

**IN THE HIGH COURT OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA**

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 134 OF 2020

(Original Criminal Case No. 13 of 2019 of the District Court of
Dodoma at Dodoma)

MOHAMED HAMISI APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

11/12/2020 & 17/12/2020

JUDGMENT

MASAJU, J

The Appellant, Mohamed Hamis, was charged with and convicted of the offence of Rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, [Cap 16] in the District court of Dodoma at Dodoma where he was sentenced to serve thirty (30) years imprisonment with corporal punishment (twelve (12) strokes) accordingly hence this Appeal, to the Court. His Petition of Appeal is made of five (5) grounds of appeal which essentially boil to one ground of appeal thus, *"That, the prosecution case*

against him before the trial Court was not proved beyond reasonable doubt"

The said ground has also been pleaded in the 4th and 5th grounds of appeal.

The Republic contests the appeal. When the appeal was heard in the Court on the 3rd day of December, 2020, the layman Appellant appeared in person and adopted his grounds of appeal to form his submissions in support of the appeal as he prayed the Court to allow the appeal accordingly.

The Respondent Republic in the service of Ms. Phoibe Magili, the learned State Attorney, submitted that the prosecution case was proved beyond reasonable doubt against the Appellant before the trial Court through the evidence adduced thereat by the prosecution witnesses, the victim of crime (PW1) in particular, whose evidence was corroborated by PW2, PW3, PW4 and PW6 who allegedly found the victim of crime (PW1) in the Appellant's room in his presence on the 12/1/2019. The medical officer (PW7) who medically examined PW1 testified that PW1 had no virginity. The Medical Examination Report (PF3) thereof was admitted in evidence as

prosecution exhibit P2. The Respondent Republic also argued that in sexual offences the evidence of the victim of crime is what matters much. That, in the instant appeal, the victim's evidence was meritorious, the Court should therefore uphold conviction pursuant to section 127 (6), for PW1's evidence was true and credible. The case of **Seleman Makumba V. Republic [2006] TLR 379** was cited by the Respondent Republic to buttress her position on the appeal that in sexual offences the best evidence to be considered by the Court is that of the victim of crime. That is all, by the parties.

The Court is of the considered of position, other things remaining equal, that the prosecution in the trial Court was not proved beyond reasonable doubt for want of credible and truthful evidence on the prosecution case. The prosecution case was fraught with contradictory evidence on the part of her witnesses, thus;

First, there is contradiction between the alleged victim of the crime, Helieth Godson (PW1) on the one hand, and her biological mother Agulo Kushoka (PW2) and father Godson Jailos Kushoka (PW3) respectively on the other hand, on the particular day the PW1 was allegedly found in the Appellant's residential room. The victim of crime (PW1) alleged that she

was found there on the 13th day of January, 2019 at 2300hrs upon being there from the 11th day of January, 2019 when the Appellant forcefully pulled her into his residential room where she had all along been carnally known by force by the Appellant to the extent of bleeding. PW2 and PW3 respectively testified that PW1 was found at the Appellant's residential room on the 12th day of January, 2019. PW2 testified that it was about 2000hrs whilst PW3 testified that it was about 1700hrs on the material day (12/1/2019) and the Appellant was arrested on the same alleged day.

Secondly, whereas the victim of crime (PW1) testified that she had been carnally know by force by the Appellant to the extent of there being vaginal bleeding, the medical officer, Honsia Elisa Moshi (PW7) did not observe any vivid evidence of forceful rape on the alleged victim's genitalia, though she was no longer a virgin. The Medical Examination Report (PF3) was admitted in evidence as prosecution Exhibit P2. Sperms and bruises were not observed (seen) in PW1's genitalia but vaginal discharge (mostly infection of bacteria).

Thirdly, Charles Athanasio Mnyamazi (PW4), Ng'ong'ona village Chairman, testified that on the 12th day of January, 2019, at about 2000hrs in the company of village Executive officer, and community police officer

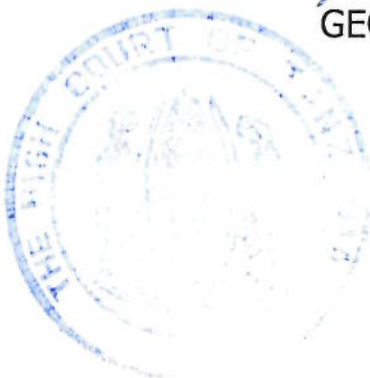
they found PW1 in the Appellant's residential room in the presence of the Appellant who was there in the sitting room. They arrested the Appellant and PW1 and took them to the police station for action. But WP 7201 D/C Sefroza Damas testified that on the 14th day of January, 2019 is when they received report at the University of Dodoma (UDOM) Police station that PW1 was locked into somebody's room. That, those who reported the incident went there at the scene of crime and found PW1 there in the presence of the Appellant. That the Appellant was arrested on the 14th day of January, 2019 and taken to UDOM police station on the same day.

So, with this kind of contradictory evidence on the part of the prosecution case it becomes seriously difficult for the Court to form a well-informed opinion that indeed PW1 was a victim of rape on the 12th day of January, 2019 and that the Appellant was responsible for the alleged sexual offence.

The Court has learned that the entire prosecution case was heard by Hon. G.M. Pius but the Defence case was heard by Hon. P.F. Mayumba, RM who penned the judgment of the trial Court. The original record of the trial Court bears no reasons, if any, as to why there was such change of presiding trial Magistrates when the Appellant was tried before the trial

Court. The law (section 214 of the Criminal Procedure Act, [Cap 20]) sanctions change of Magistrate s for any reason thereof. But such reason must be stated in the record. Since the reasons, if any, for the change of the trial Magistrates has not been stated, the Court is of the considered position that the Appellant's trial was a nullity and it is hereby so declared along with the conviction and the sentence thereof which are hereby quashed and set aside together with the proceedings and judgment thereof pursuant to the Court's revisionary powers under section 372 of the Criminal Procedure Act, [Cap 20]. Since the prosecution case evidence was inherently too weak to prove the case against the Appellant, there should be no re trial.

That said, the Appellant shall be released forthwith from the prison unless there was a lawful cause.




GEORGE M. MASAJU

JUDGE

17/12/2020