

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CRIMINAL APPEAL NO 57 OF 2018

(Original Criminal Case No 890 of 2016, of Temeke District Court at Temeke)

ABDALLAH HASSAN HAMISI @ MPEMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 5/9/2018

Date of Judgment: 19/9/2018

Munisi, J.

The appellant, Abdallah Hassan Hamisi @ Mpemba stood arraigned before the District Court of Temeke for the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 RE 2002. It was alleged that on diverse dates in November, 2016, at Mtoni kwa Aziz Ally area in Temeke District within Dar es Salaam Region, appellant had carnal knowledge of a girl named Fatuma Hassan aged 7 years old. At the conclusion of the trial, the court found the appellant guilty of the offence charged and sentenced him to the statutory punishment of 30 years imprisonment. The present appeal comprised of 9 grounds of

appeal challenges the finding. The main areas of complaint include:

- Irregular voire dire
- Lack of sufficient and credible evidence to support the conviction
- Reliance on the weakness of the defence

On 5/9/2018 when the appeal was called on for hearing, the appellant appeared in person unrepresented and prayed to adopt the grounds set out in his petition of appeal. On its part, the respondent/Republic was being represented by Miss Veronica Mtafya, learned State Attorney.

In response to the grounds of objection made against the conviction, Miss Mtafya, learned State Attorney responded that they had no merit on the main ground that the evidence was overwhelming. She supported the conviction entered and the sentence meted on the appellant arguing that the evidence of PW1, the victim of the alleged rape was sufficient to support the conviction. She thus prayed for the appeal to be dismissed.

I have considered the grounds of objection made by the appellant together with the response made by the learned State Attorney together with the contents of the record of the trial court. It appears that the trial magistrate was impressed by the testimony of PW1 that she was indeed raped on the fateful day. Having quoted in extenso the provisions of section 127(7) of the Evidence Act, the learned magistrate concluded:

"Therefore, being guided with the provisions of the law this Court finds that the evidence of PW1 though taken without oath but it holds water and accused person is hereby convicted"

The provisions of section 127(7) relied upon by the magistrate are indeed clear that evidence of the victim of sexual assault could be relied upon solely to ground conviction if it is found credible. In that regard, the finding by the magistrate would be proper in law only if PW1's evidence was credible and it contained the requisite details to justify the findings. It is settled law that in rape cases, the evidence of the victim is the best evidence to prove the offence of rape, see the cases **Selemani Mkumba V Republic, Criminal Appeal No 94 of 1999** and **Ally Mkong'oto V Republic, Criminal Appeal No 133 of 2009** (unreported). The Court of Appeal has also in a number of its decisions insisted that victim of rape should give clear account of how the rape took, see the case of **Mathayo Ngalya @ Shabani V Republic, Criminal Appeal No 170 of 2006** (unreported). The question is whether PW1's account of how she got raped met the said standard. With regard to what befell her on the fateful day, she told the court that:

"...PW1 identified the accused person herein court that he has shop near her house and her mother send her to buy pampers to his shop. (sic) PW1 stated that one day when I was back from school my friend Angel asked me whether I knew accused I replied that I knew him. On the second day when were back home Angel told me to go to greet

accused person and accused person gave us Tsh. 1,000/= to go to buy chips and we passed to accused person four times and he gave us Tsh. 1,000/= to go to buy chips. On the first day I passed there and accused called me to his shop I went there and accused send me inside of his shop and refused Angel to come. PW1 stated that in the accused shop accused removed my pants and removed his trouser then he inserted "mdudu wake" penis into my private parts (sehemu yangu ya kukojolea) PW1 told the court that by the time accused did rape me shop was opened and no any person passed there. PW1 testified that accused ordered me to sleep by using (alinilaza chali) PW1 stated that after finished I put on my clothes and went outside and met my friend Angel who told me that she went to tell teacher. Angel on the following day told teacher that yesterday one person took PW1 inside and inserted his penis to her..."

I have keenly pondered over the above account and wondered what exactly happened. Admittedly, my close reading of PW1 left me with more questions than answers. It is inconceivable to me how a 7year old could be raped in such simple way without any complaint of pain or discomfort and once through put on her clothes and move on with her errands as if nothing had happened. I have no doubt a seven years girl is a child of tender years who cannot withstand the violent act of rape by a 21 years old young man and survive the act unhurt and put on her clothes and walk out of the shop. The doctor who examined her did not observe any sign of violence on her private parts. PW3 who

allegedly was with PW1 said she witnessed the alleged rape however it is unclear how she saw what was going on inside the shop after PW1 was taken inside. I thus found very suspect the evidence of PW1 which leaves a lot to be desired for a baby of her age. Further the teacher who was informed by Angel of the happening did not even turn up in court to testify what she was told nor the mother who according to PW2 was with the victim on 24/11/2016 when she took over investigation. To say the least, I am not impressed by the evidence of PW1 as a witness of truth.

In addition to the above concerns, there are other pieces of evidence that creates doubts, if indeed PW1 was raped and the information was passed on to the teacher on the same day or the next day, why was the date of the alleged rape unknown? Why didn't the teacher testify? Why did Angel (PW3) decide to inform the teacher instead of the mother? Why was PW1 taken to Hospital on 22/11/2016 if the date of rape was unknown? If PW2 is telling the truth about the date she interviewed PW1 and her mother, who is telling the truth regarding the date PW1 was taken to hospital. PW1 said the appellant raped her only once, under the circumstances, it is unclear why was the charge sheet couched in the manner it did i.e. '**on diverse dates**,' I have no doubt such phrase would have prejudiced the appellant's defence and deny him a fair trial. As the answers to all the questions are unclear, the doubts should be resolved in favour of the appellant which I hereby do and found that the case was not proved to the required standard.

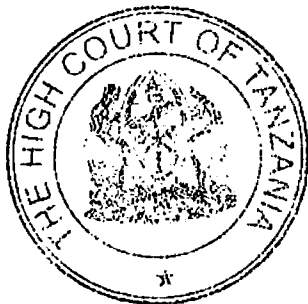
Consequently, I find the appeal with merit and I allow it. Accordingly, I quash the conviction, set aside the sentence imposed together with the order thereto and direct the appellant to be released from prison forthwith unless otherwise lawfully held.

It is so ordered.




A. Munisi
Judge
19/9/2018

Judgment delivered in Chambers in the presence of the appellant in person and in the presence of Mr. Justus Ndibalema, learned State Attorney for the respondent/Republic, this 19/09/2018.




A. Munisi
Judge
19/9/2018