**IN THE COURT OF APPEAL OF TANZANIA**
**AT IRINGA**

**(CORAM: LUBUVA, J.A., MBAROUK, J.A., and OTHMAN, J.A.)**

**CRIMINAL APPEAL NO. 12 OF 2006**

**SAID ALLY MAPUNDA ..... APPELLANT**
**VERSUS**
**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania at Songea)**

**(Kaganda, J.)**

**dated the 16th day of April, 2005**
**in**
**Criminal Appeal No. 30 of 2004**

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**JUDGMENT OF THE COURT**

**21 & 25 July 2008**

**OTHMAN, J.A.:**

On 5.08.2004 the District Court of Songea convicted the appellant of rape c/ss 130 (1) (2) (e) and 131 of the Penal Code, Cap 16 RE 2002, committed on PW5 (Theodosia d/o Menas Lwena) a three year old girl and sentenced him to life imprisonment. On first appeal, the High Court at Songea (Kaganda, J.) on 16.11.2005, dismissed the appeal. Aggrieved, the appellant unrepresented is now before this Court on second appeal. The respondent Republic, which

resists the appeal is represented by Mr. Ntwina, learned Senior State Attorney.

The facts relevant to this appeal are these. At the trial court, the prosecution case, which essentially relied on the evidence of PW3 (Matei Luka), PW4 (Azizi Shabani) and PW5 was that on 26.05.2004 at around 12.30 hrs, while the trio were at the river catching grasshoppers and butterflies ("tunadaka madede") the appellant who was also there digging sand took away PW5, undressed and raped her. When PW3 and PW4 approached, he ran away. They knew him before. PW3 and PW4 immediately reported the incident to PW2 (Juliet d/o Matofali), PW5's mother. She inspected PW5 and found bruises on her private parts. In Court, she tendered a PF3 Form (Exhibit P.2) dated 27.05.2004 wherein the medical examiner marked that PW5 had bruises at the labia manora caused by blunt object. The appellant's cautioned statement recorded by PW1 (D/Cpl. Akando) was admitted for identification and marked Exh. ID P.1.

The appellant, in his defence denied involvement. He testified that at the time of the commission of the offence he was at the shamba from around 9 a.m. to 2 p.m. He was supported by DW2 (Babu s/o Nungu), as well as DW3 (Jafua d/o Katembo) and DW4 (Khadija d/o Omari) respectively, his mother and grand mother.

The district court held that the appellant's cautioned statement (Exh. ID P.1) was offered voluntarily; that he raped PW5 and accorded no weight to the alibi under section 194 (6) of the Criminal Procedure Act, Cap 20 R.E. 2002. The appellant was convicted of the offence charged.

On first appeal, the High Court found out that the *voire dire* examination of PW3, PW4 and PW5 was properly conducted; that these witnesses were all eye witnesses to the incident and that the appellant's alibi was correctly rejected. In terms of section 366 (1) (a) of the Criminal Procedure Act, Cap 20 R.E. 2002, it altered the nature of the sentence to include apart from life imprisonment,

twelve strokes corporal punishment and Tshs. 500,000/= as compensation to PW5.

Extracted from the appellant's memorandum of appeal lodged on 16.07.2008 and account taken of his submissions before us on 21.07.2008, in our considered view, three grounds of complaint emerge: That is

(i) the trial court's non compliance with court procedures;

(ii) non consideration of the defence case; and

(iii) reliance placed on the contradictory evidence of PW3, PW4 and PW5, and the hearsay evidence of PW1 and PW2.

Adverting to them in *seriatim,* the first issue to be determined is whether or not the trial court complied with all the required court

procedures? The appellant submitted that PW5, unable to speak, was tutored in court by PW2, her mother in the presence of the learned trial magistrate and the public prosecutor. That the PF3 Form (Exhibit P2) was tendered by PW2, a nurse. The inference he sought to draw being that she may have filled it in. He also complained that the cautioned statement (Exh. ID P.1) was wrongly acted upon.

In response, Mr. Ntwina submitted that the trial court had properly complied with section 127 (2) of the Evidence Act, Cap 6 RE 2002, in the conduct of the *voire dire* examination of PW3, PW4 and PW5, children of tender years. He indicated that the record also clearly showed that the evidence of all prosecution witnesses was received on 23.07.2004 and section 3 of the Children and Young Persons Act, Cap 13 RE 2002 that requires the trial court to sit in camera while receiving the evidence of PW3, PW4 and PW5 was fully complied with. That even if the trial court may not have sat in camera as required by law, the appellant had neither suffered any prejudice nor had he complained to that court. He relied on

**Herman Henjewele v.R,** Criminal Appeal No. 164 of 2005 (CAT) (unreported).

That apart, Mr. Ntwina agreed that the cautioned statement, admitted only for identification purposes was improperly acted upon by the trial court and could not have been used in any way. He was, however, quick to point out that even if it was discounted, the evidence of PW2, PW3, PW4 and PW5 was sufficient to sustain the appellant's conviction beyond all reasonable doubt.

Having closely scrutinized the record, it would appear to us, as it did to an extent to the High Court, that the *voire dire* examination of PW3 and PW4, respectively 7 and 5 years old, was properly conducted as *per* section 127 (2) of the Evidence Act. After posing a series of questions and obtaining replies from each of the witnesses in order to determine whether or not they knew the nature of an oath or whether they were possessed of sufficient intelligence to justify the reception of their evidence **and** whether they understood the duty of speaking the truth, the trial court was of the view that

their evidence could be received without oath. In respect of PW3 and PW4 it found out that they were possessed of sufficient intelligence to justify the reception of their evidence and understood the duty of speaking the truth. It proceeded to receive their evidence.

As regards the *voire dire* examination of PW5, 3 years old, the learned trial magistrate opined that she was intelligent enough to justify the reception of her evidence but omitted to direct herself whether she also understood the duty of speaking the truth as is required under section 127 (2) of the Evidence Act. With respect, this went unnoticed with the High Court. The effect is that it rendered PW5's evidence to the level of unsworn evidence, which requires corroboration (See, **Dahiri Ally v.R** (1981) T.L.R. 218; **Deemay Daati and Two Others v.R,** Criminal Appeal No. 80 of 1994 (CAT) (unreported).

That apart, we would agree with Mr. Ntwina that the evidence of PW3, PW4 and PW5 was received on the same day, 23.07.2004

and in camera as recorded therein by the trial court which directed itself to having complied with section 3 (5) of the Children and Young Persons Act. The fact that the learned trial magistrate repeatedly recorded such compliance fortifies the above view we have taken. In these circumstances, the question of any prejudice suffered or likely to be suffered by the appellant does not arise. It is on record that he cross examined PW3 and PW4. With such compliance by the trial court, we are fully satisfied that the alleged tutoring of PW5 by PW2 cannot be said to have taken place.

The only discernible error in the trial court's judgment as indicated by Mr. Ntwina was the reliance it placed on the appellant's repudiated cautioned statement recorded by PW1, which was admitted on 23.07.2004 only for identification purposes as Exh. ID P.1. As such, it did not constitute evidence. With that piece of evidence discounted what remains is the evidence of PW2, PW3, PW4, PW5 and Exh. P.2 in proof of the charge. This precisely forms the third ground of complaint, we shall addressed in due course.

The second issue to be canvassed is whether or not the defence case was duly considered? Both the trial court and the High Court had accorded no weight to the appellant's "eleventh hour" alibi that he was at the shamba from around 9 a.m. to 2 p.m. and hence could not have committed the offence at 12.30 hrs at the river bank. They did so under section 194 (6) of the Criminal Procedure Act, Cap 20 RE 2002. The appellant submitted that his alibi was wrongly rejected. That furthermore, the two courts below failed to take into account his testimony that PW2 had a quarrel with DW2, his mother and that the former had threatened the later to show her "big bad things".

In response, Mr. Ntwina submitted that both the courts below had looked into the alibi and properly rejected it under section 194 (6) of the Criminal Procedure Act.

With respect, this complaint has no foundation. It is on record that the alibi was first introduced in defence when the appellant was testifying and not in conformity with sections 194 (4) and (5) of the

Criminal Procedure Act. It was supported by DW2, DW3 and DW4. Despite this non-compliance the trial court and the High Court did considered it and accorded no weight to it as *per* section 194 (6) thereof (See, **Charles Samson v.R** (1990) T.L.R. 39).

On a consideration of the entire evidence, we are not at all persuaded that PW2 had any enmity towards DW2 or interest in falsely implicating the appellant. The incident was reported to her by PW3 and PW4. When DW3 testified, she said nothing on the alleged quarrel. The appellant also never cross examined PW2 on that point when the opportunity arose. Raised only in his defence, it is obviously an afterthought.

The third and final issue impugns the trial court and High Court for relying on PW3, PW4 and PW5's contradictory evidence and PW1 and PW2's hearsay evidence to base conviction. The appellant submitted that while PW3 gave evidence that he had taken PW5 to the area where he was digging sand at the river; PW4 on the other

hand stated that he had taken PW5 away. That he did not say where.

Responding, Mr. Ntwina submitted that although there was no analysis done by the High Court to satisfy itself that the evidence before the trial court entitled it to convict the appellant, nonetheless, had it done so as required, it could not have come out with any other conclusion than that its conviction was proper on the evidence of PW3, PW4 and PW5. He submitted that they had witnessed the event. That moreover, there was no major contradictions in their testimony, which was sufficient to prove the prosecution case beyond all reasonable doubt. That they could not have mistaken the appellant as they all knew him before and the incident took place at 12.30 hrs, day time. Mr. Ntwina went on to urge that the evidence of PW3, PW4 and PW5 was corroborated by that of PW2 as when the appellant was arrested he was found hiding behind a sofa set in a neighbours' house. He added that the PF3 Form (Exhibit P.2) also corroborated PW2 and PW5's evidence that PW5 had been raped.

Bearing in mind this ground of complaint and Mr. Ntwina's submissions, with respect, first, we wish to observe that much as it is settled law that the evaluation of evidence and the ascription of its probative value thereto primarily rests within the domain of the trial court that saw, heard and assessed the credibility of witnesses, on first appeal an appellant is entitled to expect that the appellate court will subject the entire recorded evidence to critical analysis and scrutiny. In **Hassan Mfaume v.R** (1981) T.L.R. 167 (CAT) the Court held:

> **"A judge on first appeal should reappraise the evidence because an appeal is in effect a rehearing of the case".** (Emphasis added)

Considering the seriousness of the charge of rape and in this case the mandatory sentence, life imprisonment, with respect, we are of the considered view that the High Court should have subjected the evidence to a more detailed analysis before arriving at its own conclusion.

Next, taking the issues raised, it was fully established on the evidence of PW2, PW3, PW4, PW5 and the PF3 Form (Exh. P.2) that PW5 had been raped. She had bruises on her labia manora (i.e. small lips of the vulva). PW5 testified:

> "Saidi aliniingiza kidudu hapa (pointing at her private parts). It was painful. I saw his penis. It was upright".

PW3 testified:

> "We saw Said doing it to Theo".

PW4 also stated:

> "We saw Said doing it".

In our considered opinion in terms of the requirements of section 130 (4) (a) of the Penal Code, there was sufficient evidence to prove penetration which constitutes one of the essential ingredients of the offence of rape.

The remaining question, therefore, is whether or not there was sufficient evidence to justify the concurrent findings of the trial court and the High Court that it was the appellant who committed that sexual assault on PW5.

Having anxiously and closely considered the record, while we agree that PW3 said that the appellant took away PW5 to the place he was digging sand; PW4, that he only took her away and PW5 that he took her to the bushes, these discrepancies are trivial and do not cast any doubt on the core testimony offered that the incident took place at the river, that the appellant took away PW5 and that when PW3 and PW4 approached them PW5 was naked and the appellant immediately ran away. Quickly reported to PW2, she found PW5 still carrying her dress. On inspection she noticed bruises on her private parts (Exh. P.2). Given that the incident took place at 12.30 hrs, day time and PW3, PW4 and PW5 knew the appellant before, his identification could not have been but watertight and unmistaken. The appellant acknowledged that PW5 lived the third house from theirs (DW1, DW3). On the evidence of PW3, PW4 and PW5 the

appellant was the only other person apart from them that was digging sand at the river bank at that time. PW3, PW4 and PW5 were held credible by the concurrent findings of the trial court and the High Court on first appeal and their truthful evidence was acted upon. In our considered view, there does not appear to be any circumstance of an unreasonable, erroneous or perverse nature to disturb those findings on the inprint of truth revealed by their cogent and consistent testimony.

It is trite law that under section 127 (7) of the Evidence Act, in a fit case a conviction for rape can be validly sustained even on uncorroborated evidence of a child of tender years as a single witness where the court is satisfied that she is telling nothing but the truth (See, **Omary Kijuu v.R,** Criminal Appeal No. 39 of 2005 (CAT) (unreported). As it is generally always prudent as a matter of practice in sexual assault cases for the court to look for corroboration (See, **James Bandoma v.R,** Criminal Appeal No. 93 of 1999 (CAT) (unreported) we would agree with Mr. Ntwina that in the instant case corroboration can first be found in the PF3 Form (Exhibit P.2) which

independently supports PW2, PW3, PW4 and PW5's evidence that the later was indeed raped. Second is the appellant's immediate post crime conduct. In **Pascal Kitigwa v.R** (1994) T.L.R. 65 the Court held:

> **"Corroborative evidence may be circumstantial and may well come from the words or conduct of the accused".**
> (Emphasis added)

It was PW2's unchallenged evidence that on reporting the incident to Matarawe Police Station she was given militia to arrest the appellant. They found him hiding under a sofa set in a nearby house (PW2). No explanation, let alone a reasonable one was offered for such conduct.

Upon the whole evidence, we are of the considered opinion that the trial court and the High Court took a view entirely permissible on the available evidence of PW2, PW3, PW4, PW5 and Exhibit P.2 in holding the appellant guilty as charged on the standard

of proof required in a criminal charge established by the prosecution beyond all reasonable doubt.

On the sentence imposed section 131 (3) of the Penal Code provides:

> "131(3). Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment."

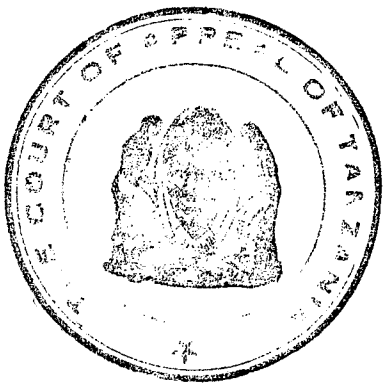
Section 348A (1) of the Criminal Procedure Act as amended by the Sexual Offences Special Provisions Act, 1998 (Act No. 4 of 1998) stipulates that when a court convicts an accused person of a sexual offence **it shall in addition** to any penalty which it imposes make an order requiring the convict to pay such effective compensation as the court may determine to be commensurate to possible damages obtainable in a civil suit by the victim of the sexual offence for

injuries sustained by the victim in the course of the offence being perpetrated against him or her. This requirement is mandatory.

PW5, the victim of rape was a three year old girl. Taking what was meted out by the High Court, that is, the sentence of life imprisonment and Tshs. 500,000/= as compensation, both mandatory, in our considered view the twelve strokes corporal punishment imposed on the appellant was improper. Accordingly, we invoke this Court's revisional powers under section 4 (2) of the Appellate Jurisdiction Act, 1979 to quash and set aside the corporal punishment imposed.

For the foregoing reasons, save for the correction in the punishment, we find no merit in this appeal, which we accordingly dismiss.

DATED at IRINGA this 25th day of July, 2008.




D.Z. LUBUVA
**JUSTICE OF APPEAL**

M.S. MBAROUK
**JUSTICE OF APPEAL**

M.C. OTHMAN
**JUSTICE OF APPEAL**

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

**DEPUTY REGISTRAR**