IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELATE JURISDICTION

CRIMINAL APPEAL NUMBER 130 OF 2019

(Arising from Original Criminal Case No. 48 of 2018 of Tabora RM's Court at Tabora)

ALLY AMIMU ---------- APPELLANT

VERSUS

REPUBLIC ---------- RESPONDENT

JUDGEMENT

27/05 & 12/6/2020

BONGOLE J.

Ally Amimu, the appellant was indicted for an offence of Rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E 2002. He was tried by the Resident Magistrates' Court at Tabora, he was convicted and sentenced to 30 years in jail.

The particulars of the charge reads as follows:

> ***Ally S/O AMIMU*** *on 28th day of April 2018 during noon hours at Iyongo village Mpombwe Ward, within Sikonge district in Tabora Region, had carnal knowledge of* ***SEKO S/O LUKUBANJA*** *aged 15 years old a standard seven pupil of Mpombwe Primary School.*

After a full trial, the count found the appellant guilty of the offence charged and sentenced him to serve 30 years imprisonment.

The appellant was aggrieved with the decision of the trial court and appealed to this court on the following grounds.

1. ***That, the medical report, PF 3 (ex. P1) was not rightly admitted and acted upon by the trial court as the same was not read out to reveal its contents to the appellant and so it was useless and liable to be expunged from the record.***
2. ***That, the identification of the appellant during the incident was not beyond reasonable doubt to exclude all possibilities of the mistaken identity in that before the arrest of the appellant the victim of rape (PW1) and PW 2 gave no details on any identifying particulars of the appellant as a result of the purported visual encounter at the scene of crime.***
3. ***That, without prejudice to grounds of appeal above the arresting team, they were tracing to arrest the undescribed rapist due to the fact that they were unaware of any detail identity as to who they were to arrest apart from the identity area only.***
4. ***That, the case for the prosecution was not proved as required by the law that is to say beyond reasonable doubt.***
5. ***That, the appellant's defense was wrongly ignored by the trial court.***

Wherefore the appellant prays that his appeal be allowed, conviction be quashed and the sentence of 30 years be set aside and order to his immediate release from prison. When this appeal came for hearing the

appellant appeared in person while the respondent was represented by Mr. Kajiru learned State Attorney.

The appellant added nothing more to his petition rather he prayed the court to adopt the petition of appeal to form part of his submission.

While submitting on the first ground Mr. Kajiru opposed the appeal by stating that, in the case of ***Job Mwangisi*** documents that were not read before the court to know its content must be expunged from records and even if the PF3 is expunged in this case the remaining evidence of the victim of crime at page 15 second paragraph is evident that the appellant threw the victim down opened her underwear and inserted his penis to her vagina.

That the victim explained how she was raped as per the requirement of section 131 (4) that penetration however slight is tantamount to rape. He cited the case of ***Selemani Mahumba vs Republic [2006] TLR 384*** where it was held, the best evidence in rape cases is that of the victim; The victim narrated how the appellant raped her.

That on the issue of identification, there was no mistaken identity as the offence was committed in the afternoon and the appellant found the victim grazing cattle then raped her in the presence of PW2, they described the clothes worn by the appellant that it was jeans trouser, white shirt and red T-shirt.

That the appellant was arrested shortly after the incident wearing the same clothes, the victim identified the appellant before the village chairman. Further that at the police the victim identified the appellant, the evidence of PW2 and PW3 equally explains how the appellant was identified.

Furthermore that, on the issue that his defense was not considered it is not true because the same was considered and the court was satisfied that the appellant raped the victim and convicted him accordingly, he buttressed that, this appeal has no merit it should be dismissed.

In reply the appellant submitted that the arguments by the State Attorney are not true, that he was arrested on 28th in the afternoon, they went to complain to the Village Chairman who said the appellant wear the same clothes then they sent him to Police basing on the clothes. He prayed this court to go in deep of the matter and do justice to him.

The respondent in his submission agreed that the victim's PF3 was never read before the court and he referred the case of ***Job Mwangisi*** which stated that, that type of evidence must be expunged from record; in other words one can say that it is as good as the evidence that was never received in court.

In ***Mathias Dosela @ Adriano Kasanga vs republic Criminal Appeal No. 212 of 2019 HC Mwanza*** (unreported) while citing the case of ***Mbagga Julius Vs Republic Criminal Appeal No. 131/2015 CAT Mwanza (unreported)*** Tiganga J. emphasized that failure to read out the documentary exhibit after their admission renders the said evidence contained in that document improperly admitted and should be expunged from the record.

Now the respondent is relying on the remaining evidence; it is my tusk to evaluate the remaining evidence to see whether it proved the appellant's case beyond reasonable doubt.

It is Mr. Kajiru's submission that, in rape cases the best evidence is that of a victim and in this case the victim explained by herself how she was raped as per the requirement of section 131 (4) that penetration however slight tantamount to rape.

It is a requirement of law that for one to be convicted of rape penetration must be proved in evidence, having regard to the fact that the content of the victim's PF3 was unusable I turned to the oral evidence adduced by the medical expert who examined the victim to see whether it proved penetration.

The evidence on record shows that, as per the charge sheet, the incident occurred on 28th April 2018 at noon hours and the victim was taken to medical examiner on the following day that was 29th April 2018. PW5 who was the medical examiner stated that he examined the victim into her private parts, her under pant was torn off and stained with blood, the victim was feeling pain into her vagina, there were bruises into her vagina that were serious.

That short evidence of the medical examiner never explained what were the likely cause of bruises in victim's vagina and whether the blood stain found on victim's under pant were from internal or external part of victims genitalia, to that end the evidence of PW5 falls short of proving penetration.

It is my own observation that, the trial magistrate relied much on the evidence of the victim as it is her evidence that carried the weight of the case, she stated that she was 14 years old.

Section 127(2) of the Evidence Act Cap 6, R: E 2002 as amended by the Written Law (Misc amendment Act) No.2/2017 provides for two conditions

(a) It allows the child of a tender age to give evidence without oath or affirmation, and

(b) Before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies.

Since PW1 falls under the category of a child of tender age whose apparent age is not more than 14 years ought to have given her evidence after promising to tell the truth. The act of affirming a child of a tender age was contrary to section 127 (2) cited above. In ***Godfrey Wilson v. R Criminal Appeal No. 168 of 2018, Court of Appeal Bukoba*** (Unreported) the court held that in absence of that promise the evidence so admitted is of no evidential value. In this case the victim who was of tender age testified without promising to tell the truth therefore her evidence has no value.

Also when I was researching on this case I came across a decision of the Court of Appeal in ***Robert Andondile Komba v. D.P.P Criminal Appeal No. 465 of 2017 CAT*** at Mbeya *(unreported)* where the court decided that in cases of statutory rape, age is an important ingredient of the offence which must be proved.

As to this case, the charge sheet which is an important document to enable the accused understand the offence charged states that the victim is a male child and his age is 15 years but the victim herself stated in evidence that she is 14 years old. The fact that the charge sheet identifies the victim

as a male person, I find it to be a minor error which is curable under section 388 of the Criminal Procedure Act Cap 20 R.E 2002 but uncertainty of victim's age in cases of this nature is incurable.

That said and done, I find the appeal with merits and consequently I allow it. The appellant's conviction is quashed, the 30 years imprisonment is set aside with order of immediate release of the appellant from prison unless lawful held in on another cause.

S. B. BONGOLE
JUDGE
12/06/2020

Judgement delivered under my hand and seal of the court in chambers, this 12/06/2020 in the presence of the Appellant in person and Mr. Miraji Kajiru learned State Attorney for the Respondent (Republic).

S.B. BONGOLE
JUDGE
12/06/2020