IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 57 OF 2020

(Original Criminal Case No. 41/2020 of Kasulu District Court, before Hon. I.E. Shuli - RM)

SUNDEO S/O BALAMPUZA @ MASHITA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

3rd & 18th March, 2021

I.C. MUGETA, J.

The appellant is serving thirty years jail imprisonment for allegedly raping a girl of 10 years. He has appealed with six grounds of appeal. Those grounds of appeal boil to one major complaint that the prosecution did not prove the case beyond reasonable doubts. The reasons for this complaint are that the prosecution evidence is marred with contradictions, that the evidence of the victim being a child of tender age was taken in violation of the law, that evidence of the defence was not considered and that the charge was just a

frame up against him. He appeared unrepresented while the respondent was represented by Happiness Mayunga who opposed the appeal.

The brief facts of the case are that the appellant and victim's family are neighbors. Their house are adjoining to each other. On the incident date (7/2/2020) the victim was asleep with her sister Sedensia Patrick (PW3). She felt something penetrating her vagina and on opening her eyes, she saw the appellant on top of her fucking. He scream due to pain woke up her sister who saw the appellant on top of the victim. Both of them saw him on assistance of the bulb light which was on. They identified him because of their familiarity and assistance of bulb light which was on. Their joint scream attracted the attention of their mother who on arrival saw the appellant naked but he managed to escape. On 7/2/2020 at 06:00 hours the victim was received at Kasulu District Government Hospital for treatment. She was treated by Mamboleo George (PW4). The PF3 which he tendered as exhibit P1 shows that the victim suffered "bleeding from the vagina and perineum tear from the anus". Consequently, she was admitted "following surgical perinial repair".

In his defence the appellant blamed the case to a frame up due to sour blood between him and the victim's family due to a farm dispute. The learned trial

magistrate found that his defence raised no reasonable doubts. She proceeded to convict and sentence the appellant accordingly.

During hearing, the appellant submitted that he was convicted without exhibits to support the evidence on record and all witnesses for the prosecution are from the same family who has sour blood with him and this is a second case where he is alleged to have raped children from that family. He submitted that the victim was alleged to be ten years old but no birth certificate was tendered. He challenged the evidence of the medical doctor (PW4) for being false because he referred to his experience without stating his profession.

In reply, the learned State Attorney was firm that the case was proved beyond reasonable doubts. While she conceded that the evidence of the victim was recorded in violation of section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019] and such illegal evidence ought to be expunged from record, she submitted that the evidence by other witnesses still proved the charge. These are, she submitted, PW3 who was asleep with the victim. She saw and identified the appellant; and PW2, mother of the victim, who on hearing the victim's cry and upon following up, she met the appellant naked and ran away. The learned State Attorney submitted further that due to the

familiarity of these witnesses with the appellant and the light which came from an electric bulb, their identification cannot be mistaken. Even the appellant conceded to be familiar with the witnesses as neighbors, she humbly submitted.

On the ingredients of the offence the learned State Attorney submitted that penetration was proved by the Medical doctor who treated the victim and found her vagina bleeding and with several bruises inside it measuring from 3cm – 6cm. The PF3 was tendered as exhibit P1. On this evidence, she submitted, the charge was sufficiently proved. On evidence being from same family members, the learned State Attorney submitted that there is no law which discredit evidence from same family members and that the allegation of sour blood between the families is an afterthought as it is not borne in evidence.

In rejoinder the appellant wondered why he was arrested the next day if after the incident he ran and entered into his house. That he ought to have been arrested by assistance of village leaders or neighbors and his wife could not have tolerated him if she knew he was from a rape expedition.

I agree with the learned State Attorney that the evidence of the victim ought to be expunged from the record. The proceedings does not show that the victims was asked questions to test if she does not understand the nature of oath to warrant her evidence to be taken without oath. Further, the record does not show that she was made to promise to tell the truth. In short section 127 (2) of the Evidence Act was not complied with. The evidence of the victim is, therefore, expunged from record on account of illegality.

I also agree with the prosecution that penetration, as a necessary ingredient of rape, was proved by the medical evidence. The complaint that the medical doctor did not state his profession is unjustified. Before PW4 testified he said he is an assistant medical doctor. Then he testified that upon examination of the victim's vagina he saw blood and multiple bruises. From what he saw he believes it had been assaulted with a blunt object like a penis. From this evidence the issue for my determination is whether it is the appellant who perpetrated it.

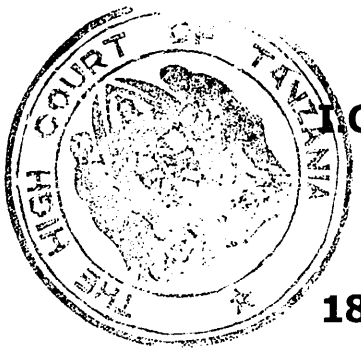
As said by the State Attorney, both PW2 and PW3 said they saw the appellant at the scene by assistance of light from electric bulb and identified him due to their familiarity. I have no problem with this evidence except for the need to prove that it is reliable. It is now settled that when determination of a

case depends wholly on identification, it is not sufficient to say that the conditions favored a correct identification. Equally important is the assessment of the credibility of witnesses. This aspect is crucial in order to identify witnesses who falsely and corruptly can mislead the court. Therefore, the safe guards developed by courts are that reliability of witnesses not familiar with the suspect is tested by conducting a credible identification Parade. Those claim familiarity with the suspected their reliability is tested by how soon they named the suspect to an independent person. In this case both PW2 and PW3 did not say that they named the appellant to anybody as the rapist. On this account their reliability is lowered and once their testimony becomes questionable, there remains no other evidence upon which conviction can be sustained in the light of documented defence of the appellant that the two families have a land dispute. The argument by State Attorney that the allegation of bad blood between them is not borne out by evidence is, therefore, misconceived. It was raised in defence.

The appellant in his defence stated that he could not have entered the house by removing two bricks as that space is not enough. The two set of defence that there is sour blood between the two families and that by removing two

bricks the space does not allow a person to pass through are uncontroverted. The appellant was not cross examined on the issue of land dispute and the size of the hole created for gaining access into the house which means the facts were admitted. I understand the appellant ought to have cross examined the prosecution witnesses, especially, mother of the victim on the land dispute in order to indicate the rhythm of his defence and avoid risking the assumption that such a defence is an afterthought. However, this principle applies where the prosecution witnesses are held to be credible which is not the case here. On escape from the house, the mother of the victim (PW2) and sister of the victim (PW3) said he ran away without mentioning the exit used. There is no explanation on how he existed without arrest if the entry was a space after removing two bricks from the wall. If he used the door, there is no evidence on how and when he unlocked it. The defence of the appellant, in my view raised reasonable doubts in the prosecution's case. The learned trial Magistrate just failed to properly address his mind to that defence, hence, fell into error.

In the event, I hold that the case was not proved beyond reasonable doubts. I quash the conviction and set aside the sentence. Appellant to be released from the prison unless otherwise lawfully held for another cause.



I.C. Mugeta

Judge

18/3/2021

Court: Judgment delivered in chambers in the presence of the appellant and Miss Happiness Mayunga, State Attorney.

Sgd: I.C. Mugeta

Judge

18/3/2021