IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., MSOFFE, J.A. And OTHMAN, J.A.)

CRIMINAL APPEAL NO. 166 OF 2005

DEOGRATIUS BENO.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Manento, J.)

dated the 8th day of September, 2004
in
PC Criminal Appeal No. 111 of 2000

JUDGMENT OF THE COURT

12 March & 22 April, 2009

MUNUO, J.A.:

In Kinondoni District Court Criminal Case No. 156 of 2000, the appellant, Deogratius Beno, was convicted of rape c/s 130 (2) (e) and 131(1) of the Penal Code in that he had carnal knowledge of a 6 year girl, one Eva Kyando. The trial court sentenced the appellant to 30 years imprisonment. Aggrieved, the appellant unsuccessfully lodged Criminal Appeal No. 111 of 2002 in the High Court of Tanzania at Dar es Salaam. The learned judge set aside the

sentence and substituted therewith, a term of life imprisonment, the scheduled statutory sentence for culprits who sexually assault children below the age of ten years.

The mother of the victim testified as PW1. She stated that when she returned from work on the material day, her daughter, Eva was unwell. The latter told her that the appellant, their neighbour's house boy, had injured her secret parts. She identified the appellant by name. When PW1 checked the little girl, she found semen in her private parts. She then took the victim to the police. There, PW3 WP1378 Detective Corporal Dotto who examined the victim and also found semen in her private parts. Subsequently, the appellant was charged with the offence of rape.

In his sworn defence, the appellant denied the offence. He stated that the mother of the victim asked him for drinking water which he did not have so she threatened him by saying –

Utaona nitakachokufanya mimi.

Meaning-

You will see what I will do to you.

She went out and returned with policemen who arrested him.

The PF3 of the victim was tendered as Exhibit A to show that the child had bruises around the vulva, a fresh broken hymen – slight bleeding and the vagina swab taken from the victim had spermatozoa.

In his second appeal, the appellant lodged 8 grounds of appeal complaining that the trial was irregular because the provisions of Section 240(3) of the Criminal Procedure Act, 1985, Cap 20 R.E. 2002 were not complied with. The doctor who examined the complainant, the appellant asserted, should have been summoned to testify so that he would cross examine him. Furthermore, the appellant complained that the trial magistrate also failed to record or conduct voire dire examination to test whether the small girl knew the meaning of an oath and the duty to tell the truth. Besides, the appellant contended, the trial proceedings should have been in camera in compliance with the provisions of Section 28(5) of the

Sexual Offences Special Provision Act, 1998, Cap 101 R.E. but instead, the trial magistrate erroneously held the trial in open court.

In short, the appellant argued that his guilt was not established beyond all reasonable doubt, and coupled with the procedural irregularities in the conduct of the trial, he ought to have been acquitted, he stressed.

Ms Choma, learned State Attorney, represented the Respondent Republic. She supported the conviction and the sentence imposed on the appellant. The learned State Attorney conceded that the trial magistrate did not comply with the provisions of section 240 (3) of the CPA, Cap 20 R.E. 2002 so the PF3, Exhibit PA, should be excluded from the evidence resulting in grounds 1 and 3 of the appeal being allowed. That is, in our view, the correct position in law.

With regard to the appellant's complaint that the trial should have been held in camera, the learned State Attorney argued that conducting the case in open court did not adversely affect the rights

of the appellant to a fair trial. Ms Choma further contended that section 28(5) of the Sexual Offences Special Provisions Act, 1998, Cap 101 R.E. is intended to protect children who are victims of rape from embarrassment and fear to appear and testify without inhibition in camera so that the law can take its course. As the learned State Attorney submitted, the said section 28(5) was not intended to protect the appellant. In this case, the appellant was accorded a fair trial and he was not prejudiced by the omission to try the case in camera. The omission occasioned no injustice to the appellant. Such irregularity was minor and curable under the provisions of section 388(1) of the CPA, Cap 20 R.E. 2002 which state, inter-alia:

> *388(1) Subject to the provisions of section 387, no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where*

> *on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable.*

Section 387 of the CPA relates to convening criminal matters in a wrong location in terms of region, district, or other local area, in which case such irregularity would not be fatal unless it appears that the error has in fact occasioned a failure of justice. In the present case, we find no material procedural irregularities to warrant interference by the Court.

On the failure of the trial magistrate to conduct voire dire examination, Ms Choma contended that the small girl knew the appellant who was living in the neighbourhood. She identified him by name so there was no possibility of mistaken identity for the offence was committed during the day. P.W.2 narrated how the appellant called her to his room and then sexually assaulted her, the learned State Attorney observed. The credibility of the little girl was sound so

there is no cause not to believe that she said nothing but the truth. The learned State Attorney urged that the conviction is sustainable in view of the provisions of section 127(7) of the Evidence Act, Cap 6 R.E. 2002 which allow the court to count on the testimony of a child without corroboration if such evidence is credible.

Section 127(7) of the Evidence Act, Cap 6 R.E. 2002, states, *inter-alia*.

> *127 (7) Notwithstanding the preceding provisions of this section, where in Criminal proceedings involving a sexual offence the only independent evidence is of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be on its own merits,* ***notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be in the proceedings, the court is satisfied that the child of tender years or the victim***

of the sexual offence is telling nothing but the truth.

The learned State Attorney observed that the victim identified the appellant by name because she knew him as a neighbour. The conditions of identification were favourable for the offence was committed during broad daylight. She pointed out that during the hearing, the appellant stated that PW1 had threatened to fix him. The alleged threat, the learned State Attorney contended, was an after thought because the appellant did not cross-examine PW1 on any threat she had uttered to him. He raised the threat allegation during the defence behind the complainant's mother's back which showed that it was an after thought, the learned State Attorney maintained.

With regard to non compliance with the provisions of Section 312 of the Criminal Procedure Act, 1985, Cap 20 R.E. 2002 as alleged in ground 7 of the appeal, Ms Choma urged us to dismiss the same because there are not fundamental irregularities in the judgments of the courts below.

On non-compliance with the provisions of Section 28(5) of the Sexual Offences Special Provisions Act, 1998 Cap 101 R.E. 2002 which require sexual offences involving children to be tried in camera, the learned State Attorney, correctly, in our view, asserted that not conducting the trial in camera occasioned no injustice to the appellant. Hence ground 8 of the appeal is lacking in merit.

As for the defence of alibi raised by the appellant, the learned State Attorney submitted that the same was found not probable by the learned judge, and, in event the appellant could not even produce the defence witness he intended to call having failed to give the particulars of his *alibi* as required under the provisions of Section 194(5) of the Criminal Procedure Act, Cap 20 R.E. 2002 which provides:

> *194 (5) Where an accused person does not give notice of the intention to rely on the defence of alibi before the hearing of the case, he shall*

> *furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.*

The defence of *alibi* was properly rejected by the trial magistrate, the learned State Attorney contended.

The learned State Attorney contended that the evidence on record established the guilt of the appellant beyond all reasonable doubt. She prayed that the appeal be dismissed because it is lacking in merit.

We note that the learned judge rightly excluded the victim's PF3, Exhibit A, because the trial magistrate failed to comply with the provisions of Section 240(3) of the Criminal Procedure Act, Cap 20 R.E. 2002 which imposes on the trial court, an obligation to inform the accused his or her right to summon the doctor who examined the victim by stating verbatim:

> *240(3)..... The Court **shall** inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this section.*

In the case of **John Choroko versus Republic, Criminal Appeal No. 23 of 1999 (CA) (unreported),** the trial magistrate failed to comply with the provisions of section 240(3) of the Criminal Procedure Act, Cap 20 R.E. 2002. The Court quashed the conviction.

At the hearing, the appellant complained that PW1 Annastella Rutta is the mother of the victim, PW2 Eva Kyando, so being her mother, her evidence would be biased. On this, the learned State Attorney referred us to the case of **Paul Tarayi versus Republic, Criminal Appeal No. 216 of 1994, (CA) (unreported)** wherein the Court considered the issue of evidence of relatives and observed:

> *.....we wish to say at the outset that it is, of course, not the law that whenever relatives*

> *testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be born in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them.*

The Court further observed that –

> *The veracity of their story must be considered and engaged judiciously, just like the evidence of non-relatives. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative.*

We affirm the above observation. Furthermore, we are satisfied that in the instant case the victim simply reported to her mother that when she was playing outside the house with her young sister, the appellant called her into his room, and sexually assaulted her. Upon checking the victim, PW1 found semen in her private parts. PW1 then reported the matter to the police. PW3, WP 1378 Detective Corporal Dotto, checked the victim and found semen in her private parts. The victim had no problem identifying the appellant because he was a house servant next door. It was day time. The little girl identified the appellant by name so there was no possibility of mistaken identity.

The trial magistrate omitted to conduct *voire dire* examination to establish whether the complainant had sufficient intelligence to know the nature and meaning of an oath, and the duty to tell the truth. In view of the said omission, the unsworn evidence of the complainant needs corroboration but under the provisions of Section 127(7) of the Evidence Act, Cap 6 R.E. 2002 referred to supra, the evidence of PW2 can sustain a conviction if it is credible.

Like the learned judge, we are of the settled mind that the evidence of the victim in this case is straight forward and credible. We have already considered and ruled out the possibility of mistaken identity. The learned judge had this to say on the identity of the appellant:

> *.....The accused who was familiar to the complainant as well as a neighbour, was properly identified by the complainant at broad daylight. In fact, the accused did not use force to the dear child. He enticed her and took her to a bed room from where she was playing with her friends. Thus, if rape was proved and no mistaken identity as to the person who committed the offence, then the prosecution did prove the charge against the accused beyond all reasonable doubts.*

That is indeed the position. Even after excluding the PF3 of the victim, we find no speck of doubt to reverse the conviction. We accordingly dismiss the appeal.

DATED at DAR ES SALAAM this 1st day of April, 2009.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

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

(P. A. LYIMO)
DEPUTY REGISTRAR