IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK,J.A.,LUANDA,J.A., And MZIRAY, J.A.,)

CRIMINAL APPEAL NO. 380 OF 2015

ABEID SEIF .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Lukelelwa, J)

dated 25th day of June, 2013
in
DC Criminal Appeal No. 126 of 2010

JUDGMENT OF THE COURT

12th & 17th October, 2016

LUANDA, J.A.:

Mr. Rwegira Deusdedit learned State Attorney who represented the respondent/Republic supported the appeal lodged by Abeid Seif (the appellant), and rightly so.

Briefly the facts of the case were that the appellant was charged with rape C/SS 130 (2)(e) and 131(1) of the Penal Code, Cap. 16 of the R.E 2002 in the District Court of Urambo at Urambo. He was convicted and sentenced to 30 years imprisonment. It was alleged that he raped

Nyamizi d/o Madili (PW1) a girl of tender age of 13 years. The material evidence to connect the appellant with the charge came from two prosecution witnesses out of four namely Nyamizi (PW1) and Stella d/o Triphon (PW4), another girl of tender age of 14 years. But these two, who are children of tender years as per S.127(5) of the Evidence Act, testified without the trial Court first conducting a *voire dire* examination as provided under s. 127(2) of the Evidence Act, Cap. 6 RE 2002 (the TEA). That was wrong as correctly pointed out by both the learned judge on first appeal as well as Mr. Rwegira. But surprisingly the learned judge on appeal said though the evidence of PW1 and PW4 were expunged, the evidence of the remaining two witnesses namely Sr. Teresia Balisimaki (PW3) a medical officer who attended PW1 following a rape report and Agatha d/o Sadick (PW2) a relative of PW1 who claimed to have been tracing her and found in the house of the appellant was sufficient to ground a conviction.

It was the finding of the learned judge on first appeal who said:-

> *"PW2 found the appellant in a flaggerant delicto with the victim in his room".*

There is no such evidence on record to that effect. This witness said:-

> *"I went on to find her, when we approached the house of Mzee Seif we heard a cry for help "Mnisaidieni nakufa amenibaka" I recognized that it was the voice of Nyamizi it was from the room of Abeid. I knocked a door,* ***the accused person came out.*** *I saw Nyamizi was crying."*
> *(Emphasis added)*

The learned judge, as correctly observed by Mr. Rwegira, did not grasp properly the evidence of PW2. Had it being shown PW2 met the appellant in the act of sexual intercourse, that evidence would have carried the day. That direct evidence would suffices to prove rape especially to children below the age of 18 years. It is not in this case.

The remaining evidence is that of PF3 given by PW3. Mr. Rwegira rightly pointed out that that evidence alone cannot be the basis of conviction. This is because the evidence of a medical findings is mainly geared towards supporting material evidence.

In sum, the appeal is allowed. The conviction is quashed and sentence and compensation order are set aside. The appellant to be released from prison forthwith unless he is detained in connection with another matter.

Order accordingly.

DATED at **TABORA** this 13th day of October, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL