IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 19 OF 2007

(ORIGINAL CRIMINAL CASE NO. 161 OF 2006
OF MASASI DISTRICT AT MASASI

BEFORE: M.O. LILIBE – PDM)
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Date of Last order 23/1/2008
Date of Judgment: 18/3/2008

REASONS OF THE JUDGMENT

SHANGALI, J.:

The appellant **BOSCO S/O JOAKIM,** a Youngman of 15 years old was charged before Masasi District Court with two counts in criminal case No. 161 of 2006. The first count was rape contrary to section 130(1)(2) (e) and 131 (1) of the Penal code Cap. 16 while the second count which was an alternative charge was indecent assault contrary to section 135 of the penal code. Having heard the evidence from both the prosecution side and defence side the trial District magistrate was satisfied with the prosecution e3vidence and convicted the appellant on the first count.

Consequent to that conviction, the appellant was sentenced to serve thirty (30) years imprisonment term being a minimum sentence on such offences.

On 23//1/2008, after hearing the submission from both the appellant and Mr. Hyera, Learned State Attorney who represented the respondent/Republic, and having perused the record of the trial courts proceedings, with haste I decided to set aside the sentence of 30 years imprisonment imposed on the appellant . Furthermore, considering that that the appellant had by then already stayed in custody for 10 months serving that illegal sentence I ordered for immediate release without any further punishment. On that date I reserved my reasons for such a drastic decision which I am now set to pronounce.

The facts of this case are not complicated and may briefly be recapitulated as follows; In the night of 24th July 2006 at around 8 p.m. at Mungane Village, the two girls namely Hadija d/o Salum Awadhi (PW1) aged 16 years old and Amina D/O Yazidu (PW2) aged 12 years were going back home from a nearby shop., As they were passing near the house of the appellant who was well known to them, the appellant called the girls and invited them in his house.

Innocently the two girls accepted the invitation and retracted to the house of the appellant. In no time the appellant ordered PW2 out of the house. POW2 went out leaving PW2 and appellant inside the house. The appellant locked the door, grabbed PW1 to the bed, undressed her while threatening her not to shout and sexually assaulted her by raping her. After satisfying his sexual lust the appellant released PW1 and directed her to go home. Pw1 went straight home and narrated the whole urgly incident to her mother who in turn reported the matter at the police station. PW1 was issued with a PF3 which was subsequently filled by the medical Assistant Saad Suleiman, PW3 who examine PW1. PF3 (Exhibit P1) indicate that there were some bruises and watery fluid (Semen) around PW1's vagina.

In his defence the appellant categorically denied to have committed the offence.

As I have shown above the trial District Magistrate was convinced with the prosecution evidence and convicted the appellant on the first count.

In his memorandum of appeal and during the hearing of this appeal the appellant has attacked the trial court on the ground that there was no sufficient prosecution evidence to form a conviction against him. He also complained that the Police refused to appreciate that he was 17 years old and instead wrote 18 years on the charge sheet while the trial District magistrate decided to record his own conjuncture that he was "an adult" without showing his exact age of 17 years. The appellant also stated that the evidence of PW2 a child of 12 years old was recorded without conducting a voire dire examination as required by the law.

In response, Mr. Hyera, learned State Attorney supported the decision of the trial district court in convicting the appellant but refrained to support the sentence of thirty (30) years imprisonment met against the appellant.

Mr. Hyera submitted that there was ample and sufficient prosecution evidence on record to warrant a conviction deponed by PW1, PW2 and PW3. On the issue of sentence he submitted to the effect that in the offence of Rape, the law is clear under section 131 (2) of the Penal Code that the sentence for a boy who is 18 years old or below that age and who is a first offender is only corporal punishment. He stated that it was wrong for the district Magistrate to sentence the appellant to thirty years imprisonment because the charge sheet indicate clearly that the appellant was 18 years old.

I am comfortably convinced by Mr. Hyera's ample submission. The prosecution evidence against the appellant that he is the one who raped PW1 in that night is immense. PW1's evidence alone is enough to ground a conviction against the appellant under section 127 (7) of the evidence Act, 1967 Cap 16. It is true that the trial District Magistrate omitted to conduct a voire dire Examination on the PW2 before recording her evidence as provided under

section 127 (5) of the Evidence Act, 1967. Nevertheless the stance of the law is clear that evidence of a child of tenders received without conducting voire dire examination of that witness is graded as unsworn evidence which requires corroboration. See KARIMU ABDALLA "LIKOWE VS. THEREPUBLIC, CRIMINAL APPEAL NO. 43 OF 2005, CAT, Dar es Salaam registry (unreported) and DEE MAY DAATI AND TWO OTHERS VS. REP., CRIMINAL APPEAL NO. 80 OF 1994 CAT (UNREPORTED). Therefore, despite of that credible evidence of PW1 THERE IS EVIDENCE OF PW2 corroborated by the evidence of PW3 and Exhibit P1. From that analysis of evidence it is apparent that the conviction against the appellant was sound based on solid prosecution evidence. The appellants total and complete denial of the offence does not raise any doubt on that strong prosecution evidence.

Mr. Hyera is equally right that the trial District magistrate was wrong to sentence the appellant to a thirty years imprisonment sentence because the law i.e. section 131 (20 of the penal Code protects boys of18 years of age or below from the faceless life of imprisonment. It seems that the trial District Magistrate was bent to harshly sentence the appellant because despite of the act that the charge sheet indicated the age of the appellant to be 18 years of age and therefore a beneficiary of the stance of law (S.131 (2) he recorded the appellant to be "an adult" without showing the exact age of the appellant. From the appellants complaints and the circumstances of the case I am convinced to believe that the appellant told the trial District.

Magistrate that he was 17 years old but the Trial District magistrate, for reasons best to himself, decided to ignore him.

It is for those reasons that I uphold the decision of the Trial District Court on conviction and dismiss the appellants appeal on conviction. On the other hand, it was for the above reasons as well that I allowed the appeal against sentence and set free the appellant on 23/1/2008.

M. S.SHANGALI
JUDGE
18/03/2008

Reasons for the judgment of the court delivered todate 18/03/2008 in the presence of Ms. Shio, Learned State Attorney and in the absence of the appellant.

M.S. SHANGALI
JUDGE
18/3/2008