

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT MBEYA CRIMINAL APPEAL CASE NO. 141 OF 2016
((Original from criminal Case No. 1 of 2015 from the Resident Magistrate Court of Mbeya)
ROK.ETO ZABRON..... APPELLANT VERSUS THE
REPJBLIC RESPONDENT

JUDGMENT

Date of last Order: 1310612017 Date of Judgment: 11/07/2017 Dr. M.C. Levira, J The appellant Roketo s/o Zabron was in the Criminal case No. 1 of 2015 in the Resident Magistrate Court of Mbeya, charged with the offence of rape c/s 130(1) (2) (e) and 131 (1) of the Penal Code, Cap 16 of the Revised Laws of Tanzania. It was alleged that on the 26th day of October, 2014 at Mwakibete area within the City and Region of Mbeya the appellant did have carnal knowledge of MAGRETH D/O NILONGO a girl of 14 years old. He was convicted and sentenced to 30 years imprisonment. Aggrieved, the appellant has lodged Criminal Appeal in this Court to challenge the conviction and sentence of the trial court on the following grounds:

1. That, the trial magistrate erred in law point and fact when convicted the appellant relying on the evidence of PW1 (a mother of a victim) regard such evidence was of here say only because she did not see the appellant when raping the victim who did not testify. Page 1 of 11 JI That, the trial magistrate erred in law point and fact when he convicted the appellant regard the said incident occurred at (. about 00.00 hours, there was no any witness of the prosecution side who testified that he/she identified the appellant at the scene of crime. That, the trial magistrate erred in law point and fact when he convicted the appellant by believing the evidence of PW2, that the appellant confessed before him and he recorded the caution statement (Exhibit P1) from the appellant which the trial court admitted as an exhibit P1 before PW2 to read loudly before the court, so that the question to ask is there was two caution statement of the appellant? If there was only one caution statement of the appellant where PW2 got the second caution statement which he read loudly before the court while the cautioned statement was already admitted by the court as exhibit P1? For these circumstances there was irregularity process did by the trial magistrate (sic) before to admit the cautioned statement as an exhibit. That, the trial magistrate erred in law point and fact when he convicted the appellant relying on the evidence of PW3 (a doctor) and a PF3 could never be a corroborative evidence; corroboration must be independent evidence in

the case connected with the accused person. See the case of Republic Vs. Mwaipopo (1968) HCD page 300, held that: "the PF3 could never be corroborative evidence Corroboration must be independent evidence in the case connected with the accused person". That, the trial magistrate erred in law point and fact when he convicted the appellant relying on the evidence of PW4 that Page 2 of 11 the cap which abandoned by the rapist at the scene of crime belonged to the appellant, regard PW4 in his evidence did not (state that he knows the appellant prior of the incident, or before to appear at his garden regard the appellant was not arrested rehanded (sic) at the garden by PW4, why the prosecution side did not see the importance to conduct identification parade under Section 60 of CPA R.E. 2002 in order PW4 to identify the appellant second time if he was a person who went to take a cap at PW4 garden? The failure of prosecution to conduct an identification parade proved that PW4 identified the appellant in the court dock as an accused not otherwise. That, the trial magistrate erred in law point and fact when he convicted the appellant disregarding his defence. That, the charge against the appellant was not proved by the prosecution beyond reasonable doubt. The appellant in this case was unrepresented and the side of the Respondent Republic was represented by Mr. Kihaka, learned State Attorney. Appellant had nothing useful to add to the grounds of appeal and therefor, they were adopted as part of his submission in court. The respondent through the learned state attorney Mr. Kihaka submitted that, they don't support the appeal. He stated that, the third ground of appeal is baseless because the exhibit was tendered before the court and all the procedures were followed. Page 3 of 11 He went further to state that, the law requires that when the exhibit is tendered/ admitted it has to be read out. At page 15 of the proceedings PW2 tendered caution statement of the appellant and the same was not objected by the appellant and therefore was admitted as exhibit P1. He said the exhibit was read loudly in the court so as to enable the appellant to hear what he confessed therefore it was proper for PW2 to read it. The learned state attorney submitted further that, the evidence of PW3 who was a medical doctor was truthful evidence and the court admitted it. This witness tendered PF3 and the same was not objected by the appellant as shown at page 18 of the proceedings. On the fifth ground of appeal, the learned state attorney submitted that, it is baseless because appellant followed his cap and therefore there was no need of conducting identification parade as there was no justifiable reason to conduct the parade. Submitting on the first and second ground, the learned state attorney submitted that, they are also baseless because the appellant confessed before police officer and his confession was admitted and therefore there was no need of conducting identification parade. On the sixth ground Mr. Kihaka, learned state attorney submitted that, it is baseless, and since this is the first appellate court, it can go through the defence and see whether Page 4 of 11 it can bring charges to the decision of the trial court as stated in Prince Junior Vs. Republic Criminal Appeal No. 250 of C' 2014 unreported). He further submitted that, the seventh ground is general and as stated in all grounds that they are baseless as the appellant did not dispute anything at the trial court. He said, his caution statement was not objected, and in that statement he explained that, he was the one who raped the victim. The learned state attorney went on to state that, when they were going through the case file they discovered some shortcomings. In the

charge sheet it was stated that, the offence was committed on 26 1 h October, 2014 and the case was filed on 05/01/2015. The charge sheet reveals that, the statement of the appellant by the time he was committing the offence was 18 years. He said, at page 2 of the proceeding matters not in dispute included the statement of the appellant and while defending himself on 01/10/2015 the appellant was 19 years old. This shows that his statement was correct; if that is the case the appellant had 18 years by the time of commission of crime. The accused was sentenced to serve 30 years imprisonment on 30/10/2015 and was ordered to compensate the victim Tshs. 2,000,000/=. According to Section 131 (2) (a) of the Penal Code, Cap 16 R.E 2002, the punishment should be corporal punishment, therefore it is their submission that he was properly convicted, his appeal be dismissed but with regard to the punishment the court should consider Section 131 (2) (a) of the Penal Code. Page 5 of 11 Having gone through the grounds of appeal and the reply thereto, I find it important to start with the first ground where C the appellant claim that the trial court relied on hearsay evidence of PW1. It is true that the records do not show that PW1 was the eye witness of the incident, but she came to know later when the victim came back home. But the records show further that, evidence of PW1 was not the only evidence used to ground conviction, the trial court also considered evidence of PW3 who is a doctor and exhibit P2 (a caution statement) which was admitted without objection. For that reason, the first ground together with the second ground lacks the legs to stand. Coming to the third ground where the appellant is disputing on the legality of admitting the caution statement that it was admitted first then thereafter reading it loudly. In the case of Robinson Mwanjisl and 3 others Vs. Republic (2003) TLR 218 at page 226, it was stated among others that:

- a practice unfortunately common in trials before subordinate courts. Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Ruling out documents before they are admitted in evidence is wrong and prejudicial". Therefore it was not illegal for the said caution statement to be admitted first before reading it. Moreover the law requires some procedures to be complied of from the time of taking the statement to the time when it is admitted before the court of law. Going through the record it shows that, the statement was taken under Section 54(4) of the Criminal Procedure Act, Cap Page 6 of 11 20 R.E 2002, as amended by Miscellaneous Amendment Act No. 3 of 2011, that provision among others shows that it is C mandatory to show the statement to a person (accused) and ask him to read or to read the statement to him and ask him whether he would like to add or correct anything from the statement. It is clear in the statement that all were done and the accused never disputed anything. Moreover during admission of the caution statement as observed under page 15 of the proceedings the accused is recorded saying "I have no objection". The law requires a person to admit a statement to which he understand its content, despite the records showing that, it was read loudly after being admitted still the accused did not object the same. Apart from that, during defence, in cross examination by the state attorney the accused is recorded saying that: .1 recorded my caution statement with the police, yes the police was recording what I told him ". From the observation above if what was read was

a different thing the accused could have objected or denied it. Thus this ground also lacks merit. On the fourth ground the appellant alleged that, it was an error for him to be convicted relying on the evidence of PW3 (a doctor) and a PF3, regard a PF3 could never be a corroborative evidence citing the case of Republic Vs. Mwalpopo (1968) HCD page 300. I have gone through the said case and found it to be distinguishable from the case at hand. In that case there was no evidence linking the accused to the assault except that Page 7 of 11 offered by the girl herself and unfortunately enough there was no examination by court to discover whether she understood (the nature of an oath nor was there examination to discover if she was sufficiently intelligent and understood the duty of telling the truth so that her unsworn evidence could be admitted, thus corroboration was required. Generally, the case cited by the appellant is not relevant in this case at hand. The appellant on the fifth ground alleged that it was necessary for identification parade to be conducted so that PW4 could identify him for the second time. The records show that, it was PW4 who saw the appellant for the first time when he went to collect his cap from the scene of crime, and he identified the accused during his testimony, thus the issue of conducting identification parade regarding the circumstances of this case was irrelevant. On the sixth ground, the appellant contended that, the trial court disregarded his defence. I have taken time to go through the defence evidence, where the records show that, the appellant/ accused denied knowing about the incident until he was told by two young men who took him. But in cross examination by the State Attorney he admitted that the words recorded in the caution statement are his words that he told the police officer. Therefore his defence has nothing to change the decision of the trial court. Lastly on the seventh ground, the appellant alleged that, the charge against him was not proved beyond reasonable doubt. It Page 8 of 11 is the requirement of law in criminal cases that, proof is beyond reasonable doubt and that responsibility lies on prosecution see (the case of Jonas Nkize Vs. Republic [1992] TLR 213 (HC). Among the important elements to prove the offence of rape, is lack of consent for an adult and penetration however slight, as it was held in the case of Ally Athumani Vs. Republic (1991) TLR 59 (HC). Regarding the circumstances of this case consent is irrelevant not only because the victim is insane, but it is a statutory rape as a victim is under eighteen years of age. In the case of Burundi slo Deo Vs. Republic, Criminal Appeal No. 33 of 2010, it was stated among others that, in proving rape, one of the ingredients that must be established is, penetration. In doing so, it is not enough to say such and such a person raped so and so. The complainant is expected to be more specific in her evidence and clearly point out what the accused person actually did and where. In this case the complainant was insane and was not able to testify so penetration was not specifically proved by the victim, however, I find no reason to differ from the findings of the trial court as the accused in his caution statement admitted to have committed the offence, and went further to state that, he committed the act without condom. This ground also has no merit. However as rightly submitted by the learned state attorney, the appellant was wrongly charged with the offence of rape contrary Page 9 of 11 J * to Section 130 (1) (2) (e), and 131 (1) of the Penal Code. The problem is on the second provision that is Section 13 1(1) which was irrelevant to the appellant who by then was 18 years old. Section 131 (2) (a) provide that: "Notwithstanding

the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall-

- a) If a first offender, be sentenced to corporal punishment only". Therefore, because the appellant was sentenced under the wrong provision of law, this appeal is partly allowed to the extent that In terms of Section 366 (1) (a) (ii) this court reduces the sentence from the sentence of thirty years imprisonment and set aside the compensation of 2,000,000/= imposed to the appellant, to corporal punishment. Taking into consideration the time spent by the appellant in prison which is more than 12 months, I hereby order the infliction of 3 strokes to the appellant. Thus, conviction is upheld save for sentence which has been altered. ---- ----." . -- Dr. M. Levira '. Judge 11/07/2017 Page 10 of 11 Date: 11/07/2017 Coram Hon. Dr. M. C. Levira, J (Appellant: Present For the Republic: Ms. Zena James - State Attorney C/C: Sichaiwe Ms. Zena James - State Attorney: Hon. Judge, the matter is coming for judgment, we are ready. Court: Judgment delivered in presence of Ms. Zena James learned State Attorney and the appellant this 11th day of July, 2017. Right of, Appeal Explained Dr. M. C. Levira Judge 11/07/2017 Page 11 of 11

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