IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: RAMADHANI, C.J., MUNUO, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 65 OF 2005

SAASITA MWANAMAGANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(L U K E L E L W A , J .)

Dated the 13th day of April, 2005

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Criminal Appeal No. 18 of 2005

JUDGMENT OF THE COURT

November 17 & 20, 2009

MJASIRI, J.A.:

The appellant, Saasita Mwanamaganga was charged and convicted by the Mtwara District Court of the offence of rape contrary to section 130(2) and 131 (3) of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was sentenced to 30 years imprisonment. Being aggrieved by the decision of

the District Court, he appealed to the High Court against both conviction and sentence. His appeal to the High Court was unsuccessful, hence his appeal to this Court.

At the hearing of the appeal the appellant was unrepresented and the Republic was represented by Ms Evetta Mushi, learned State Attorney.

The appellant filed five (5) lengthy grounds of appeal and presented three (3) additional grounds at the hearing of the appeal.

Briefly the facts of this case are as follows: PW1 and PW2, the parents of PW3, a child of tender years, left their home for Ruvuma area leaving their child with the appellant. No details were given as to what they went to do and for how long they were absent. It was also not clear under what circumstances was their child left with the appellant. Upon their return they found their child crying, was bleeding in her genital area. She informed them that she was raped by the appellant. PW2 examined her and found that she was violated. They reported the matter to the police. A PF.3 form was issued and PW3 was examined by a doctor. The doctor was not called to testify in Court. The prosecution called four (4) witnesses including PW3. The appellant denied the charge. He also elected to remain silent when called upon to present his defence.

Ms Mushi opposed the appeal. She submitted that the evidence of PW3 clearly established that the appellant raped her. She further argued that even though a voire dire examination was not conducted by the trial magistrate, which meant that her unsworn testimony required corroboration, there was enough evidence to corroborate the evidence of PW3. She further submitted that both PW1 and PW2 testified that they left their daughter in the company of the appellant who was found bleeding on their return after being violated by the appellant. The bleeding was also witnessed by PW4. She further argued that even though the doctor was not called to testify, there was enough circumstantial evidence to establish that PW3 was raped and it was the appellant who did the act. She brought to the attention of the Court, the case of Remigious Hyera v R, Criminal Appeal No. 167. of 2006 CA, (unreported).

Ms Mushi further submitted that the conduct of the appellant also caused a lot of suspicion. She asked the Court to draw an adverse inference against the appellant.

After reviewing the evidence on record and the submissions by the appellant and the learned State Attorney, we are of the view that the crucial issue to be determined is whether PW3 was raped and whether it was the appellant who committed the rape. The only evidence linking the appellant with the offence is that of PW3, a child of tender years. The trial magistrate did not conduct a proper *voire dire* examination to determine whether or not the complainant knew the nature of oath or whether she was possessed of sufficient intelligence to justify the reception of her evidence and whether she understood the duty of speaking the truth as

required under section 127 (2) of the Evidence Act, Cap 6 R.E. 2002. He simply stated that a *voire dire* examination was conducted. In Jonas Raphael v Republic, Criminal Appeal No 42 of 2003 (unreported) the Court underscored the procedure obtaining under sub section 2 in receiving the evidence of a child of tender age.

As rightly pointed out by Ms Mushi, the law is settled that the omission to conduct a voire dire examination of a child of tender years brings such evidence to the level of unsworn evidence of a child which requires corroboration. See Remigious Hyera v R, Criminal Appeal No. 167 of 2006 CA (unreported); Kibangeny Arap **Kolil** v R [1959] EA 92; Kisiri Mwita v R [1981] TLR 92; Dhahiri Ally v R [1989] TLR 27 and Deema Daati and two others v Republic CA, Criminal Appeal No. 80 of 1994 (unreported).

The important issue for us to consider at this stage is whether there was any evidence which corroborated the evidence of the complainant, PW3. The account given by both PW1 and PW2 was what they were told by PW3. PW1 and PW2 were therefore not in a position to corroborate the evidence of PW3.

The medical report, PF. 3 was admitted in Court as Exhibit P1 without calling the medical doctor contrary to the requirement under section 240(3) of the Criminal Procedure Act, R.E. 2002. The trial Court was duty bound to inform the appellant of his right to require the person who made the report to be summoned for cross examination. This was not done, thereby

offending the relevant mandatory provision of the sub-section. This was evidence that the complainant was raped. It was not evidence to the effect that she was raped by the appellant. In view of the fact that the appellant was not advised of his right to request the doctor to be called, the medical report cannot therefore be relied upon. This factor was also conceded by the learned State Attorney.

This leaves us with the testimony of PW3. While we have no problem in reaching a conclusion that the evidence on record supports the allegation of rape, we are not satisfied that the prosecution has established on the standards required under the law that it was the appellant who committed the act of rape. We are increasingly of the view that the appellant was convicted on the weakness of the defence. We need not emphasise that the offence of rape is a serious offence, and in law, a conviction cannot be grounded on the weakness of the defence. We must admit that the appellant behaved very strangely, by electing to keep quiet instead of presenting his defence. Despite the fact that an adverse inference can be drawn against the appellant in view of his behavior, this does not shift the burden of proof to the appellant. What needs to be considered is whether or not the evidence on record supports the allegation of rape. In a criminal case, the burden is always on the prosecution to prove the case against the appellant beyond reasonable doubt. The burden never shifts.

Given the status of the evidence of PW1, PW2 and PW3, the failure to conduct a voire dire examination before receiving the evidence of the complainant and the shortcomings on the PF. 3, we are satisfied that such evidence is not sufficient to establish the guilt of the appellant. Had the learned Judge considered the above aspects we think he would have come to the inevitable finding that it was not safe to sustain the conviction.

For the foregoing reasons, we hold that the appellant's conviction was not proper. We accordingly allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment. The appellant is to be released forthwith unless he is otherwise lawfully held. It is so ordered. DATED at Mtwara this 20th day of November, 2009

A.S.L. RAMADHANI
CHIEF JUSTICE

E.N. MUNUO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

KITUSI
SENIOR DEPUTY REGISTRAR