

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 40 OF 2020

(Arising from Criminal Case No. 82 of 2020 of Kibondo District Court Before S.G.
Mcharo, RM)

KAMANA S/O BALISHIMA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

11th & 11th March, 2021

A. MATUMA J.

The appellant stood charged in the District Court of Kibondo at Kibondo for an offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E. 2002.

He was alleged to have raped the victim **F** d/o **M**, a girl of 11 years old on the 26th day of February 2020.

After a full trial, the trial court was satisfied that prosecution case against the appellant was proved beyond reasonable doubt. The appellant was then sentenced to suffer 30 years custodial term with an order of compensation to the victim at a tune of Tsh. ~~500,000/=~~.

The appellant was aggrieved with the conviction and sentence hence this appeal with a total of two grounds of appeal challenging his identification as a culprit of the crime and the prosecution evidence generally.

At the hearing of this Appeal, the appellant appeared in person while the respondent had the service of Mr. Raymond Kimbe learned State Attorney.

Both the Appellant and the Respondent are not at issue that this appeal be allowed. The learned State Attorney argued that the evidence of the victim was received contrary to the law section 127 (2) of the Evidence Act and as per guidelines in the case of **Issa Salumu Nambaluka versus Republic, Criminal Appeal No. 272 of 2018**. He thus called this court to expunge her evidence and that once such evidence is expunged, the prosecution case would remain with no tangible evidence to sustain the conviction of the appellant.

The appellant on his party maintained that he was not properly identified as the crime was allegedly committed in the late night.

I agree with both parties that the prosecution case was very weak to warrant the conviction of the appellant.

Starting with the arguments of the learned State Attorney Mr. Raymond Kimbe, it is true the evidence of the victim was taken contrary to the guidelines in the case of **Issa Salumu Nambaluka** supra.

In that case, it was held that a witness of tender age before giving evidence should be tested by simplified questions as to whether she/he knows the meaning and nature of oath. It is from such examination the trial court would decide whether the witness of such tender age should give evidence under oath/affirmation or not.

If the court determines that, she/he should give evidence without oath or affirmation then it is when the witness would be required to promise telling the truth to the court and not lies.

In fact, giving evidence without oath or affirmation is an exception to the general rule under section 198 (1) of the Criminal Procedure Act which requires every witness to a Criminal trial to give evidence under oath or affirmation.

I therefore rule out that the evidence of the victim was admitted contrary to the law and as rightly argued by Mr. Kimbe learned State Attorney such evidence is liable to be expunged. I do hereby ~~expunge~~ the same.

Having expunged the said evidence, it is rightly observed by the learned State Attorney that there remains no tangible evidence to warrant the conviction and sentence against the appellant.

But I have also considered the complaint of the appellant that he was not properly identified at the crime scene.

I find such complaints to hold water. The victim in this case clearly stated in evidence if we have to consider the same as having been properly admitted/received, that she did not know the appellant prior to the crime;

'I never know the accused but he usually passes by our home and smile at me. That was not the first day I saw him. I didn't know his name'.

With such evidence it is quite clear that upon the arrest of the appellant, Identification parade was called for with his prior descriptions to establish the identity of the real culprit. This was not done in this case and only dock identification was made.

Again, the incident is stated to have happened in the night. The source of light and its intensity is undisclosed.

In the case of **Issa S/O Magara @ Shuka v. R, Criminal Appeal No. 37 of 2005** the Court of Appeal stressed the need of witnesses to state

the source of light and its intensity for assurance whether the accused/appellant was well and properly identified. It held;

"In our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in evidence sufficient details the intensity and size of the area illuminated."

The Court went on:

"We wish to stress that even in recognition cases where such evidence may be more reliable than identification of on stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."

Therefore, it cannot be said with certainty that the appellant was properly identified in the dark night without there being explanations of such identification.

With the herein observations, I allow the appeal, quash the conviction of the appellant and set aside the sentence of thirty years meted on him. The compensation order is as well vacated. I order the Appellant's release from custody unless held for some other lawful cause.

It is so ordered.




A. Matuma

Judge

11/03/2021

Court: Judgment delivered today 11th day of March, 2021 in the presence of the Appellant in person and Raymond Kimbe learned State Attorney for the Respondent/Republic.



Sgd. A. MATUMA

JUDGE

11/03/2021