

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 19 OF 2020

*(Originating from Criminal Case No. 290 of 2017 in the District Court of Kilombero at Ifakara
passed by Hon. N. R. Bigirwa (RM) dated 28th November, 2018)*

EMMANUEL KAVIRA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 04/06/2020

Date of Judgement: 16/07/2020

MLYAMBINA, J.

The main issue that has been ventilated before this court at this appeal stage is: *whether the judgement of Hon. N. R. Bigirwa (RM) in Criminal Case No. 290 of 2017 in the District Court of Kilombero at Ifakara dated 28th November, 2018, properly qualifies to be termed a "Judgement"*.

In view of the Senior State Counsel Credo Rugaju, the impugned judgement is not a judgement at all. It is a *replica* of the prosecution witnesses' evidence without proper and critical evaluation and analysis of the evidence.

Before going into details, the brief facts of the case are that, the appellant, was charged with an offence of Rape contrary to *Section*

130 (1) (2) (e) and 131 of the Penal Code and sentenced to serve 30 years imprisonment. Being aggrieved, the appellant lodged this appeal on the following seven grounds:

1. That, your honorable judge, the learned trial Magistrate's judgment was faulty as, it was a mere *replica* of the prosecution witnesses' evidence without a proper and critical evaluation and analysis of the evidence hence arriving at an erroneous decision as:
 - i. It failed to comply with the provisions of *Section 312 (1) of Criminal Procedure Act (Cap. 20. R.E 2002)* at it lacked points of determination.
 - ii. The accused defence was not considered and reasons for not doing so were not assigned hence arriving at an erroneous decision
2. That, the learned trial Magistrate erred in law and fact by convicting the appellant relying on the incredible, implausible and improbable evidence of PW2 as:
 - i) It is not improbable and defects reasoning for a girl aged 6 years to bear a penis of a male aged 48 years inserted into her vagina and not feel pain at the time the act is taking place nor make or attempt to shout/cream as her evidence is silent.

- ii) Her evidence failed to disclose how the alleged offence was detected, whether she was bleeding or not and the events that took place after detection of the alleged offence.
 - iii) Her evidence failed to mention whether she was taken to hospital and the precise day she was taken if such an event took place.
3. That, the learned trial Magistrate erred in law and fact by convicting the appellant in a case that was poorly investigated and prosecuted as:
- i) The prosecution failed to summon material witnesses;
 - a) Village Chairman.
 - b) Arresting Officer (s) and
 - c) Investigator failed to adduce evidence of how the appellant was arrested and linked to the alleged offence.
 - ii) There is no investigatory evidence led to show the investigator or any other prosecution witnesses visited the *locus in quo* to ascertain that it is where the incident took place as described by PW1.
 - iii) No plausible explanation was given by the prosecution for delay of five (5) months from the day he was arrested till finally being arraigned in court.

4. That, the learned trial magistrate erred in law and in fact by believing the contradictory, incredible and unreliable evidence of PW1, PW3 and PW4 regarding:

- i) The date PW1 was taken to hospital for checkup.
- ii) Sperms in her private parts.

5. That, the learned trial Magistrate erred in law and fact by believing on the oral evidence of incredible witness PW4 (Doctor) and un-procedural tendered and admitted exhibit PE 1 (PF3) to convict the appellant as:

- i) This witness did not mention his credentials or qualifications in order to prove that he is a qualified Doctor.
- ii) Exhibit PE1 (PF3) was un-procedurally tendered by the Public Prosecutor contrary to procedure.
- iii) Exhibit PE1 (PF3) was not read aloud in court after being admitted in court, hence denying the appellant his right to know its contents.
- iv) His oral evidence didn't show what caused the bleeding and bruising.
- v) Its oral evidence didn't state whether witness (PW1) hymen was intact or not.

6. That, the learned trial Magistrate erred in law by failing to comply with the following provisions of law:

- i) *Section 231 (1) Criminal Procedure Act (Cap. 20, R.E):* The appellant was not given right to give his evidence on oath/not on oath, affirmation or call witness.
- ii) Substance of charge was not explained again before the appellant entered his defence.
- iii) *Section 210 (3) Criminal Procedure Act (Cap 20. R.E 2002)* after recording the evidence of the prosecution and defence witnesses.

7. That, the learned Trial Magistrate grossly erred in holding that the prosecution proved its case against the appellate beyond reasonable doubt as charged.

Whereof, the appellant prayed that the conviction and sentence be quashed, set aside and the appellant be acquitted.

At the hearing, the appellant being a layman, simply asked the court to go through his grounds of appeal and grant his prayers.

The appeal was supported by Senior State Counsel Credo Rugaju.

To start with the first ground of appeal, the impugned judgement, in my mind, as observed by Mr. Rugaju leaves much to be desired as to whether it is a judgement or a typical narration of evidence.

It does not need a great curiosity to discover that the learned trial Magistrate did not pick and apply the requirements of *Section 312 (1) of the Criminal Procedure Act* when composing his judgement.

Section 312 (1) (supra) provides for the content of judgement. It states:

312 (1) Every judgement 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 super intendance 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. [Emphasis Applied].

The significant features to be gathered in Section 312 is that a judgement worth of its meaning must apart from the brief facts of the case, contain: **One**, the point or points for determination (Legal Issues). **Two**, the decision thereon. **Three**, the reasons.

As properly argued by Mr. Rugaju, the impugned decision has four pages. In the first page, there is brief facts of the case. Then, there is evidence of PW1 which goes to page 2, then the evidence of PW2, PW3 and PW4. At page 3 first paragraph the judgement repeats the defence evidence. It is a *replica* of evidences. There is neither point for determination nor analysis and findings of the

court which could lead to the impugned decision. The Magistrate never did evaluation and analysis of the evidence.

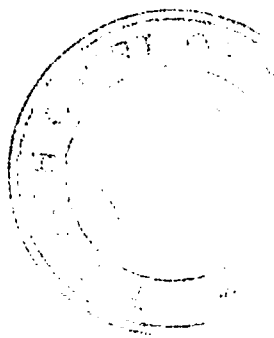
It is clear from the record, the offence charged against the appellant involved a minor but the age issue was not considered at all in the impugned judgement. As such, the appellant was denied to know the basis of conviction. In the case of **Shija Massawe v. R**, *Criminal Appeal No. 158 of 2007* Court of Appeal of Tanzania at Dar es Salaam, (unreported) the Court of Appeal of Tanzania explained with emphasis on the point for determination, evaluation and analysis.

Again, the age was not proved. PW4 was a Doctor he cannot prove age. In the case of **Mario Athanas Sipenga v. The Republic**, *Criminal Appeal No. 116 of 2013* Court of Appeal of Tanzania at Mtwara at page 9-10 (un-reported) stated:

Clear evidence has to be led to establish the age of the victim of sexual offence.

The fact that the age was not proved, the charge remained unproved beyond reasonable doubt.

In the circumstances of the above, I find this appeal has merits. The conviction and sentence meted against the appellant are quashed and set aside. I order the appellant be acquitted forthwith till when held under lawful cause. Order accordingly.



Y. J. MLYAMBINA

JUDGE

16/07/2020

Judgement pronounced and dated 16th July, 2020 in the presence of the Appellant in person and Senior State Attorney Credo Rugaju for the Respondent.



Y. J. MLYAMBINA

JUDGE

16/07/2020