

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

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**DC CRIMINAL APPEAL NO 4 OF 2023**

(Arising from the Criminal Case No. 123 of 2021 of Manyoni District Court)

**HAMZA SELEMANI .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*22/2/2023*

**MASAJU, J.**

The Appellant, Hamza Selemani, was charged with, and convicted of **RAPE** contrary to sections 130 (1) (2) (e) and 131(1) of the Penal Code [Cap 16 RE 2019] in the District Court of Manyoni. He was sentenced to serve seven (7) years in prison, hence this appeal against the conviction and sentence by the trial court. His petition of Appeal was made of three grounds of appeal, including the grounds that the prosecution case before the trial court was not proved beyond reasonable doubt and that there was no fair trial.

When the appeal was called upon for hearing today the 22<sup>nd</sup> day of February 2023, the layman Appellant appeared in person. He adopted his grounds of appeal to form submissions in support of his appeal in the Court as he stated that he did not commit the offence. He also prayed the Court to allow the appeal and set him free.

The Respondent Republic, in the service of the learned Senior State Attorney, Mr. Leonard Chalo, did not contest the appeal for want of material witnesses. The Respondent also took issues with the sentence of seven (7) years imprisonment which was against the law in terms of sections 130 (1) (2) (e) & 131(1) of the Penal Code [Cap 16 RE 2019]. That is to say, other things being equal, upon conviction, the Appellant could have been sentenced to serve thirty (30) years imprisonment, not seven (7) years imprisonment that was imposed upon him.

The Court agrees *in toto* with the parties that the prosecution case against the Appellant before the trial Court was not proved beyond reasonable doubt against the Appellant who had pleaded not guilty to the charge. Going by the evidence adduced by Miraji Hamis (PW1) and Zena Hamis (PW2), the victim of crime was allegedly in the company of her sister, one Hadija Hamis, when the Appellant took the victim of crime

away so that he could rape her. Surprisingly, the said Hadija Hamis, who could have been a very important prosecution witness did not testify before the trial court against the Appellant who denied the offence. Her testimony was very crucial since the evidence by Miraji Hamis (PW1) was questionable, for the Appellant had testified uncontroverted before the trial court that the said prosecution witness found him defecating in the bush and took away his Axe. That, he demanded his Axe in vain and reported the incident to Police Station where he was advised to complain before the Village Executive Officer who in turn advised him to report the matter before the Ten Cell Leader. That, when they met before the ten cell leader the victim of crime alleged that she had been raped by the Appellant, the allegations he denied. The police officer who attended the Appellant, the Village Executive Officer and the ten cell leader did not testify before the trial court so as to confirm or deny the Appellant's defence before the trial court. It is no wonder that the Appellant argued that there was no fair trial against him. These compellable and competent witnesses, including the investigation officer of the case did not testify before the trial court. In such circumstance this Court is entitled to draw adverse inference against the prosecution case, that its evidence was not credible. In such circumstance the evidence by Miraji Hamis (PW1) that

he found the Appellant *in fla grante delicto* in the act of sexual intercourse with her sister (PW2) was questionable bearing in mind the fact that the Appellant had testified before the trial court that there had been a long standing dispute between him and the PW1 & PW2's family.

There is exaggeration on the evidence testified by one Godfrey Venant (PW3), a clinical officer, who medically examined the victim of crime (PW2) and his finding on the Medical Examination Report PF3 (prosecution exhibit "H1"), which finding was not reflected in the victim (PW2)'s evidence. One wonders whether the victim of crime's clothes could still be clean in light of the injury observed by the clinical officer (PW3) on her genitalia as per PF3 (prosecution exhibit "H1".)

It suffices to state here that the Medical Examination Report (prosecution Exhibit "H1") leaves much to be desired in particular when on the Medical Practitioner's Remarks part, the Clinical Officer had this to say thus;

*"Need to be tested for UPT and HIV after 14 days from today, that is on 7/10/2021"*

The alleged victim of crime (PW2) also alleged during the trial before the trial court that on the material day the Appellant gave her TZS 1000

so that he could have carnal knowledge of her and that she had a khanga (garment) which was laid on the ground where they lay during the forced sexual intercourse. The alleged TZS 1000 and the khanga (garment) altogether were not tendered for admission in evidence before the trial court. The khanga, in particular, could have borne blood stains coming from the alleged ruptured vagina membrane as per the Medical Examination Report (prosecution exhibit "H1").

The Court is of the considered position that the evidence adduced by alleged victim of crime (PW2) was not capable of being credible and true in order to ground conviction in terms of section 127(6) of the Evidence Act, [Cap 6 RE 2019] and section 115 (3) of the Law of the Child Act, [Cap 13 RE 2019].

The Court also agrees with the Respondent Republic that the Appellant's sentence of seven (7) years imprisonment was illegal in terms of the charge that was laid against him before the trial court in terms of sections 130 (1) (2) (e) & 131(1) of the Penal Code, [Cap 16 RE 2019].

Thus, the meritorious appeal is hereby allowed accordingly. The conviction, sentence of seven (7) years imprisonment and the order that the Appellant compensates the victim of crime TZS 800,000 upon service

of his custodial sentence are hereby severally and together quashed and set aside respectively. The Appellant shall be released forthwith from prison except if there was a lawful cause.



GEORGE. M. MASAJU

**JUDGE**

22/2/2023