

IN THE HIGH COURT OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 18 OF 2022

(Arising from Kigoma District in Criminal Case No. 248 of 2008)

HUSSEIN S/O SAIDAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of Last Order: 29/08/2022

Date of Delivery: 29/08/2022

AMOUR S. KHAMIS, J:

Hussein Said was charged for two counts of abduction contrary to Section 133 and rape contrary to Section 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16, R.E. 2002.

It was alleged that on 15th day of May 2008 at about 07.00 hours at Kazima area, Tabora region, Hussein Said took to Nguruka area, Kigoma region, one "XX", a girl of 13 years old against the will of her parents in order to have sexual intercourse with her.

Further the prosecution alleged that on 15th day of May 2008 at about 17.00 hours at Kasisi Nguruma area in Kigoma region, Hussein Said had a carnal knowledge of "XX", a girl of 13 years old.

A plea of not guilty was entered and the case proceeded to trial. Finally, Hussein Said was convicted and sentenced to serve thirty (30) years in jail with twelve (12) strokes of the cane.



Upon refusal of the High Court to extend time to file an appeal, the Court of Appeal vide Criminal Appeal No. 159 of 2018 granted him leave to lodge notice of intention to appeal within ten (10) days from 25 March 2022.

Consequently, the present appeal was filed containing four (4) grounds of appeal.

At the time of hearing, Ms. Veronica Moshi, learned State Attorney appeared for the Republic while the appellant fended for himself.

Ms. Veronica Moshi was the first to address the Court and readily supported the appeal.

The appellant had not much other than associating himself with Ms. Moshi's assertions.

The relevant submissions will be addressed in the course of resolving the first ground of appeal which in my view, accommodates the other three (3) grounds and sufficiently dispose of the entire appeal.

In the first ground of appeal, the appellant contended that the prosecution case was not proved against him beyond reasonable doubts as required by law.

Ms. Veronica Moshi faulted the trial magistrate for failure to comply with Section 34 B of the Evidence Act, Cap 6 R.E 2019 and for failure to ensure if admitted exhibits were read out loudly immediately after admission.



Having read out the trial court's records, I am in total agreement with Ms. Moshi that the prosecution case was not proved beyond reasonable doubts.

Records show that the victim "XX" did not testify. Instead her statement was tendered in Court by the Public Prosecutor in terms of Section 34 (2) (c) of the Evidence Act, Cap 6, R.E. 2002.

Section 34 B (1) of the **EVIDENCE ACT, CAP 6, R.E. 2022** provides that in any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is or by any person who may be a witness shall be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

Section 34 B (2) of the **EVIDENCE ACT** provides that such statement may only be admissible if its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness or if all reasonable steps have been taken to procure his attendance but he cannot be found, or he cannot attend because he is not identifiable or by operation of any law he cannot attend.

Proceedings of the trial Court in this case are silent on a reason that prompted the Republic to tender the victim's statement based on the above provision of the law.

The proceedings did not show any efforts employed by the Republic to cause attendance of the victim "XX" for the purpose of testifying.

It follows therefore that the production of Exhibit P2, a statement by the victim, was made in contravention of Section 34 B (2) (a) of the **EVIDENCE ACT**.

Further, upon admission, the two exhibits tendered by the Republic, namely: Statement by the victim (XX) and PF 3 of the victims, exhibits P.1 and P.2 respectively, were not read out aloud as the law requires.

Apart from that, the statement of the victim (P.1) was produced in Court by Inspector Mgode, a Public Prosecutor, who was not a witness.

This novelic procedure was highly discouraged by the Court of Appeal in **THOMAS ERNEST MSUNGU @ NYOKA MKENYA V REPUBLIC, CRIMINAL APPEAL NO. 78 OF 2012** wherein at page 3 thereof, it was held that:

“.....It is evident that the key duty of a prosecutor cannot assume the role of prosecutor and witness at the same time. In tendering the report the prosecutor was actually assuming the role of a witness. With respect, that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation. In terms of Section 198 (1) of the Act. As it is, since a prosecutor was not a witness he could not be examined or cross examined on the report.”

In view of these glaring omissions and misdirections, the two exhibits are hereby expunged from the records.



It is trite law that the true evidence of sexual offences comes from the victim (refer to SELEMANI MKUMBA V REPUBLIC (2006) TLR 379)

That position was restated In **SAID MUSSA @ CHINDU V REPUBLIC, CRIMINAL APPEAL NO. 18 OF 2018** (Unreported) thus:

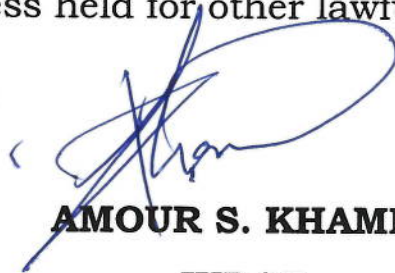
“I am mindful that the best evidence of rape comes from the victim.....”

In the present case, the victim did not testify and her purported statement was expunged from the records for failure to comply with mandatory requirements of the law.

The remaining evidence on record, namely: testimonies by PW1 C 6744 ST. Sargent Seif and PW2 WP – 5161 PC Gisengo, are insufficient to prove the two counts of abduction and rape.

Consequently, this appeal is allowed. The appellant’s conviction for rape is quashed and the sentence of thirty (30) years imprisonment imposed on him is set aside. He is to be released from prison forthwith unless held for other lawful causes.

It is so ordered.



AMOUR S. KHAMIS

JUDGE

29/08/2022

ORDER

Judgement delivered in chamber in presence of the appellant under custody and Ms. Veronica Moshi, State Attorney for the Republic.

Right of Appeal is Explained.



A handwritten signature in blue ink, appearing to read "Amour S. Khamis", is written over the printed name.

AMOUR S. KHAMIS

JUDGE

29/08/2022