

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 315 OF 2017

*(Arising from the Judgment of District Court of Ilala, Criminal Case No.
271 of 2016)*

JOHANES KISULILO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 13/11/2019

Date of Judgment: 31/12/2019

S.M. KULITA, J.

This is an appeal originating from Ilala District Court, Criminal Case No. 271 of 2016. The accused JOHANES KISULILO (hereinafter to be referred as the appellant) was convicted and sentenced to serve life imprisonment for the "Rape" contrary to section 130(1) (2)(e)(ii) and section 131(1) of the Penal Code [Cap 16 R.E.2002].

Being aggrieved with the decision of the said court the appellant appealed to this court against both conviction and sentence.

The background of this matter is that; it was alleged that on the 31st day of August, 2016 at the morning hours at Majohe area, within Ilala District in Dar es Salaam Region, the appellant had a carnal knowledge of Jenifer Sadick a girl of three years.

The appellant lodged his appeal comprising of seven grounds challenging the decision of the aforementioned case as follows;

1. That the learned trial Magistrate erred in law and fact by convicting the appellant relying on the discredited testimony of PW1 a girl of tender age of three years old as the trial court wrongly satisfied that the child was capable of telling the truth.
2. That the trial Magistrate erred in law and fact by convicting the appellant relying on the un-procedural testimony of PW1 (victim) while the questions put to her in voire dire test were not rational to justify that PW1 possessed sufficient intelligence to understand the duty of speaking the truth contrary to the procedure of the law.

3. That the trial Magistrate erred in law and fact by convicting the appellant relying on the discredited testimonies of family members PW1 (victim) who at first instance stated to be raped by her father at page 6 line 1-3 of the copy of judgment.
4. That the learned trial Magistrate erred in law and fact by convicting the appellant relying on the discredited testimony of PW2 and PW4 who stated to have examined the genital area of PW1 (victim) and found some white fluids (at page 4 of the copy of judgment) and signs of bruises, blood stains and white discharge that looks like male semen (at page 6 in the copy of judgment) contrary to PW3 (Medical Doctor) who stated that there was no sperm though the incident occurred on the same date 31/08/2016 and the medical examination was done on the same day by PW3.
5. That the trial Magistrate erred in law and fact by convicting the appellant while the prosecution side has failed to prove age of the victim (PW1) as no document was tendered to prove that PW1 is a girl aged 3-4 years old (line 1-4 in the copy of judgment).
6. That the trial Magistrate erred in law and fact by convicting the appellant relying on Exh.PB (PW3) while he failed to allow medical examination of the appellant for

the analysis of specimen/samples, semen's, spermatozoa, viscid fluids, DNA test and sexual transmitted diseases for the comparison with those findings in the PF3 (Exh.PB) for PW3 to determine whether the appellant had committed the charged offence or not, contrary the procedure of law.

7. That the trial Magistrate erred in law and fact by convicting the appellant relying on the weakness of the defense testimony (at page 11 in the copy of judgment) contrary to the procedure of law as the burden of proof never shifted.

During the hearing of this appeal, the appellant represented himself while the respondent was represented by Ms. Monica Ndakidemu the Learned State Attorney.

In the oral submissions the appellant submitted that, he prays for his grounds of appeal to be adopted as part of his submission. He said that he was wrongly convicted and sentenced to serve life imprisonment for Rape by Ilala District Court on that 20/9/2017. Wherefore the appellant prayed for his appeal to be allowed, conviction quashed and the sentence of life imprisonment be set aside.

In reply to the appellant's grounds of appeal Ms. Ndakidemu, the learned State Attorney submitted that with regard to

ground 1 and 2 that PW1 (Victim) was not a credible witness and she did not testify about rape against her but she just identified the appellant as her Uncle (baba mkubwa).

Replying on ground 3 the learned State Attorney submitted that it is true that the witnesses were relatives as alleged by the appellant but the law does not prohibit the family members to be a witnesses in the case that involves their relative, hence that ground of appeal lacks merits.

Replying on ground 4 of appeal, regarding contradictions between PW2 (victim's mother) and the doctor (PW3) Ms. Ndakidemu submitted that while PW2 saw the semen in the victim's vagina, the doctor (PW3) said that she just found the fluid(discharge) and frictions and that the virginity had been destroyed. She said that as per doctor's opinion the victim was raped.

Ms.Ndakidemu further submitted that time had passed before the victim was examined by the doctor, it was first noted by PW2 that the victim was raped who then took the victim to PW4 who is her sister, they then went with the victim to the private hospital where they were advised to report the matter at the police station in which they went at Gongolamboto Police

Station and they were supplied with PF3. Thereafter they went to Amana hospital for medical examination.

Ms. Ndakidemu contended that it is possible for the sperm not be observed in the medical examination.

Arguing on ground 5 of appeal Ms. Ndakidemu submitted that it is not true that the victim's age was not established because it is in the charge sheet and the victim herself was seen by the trial Magistrate. Hence the victim's age is not an issue.

Arguing on ground no. 6 Ms. Ndakidemu submitted that the case was proved beyond all reasonable doubts through circumstantial evidence. She said that the evidence of PW2 is that the appellant was left at home with the victim while she was going to market and the victim was safe. The counsel submitted that the said evidence was not challenged by the appellant. The counsel also said that when PW2 came back home the appellant left, where later on she noticed that the victim was crying for pains while urinating and when she examined her she noticed that she had been raped.

Ms. Ndakidemu contended that the records also show that by the time the incident had occurred there was no other male person at home. Also when the victim was asked about the person who had injured her she mentioned the appellant.

Ms. Ndakidemu went on to submit that as for the testimony of PW5 who is the investigating officer of the case the appellant requested the matter to be amicably settled at home. Had the appellant not committed the offence he would have not said that to the PW5. The Counsel also submitted that there are no records to show that the prosecution witnesses had grudges against the appellant.

Ms. Ndakidemu concluded by praying that the trial court correctly convicted the appellant, therefore the conviction and sentence should be upheld.

In the rejoinder the appellant submitted that he has never committed the said crime, the victim had just identified him and said nothing about being raped by him. The appellant went on to submit that he left in a very short period after the victim's mother had returned from the market and that there were possibilities that the victim was raped by another person after he had left the premise.

From the submission of both parties I prefer to determine the grounds of appeal collectively for those which look alike as follows;

Starting with the ground one and two which relate testimony of PW1 (victim). The appellant contends that the trial magistrate

relied on the discredited testimony of PW1 who is of tender age of three years old, the Learned State Counsel Ms. Ndakidemu contended that PW1 just identified the appellant, she was not a credible witness. I have gone through the trial court's records at page 3 of the judgment and noticed that the trial Magistrate was of the view that the child was capable of telling the truth after examining her in Voire Dire. The Magistrate did notice that the victim (PW 1) was only able to tell her name and that she knows the appellant and that he used to play with her.

The trial Magistrate rightly satisfied herself that the child was capable of telling the truth which is the most important aspect while conducting the Voire Dire and therefore complied with the provisions of section 127(2) of the Evidence Act.

In that regard I also find the appellant's ground that the prosecution side failed to prove the age of the victim is irrelevant, as submitted by the Learned State Attorney Ms. Ndakidemu as the age was indicated in the charge sheet that she was 3 years old. It was therefore seen by the trial Magistrate and heard by the Appellant when the charge was read over to him. Had that been the issue the appellant was supposed to challenge it there at the District Court.

With regard to the ground of proof of the prosecution case I have observed that evidence of the prosecution side was basically circumstantial, it was not corroborated by any other evidence to make their case bold. It only relied on the fact that the appellant left the house immediately after the victim's mother had returned home from gengeri (local market) then he could be the one who committed the crime. It was also not stated as to whether PW2 noticed any changes on the victim's (PW1) condition and behavior immediately after the appellant had left the premise. Also it is the evidence of PW2 that there were other children who were playing outside nearby the premises of PW2 but none of them had been brought before the trial court to testify so as to corroborate her evidence, in such circumstance an adverse inference can be drawn from the prosecution case.

From the evidence in record it was not stated as to how long did it take when the victim's mother discovered the PW1 was raped. The gap between the time when the appellant left the premise and when PW2 noticed that PW1 was raped was not established. PW2 only stated that PW1 was crying when she went for a call of nature.

With regard to the circumstances of the case there is also a possibility that the victim was raped after the appellant had left the premises.

From the above analysis it is quite clear that the prosecution side left a lot of questions which creates doubts as to whether the appellant is the one who committed the crime.

Having so said I find this appeal has merits. Hence, I quash the conviction and set aside the sentence of the lower court and acquit the accused forthwith. He is to be set at liberty unless otherwise held in other lawful cause.

Appeal allowed.



S.M. KULITA

JUDGE

31/12/2019