IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC. CRIMINAL APPEAL NO. 12 OF 2019
(Originating from Mufindi District Court at Mafinga in Criminal Case No. 91 of 2016)

MARCO MBEGASI ---------- APPELLANT

VERSUS

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

JUDGMENT

KENTE, J

The appellant Marco Mbegasi appeared before the District Court of Mufindi where he was charged with rape contrary to section 130 (1) (2) (e) 131 (1) both of the **Penal Code 16 RE 2002.** After a full trial, he was convicted and sentenced to thirty years imprisonment. Dissatisfied with the said conviction and sentence he has appealed to this court citing the following grounds of appeal, thus:-

1. *The trial Magistrate grossly erred in point of law and facts by convicting the appellant relying and depending on the evidence of PW1 (victim) without take into consideration that her evidence was not corroborated with any eye*

witness who alleged to have assisted her when the incident took place at the first time.

2. *The trial magistrate erred in point of law and facts when convicted the appellant in mere believing the evidence of PW2 (mother of the victim) without considering that he evidence was mere hearsay who only heard what she (PW2) told by PW1.*
3. *The trial magistrate grossly erred in point of law and facts when convicted the appellant in mere believing the evidence of PW2 that she (PW2) was called by VEO and VEO informed her that the accused/appellant (her husband) wanted to rape Salome (PW1) the VEO gave PW1 letter and headed to Police Station, since her evidence needed corroboration, due to the facts the said VEO was not summoned by the prosecution side in court as a witness in order to testify her allegation but no explanation from the prosecution side as to why they failed to call him/her to probe that point.*
4. *The trial Magistrate erred in points of law and facts when convicted the appellant in mere relying and depending on*

exhibit (Police Form No. 3) of PW1 which tendered in court by PW3 (Doctor) who didn't discover any sexual diseased but he (PW3) mere observed is the absence of hymen to the victim.

Before this court, the appellant appeared in person fending for himself while the respondent the Republic was represented by Ms. Nungu learned State Attorney. When he was called upon to expound on his grounds of appeal, the appellant requested for the learned State Attorney to set the ball rolling so that he could himself make submissions in reply thereto.

To start with, Ms. Nungu told this court that, in a bid to prove its case the prosecution side was bound to receive the evidence of a child of a tender age according to law. The learned State Attorney submitted and correctly so that, in this case, the provisions of section 127 (2) (3) of the **Evidence Act** as amended by the **Miscellaneous Amendment Act No. 4 of 2016** were not complied with and as a result, the evidence of the said child namely who was a minor then aged 13 years who testified as PW1 had no evidential value, unless otherwise corroborated by some other independent evidence. She cited the case of **Godfrey Wilson V.**

Republic, Criminal Appeal No. 24 of 2017, Court of Appeal of Tanzania at Bukoba (unreported) in support of her legal proposition.

Going forward, the learned State Attorney submitted to the effect that, the evidence of Stela Kinayavene (PW2) goes to support or otherwise corroborate the evidence of PW1. Notably, PW2 had told the trial court that, on 16th March 2016 she was called by a Village Executive Officer who told her that her husband (the appellant) had sort of attempted to rape PW1. She went on telling the court that, the Village Executive Officer gave her a letter referring them to the Police Station where they were given a Police Form No. 3 referring PW1 to hospital for a medical examination. She said that upon examination, the doctor (one Dr. Innocent Mhagama, PW3) told them that indeed PW1 had been raped and when she asked PW1 as to who had raped her, PW1's reply was that it was the appellant. According to the learned State Attorney, the above evidence adduced by the prosecution was sufficient enough to ground a conviction. Thus, she implored this court to find that the case against the appellant had been proved beyond reasonable doubt and therefore the present appeal has no merit. She implored me to dismiss it.

Submitting in reply, the appellant maintained in the first place that there was no proof that PW1 had indeed been raped. This is because,

according to him, on being examined, PW1 was found to have neither bruises nor semens on her private parts. Moreover, the appellant faulted the trial Magistrate for allegedly making a wrong finding that PW1 had been raped simply because she was found to have no hymen. He reasoned that, it is not only an act of rape that causes a female person to have no hymen. He also challenged the trial Magistrate for believing the evidence of PW2 which he said was pure hearsay evidence. Finally, the appellant complained that this was a case of a frame-up by his wife after they had fallen into serious matrimonial disputes as she was accusing him of having some extra-marital relationships. He said that, following the said dispute PW2 had vowed to teach him a lesson, hence the present case. He went on saying that, after the case was lodged in court and apparently upon reflection, PW2 sought to have the same withdrawn but all in vain as the trial magistrate told her that it was too late for her to cause the case to be withdrawn and that, after he was convicted and sentenced, PW2 committed suicide. He urged this court to look into this appeal very closely saying that, PW2 had promised to fix him so that she (PW2) and another woman who was his (appellant's) lover would end up bieng all losers. The appellant told this court that, after discovering that she had made a blunder and when the case was still pending in court, she sought to stand

as surety for him but the trial Magistrate remained steadfast saying that she could not stand as surety in a case in which she was both a complainant and witness.

I have paid due consideration to the submissions made by both parties herein. I have as well sought to analyse the evidence touching upon the appellant with the attendant assiduity. In the first place, I entirely agree with Ms. Nungu learned State Attorney that, indeed, the failure by the trial Magistrate to comply with the mandatory provisions of section 127 (2) (3) of the **Evidence Act** as amended by **Miscellaneous Amendments Act No. 4 of 2016** vitiates the evidence of PW1 as to render it almost valueless. I also agree that in the circumstances, the said evidence ought to have been materially corroborated.

However, I do not subscribe to the position taken by the learned State Attorney that the evidence of PW2 had the required quality of corroborating PW1's evidence in this case as I will hereinafter explain why. As it can be seen from the evidence on record, and going by the appellant's complaints which were not materially controverted, PW2 was a witness who seems to have had her own interests to save in this matter. There is evidence and this was not materially contradicted that, PW2 who was the appellant's wife had formed a grudge against her husband and

that she was all out to nail him after he had fallen in love with another woman at his place of work. As a result, PW2 having surprised them had made a vow to do something harmful to the appellant in reprisal. In these circumstances it was rather very unsafe for the trial court to rely on her (PW2) evidence as she was a witness who was not free from prejudice. Her evidence was equally wanting and therefore it could not corroborate the evidence of PW1. For it is the law of practice in this land that evidence which itself requires corroboration cannot corroborate (See **Chadi Mndolwa Kiama V. Republic [1979] LRT n. 33**)

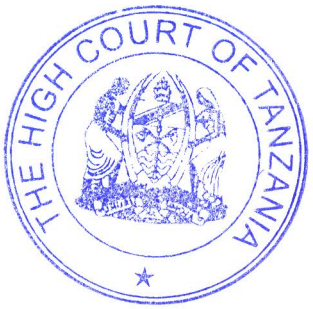
For the foregoing reasons, I find that, the case against the appellant was not proved to the required standard and that he was unjustly convicted and sentenced. The evidence against him had not met the required legal threshold to ground a conviction. As per his complaints, he might have been a victim of a frame-up by his own wife who, having done whatever she could to steer her ill motive through, she incidentally ended up committing suicide after learning that she might have committed a serious blunder which led to the wrong conviction and long term custodial sentence of her husband.

In the ultimate event, I find this appeal to have merit and I accordingly allow it. Consequently, the appellant's conviction is quashed

and the custodial sentence imposed on him is set aside. He is to be released from jail, unless he is otherwise lawfully retained.

It is so ordered.

DATED at IRINGA this 1st day of June, 2020.



P. M. KENTE

JUDGE