IN THE HIGH COURT OF TANZANIA
AT SONGEA

DC CRIMINAL APPEAL NO. 4 OF 2016

(Originating from the decision of the Namtumbo District Court in Criminal Case No. 30 of 2015)

SWALEHE ALLY.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 29th March, 2016

Date of Judgment: 11th April, 2016

CHIKOYO, J.

Following the appellant's conviction on rape offence contrary to section 130 (1) and 131 (1) of the Penal Code [Cap.16 R.E 2002] and sentence of thirty (30) years in jail imposed by the Namtumbo District Court, (the trial court) the appellant is aggrieved hence this is his appeal. Through the legal services of Mr. D. Ndunguru, the learned Advocate of the appellant has raised one ground of appeal that the trial court erred in law by convicting

the appellant on the alleged offence while the prosecution side failed to prove the said offence beyond reasonable doubts.

The facts leading to the instant appeal are as follows; on 23rd day of July, 2015 FATUMA SWALEHE (PW1) aged 8 years old, a standard II and a student Migeregere Primary School while she was on her way back home with other students from the school, she was instructed by one SAIDI who was at the shop to take some sugar and send it to the PW1's father one SWALEHE. On her way home, PW1 met the appellant and when they arrived in a bush, it was alleged that, the appellant grabbed PW1 and raped PW1. PW1 tried to scream but the appellant blocked her mouth and then the appellant raped PW1.Then the appellant gave PW1 soda and biscuits and told her that she should not tell anyone. When PW1 arrived at home, PW1 met her mother, sister one REHEMA SWALEHE (PW3) and brother in 'law MOHAMED RAJAB KIWANDA (PW2), where PW1's sister appeared to be very suspicious on how PW1 was walking, as a result PW1's mother instructed PW3 to go with PW1 in the toilet so as to inspect PW1's private parts. That is when PW3 discovered that, PW1's private parts had sperms and bruises thus it appeared PW1 was raped and when PW1 was asked as to who was responsible, that is when PW1 mentioned the

appellant, then later the matter was reported to the Namtumbo Police station and PW1 was sent to the Hospital, where according to the testimony of PETER NDUNGURU (PW5) a doctor who conducted medical examination to PW1's private parts came up with the opinion that, PW1's vagina had bruises and semen as far as PF3 is concerned which was admitted as exhibit P.2. Basically, at the trial, the appellant denied to have committed the alleged offence and he insisted that, PW2 was the one who raped PW1, however at the end of the trial, the appellant was convicted and sentenced as stated above.

Aggrieved by the said imposed conviction and sentence, the appellant has come in this court by virtue of an appeal. When this appeal was called for hearing, Mr. D. Ndunguru the learned Advocate appeared for the appellant while Mr. Baligila, learned State Attorney appeared for the respondent.

Mr. D. Ndunguru's submissions in support of the ground of appeal were to the fact that, the trial court did not conduct a proper voire dire examination before PW1 testified since she was of a tender age hence this was contrary to what has been stated by the Court of Appeal in a full bench of five Justices of Appeal in the case of **Kimbute Otiniel Versus Republic, Criminal Appeal No. 300 of 2011 (CAT-DSM) (Unreported)** as the

religion questions were involved; the case against the appellant is a framed one and the entire evidence of the prosecution side did not prove as to whether there was penetration since the appellant did not commit the alleged offence, and the prosecution side at the trial court failed to prove the case beyond reasonable doubts. Thus Mr. Ndunguru prayed this appeal to be allowed.

In reply, basically Mr. Baligila opposed this appeal that the voire dire was properly conducted as per the law, and even where the said voire dire is found to be improperly conducted, according to the case of **Kimbute (supra)**, such evidence is not required to be expunged and more so he insisted that the case against the appellant was proved beyond reasonable doubts. Hence he prayed this appeal to be dismissed.

In his rejoinder basically Mr. D. Ndunguru insisted that the voire dire was improperly conducted and the prosecution side failed to prove the alleged offence beyond reasonable doubts since PW1 did not state on how long the incident took place; how PW1 knew the appellant and he mainly insisted that the case against the appellant is a plant one.

As to me after a carefully perusal of the entire court records and the submissions from both parties, the issue here is whether this appeal has merit or not.

Starting with the allegation of whether the trial court conducted improper voire dire or not. This issue should not detain me so long since Mr. Ndunguru alleged that, the trial magistrate during the conduct of the said voire dire involved the questions relating to the religion which is wrong as per **Kimbute's** case. I have gone through the entire questions asked PW1 by the trial magistrate in that voire dire examination (pages 12-13 of the typed proceedings of the trial court), I have found no question which is directly related to the religion of PW1, instead the trial court only asked PW1 which religion is she believing and there are no more questions about PW1's religion. For that reason, I find Mr. Ndunguru's allegations lacks merits and I agree with Mr. Baligila's position that, the trial court conducted a proper voire dire examination.

Regarding to the question as to whether the appellant was properly convicted or not. Upon my perusal of the entire adduced evidence, I find no good reason to fault the appellant's conviction, because PW1's testimony after a proper voire dire examination was done, she clearly

narrated what the appellant did to her that is, she was raped by the appellant and as I am alive with the settled position of the law that the best evidence in sexual offences comes from the victim **See; Godi Kasenegala Versus Republic, Criminal Appeal No. 10 of 2008 (CAT-IR) (Unreported)**; PW1 mentioned the appellant's name soon after being asked by PW3 upon being inspected into her private parts, in my view the ability of PW1 to name the appellant's name at the earliest stage in the instant appeal implies to the assurance of the alleged fact, which carries weight against the appellant's guilt. **See; Marwa Wanjiti Mwita and Another Versus Republic [2002] T.L.R. 39 at page 43.**

Again, had it been the fact that what the appellant was charged was a framed case as alleged by Mr. Ndunguru, the question is why during the trial the appellant even upon given an opportunity to cross examine PW1 (the victim) and PW2 he did not, instead, the appellant crossed examined PW3? In my view, failure of the appellant to cross examine PW1 and PW2 suggests that, the appellant knew what he had done to PW1 and at this stage the appellant is stopped to discredit the testimonies of PW1 and PW2. This position is well settled in the case of **Emanuel Adamu Kessy and Another Versus Republic, Criminal Appeal No. 303 of 2012**

(CAT-AR) (Unreported) at pages 8 and 9 the Court of Appeal of Tanzania cited with approval the case of **Nyerere Nyague Versus Republic, Criminal Appeal No. 67 of 2010 (Unreported)** where it was stated;

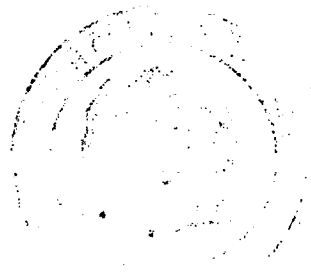
> ***'As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to accept that matter*** *and will be estopped for asking the trial court to disbelieve what the witness said.'* [Emphasis is mine]

I could end up here, but I find it appropriate to ascertain on the legality of the imposed sentence of 30 years in jail by the trial court. The court records reveal that, PW1 was a Standard II at Migeregere Primary School and according to the testimony of PW1's mother HAWA JUMA (PW4) and a clinic card Exhibit P1 reveal that, PW1 was aged 8 at the time of commission of the alleged offence. The question is whether the imposed sentence is proper? The answer is no. Because since the victim (PW1) was aged below ten years at the time of commission of the alleged offence, thus by virtue of **section 131 (3) of the Penal Code (supra)**, a person convicted for raping a victim aged below 10 years shall be imprisoned for life.

In the event, it goes without saying that, the imposed sentence by the trial court to the appellant is manifestly inadequate as stated above, this court has the power to interfere and rectify that error by imposing an appropriate sentence. **See; Republic Versus Ratilal Amarshi Lakhani [1958] EA 140** and **Samwel Yose @ Kijangwa Versus Republic, Criminal Appeal No. 208 of 2005 (CAT-TA) (Unreported).** For that reason, I hereby set aside the imposed sentence of 30 years in jail and substitute it with the sentence of life imprisonment as per **section 131 (3) of the Penal Code (supra)**. The appellant is hereby sentenced to life imprisonment.

Having said so, I find this appeal has no merit, since the prosecution side at the trial court proved the alleged offence beyond reasonable doubts. This appeal is hereby dismissed.

It is so ordered.



S.M. CHIKOYO

JUDGE

11/04/2016

Judgment delivered in chambers in the presence of the appellant in person, Mr. Mwegole Learned State Attorney for the respondent and Mr. Komba Court Clerk, this 11th day of April, 2016.

S.M. CHIKOYO

JUDGE

11/04/2016

COURT: Right of appeal explained.

S.M. CHIKOYO

JUDGE

11/04/2016