IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 285 OF 2007

CHRISTIAN ORGENES NKYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Principal Resident Magistrates' Court at Moshi (Extended Jurisdiction)

(Mgaya, PRM, Extended, Jur.)

dated the 10th day of April, 2007
in
Criminal Appeal No. 17 of 2007

JUDGMENT OF THE COURT

3rd & 6th September, 2010

MSOFFE, J.A.:

The District Court of Moshi (Mwaiseje, RM.) convicted the appellant of rape contrary to **sections 130** and **131** of the **Penal Code,** as amended, and sentenced him to a term of imprisonment for thirty years. He was also ordered to pay a sum of shs. 200,000/= as compensation to the victim of the alleged rape. Aggrieved, the appellant preferred an appeal to the High Court of Tanzania at Moshi. The High Court

(Mwaikugile, J.) invoked the provisions of **Section 45(2)** of the **Magistrates' Courts Act No. 2 of 1984**, as amended, and transferred the appeal to the Resident Magistrates' Court at Moshi for hearing before F. W. Mgaya (PRM, Ext. J. as she then was). The Principal Resident Magistrate with extended jurisdiction upheld the conviction and the sentence. Still aggrieved, the appellant has lodged this second appeal.

In the memorandum of appeal the appellant has raised a number of issues. The main ones are as follows: -

1. *That the conviction was not based on the weight of the evidence.*

2. *That the trial court erred in not complying with the mandatory provisions of section 186(3) of the Criminal Procedure Act (CAP 20 R.E. 2002).*

3. *That the trial court ought to have complied with the mandatory provisions of Sections 142(1) and 143 of the Criminal Procedure Act (CAP 20 R.E. 2002).*

4. *That the courts below erred in not considering the defence of alibi.*

5. *That there was a failure of justice because the provisions of Section 214(1) of the Criminal Procedure Act (CAP 20 R.E. 2002) were not complied with.*

6. *That there were contradictions in the prosecution case which ought to have been addressed by the lower courts.*

7. *That there was failure to comply with Section* ***39(b)*** *of the* ***Criminal Procedure Act.***

The facts of the case as they unfolded at the trial were that on 18/2/2004 PW1 Suzana Samwel, a girl of 8 years of age, was at home when the appellant, with whom she stayed in the same house but in different rooms, gave her 40 shs. and sent her to buy cigarettes for him from a nearby shop. At the time, her mother PW2 Bahati Juma had gone to a place known as Weruweru to buy fruits for sale. Upon PW1's return from the shop the appellant asked her to take the cigarettes to his room.

She obliged while carrying her younger brother on her back. Upon entering the room she saw the appellant lying on his bed. The appellant took the child from her back, laid PW1 on the bed and raped her. She felt pains but she did not inform her mother immediately. On the following day PW2 was making PW1's bed when she saw blood stains on the bedsheets. PW2 and PW3 Dorcas Felix examined PW1's vagina and saw plenty of clotted blood. PW1 told them that the appellant had raped her during the absence of PW2. The incident was reported to the police where a PF3 was issued. PW4 Dr. Constantin Irongo examined PW1 and confirmed that there were injuries in her vagina which were inflicted by a blunt object.

Before us the appellant appeared in person. He adopted the points canvassed in his memorandum of appeal. He also filed a written submission in support of the points in question. On the other hand, Mrs. Neema Joseph Ringo, learned Principal State Attorney, appeared and resisted the appeal on behalf of the respondent Republic.

As for the first ground of appeal Mrs. Ringo was of the affirmative view that the prosecution case against the appellant was established

beyond reasonable doubt. With respect, we agree with her. As shown above, PW1 was well supported by PW2, PW3 and PW4. The courts below believed these witnesses. In this second appeal we find no basis for faulting the said courts in the credibility that they attached to these witnesses.

The complaint in the second ground of appeal arises from the fact that in terms of **Section 186(3)** of the **Criminal Procedure Act** (CAP 20 R.E. 2002), hereinafter the **Act,** the evidence of all persons in trials involving sexual offences must be received by the court in camera. The record before us shows that the above provisions were not complied with. The trial ought to have been conducted in camera. In our view however, the failure to do so was not fatal. A look at the record will show that both prosecution and defence witnesses gave evidence freely. Indeed, even the appellant is not suggesting anywhere that he was prejudiced by the failure to comply with the above **sub-section**. We think that in the circumstances obtaining in the case the irregularity was curable under **Section 388(1)** of the **Act**. We are supported in this view by this Court's

decision in **Herman Henjewele v Republic**, Criminal Appeal No. 164 of 2005 (unreported).

The third ground of appeal is based on the provisions of **Sections 142** and **143** of the **Act**. Under these sections, if it is made to appear that material evidence can be given by or is in the possession of any person, it shall be lawful for the court to issue summons to that person requiring the attendance of the said person. The complaint in this ground arises from that portion of the evidence of PW1 where she stated: -

> *...Then my grandmother with my mother looked at me on my private parts...*

If we understood the appellant correctly, and we think we did, the suggestion in this ground is that the grandmother was a material witness who ought to have been summoned to give evidence. As submitted by Mrs. Ringo, quite correctly in our view, there was no need for the trial court to invoke the above **sections** and thereby summon the said grandmother. If summoned, we think at best she would have merely confirmed the evidence of PW2 that she and PW3 examined PW1 and

detected some signs of rape. At any rate, under **section 143** of the **Evidence Act** (CAP 6 R.E. 2002) no particular number of witnesses is required to prove any fact. In this case, there was already the evidence of PW1 that she was raped; the evidence of PW2 that she saw blood stains on the bedsheets; the evidence of PW2 and PW3 that they examined PW1's vagina and observed that she had been raped; and the evidence of PW4 that he examined PW1 and found *"bruises and clotted blood in the private parts of the victim...that she was injured..."* Surely, in the midst of all this evidence there was no need to summon the grandmother.

In the fourth ground of appeal the appellant is faulting the courts below for not considering his defence of *alibi*. A look at the appellant's evidence at the trial will show that he raised the defence of an *alibi*. But it is also true that he did not give notice or furnish particulars in terms of **section 194(4) and (5)**, of the Act. However, in spite of the failure to do so it is on record that, although the trial court did not say so in so many words, it did actually invoke **sub-section 6** of the above **section** and considered the defence after which it decided not to accord any weight to it. This is borne out by that portion of the judgment which reads; -

> *However the accused person in his defence kept on telling this Honorable Court that on the material day he was not around in Moshi he was travelled to Hai with his wife. This court believe that what testified by the accused person was untruth he was just trying to convince this court testified that PW1 testified untruth evidence, but when he asked if he ever conflicted with PW1. He replied that they never conflicted.*

So, in doing so, the trial court actually took cognizance of the defence and in its discretion decided not to accord any weight to it. What the court did here was in line with the law – See also **Charles Simon v R** (1990) TLR 39 and **Ludovick Sebastian v R**, C.A.T. Criminal Appeal No. 318 of 2007 (unreported).

The fifth ground of appeal has a bearing on that part of the record of proceedings which shows that Duma (DM and then elevated to the post of an RM) recorded part of the evidence and then following her transfer Mwaiseje, RM took over the case to its conclusive end. According to the

appellant, Mwaiseje, RM ought not to have proceeded from where Duma RM ended without complying with the "mandatory" provisions of **section 214** of the Act. With respect, this ground need not detain us. Under **section 214** the Magistrate taking over has the discretion to act on the evidence recorded by his/her predecessor and may if necessary resummon the witnesses and recommence the trial. In this sense, Mwaiseje, RM properly exercised her discretion provided for under the law. We appreciate that before the amendment the law mandatorily required the magistrate taking over to inform an accused person of his/her right to demand the witnesses who testified to be summoned. The appellant was charged on 23/2/2004 when the law had already been amended – See also **Yusuph Nchira v R**, C.A.T. Criminal Appeal No. 174 of 2007 (unreported).

Yet again, the complaint in the sixth ground of appeal need not detain us. According to the appellant the blood stained bedsheets ought to have been tendered in evidence in order to *"afford evidence of the commission of the offence"* in line with **Section 39(b)** of the **Act**. This complaint has no substance because as per page 13 of the record of

appeal the bedsheets were actually produced and admitted in evidence as exhibit P2.

In the last ground of appeal the appellant is alleging that there were contradictions in the prosecution case, notably that PW1 stated in court that she was raped on the bed while in the statement (exh. D1) she said that the act took place on the floor. With respect, we agree with Mrs. Ringo that this was a very minor contradiction. In fact, going by the general and overall flow of the evidence, particularly that of PW1, this so called contradiction was probably a slip of the pen. Anyhow, the crucial question was whether or not PW1 was raped by the appellant. As we have shown above the evidence is overwhelming that the appellant raped PW1 on the fateful day. So, it did not matter whether the rape was on the floor or on the bed.

The final point in this appeal is on sentence. As correctly pointed out by Mrs. Ringo, under **section 131(3)** of the **Penal Code**, as amended by **section 6** of the **Sexual Offences Special Provisions Act No. 4 of 1998**, where a person commits rape to a girl under the age of ten years

he shall on conviction be sentenced to life imprisonment. In this case there is no dispute that PW1 was eight years old at the time of the rape in question. The offence was committed on 18/2/2004 when **Act No. 4** of **1998**, which came into effect on 1/7/1998, was in force. The trial court as well as the Principal Resident Magistrate with extended jurisdiction overlooked the above legal requirement. The sentence of thirty years imprisonment which was imposed on the appellant was therefore illegal. Admittedly, the Director of Public Prosecutions did not appeal against the sentence but we will not allow the illegal sentence to stand now that we have been made aware of the illegality. Going by the spirit of this Court's decisions in **Stuart Erasto Yakobo v Republic**, Criminal Appeal No. 202 of 2004, **Ifunda Kisite v Republic**, Criminal Appeal No. 47 of 2003, and **Herman Henjewele v Republic**, Criminal Appeal No. 164 of 2005 (all unreported), we hereby invoke our revisional jurisdiction under **section 4(2)** of the **Appellate Jurisdiction Act, 1979** as amended by **Act No. 17 of 1993**, and accordingly quash the sentence of thirty years imprisonment and substitute thereof the correct sentence of life imprisonment.

In the event, for the foregoing reasons, the appeal against conviction is dismissed. The sentence is varied as stated above.

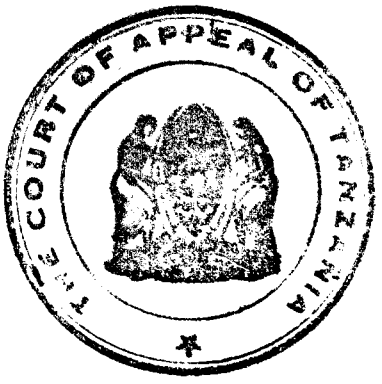
DATED at **ARUSHA** this 6th day of September, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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



(E. Y. MKWIZU)
DEPUTY REGISTRAR
COURT OF APPEAL