IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: KILEO, J.A., BWANA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 430 OF 2007

LAURENO MSEYA..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Mrema,J.)

dated the 2nd day of February, 2007
in
(DC) Criminal Appeal No. 23 of 2005

JUDGMENT OF THE COURT

15 & 16 September 2009

BWANA, J.A.:

This is a second appeal by Laureno Mseya, the appellant. Before the District Court of Iringa, at Iringa, the appellant was charged with and convicted of the offence of Rape contrary to sections 130 and 131 of the Penal Code as replaced by Sections 5 and 6 of the Sexual Offences Special Provisions Act (SOSPA) No. 4 of 1998. He was sentenced to a prison term of 30 years and ordered to compensate the victim the sum of shs. 200,000/=. His appeal to the

High Court against both conviction and sentence, was unsuccessful. Still undaunted, he has preferred this second appeal.

The particulars of offence as culled from the record show that the appellant, on 19 November, 2003 at about 8:00 p.m. at Itungi Village, Kilolo District of Iringa Region, did have sexual intercourse with one Alfa Kiponda, a girl of 11 years of age. During the trial six witnesses testified for the prosecution. Together with testifying in his defence, the appellant called one witness, one Joyce Nyumile, one of his two wives.

In his memorandum of Appeal to this Court, the appellant, advocated by Justinian Mushokorwa, learned counsel, raised four grounds of appeal namely-

1. That the Hon. Judge (of the High Court – the first appellate Court) erred in holding that non – compliance with the provisions of section 186 (3) of the Criminal

Procedure Act (the CPA) did not vitiate the trial.

2. The Hon. Judge erred in not faulting the trial court for accepting and acting on the evidence of PW2, a child of 11 years, without conducting a voire dire as required by section 127 (2) of the Tanzania Evidence Act (the TEA), which omission went to the root of the trial.

3. The Hon. Judge erred in not faulting the confessional evidence, both written (Exh. P2) and oral which was obtained in abrogation of the law.

4. The Hon. Judge erred also in refusing to appreciate the concern of the appellant that the too many questions put by the trial magistrate to witnesses impaired the impartiality that should characterize any court of law conducting a trial.

Ms. Ngasori Sarakikya, learned State Attorney, represented the Republic.

It is not insignificant to point at the outset that the fourth ground of appeal which questions the impartiality of the trial magistrate by asking many questions in the course of trial, needs our immediate consideration. We do note however, that Mr. Mushokorwa, failed to pinpoint areas of the proceedings where the trial magistrate is alleged to have usurped the role of a prosecutor and/or defence counsel. Ms. Sarakikya however, did point out that the said magistrate did raise questions only to PW1 (pages 5 to6) and PW3 (P. 10) of the typed court record and that the said questions arose from what the appellant had asked in cross examination. We fail to see how those questions by the trial magistrate influenced her decision. We do agree with Ms Sarakikya that they were meant for clarification, to which a court of law has power and/or entitled to ask.

That said, it must be noted here that a trial court is fully entitled to ask pertinent questions which it thinks will assist in reaching a decision one way or the other. We would note as well that a judge or magistrate has the control of the proceedings and if justice has to be seen as working efficiently then the said member of

the Bench must play a more proactive role (judiciously) in the proper management of a case. Therefore an assessment of whether the judge's or magistrate's interventions had to do with trial management or partiality thus prejudicing a fair trial, cannot be made by mere allegations.

We have scrutinised the record in this case and we are satisfied that it does not unequivocally support the allegations raised by the appellant herein. All that we have is that the evidence of the two witnesses (PW1 and PW3) taken in long hand was not in the form of question and answer as it would be the case if the proceedings were recorded electronically and later transcribed. The couple of interventions that the trial magistrate made, are, in our view, measures taken in effective management of the case. We should be quick to add, however, that both the Bench and the Bar should ensure that there is an element of mutual trust and confidence when discharging their respective duties under the law. In the upshot we hold that this ground of appeal is patently wanting in merit. Therefore it fails.

The other ground of appeal touches on the non compliance with the provisions of Section 186 (3) of the CPA as amended by SOSPA. The relevant provision states –

> "186 (3) – Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences **shall be received by the Court in camera, and** the evidence and witnesses involved in these proceedings shall not be published by or, in any newspaper or other media ..." (Emphasis provided).

It was emphatically submitted by Mr. Mushokorwa that by conducting these proceedings in open Court, the trial magistrate flouted the law and consequently all such proceedings should be quashed as it occasioned a failure of justice. With due respect to Mr. Mushokorwa, we hold differently. We consider the conduct of the proceedings in open Court did not occasion injustice warranting us to set aside such proceedings. The saving provisions of Section 388 of the CPA are relevant. That section states:

> "No finding, sentence or order of any Criminal Court **shall be set aside merely on the ground that the inquiry, trial or other proceedings** in the course of which it was arrived at or passed, took place in a wrong... area, **unless it appears that such error has in fact occasioned** a failure of **justice** ..." (Emphasis provided).

We see no such error occasioning a failure of justice. We do agree with the two courts a quo that if anything, that failure of justice would have been prejudicial to the victim – a child of tender years. That seems not to be case here. Was the appellant prejudiced by holding the trial in open court? Our response is in the negative, in the absence of evidence to that effect. Therefore we are in respectful agreement with Ms Sarakikya that the omission to conduct the trial in camera did not occasion a failure of justice to the appellant. If at all any defect, then it is curable as under Section 388 of the CPA (supra). This position is not affected by the coming into force of the Interpretation of Laws, Act of 2004.

The second and third grounds of appeal may be considered together as they hinge on factual issues resulting from an interpretation of Section 127 (2) of the TEA and the effects of admission of cautioned statement.

As a second appellate court, our review of factual issues is restricted by well settled principles of law. In the case of **DPP vs Jafari Mfaume Kawawa** (1981) TLR 149 at 153, this court held:

> "The next important point for consideration and decision in this case is whether it is proper for this court to evaluate the evidence afresh and come to its own conclusions on matters of fact. This is a second appeal brought under S. 5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this court only on a point or points of law. ... in cases where there are misdirections or non directions on the evidence, a court is entitled to look at the relevant evidence and make its own findings."

We find no such misdirections or non directions in the instant case so as to fault the decisions of the two courts a quo. If at all there are any, such misdirections or non directions then they are not fatal to the case – they are curable irregularities. Various decisions seem to agree with our position on this matter. See for example: **Salum Mhando vs Republic** (1993) TLR 170; **Edwin Isdori Elias vs SMZ** (Crim. Appeal No. 145 of 2002 Unreported) **Musa Mwaikunda vs Republic** (Crim. Appeal No. 179 of 2006 – unreported); **Daniel Nguru and others v Republic** (Criminal Appeal No. 178 of 2004 – unreported); **Dr. Pandya v R** (1957) EA 336; **DPP vs Norbert Mbunda** (Crim. Appeal No. 108 of 2004 - unreported); **Zacharia John and Another vs Republic** (Crim. Appeal No. 9 of 1998 – unreported); **Benmax vs Austin Motors Co. Ltd** (1955) All. E.R. 326; **Maric Celine Quatre vs Republic** (2006) SCA No. 2; **Leonard Z. Maratu vs Republic** (Crim. Appeal No. 86 of 2005 – unreported).

The "common thread," if we may borrow that phrase, is that on questions of fact, the trial court is sovereign unless there are

breaches of some fundamental tenets of the law but there are no such breaches here. What is evident from the proceedings before the trial court is that the appellant, a husband of two, had sexual relations with the victim, a girl of 11 years of age. It would appear that this relationship had been going on for some time, the appellant giving his victim some token sums of money to appease her. Each such act of sexual intercourse with that child constituted an offence although we are herein concerned only with this particular incident. Section 130 (2) (e) of the Penal Code makes it an offence (of rape) for a man to have sexual intercourse with or without her consent when (such a woman/girl) she is under 18 years old unless the woman is his wife who is 15 or above years old and is not separated from the man. That is not the position in this case thus not in defence of the appellant.

Likewise it is clearly provided under section 130 (4) (b) of the Penal Code as amended, that evidence of resistance, such as physical injuries to the victim, is not necessary to prove that sexual intercourse did take place without consent. We have perused through

the evidence of PWs 1, 2, 3, 5 and 6 as well as that of DW1 (the appellant) and DW2 (his wife) and considered the same in the light of the findings of the trial court and the first appellate court and have come to the considered conclusion that there is no basis for disturbing their decisions. Therefore the appeal against conviction fails.

The thirty years prison term imposed on the appellant, is the minimum statutory sentence provided for by the law. Therefore there is no basis for altering it. Likewise we see no basis for disturbing the payment of shs. 200,000/= as compensation to the victim.

In conclusion, this appeal fails in its entirety. It is accordingly dismissed

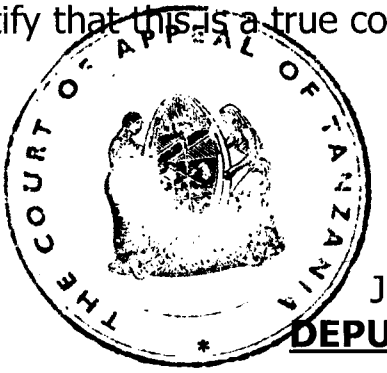
DATED at MBEYA this 16th day of September, 2009.

E. A. KILEO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



J. S. MGETTA
DEPUTY REGISTRAR