused did not object to the Cautioned Statement when it was being tendered and admitted in evidence before the trial Court. Alternatively, M/s Gisela submitted that, if this Court finds that the Cautioned Statement of the accused was recorded contrary to the prescribed time, to expunge it from the record, and remain with the evidence of PW1 under oath that she was sexually known without her consent.

This Court being a first appellate court has powers to go through the evidence and the record of the proceedings of the trial Court so as to satisfy itself as to whether the evidence was properly received before the trial Court and evaluated. In case of any discrepancies in receiving the evidence by the trial Court, this Court has powers to correct them, and if

necessary even to expunge them from the Court record. In this case, it is not disputed that, **PW4** arrested the accused person on **25/05/2015**. The Cautioned Statement was recorded on **26/05/2015** from **8:20 Hours**. It is not indicated when recording the Cautioned Statement ended. This is fatal. The law requires that the time the Cautioned Statement begun to be recorded and the time its recording ended is to be indicated thereat. Furthermore, there has been no explanation on record as at what time of the day on **25/05/2015** the accused was arrested. The accused was arrested on **25/05/2015.** His Cautioned Statement was recorded on **26/05/2015**, being the next day following his arrest. Clearly the Cautioned Statement was recorded beyond the legally prescribed time period of **four (4) Hours** commencing at the time when the accused was taken under restraint in respect of the offence as mandatorily required under section ***50(1)(a) of the Criminal Procedure Act [Cap.20 R.E 2002].*** There are no recorded reasons as to why the Police failed to record the Cautioned Statement of the Appellant within the legally prescribed period of four hours. There is also no any evidence on record if the prescribed period of time was extended as per section 51 of the ***Criminal Procedure Act, Cap.20 R.E. 2002.*** The legal consequences for non-compliance with the provisions of section 50 of the ***Criminal Procedure Act, Cap.20 R.E. 2002*** have been amply stated by the Court of Appeal of Tanzania in its decision in the case of ***Pambano Mfilinge v. R., Criminal Appeal No. 283 of 2009***, where the Court sitting at Iringa stated at page 8 of its Judgment that;

"....the non-compliance vitiated the particular cautioned statement. To this end, we are left with no other option than to expunge the cautioned statement from the record."

In light of the binding authority in the above cited decision of the Court of Appeal of Tanzania in ***Pambano Mfilinge,*** the Cautioned Statement of the Appellant which was admitted in evidence by the trial Court as **Exh.P1** is hereby expunged from the Court record for having been recorded in contravention of the mandatory provisions of section ***50(1) (a) of the Criminal Procedure Act [Cap.20 R.E 2002].***

Rather curiously, the Cautioned Statement (**Exh.P1**) also contains the initials of someone going by the name of **Siyajali Ruckas** who no longer was an accused before the trial Court. The accused person, the Appellant herein goes by the name of **Siyajali Jumanne**. This will therefore make **Siyajali Ruckas** and **Siyajali Jumanne** to be two different persons. Before the trial Court, it was not established if **Siyajali Ruckas** and **Siyajali Jumanne** refer to one and the same person.

It is for the above reasons; this Court finds that, the **Cautioned Statement** (**Exh.P1**) was fatally defective in material content and ought not to have been admitted in evidence. The Cautioned Statement therefore remains expunged from the Court record.

In the sixth ground of appeal, the Appellant stated that the prosecution did not prove the case against him beyond reasonable doubt. I am at one with the Appellant on this score. There are other discrepancies in the case which make for doubts against the prosecution's case. In the

Charge Sheet it is shown that, the offence was committed at **Ilyamchele** Village within Chato District in Geita Region. However, in their testimonies before the trial Court both **PW1** and **PW2** stated that, the offence was committed at **Isabilo** Village within Chato District in Geita Region. This therefore has created a contradiction as to where exactly the alleged offence was committed.

Another notable discrepancy in the case comes from the testimony of **PW1** where she stated that, her mother (**PW2**) reported the incidence to the Village Chairperson (**PW3**). This evidence finds support from the testimony of PW2 that, she reported the incidence to the Village Chairperson. However, in his testimony **PW3** stated that, he was the **Hamlet Chairperson** (*Kitongoji* Chairman). **PW3** stated further that, on the fateful night at about **00:00 Hrs** PW2 reported her daughter's rape incidence to him. This creates contradiction as to whom exactly PW2 reported the incidence, thus making for more doubts on the prosecution case.

It is a trite principle in criminal law that the benefits of doubts in the prosecution case have to be resolved in favour of the accused. This trite principle was amply emphasized by the Court of Appeal of Tanzania in its decision in the case of ***Bigara Kiguru v. Republic, Criminal Appeal No. 153 of 2011 (unreported)***, where the Court sitting at Mwanza stated at page 9 of its Judgment that;

> *"It is trite law that in a criminal case, the standard of proof has to be beyond all reasonable doubt. The implausibilities in the*

prosecution case coupled with the appellant's defence have created serious doubts on the guilt of the Appellant. The benefits of those doubts ought to have been given to the Appellant."

Considering the discrepancies and implausibilities in the prosecution case as I have endeavored to explain herein above, coupled with the Appellant's defence, have created serious doubts on the prosecution case. The doubts have to be resolved in favour of the Appellant.

In the upshot, the appeal is hereby allowed to the extent as explained herein above.

The conviction and sentence in *Criminal Case No. 182 of 2015 of the District Court of Chato District at Chato before Hon. Kato Esq Resident Magistrate)* are hereby quashed and respectively set aside.

The Appellant, **Siyajali s/o Jumanne**, is hereby discharged from the offence of rape with which he stood charged and convicted.

The Appellant **Siyajali s/o Jumanne** shall immediately be released from imprisonment and set at liberty forthwith unless he is being otherwise lawfully held. It is so ordered.

.....

R.V. MAKARAMBA

JUDGE

13/04/2018