

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT DAR ES SALAAM DISTRICT REGISTRY**

**CRIMINAL APPEAL NO. 105 OF 2017**

*(Originating from District Court of Kisarawe at Kisarawe, Criminal Case No 143*

*of 2016)*

**MASOUD MGOSI..... APPELLANT**

**VS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

**MWENEMPAZI, J.**

The appellant, Masoud Mgosi was charged and convicted with the offence of Rape contrary to section 130 (1) & (2) (e) and section 131(1) of the Penal Code, Cap. 16 [R.E 2002]. He was sentenced to serve mandatory term of 30 years (thirty years) imprisonment. He is appealing against conviction and sentence. It was alleged that the appellant, on the 16<sup>th</sup> day of September, 2016 at about 9:00 hours at Mtamba Village within Kisarawe District in the Coastal region, did have carnal knowledge with one Bandita d/o Mwaruko a girl aged 11 years old.

In order to challenge the decision of the trial court, the appellant filed a petition of appeal listing eight grounds of appeal. In the first and second ground the appellant sought to discredit the testimony of the victim one, Bandita d/o Mwaruko(PW1) that her evidence was not supposed to be accorded weight as *voire dire* was not properly conducted. That questions were not recorded as well as the court did not come up with its opinion on the compliance with the provisions of section 127(2) of the Evidence Act, Cap. 6 [R.E. 2002]. As a result, PW1 lied to the court. The court however, accorded weight to her testimony and in fact it was relied on the evidence in its decision. The appellant also raised a point that he is a disabled man unable to move in grasses in that way the evidence of PW1, PW2 and PW3 is not true. He further contends that the prosecution case was poorly investigated because they failed to produce shoes alleged to have left marks at the scene of crime. In his appeal the appellant also faults the prosecution evidence for failure to summon a ten-cell leader where the victim was interrogated. Another point raised is that the prosecution was supposed to bring evidence showing how he was arrested. More over the appellant has a view that, it was wrong for the court to convict him without taking into consideration that the victim, Bandita d/o Mwaruko was taken to hospital for medical examination four days after the event. In the last point he is of the view that the prosecution failed to prove the case beyond reasonable doubt therefore the Court wrongly convicted him.

At the hearing, the appellant was representing himself and the Respondent(Republic) was enjoying the services of Debora Mushi, learned State Attorney. The appellant fully adopted the Petition of Appeal without elaboration but he, however, asserted his right to make rejoinder in the wake of the submission of the learned State Attorney. He further prayed that this court should see it fit to release him, as he never committed the crime. His story is, that on the date he was arrested by people who visited his home, he was taking breakfast with his family. Visitors asked him to accompany them to the police station. There he was told that he is being accused of raping Bendita d/o Mwaruko. They accused him to have committed the said offence on the 16<sup>th</sup> day of September, 2016. However, he insists that on the said date he went to Mhaga to deliver food for his kid who studies at Kibuta Secondary School. He prays to be set free so that he can join his family.

The Respondent, Republic submitted on the appeal supporting conviction and sentence. The respondent prayed that this appeal should be dismissed. According to the available evidence on record, six witnesses testified in court. Among them the key witness is PW1 who is the victim. She testified that as she was going to school on the 16<sup>th</sup> day of September, 2016 the appellant called her in the bush. He offered her Tshs. 1000/= so that they may have sexual intercourse. She took the money, The appellant forced her down, undressed her and himself,

finally entered his penis in her vagina. They had sexual intercourse and then she left for school. She spent the money at school. PW1 was seen by PW2 Gaudensia Lazaro at the time she was coming out from the bush a scene of crime. PW2 was at the time returning home from her farm. PW2 told the story to PW3, Bendita Ernest. She had asked PW2 the direction PW1 came from. She was told the direction and that the appellant was seen leaving the bush on the other side of the bush. PW1 was later interrogated and was able to identify the appellant by the name of Mgori. In court PW1 testified that this incident was occurring for the third time. The doctor also confirmed that PW1 had bruises in her vagina and had no virginity.

The Respondent submitted that the evidence by PW1 is somehow weak. Her submission was to effect that the court failed to properly conduct *voire dire* in order to assure itself whether PW1, one Bendita d/o Mwaruko, being a girl of 11 years old knew the importance of speaking the truth. The learned State Attorney referred to section 127(2) of the Evidence Act as amended by section 26 of the Miscellaneous Laws(Amendment) Act (NO. 2), 2016. The provision as it stands now is that a child of tender age may give evidence with or without oath provided the court is assured that the child knows the importance of speaking the truth. The effect of not doing so reduces strength of the evidence by PW1. The Respondent submitted that under the circumstances of the case, the evidence of PW1 should be

taken as unsworn evidence which need corroboration. This court was referred to the case of Alfeo Valentiono vs. Republic, Criminal Appeal No. 92 of 2006, Court of Appeal of Tanzania at Arusha at page 12;

*“Their (two girls of tender age) evidence having been taken on oath without complying with this mandatory requirement of the law...should be reduced to the plane of unsworn evidence which would need to be corroborated” (words in bold letter are mine)*

In other grounds or points raised by the appellant is that there is evidence tendered in court that the appellant had sexual intercourse with PW1 three times while in fact the same is not reflected in the charge. The respondent submits that the fact that the other two occasions are not reflected in the charge sheet does not relieve the appellant from being guilty of this incident. The respondent strongly urges this court to focus on the evidence supporting the event which occurred on the 16<sup>th</sup> day of September, 2016. On the fact that a ten-cell leader was not called up to testify, the respondent referred this court to section 143 of the Evidence Act. The provisions of the law state that;

*“Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.”*

The law does not specify a number of witnesses before a case can be proved. It is the strength of the evidence which is of essence for the proof of an offence. The appellant has also raised a point faulting the court that it did not consider how he was arrested. The proceedings at page 8 shows that the appellant was arrested following interrogation of PW1. The Point has no merit. The respondent pray that this appeal is dismissed.

In rejoinder, the appellant insisted that he was arrested on the 18<sup>th</sup> September, 2016 not 16<sup>th</sup> day of September as alleged by the prosecution.

This court has had time to review the proceedings of the trial court. PW1 did testify in court as briefly summarized above. Her testimony was so firm and in fact she disclosed other incidents which had happened earlier and the culprit is the same person. She has mentioned his name as Mgesi. No doubt she was sure of what she was speaking, as nobody knew what was happening in the bush but she stated categorically that she has been raped by Mgesi and this is the third time. The most important question is, in my view, whether the court below was right to believe in her story and whether this court also should believe and rely in PW1 evidence in making its decision. In the record, PW1 is a girl of tender age, 11 years old. There is a specific procedure of taking her evidence and considerations before proceeding to rely on it. In that regard, section 127(2) of the Evidence Act, Cap. 6 [R.E.2002] as amended by the Written Laws (Miscellaneous Amendments) (No 2) Act, No. 4

of 2016. Section 26 of the Amendment Act amends section 127 (2) of the Evidence Act and it provides as follows: -

*“(2) A child of tender age may give evidence without taking an oath or making an affirmation **but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.**”*

According to the law, before giving evidence the child must promise to tell the truth to the court and not to tell lies. In this case, PW1 was merely questioned by the court on what it means to say the truth and to tell lies. She did not give any promise to tell the truth or at least it was not recorded that she promised to tell the truth. Though that was the situation, this court still have the opinion that the account of the story of what went on in the bush was clearly so. It is more convincing when we have the account of PW2 one Gaudensia Lazaro who saw PW1 coming out from the bush. This person heard for the first time that the appellant raped PW1 from the mouth of PW1 herself. This resolves the question we had as to whether the trial court was right in relying on the account of PW1, Bendita d/o Mwaruko. Further more it is the opinion of this court that the child, PW1 is possessed by sufficient intelligence and understands the duty of speaking the truth.

The appellant when submitting on his grounds of appeal said that on the date he is alleged to have raped the girl, he went to Mhaga to deliver food for his kid

who studies at Kibuta Secondary School. However, during trial, specifically defence case, the appellant (accused then) raised the defence of alibi. He said he was sent by the person who is treating his wife. This is the only defence he raised and testimony as defence witness. This court is aware of the position of the law that where a defence of alibi is given after the prosecution has closed its case without any prior notice, the trial court has to take cognizance of the defence and it may exercise its discretion to accord no weight to the defence (**Mwita Mhere and Ibrahim V. Republic** [2005] TLR 107). The court record, the Judgement, does not reflect anything to show such cognizance of the defence of *alibi*. Since the appellant repeated this cry, though not specifically, this court takes it that he is complaining that the omission did injustice to him. It is also the position of the law that the burden of proof in criminal cases lies to the prosecution. Despite the fact that the appellant raised his defence after closure of the prosecution case, n still the court ought to have considered it basing on what it had at hand as evidence of prosecution. This being the first appeal, under section 388(1) of the Criminal Procedure Act, Cap. 20 [R.E. 2002] in exercising it revisional powers, will step into the role of the trial court to consider the defence of alibi raise as explained above.

PW1 Bendita d/o Mwaruko, testified that she was raped by the appellant on the 16<sup>th</sup> day of September, 2016. This is the date which has been referred to by all

witnesses, more important, PW1(victim), PW2 Gaudencia Lazaro, the woman who saw PW1 coming out from the bush, PW4 Athanas Ernest, participated to arrest the appellant and PW6 investigator who recorded statements. It is the date the appellant was arrested as per evidence of PW4 ATHANAS ERNEST. The appellant never challenged the evidence and it is so in the evidence of PW6 who the investigator was one WP 6132 D/C Marcelina. If we add up the discrepancy in the statement of the appellant himself during defence and at the time of submitting on the appeal, this court finds that the assertion lacks authenticity.

All that said leads this court to nowhere that only one conclusion, that the appeal lacks merit. It is accordingly dismissed in its entirety.



**T. M. MWENEMPAZI**

**JUDGE**

**20/6/2018**