THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 45 OF 2022

(Originating from Criminal Case No. 60 of 2021 at Tandahimba District Court at Tandahimba)

MOHAMEDI ALLY KANDURU .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Hearing: 27/06/2022
Date of Judgment: 30/06/2022

JUDGMENT

MURUKE, J.

The appellant Mohamedi Ally Kanduru, was charged and convicted with two offences, the first offence is burglary contrary to section 294 (1) (a) and (2), second offence is rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code, Cap 16 R.E 2019, thus convicted to serve six months for the first offence and thirty (30) years for the second offence with a compensation of 1,000,000/= to the victim. Being dissatisfied, he filed present appeal raising eight grounds, namely:-

1. That, the prosecution side didn't prove its case beyond reasonable doubt.
2. That, there was no watertight evidence of the Appellant identification.
3. That, the manner in which the proceedings at the trial Court were conducted, was irregular or/ and improper.
4. That, PW1 simply said there was solar torch or simply light without any attempt to elaborate on the intensity of the light because sola torch produce light of different.
5. That, trial Magistrate did not comply with the mandatory provision of the section 127(2) of the Tanzania Evidence Act, 1967.
6. That, the Appellant never confessed to have committed the alleged offence.
7. That, the trial Court having failed properly to examine, evaluate and analyze evidence on record.
8. That, there was no proof of penetration in respect of the alleged offence.

On the date set for hearing, Wilbroad ndunguru, Learned State Attorney represented respondent, while appellant was in person who asked this court to adopt his ground of appeal as his submission in support of his case.

Respondent counsel, submitted on grounds of appeal that, victim was a child of 13 years in terms of her own evidence, and the mother PW3. Evidence of Penetration is that of the victim and PW5 the Doctor, thus there is evidence that victim was penetrated. She mentioned the appellant to maua PW2 immediately after the incident. Victim identified the appellant when she described how victim threatened her, at page 6 of proceedings. She revealed

what happened immediately, on the same day. She is reliable witness. Thus ground 1, 2, 4, 6 and 8 lacks merits.

Ground 3 and 5 speaks of evidence. There is no any problem with procedure. All the procedure was followed. There was examination before she gave evidence. Section 127(2) has to be read together with section 127(6) of the Evidence Act. In the case of Wambura Kijinga V.R Criminal appeal no 301/2018 Court Appeal at Mwanza, held that section 127(2) and 127(6) of TEA Evidence Act Cap 6 R.E 2019 has to be read together. Thus ground 3 and 5 lacks merits. Sentence was proper, only that, court should order compensation. In totality Appeal lacks merits.

This court having gone through lower records, grounds of appeal and submission by both parties, there is glaring issue of identification during difficult circumstances. Victim identified the appellant using touch solar. There is no intercity of the light mentioned. Identification during difficult circumstances need to be water tight. The principal in every criminal trial, the prosecution is duty bound to prove that the accuse before he court committed the crime. The standard of which is beyond reasonable doubt. That means, the evidence must be so convincing that no reasonable person would ever question the accused's guilt. This was the holding in the cases of **Joseph John makune V. The republic [1986] T. L. R. 44 at page 49, Mohamed Saidi Mtula V. Republic [1995] T. L. R 3, and Anotory Mutafungwa V. Republic, Criminal Appeal No. 267 of 2010, CAT (unreported).** In the case of Joseph John Makune V. The republic (supra), the Court considered the prosecution evidence adduced in the particular case and held that:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case, no duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities".

Evidence of identification by the victim was not water tight. Thus conviction can not stand, same is quashed and sentence set aside. Accused to be set at liberty, unless lawfully held.

Z. G. Muruke

Judge

30/06/2022

Judgment delivered in the presence of Wilbroad Ndunguru State Attorney for the respondent and appellant in person.

Z. G. Muruke

Judge

30/06/2022