

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 6 OF 2022

*(Originating from Lindi District Court at Lindi in Criminal Case No.8 of
2021 before Hon. M.A. BATULAINI, SRM)*

SAID MOHAMED ISSA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order:6/4/2022

Date of Judgment: 13/6/2022

LALTAIKA, J.:

The Appellant **SAID MOHAMED ISSA** was arraigned in the District Court of Lindi (the trial court), charged with the offence of rape contrary to sections 130 (1)(2)(e) and 131(1) of the Penal Code, [Cap.16 R.E. 2019]. The particulars of the offence were that on 7th day of February, 2021 at Mnazi Moja area within Lindi Municipality and region of Lindi, the appellant had carnal knowledge of one MKM a girl of 12 years old. When the charge was placed before the appellant in order to answer it, he pleaded not guilty thus the matter went for a trial.

After the full trial, the trial court found the appellant guilty and sentenced him to a thirty (30) years' imprisonment term. Dissatisfied and aggrieved by both conviction and the sentence, the appellant has preferred this appeal and raised four ground of appeal which are reproduced as hereinbelow: -

- 1. That the trial Magistrate erred in law and fact when convicted the appellant by disregarding the evidence of PW1 a doctor who examined the victim and did not find any proof that she was penetrated with any blunt object, she did not see bruises and not any discharge like blood.*
- 2. That the trial court erred in law and fact to convict the appellant since the evidence produced by PW4 the victim does not collaborate with the evidence produced by PW1 a doctor.*
- 3. That the trial Magistrate erred in point of law and fact by convicting te appellant since failed to explain the appellant's right to cross examine PW4 and PW2.*
- 4. That the prosecution side case was not proved against the appellant as required by the law that a criminal case be proved beyond reasonable doubt.*

When this appeal was called on for hearing, the appellant appeared in person and unrepresented whereas the respondent Republic was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney. When the appellant was afforded an opportunity to submit on his raised and filed grounds of appeal, he submitted that the reason for lodging his appeal was that the thirty (30) years in jail sentence was worse than death. He stressed that it was better for a a person who was dead than a

prisoner. The appellant argued that staying at one place without working and with the same clothes every day was very difficult. He insisted that he was a young with a burning desire to establish a family. He was concerned that being incarcerated for 30 years means he would be out at the age of 57 years without any usefulness in the society.

Besides, the appellant accepted to have raped the victim, a thirteen (13) years old standard four pupil. He appeared to reason deeply and stated that life was full of challenges and that getting married or not was governed by God. He maintained that during his struggles to look for a spouse went to a "*kibanda umiza*" but was not drunk. He further stressed that he always met girls over the age of eighteen stressing that it was not right for children to be in the entertainment place for adults especially the *kibanda umiza*.

In reply, Mr. Ndunguru supported the conviction and sentence. He argued the 1st, 2nd and 4th grounds collectively as, in his opinion, they all touched upon proof of the case beyond reasonable doubt. The learned Senior State Attorney argued that in rape cases there are three things which need to be proved. These are age of the victim, whether there was penetration and identification of the appellant.

Submitting on the issue of age, Mr. Ndunguru argued that the age of the victim was 12 years old and was proved beyond reasonable doubt. He went further and submitted that the evidence of PW1 (a medical doctor), PW2(Father of the victim) and PW3(Mother of the victim) both testified that PW4(The victim) had twelve (12) years old when the appellant had committed the offence of rape. More so, PW3 testified even the date of birth of the victim which is 7/6/2009.

Regarding penetration, the learned Senior State submitted that the victim testified that she carnally known in the appellant's home and the appellant did not cross examine the victim as it is reflected at page 17 of the typed proceedings of the trial court. He further stressed that the appellant was totally in agreement with the evidence of the victim. Moreover, Mr. Ndunguru argued that section 127(6) of the Evidence Act, [Cap 6 R.E. 2019] provides that the evidence of the victim in sexual offences is sufficient to prove especially when the court believes the victim for being a credible witness. To that end, the learned Senior State Attorney submitted that the evidence of the victim was enough to ground conviction against the appellant as seen at page 29 of the typed proceedings of the trial court.

On the same premise, Mr. Ndunguru argued even the evidence of the appellant especially when was crossed examined accepted to have carnally known the victim though he did not rape her on the first day when PW4 arrived in his house. In that regard, the learned Senior State Attorney argued that such evidence is corroborated with the evidence of the victim on the first day when she went at his house. To cement his argument, Mr. Ndunguru cited the case of **Galus Kitaya vs Republic**, Criminal Appeal No.196 of 2015 CAT Mbeya at page 3. In that cited case the Court was of the view that the appellant's evidence corroborated the evidence of that PW1 in material particulars. Therefore, the learned Senior State Attorney argued that the allegation that the prosecution did not prove this case beyond reasonable lacks merit hence should be dismissed.

Submitting in reply on the third ground which is centred on the identification of the appellant, in the light that complaint Mr. Ndunguru argued that the appellant was properly identified. He stressed that he is

the one who took the victim from 'kibanda umiza' to his home. The learned Senior State Attorney maintained that the appellant stayed with the victim more than day until was arrested. Besides, he submitted that the fact that the appellant confessed removes any doubt that he raped the victim.

As to the complaint of not being accorded with the right to cross examine PW2 and PW4, the learned Senior State Attorney submitted that the appellant was accorded with that opportunity but did not utilize it effectively. To fortify his argument, he referred this court to page 14 and 20 of the typed proceedings of the trial court where the appellant cross examined PW2 and PW4 and they responded to accordingly. In view of that submission the learned Senior State Attorney argued that the complaint by the appellant is baseless.

Furthermore, Mr. Ndunguru went ahead and submitted on the mental status of the appellant. He referred this court at page 22 of the typed proceedings where it reflects that the appellant was taken to Isanga for mental health examination. The learned Senior State Attorney argued that the report on mental status of the appellant was tabled in court which showed that the appellant is sane when he committed the crime and even when he was before the trial court. Mr. Ndunguru emphasised that the report was admitted in court but no proof that such report was made part of the trial court proceedings for further actions.

To substantiate his argument, he referred this court to the decision of **Mohamed Ally Chuma vs Republic**, Criminal Appeal No.158 of 2017 whereby the Court stated that there must be record that the documents have been admitted and made part of the proceedings. The Court of Appeal reverted the file back to the trial court. The learned Senior State Attorney argued that since this court is empowered to review the lower

court's records thus it can confirm the availability of such documents for further actions vide its revisional powers. To that end, Mr. Ndunguru submitted that he argued this court to deal with challenge and finally deny the appeal.

A very brief rejoinder, the appellant submitted that it is true but what he disputes is the age of the victim since he was told by PW4 that she was thirteen years old and twelve (12) years as testified by prosecution witness. He insisted that that makes a big difference to him.

I have curiously considered the grounds of appeal, submissions of both parties and the trial court proceedings and judgment. As to the last issue raised by the learned Senior Attorney, prompted me to have close look on the proceedings of the trial court be either hand written proceedings or the certified typed proceedings. Indeed, it was the trial court which ordered the appellant to be sent to Isanga Mental Health Institution for mental examination on 13/07/2021 as it is reflected on page 22 and 23 of the typed proceedings. Also, at page 26 the trial State Attorney submitted that they filed a report on mental health examination of the appellant as was prepared by Dr. Enock Eterego Changarawe on 04/09/2021. It is clear that after receiving that information from the trial learned State Attorney the trial court did not take any further action (s) regarding that report which was filed by the respondent.

The act of not admitting the written report on mental condition of the appellant made it not part of the trial court proceedings. In the light of that argument, I am of the settled view that the appellant was denied a fair trial because previous it seemed the trial learned State Attorney and Magistrate noted something on the mental condition of the appellant.

I expected that when the report on the mental condition of the appellant was filed in the trial, the trial court ought to be receive, admit, communicate with the appellant regarding his mental condition during the commission of the offence and when the trial was going. Lastly, the trial court ought to consider the admitted report in its decisions before appellant gave his defence and when was composing the impugned judgment. In that respect, I am inclined to adhere to what the Court of Appeal stated in the case cited by Mr. Ndunguru, the case **Mohamed Ally Chuma vs Republic**, (supra). The Court had this to say: -

“We on our part, agree with the counsel for the parties that the omission to consider the medical report was a fatal irregularity which had the effect of denying the appellant a fair trial. We therefore invoke our revisional powers under section 4(2) of the AJA and proceed to nullify and quash the proceedings of the High Court subsequent to its orders dated 5/5/2015, judgment and conviction and set aside the sentence against the appellant.”

On the basis of the above holding by the Court, I am convinced that the anomaly made by the trial court occasioned a miscarriage of justice by not according the appellant with a fair trial. Even if the report shows that the appellant was mentally sound at the time of committing the offence still the trial court has to make a special finding as per dictates of the law. I am of the settled position because it was the learned trial Magistrate and State Attorney who commented on the mental status of the appellant.

Being said and done, there is no need at this juncture to proceed with the determination of the grounds of appeal while the trial court

proceedings feature an anomaly especially before defence commenced. In that regard by using my revisional powers under section 373 of the CPA, I do hereby order a retrial from where the trial court was being informed by learned State Attorney about the filing of the report in the trial court to the next stages of taking the defence of the appellant afresh.

It so ordered.



E. I. LALTAIKA

A handwritten signature in black ink, appearing to read "E. I. Laltaika".

JUDGE

13.6.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 13th day of June, 2022 in the presence of the Mr. Enosh Kigoryo, State Attorney and the appellant who have appeared in person and unrepresented.



E. I. LALTAIKA

A handwritten signature in black ink, appearing to read "E. I. Laltaika".

JUDGE

13.6.2022