

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 15 OF 2021

(Originating from Kilwa Masoko District Court Criminal Case No. 93 of 2020)

SAIDI ABDALLAH KITENGE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of hearing: 20/12/2021

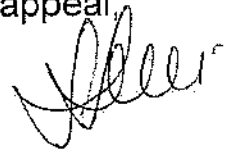
Date of Judgment: 27/12/2021

JUDGMENT

MURUKE, J.

Saidi Abdallah Kitenge, the appellant, was charged and convicted for an offence of rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code, Cap.16, R.E 2019. He, thus sentenced to serve 30 years imprisonment in jail. Being dissatisfied, he filed present appeal raising five grounds listed in the memorandum of appeal and three other in the additional ground of appeal.

On the date set for hearing appellant was in person, thus requested his ground of appeal be received as his submission in support of his appeal prayer that this court accepted.



Lugano Mwasubila State Attorney represented respondent. In his submission, supported conviction and sentence on the following reasons:

- (i) Appellant was found with the victim aged 15 years old in this room having sex.
- (ii) Evidence of a victim PW1, PW2, PW3 and PW4 were strong to ground conviction.
- (iii) PW4, Clinical Officer who examined the victim proved that PW1 was penetrated;
- (iv) Trial court considered evidence of both prosecution and defence and arrived at proper conclusion of convicting the appellant.
- (v) Exhibit P4 was not read in court, remedy is same to be expanded from the records. Despite that, remaining evidence of victim and other witnesses proved the offence charged.

In totality learned State Attorney insisted on appeal to be dismissed for lack of merits.

Having gone through grounds of appeal, submission by learned State Attorney, and court records, issue for determination is whether evidence adduced at the trial court, justified conviction. To answer the same, let's revisit some of the evidence at that trial court.

PW1 the victim aged 15 years at page 5 of the trial typed proceeding she is quoted to here said:

"on 22/10/2020 at 19.00 hrs I went at accused home. First I went to my aunt then went to accused who called me and told me to go to his home. Accused has rented one room. After reaching accused home we lighted electricity. We entered in the room and climbed on the bed. Accused did sexual intercourse to me. After doing so, we slept until 04.00 hrs when my mother and my sister and two militiamen came to arrest me and accused."



2

From the evidence of PW1, the victim, she confessed herself that, she went at accused alone after being called, then followed the accused now appellant. She willfully climbed in the bed and made love with appellant, then slept until 04,00 hrs from 19.00 hrs. On the other hand appellant who testified as DW1 he is quoted to have said at page 20 of trial typed proceedings that:

"On 22/10/2020, I came from home went to container bar. I ordered food and ate. Besides me there was a girl talking on phone. I invited her to eat. I ordered Chips and soda. I asked her name she said she is Mwajuma. I bought her a beer Serengeti Lite she drunk. She promised to come to my home. She later came. While inside, I heard people knocking I opened the door then arrested.

There is no dispute from the evidence of PW2 and DW1 that they were caught inside DW1 room (the appellant). Upon examination, it was found by PW4 that PW1 was penetrated. To be precise, PW4 Clinical Officer who examined the victim he said at page 17 of trial court records, that;

"I received PW1 on 22/10/2020 to examine her if she is penetrated sexually. I examined her vagina, I identified PW2 hymen is perforated. There was no bruise, no blood. I identified PW1, is involved in sexual intercourse is sexually penetrated her vagina had 3.cm width. I examined her blood she didn't have venereal diseases. I examined her urine on pregnancy test, she did have pregnancy."

Unfortunately, PF3 despite being tendered, it was not read after admission for accused person to be able to asks questions if any, that is totally wrong. PF3 was admitted in contravention of section 210 (3) of Criminal Procedure Act Cap.20 R.E 2019. Requirement of the above law was insisted in the case of **Robson Mwanjisi & 3 others TLR 2003 at page 218**, where it was held that;

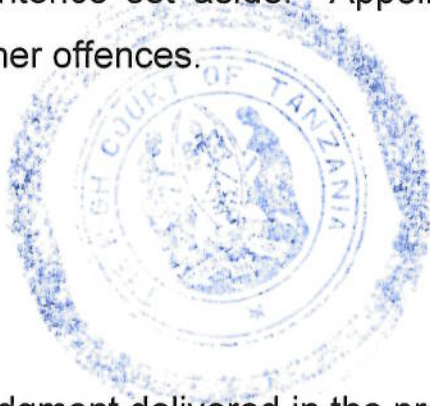


3

“Whether it is intended to introduce of document in evidence, it should be cleared for admission and be actually admitted before it can be read out”

As correctly submitted by learned State Attorney, exhibit P4, is expanged from the court records for failure to follow the law in the cause of admission.

According to PW4 the Clinical Officer who examined PW1, the victim, he said, victim was involved in the sexual intercourse following measurement he made. In the absence of PF3 to prove that, victim was penetrated evidence raises doubts. Evidence of the accused now appellant that, she found the victim at bar at 19 hrs, a daughter of 15 years, not challenged by the prosecution. It is not clear whether it is the appellant who penetrated the victim. For this reasons, then, doubts raised is entertained on the benefit of the appellant. Thus, appeal allowed. Conviction is quashed, sentence set aside. Appellant to be released, unless lawfully held with other offences.



Handwritten signature of Z.G. Muruke in blue ink.

Z.G. Muruke

Judge

27/12/2021

Judgment delivered in the presence of appellant in person and in the absence of Respondent.



Handwritten signature of Z.G. Muruke in blue ink.

Z.G. Muruke

Judge

27/12/2021