IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO 159 of 2006

(Originating from the Criminal Case No. 604/1999-Temeke District Court- J.A. Nzota-DM-)

ISACK MOHAMED @ KATAMBULI ALLY.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 24-09-2010
Date of Judgment: 04-10-2010

Juma, J.:

This is an appeal by Isack Mohamed @ Katambuli Ally (appellant herein), who was convicted on 24 December 1999 by the District Magistrate, J.A. Nzota, for the offence of robbery with violence c/s 285 and 286 of the **Penal Code** and second count of rape contrary to section 130-(2) (e) of the **Penal Code**. With respect to the first count of robbery with violence, it was alleged that on 10 November 1999 at around 5.30 in the morning, the appellant and one Bakary Jibaba stole Tshs. 10,200/=, one wrist watch (valued at Tshs. 4000/=) and immediately before such stealing they used violence on Hadija Makongoro. On the second count of rape, it was alleged that the appellant and Bakary Jibaba at the same time and day at Tandika

Azimio had carnal knowledge of Hadija Makongoro without her consent. Only the appellant was present before J.A. Nzota-DM at District Court Temeke to answer the charge sheet. After hearing the case, the District Court was satisfied with the prosecution case and found appellant guilty. Appellant was ordered to serve a 15 year sentence on first count; and life in prison on offence of gang rape c/s 131A of the **Penal Code.**

For his appeal against conviction and sentence; appellant prepared a three page document containing not only the grounds of appeal but also submissions and supporting authorities. From appeal document, I managed to discern four basic grounds of his grievance. First, the trial magistrate should not have convicted him on the basis of a PF-3 admission of which did not comply with section 240-(3) of the **Criminal Procedure Act, Cap. 20 (CPA).** Secondly, he complained that the trial magistrate failed to direct his mind to the essential ingredients required in rape specifically the requirement of penetration under section 130 (4) (a) of CPA. In his third point, appellant contends that the trial magistrate erred in law by admitting cautioned statement **(Exhibit P2)** of the appellant without determining first its voluntary nature. Finally, according to this appellant, the trial magistrate failed to evaluate the evidence of PW1 and PW3.

When this appeal finally came up for hearing on 24th September 2010 the appellant was unrepresented. Appellant basically repeated what he had stated in his grounds of appeal. Respondent

Republic was represented in this appeal by Mr. Charles Kato, the learned State Attorney. Mr. Kato readily agreed with the appellant that the trial magistrate erred in law for admitting the PF-3 without complying with section 240-(3) of the **Criminal Procedure Act, Cap. 20 (CPA)**. This section 240 provides,

> **240**.-(1) In any trial before a subordinate court, any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be receivable in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing the same held the office or had the qualifications which he possessed to hold or to have when he signed it.
>
> (3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.

With due respect, appellant and the learned State Attorney are correct. The law in Tanzania with respect to the scope and interpretation of section 240-(3) of Criminal Procedure Act has been settled by the Court of Appeal of Tanzania through a number of cases. For example, the Court of Appeal in the case of **SPRIAN JUSTINE TARIMO vs. REPUBLIC, CRIMINAL APPEAL NO. 226 OF 2007**

restated the settled law that once the medical report like the PF3 has been received in evidence under section 240 (1) of **Criminal Procedure Act, 1985** it becomes imperative on the trial court to inform the accused of his right of cross-examining the medical witness who prepared it. The Court of Appeal has, as a result, held that if such a report is received in evidence without complying with the provisions of section 240 (3) of the CPA, it should not be acted upon. Court of Appeal in **SPRIAN JUSTINE TARIMO** (*supra*) held that it was a fatal flaw where the contents of Exhibit (PF-3) were not even read out to the appellant i.e. it was akin to the appellant being convicted on the basis of evidence he was not made aware of although he was always in court throughout his trial. From the records of proceedings, it is clear that the trial magistrate did not comply with these procedural safeguards with respect to the PF-3 form.

Mr. Kato did not support the conviction of the appellant. The learned State Attorney submitted that the trial court based its conviction on the testimony of the victim Hadija Makongoro who testified as PW1. Mr. Kato stated further the trial court could only convict on the evidence of a single witness to the crime if the court showed that it believed what PW1 stated was true beyond reasonable doubt. According to the learned State Attorney there is nothing in the judgment of the trial court to show that the court believed all what PW1 said of the offence.

Mr. Kato pointed out that the testimony of PW1 had portions which raised some doubts whether the victim was narrating a true account of what transpired actually transpired. The learned State Attorney wondered how the victim could be dragged along in a busy morning for a quarter of a kilometre with knives pointed on her body without other people witnessing. Secondly, Mr. Kato wondered why it took so long for the victim between 5.30 when she was allegedly attacked and 11.30 for the victim and her husband to report the incident to the police. All these, according to Mr. Kato make it hard to accept the decision of the trial magistrate to convict the appellant on the basis of evidence of PW1. With due respect, I have duly perused the records of the trial proceedings and I am in full agreement with the pertinent position taken by the learned State Attorney that the testimony of PW1 and entire prosecution case, did not prove beyond reasonable doubt the essential ingredients constituting the counts of robbery with violence [c/sections 285, 286 of the **Penal Code**] and the count of Gang Rape [c/s 131A of the **Penal Code**]. It was not safe on the part of the trial magistrate to have relied solely on evidence of PW1 the victim of the alleged crimes. Mr. Kato has pointed out some of unexplained matters in the testimony of PW1 creating doubts on whether appellant committed the offences as charged. For example, whereas PW1 testified that her assailants threatened her with knives, the trial magistrate while meting out the sentence stated that the appellant was not armed. This is an example of inconsistency which creates doubts on the whole case appellant faced.

This being a first appeal I am required to re-evaluate the evidence, analyse it and come to my own conclusion. Upon my re-evaluation of evidence and applicable provisions of the law I could not but conclude that much to the disadvantage of the appellant, there are several areas suggesting miscarriage of justice. For example, the appellant was convicted and sentenced over Gang Rape, an offence over which he was not charged with in the first place. On the very second paragraph of the typed Judgment, the trial District Magistrate indicates that in the second count, the appellant was charged with "RAPE c/s 130 (2) (e) of the **Penal Code**". This provision of the **Penal Code** covers rape of any woman, who is under eighteen years of age-

> A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:
> (a)...
> (b)...
> (c)...
> (d)...
> (e) with or without her consent **when she is under eighteen years of age**, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.-**[emphasis added]**

Records of the trial proceedings show that the victim (PW1) was already 39 years old at the time of her testimony and she was clearly not under the age of eighteen years as envisaged by section 130-(2) (e) of the **Penal Code**. Without showing how, instead of convicting the appellant for an offence under section 130-[2], the trial

magistrate convicted the appellant with Gang Rape contrary to section 131 (A) of the **Penal Code** and proceeded to sentence him to serve a sentence of life imprisonment. The relevant section **131A** creating the offence of gang rape provides,

> **131A**.-(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.
>
> (2) Subject to provisions of subsection (3) every person who is convicted of gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.
>
> (3) Where the commission or abetting the commission of a gang rape involves a person of or under the age of eighteen years the court shall, in lieu of sentence of imprisonment, impose a sentence of corporal punishment based on the actual role played in the rape.

The trial magistrate made no attempt to explain how the appellant who was initially charged with offence of rape ended up with a conviction and a sentence of gang rape for which he was not charged and tried with in the first place. Section 300 of **Criminal Procedure Act** summarizes the law in Tanzania governing situations where trial courts are authorized to convict a person of an offence for which that person was never in the first place charged with. This section 300 is an exception to the general rule that a person cannot be convicted of an offence with which he was not charged. The relevant section 300 CPA provides,

> **300**.-(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
>
> (3) For the purpose of this section the offences specified in section 222 of the Penal Code shall, where a person is charged with the offence of attempted murder under section 211 thereof, be deemed to be minor offences.

A person can be convicted for an offence for which he was not charged with if the offence for which the person is finally convicted with, consists of several particulars, a combination of some only of which constitutes a complete minor offence but fall short of the offence for which the person was originally charged with. The law emphasizes that the offence for which the accused is sought to be convicted later on must be, minor in relation to the offence with which he was originally charged which may be called the major offence. The punishment provided for committing minor offences must be in all cases less than that provided by law for committing the major offence.

Applying section 300 of CPA to this appeal, it is clear that the trial magistrate made no attempt to show how the offence of

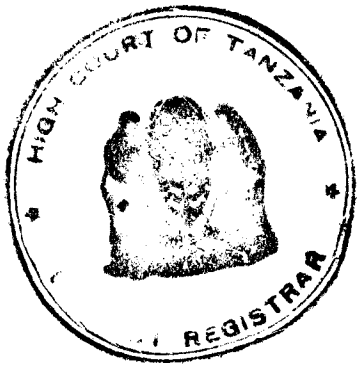
Gang Rape is a cognate minor offence to the offence of rape of a girl under the age of 18 to justify the conviction and the sentence that was meted out on the appellant. In my opinion and finding, the offence of gang rape which according to section 131A-(2) of the **Penal Code** attracts a mandatory sentence of imprisonment for life is not a minor cognate offence to the offence of rape created under section 130-(2) (e) of the **Penal Code** (which under section 131-(1) of the **Penal Code** attracts a possible sentence of imprisonment for life, and in any case for imprisonment of not less than thirty years. There is no doubt in my mind that the conviction and the sentence of gang rape which the trial court imposed on the appellant, was in all accounts improper and illegal. This Court shall not allow the illegal conviction and the resulting sentence with respect of the offence of Gang Rape to stand.

For the foregoing reasons and in view of the concession by the learned State Attorney; this appeal is allowed, the convictions quashed and the sentences imposed upon the appellant are hereby set aside. Appellant shall be set free unless otherwise lawfully held.

I.H. Juma,
JUDGE
04-10-2010

Delivered in presence of:

1. Isack s/o Mohamed Katambuli Ally (Appellant)
2. Ms Itemba– State Attorney (For the Respondent Republic)



I.H. Juma,
JUDGE
04-10-2010