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. 167 OF 2005

REMIGIOUS HYERA..... APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mihayo, J.)

dated the 13th day of July, 2005
in
HC. Criminal Appeal No. 36 of 2004

JUDGMENT OF THE COURT

27th February, 2009 & 20th March,2009

OTHMAN, J.A.:

In the District Court of Temeke, the appellant, Remigious Hyera, was charged with and convicted of rape c/ss 130(6) and 131 (1) of the Penal Code, Cap.16 R.E.2002. He was sentenced to a term of 30 years imprisonment. Aggrieved, he appealed to the High Court (Mihayo, J.), which on 13.07.2005 dismissed his appeal. He has now preferred this second appeal.

At the hearing of the appeal, on 27.02.2009, the appellant unrepresented, appeared in person. The respondent Republic was represented by Ms. Evetha Mushi, learned State Attorney.

The facts relevant to this appeal are these: The prosecution case was that on 11.6.2001 at about 09.00 hrs the appellant, 59 years old, had carnal knowledge of Margaret Charles, (PW2), a girl aged 5 years. She had gone to his pharmacy to have her injured shoulder dressed. That morning, her mother Zenna Kwiha (PW1) had looked for her. On entering the pharmacy, PW1 saw the appellant pulling up his zip. He was shaking. PW2 held her trousers. Back at home, PW1 interrogated her daughter who revealed that the appellant had undressed and raped her. She examined PW2 and found semen and bruises on her vagina. The incident was immediately reported to the Police.

In his unsworn testimony, the appellant denied the charge. He admitted only to have attended PW2 at his pharmacy. There were, he maintained, many people present including DW2 (Tony Daudi Zayumba), who seated outside, did not see PW2 enter the pharmacy.

In his memorandum of appeal, filed on 1.06.2006, the appellant preferred four grounds of appeal.

Ground one of the appeal faults the Courts below for failure to hold that the trial proceedings, which involved PW2, a child, were not conducted *in camera* as required under Section 3(5) of the Children and Young Persons Ordinance, Cap.13 R.E. 2002 rendering them void. Responding, Ms. Mushi conceded that the trial Court did not conduct the proceedings *in camera* as required by law. However, she submitted that this irregularity was curable. It did not in any way prejudice the appellant. If anything, it was PW2 who was prejudiced. No injustice had been committed to the appellant.

This ground of appeal was not raised before the High Court. A bare perusal of the record reveals that the trial Court did not conduct the proceedings *in camera* as required under section 3(5) of the Children and Young Persons Ordinance read together with section 186(3) of the Criminal Procedure Act, Cap.20 R.E.2002. The trial Court was duty bound to have conducted the proceedings *in camera* as PW2 was 5 years old. Having examined the whole matter, we would agree with Ms. Mushi that the appellant who cross-examined all the prosecution witnesses, including PW2 was not prejudiced in any way. This irregularity is, therefore, curable under Section 388(1) of the Criminal Procedure Act, it not having occasioned a failure justice - See, **Herman Henjewele v.R**, Criminal Appeal No.164 of 2005 (CA) (unreported). Accordingly, we find no merit in ground one of the appeal.

The complaint in ground two of the appeal, more serious, is that the medical report i.e. (P.F.3 Form) on PW2 was received and acted upon by the Courts below contrary to section 240(3) of the Criminal Procedure Act. The appellant submitted that he had objected to the admission of the medical report and was denied his right to cross-examine the medical officer who had examined PW2. On her part, Ms. Mushi pointed out that the complaint was rightly considered by the High Court which determined that the PF3 Form was "worthless" as evidence.

The PF.3 Form (Exhibit P.1) was issued by the police on 11.06.2001. When it was tendered in Court by PW1, the appellant objected. The trial Court admitted and acted upon it. The High Court found out that in these circumstances it was mandatory for the trial Court to have informed the appellant his right to demand the doctor who wrote it to be called for cross-examination. That the failure to comply with section 240(3) of the Criminal Procedure Act rendered the PF.3 form worthless.

This ground of appeal poses no difficultly. As correctly held by the High Court, once the P.F.3 Form was objected to when tendered by PW1 on 16.05.2002, the trial Court should have thought it fit, and it was incumbent upon it to have the medical officer who made the report summoned for cross examination by the appellant (See, **Selemani Mwitu v.R,** Criminal Appeal No. 90 of 2000 (CA),

(Unreported). In our settled view the High Court was, therefore, fully entitled to exclude it as a valid piece of evidence. Ground two of the appeal has merit.

Ground three of the appeal is an attack on the alleged discrepancy between the date the offence was committed, i.e. 11.06. 2001 and its reporting to the police, on 15.06.2001. The appellant submitted that as PW1 and PW2 did not timely report the incident to the police, it showed that the accusation against him was outright false. Responding, Ms. Mushi indicated that the incident was reported to the police on 11.06.2001. Not on 15.06.2001.

Having closely perused the record, it is borne out therein that PW1 and PW2 immediately reported the incident to the police on 11.06.2001. PW3 (D/Corporal Fatuma) was given the case file to investigate on 15.06.2001. With respect, therefore, there is no substance in ground three of the appeal.

Ground four of the appeal faults the Courts below for having failed to take into account the appellant's *alibi.* Ms. Mushi submitted that this ground of appeal has no foundation as the appellant had never raised an *alibi* as his defence. With respect, we would agree with her that this is plainly supported by the record. No defence of *alibi* was raised by the appellant in terms of section 194 (4), (5) or

(6) of the Criminal Procedure Act, or at all. This ground of appeal also has no merit.

The grounds of appeal having been disposed of and account duly taken of the whole record, we are of the considered view that the key question that arises therefrom is whether or not, excluding the PF.3 Form (Exhibit P.1) the evidence of PW1 was sufficiently corroborated by that of PW2 to prove the charge to the standard required by law.

PW2 was 6 years old when she testified on 16.05.2001. As a child of tender years, section 127(2) of the Evidence Act. Cap 6 R.E. 2002 required the trial Court to conduct a *voire dire* examination before the reception of her evidence. In conducting that *voire dire* examination, the trial Court only sought to ascertain whether she knew the meaning of an oath. It found that she did not. It then received her testimony unsworn. With respect, this was a serious irregularity. Having found out that PW2 did not know the meaning of an oath, the trial Court should have gone a step further to also find out if she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth when giving her evidence, as is required under section 127 (2) of the Evidence Act (See, **Jonas Raphael v.R,** Criminal Appeal No.42 of 2003 (CA), (unreported).

The omission to fully and properly conduct the *voire dire* examination of PW2 meant that her unsworn testimony required corroboration: - **Dahiri Ali v.R** (1989) TLR 27**, Deemay Daati v.R,** Criminal Appeal No.80 of 1994 (CA), (unreported). The pivotal question, as observed earlier, is whether PW1's evidence provided the necessary corroboration?

It is undisputed that the appellant was on 11.06.2001, between 09.00 and 10.00 hrs, with PW2 inside the pharmacy. It was fully established that PW2 who had semen and bruises on her vagina was raped. PW2 gave lucid evidence that:-

> *"Accused came from the room. He was behind my child.* ***Accused was pulling up his zip. The child had his trouser*** *.....* ***Accused was shaking*** *.....* ***I took the child I dressed her*** *..... I started interrogating her. She said he had dressed her wound. Then* ***he removed her clothes and started doing "mchezo mbaya".*** *I took my child at home and I put her on the bed and laid her down.* ***I found the semen and scratches on the vagina"*** *(Emphasis added).*

While we are alive to the fact that outside the pharmacy, DW2 said he was selling soup and PW2's younger sister, aged 2½ years, Rusiana Charles did not enter inside, on an entire scrutiny of the evidence, we are fully satisfied, as was the High Court that the evidence of PW1 was amply sufficient to materially corroborate PW2's story.

The unexplained condition which the appellant was found by PW1 pulling up his zip and shaking, and PW2, undressed holding her trousers fully establishes the above as an incriminating conduct. Giving best consideration to the evidence as a whole, we do not see any reason, let alone a reasonable one, why PW2 who it was common ground had an injured shoulder, should at the material time PW1 entered the appellant's pharmacy, be undressed holding her trousers, and the former pulling up his zip. He had betrayed the assurance made to PW1 a week before the incident that his pharmacy had good medicines to treat PW2. PW1's evidence, unerringly cements the account by PW2 that indeed she was raped inside the pharmacy by the appellant and no one else. On the whole evidence, we are satisfied that the prosecution had proved the charge beyond all reasonable doubt and there is nothing that justifies any interference by us with the safe and satisfactory conclusion reached by the High Court.

Now, on sentencing, Ms. Mushi sought us to vary and impose the statutory mandatory sentence of life imprisonment

provided for in section 131(3) of the Penal Code as it was proved PW2 was aged 5 years when she was raped by the appellant. We agree that it was fully established that PW2 was 5 years old on 11.06.2001.

Accordingly, we invoke the revisional jurisdiction of this Court under section 4(2) of the Appellate Jurisdiction Act, Cap.141 R.E. 2002 and hereby quash the sentence of 30 years imprisonment imposed on the appellant and substitute it thereof with the mandatory sentence of life imprisonment for raping PW2, a child below the age of 10 years. We also order the appellant to pay to PW2 as compensation Tz Shs.100, 000.For the reasons stated, save for the variation of the sentence, the appeal stands dismissed.

DATED at DAR ES SALAAM this 17th of March, 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.

J. S. MGETTA

DEPUTY REGISTRAR