IN THE HIGH COURT OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 32 OF 2019

(Originating from Criminal Case No. 67 of 2018 of Muheza District Court)

ALLY MSUYA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

MKASIMONGWA, J.

The appellant one Ally Msuya, stood before Muheza District Court charged with two counts as follows:

1st count: Rape contrary to Sections 130 (1) (2) (e) and 134 (1) of the Penal Code [Cap. 16 R.E 2002]

The Prosecution alleged that:

"That Ally s/o Msuya is charged on 25th day of June, 2018 at about 12.00 hours at Tengeni village within Muheza District in Tanga Region did have carnal knowledge with one Faudhia d/o Jafari a girl of aged 8 years".

2nd count: Indecent Assault on female contrary to section 135(1) and (2) of the Penal Code [Cap. 16 R.E. 2002]

It was alleged before the court that:

"That Ally s/o Msuya is charged on the 25th day of June, 2018 at about 12.00 hours at Tingeni Village within Muheza District

in Tanga Region did unlawfully indecently assault one Faudhia d/o Jafari a girl aged 8 years to wit he touch (sic) her vagina with his male genital organ'.

After a full trial of the matter whereas the accused (Appellant) was found not guilty of the first count a result of which he was acquitted he was found guilty hence convicted of the second count. He was sentenced to pay a fine of Tshs. 300,000/= or serve three years imprisonment, in default of the fine. The Appellant paid the fine. Having been aggrieved with both the conviction and sentence, the Appellant preferred this appeal a petition of which lists six grounds. Going by the grounds, it is evident that the appeal is mainly based on the allegation that the Respondent Republic failed to prove the case beyond reasonable doubt.

To have a clear facts of the case let them be briefly stated hereunder as they can be comprehended from the evidence adduced by the prosecution. They are as that: Fauzia Jafari (PW2) is a primary school student studying at Tingeni Primary School to which the Appellant was the Head Teacher. The appellant and Sauda Juma (PW1), Fauzia Jafari's mother, are neighbours. On 25/6/2018 at 11.00am an unmentioned Fauzia's aunt sent Fauzia to the Appellant's home so that she collects her mobile phone. According to PW2 at the home she met the Appellant mopping cleaning the house, and that the later asked her to go collect the phone from his bed room. In the bed room, the Appellant caught PW1. He further stripped off her under pants and raped her, in which act the Appellant did ejaculate. After being released by the appellant, PW2 proceeded back home where she reported the incident to PW1. Upon being

asked by PW1 of the allegation leveled by PW2 the Appellant denied to have raped the girl. PW1 washed clean PW2 by hot water and on 26/06/2018 the incidence was reported to the Police Station where they were provided with a PF3. With the victim, PW1 and Hemed Juma Shabani (PW3) (Fauzia's father) proceeded to Muheza Designated District Hospital where according to (PW3) the victim was admitted for three days. At the hospital PW1 was attended by Anna S. Kimea (PW5), the Assistant Medical Officer. Upon examining the victim, PW5 found her with intact hymen and anus; no any discharges from both anus and vagina; no bruises. PW5, however, detected the private part swollen and was of the view that, that could be a result of washing the parts with hot water. She eventually opined that there was no proof of penetration of any object on the vagina from which evidence the trial Court found the offence of rape had not been proved.

On the date the Appeal came for hearing, before me, there appeared Mr. Hassani Kilule (Adv) and Ms. Kayuni (SA) representing the Appellant and Respondent, respectively. In arguing the appeal the learned State Attorney hastened in supporting the Appeal. She said that rape was not proved as the "penetration" element of the offence was not proved. She added that the evidence adduced does not support even the second count the appellant was facing in Court. She was about to be tempted to ask the Court that it finds the Appellant guilty of Grave Sexual Offence Contrary to Section 138C of the Penal Code [Cap. 16 R.E 2002]. However the prosecution did not call an important witness who had been referred to by PW1, PW2 and PW4 in their testimonies as "Aunt". The witness could have

cleared the doubt: whether or not she sent the victim to the Appellant's home, and the time taken by the victim when she went to collect the phone. Ms. Kayuni left the matter to the Court for it to decide.

On the other hand Mr. Kilule recommended the learned State Attorney for exhibiting professional maturity. He prayed the Court based on what was stated by the learned State Attorney and the grounds of Appeal the Appeal be allowed, the conviction be quashed and the sentence be set aside.

I have considered the submissions along with the record. When one reads the particulars of the offences with which the Appellant stood charged, it is clear that the Appellant was charged with two offences emanating from one and single act. This certainly could have led to accused person being punished twice for one and the same act which a situation is curbed by the provisions of Section 21 of the Penal Code [Cap.16 R.E 2002] which reads as follows:

> *"A person shall not be punished twice either under the provisions of this code or under the provisions of any other law to be"*

To be safe from the effects of the above provisions of the law, where one does or refrains to do an act which constitutes two or more offences, the offences should be charged in the alternatives. As the accused/appellant was suspected of committing an act which constituted two offences, it was not proper when the offences were charged together and not in the alternative.

That apart, I have considered the evidence adduced by the prosecution in respect of the offence under the second count. The offence is established under section 135 (1) of the Penal Code [Cap. 16 R.E. 2002]. The section reads as follows:

> *"Any person who with intent to cause any sexual annoyance to any person utters any word or sound, makes any gesture or exhibits any word or object intending that such word or object shall be heard or the gesture or object shall be seen by that other person commits an offence of sexual assault"*

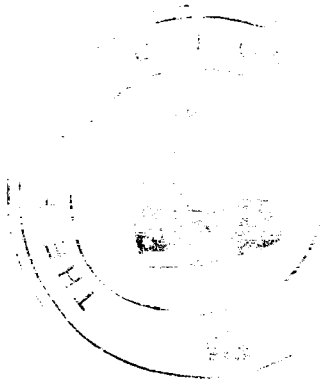
From the above provision of the law, the offence established under it, has the following elements:

1. A person with intent to,
2. Cause any sexual annoyance to any person,
3. Utters any word or sound or makes any gesture or exhibits any word or object,
4. Intending that such word or object shall be heard or the gesture shall be seen by that other person.

In the case under this section, the prosecution must prove the above elements beyond reasonable doubt. Upon considering the evidence on record, it is clear that the evidence parts way with the elements in which case, I will join hand with Ms. Kayuni, learned state attorney that the available evidence, did not prove beyond reasonable doubt the charges leveled against the Appellant, which again was the complaint by the Appellant in the Appeal.

Since, the charge was not proved beyond reasonable doubt it was not proper when the trial court made the proceedings above. I will therefore allow the appeal, quash the conviction and set aside the sentence imposed. It is ordered that the fine paid by the Appellant shall be refunded to him.

Dated at Tanga this 12th day of May, 2020.



E. J. Mkasimongwa

JUDGE

12/05/2020