

**IN THE COURT OF APPEAL OF TANZANIA  
AT TANGA**

**(CORAM: MUNUO, J.A., MSOFFE, J.A., And KIMARO, J.A.)**

**CRIMINAL APPEAL NO. 135 OF 2009**

**AUGUSTINO MOSHA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
at Tanga)**

**(Teemba J.)**

**Dated the 12<sup>th</sup> day of December, 2008**

**in**

**Criminal Appeal No. 46 of 2007**

-----

**JUDGMENT OF THE COURT**

15 & 19 March, 2010

**MUNUO, J.A.:**

The appellant, Augustino Mosha was convicted of the offence of rape contrary to sections 130 (2) (c) and 131 (1) of the Penal Code, Cap 16 R.E 2002, in Korogwe District Court Criminal Case no. 129 of 2006 for allegedly, carnally knowing one Khadija Juma, a small girl aged 10 years on the 13<sup>th</sup> day of August, 2006 at about

21.00 hours at Kwamsisi Village within Korogwe District in Tanga Region. Upon conviction, the trial court sentenced the appellant to 30 years imprisonment and 12 strokes of the cane to be inflicted on the appellant in installments of 6 strokes at the commencement of the sentence and the remaining six at the completion of the sentence. Furthermore, the trial court ordered the appellant to pay sh 200,000/= compensation to Khadija Juma for the injuries she suffered from the rape. Compensation was to be effected by distress of the property of the appellant forthwith. Aggrieved by the decision of the trial court, the appellant lodged DC Criminal Appeal no. 46 of 2007 in the High Court at Tanga. Teemba, J. dismissed the appeal in its entirety giving rise to this second appeal.

As the learned judge correctly observed, the facts of this case are straight forward. The complainant, P.W.2 Khadija Juma was a standard II pupil at Kwamsisi Primary School at the material time. She was then aged ten years. On the material night, at about 20.00 hours the small girl was returning home from the house of one Amina Mussa when she encountered the appellant. PW1 knew the appellant well for he lived at Kwamsisi where P.W. 1 was living with her

grandparents. When the appellant met PW1 he lured her into his house saying he would give her a parcel for he grandmother. When they entered the room, the appellant treated the small girl with juice, which she drunk. Thereafter the appellant forcibly undressed and raped the small girl. After quenching his lust, he gave the victim sh 400/= as reward and warned her no to disclose what he had done to her.

Back home, P.W.1 Hussein Ramadhani got concerned that the small girl had taken too long to return so he decided to follow her. However, he did not find PW2 at Amina Mussa's home, he was told she had already left. P.W.1 returned to the home of P.W. 2's grandparents only to find that P.W.1 was not yet back. P.W.1 then set out to hunt for the small girl. When he reached the appellant's house, he heard someone coughing inside so he became suspicious and sent for the village chairman while he kept guard outside the house of the appellant. The village chairman arrived at about 21.00 hours. The village chairman, P.W.3 Wante Lupia had brought militiamen along. They called out for the appellant and upon opening the door, he denied knowing the whereabouts of Khadija Juma. To

satisfy themselves that Khadija was not in the appellant's room, P.W.1, P.W.3 and the militia searched the house. They found Khadija hiding under the bed of the appellant. She then started crying saying she had been raped by the appellant. This is what Khadija Juma sated in her testimony:

*---- and instead he raped me at his house on to his bed after giving me some juice to drink. Before he raped me he forced out my clothes ----  
--- and then raped me. He thereafter gave me Tsh 400/= as a reward and cautioned me not to tell any person ---*

P.W.1 and PW3 then arrested the appellant and took him to Kilole police. Subsequently, the appellant was charged with the present offence. The victim got a PF 3 for treatment but the same was expunged from the record because the trial court failed to comply with the provisions of Section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. which provides,

Inter-alia:-

240. (1) -----

(2) -----

*(3) When a report referred to in this section is received in evidence the court may if it thinks fit and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report and 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 subsection.*

Conceding that the trial court did not inform the appellant of his right to summon the doctor who made the PF3, the learned Senior State Attorney rightly asked us to expunge the PF 3, Exh P1 from the record, and we did so.

In his sworn defence, the appellant denied the charge. He admitted that PW1 went to his house allegedly to collect some money the appellant owed her grandfather. It was ten, he claimed, that people invaded his house alleging that he had raped Khadija who the people found hiding under his bed. He said that Khadija had gone to collect sh 300,000/= for her grandfather and he told her would pay the money the next day.

Before us, the appellant filed ten ground of appeal and three additional grounds of appeal challenging the prosecution evidence deposed by PW1, P.W.2 and P.W. 3. He further faulted the respondent Republic for omitting to call the village militiamen and the policemen who investigated his case. He wondered why the sh 400/= cash he gave to the victim was not tendered in court during the trial. He also faulted P.W. 1 Hussein Ramadhani for examining the victim instead of looking for a woman to conduct the examination. In short, the appellant insisted that he did not the rape the girl. He claimed, furthermore, that the prosecution did not prove the case beyond all reasonable doubt so he should not have been convicted. He prayed that his appeal be allowed.

Mr. Oswald Tibabyekomya, learned Senior State Attorney, supported the conviction, sentence and compensation order. As observed earlier on, be prayed that the PF3, Exhibit P1 be expunged from the record for non-compliance with the provisions of section 240 (3) of the Criminal Procedure Act, Cap. 6 R.E 2002.

The evidence on the learned Senior State Attorney fully supported the conviction, noting that when P.W.1 found the small girl under the bed of the appellant, he saw bruises and a watery fluid in her private parts which confirmed that she had been sexually assaulted by her captor, the appellant. The evidence of PW 3 Wante Lupia, the Senior State Attorney, further contended, corroborated the testimonies of PW1 and PW2 for PW3 was present when the victim was found hiding underneath the appellant's bed. In view of such glaring prosecution evidence, the Republic urged, the conviction cannot be faulted.

The issue before us is whether the appellant raped Khadija Juma, a ten year old girl at that time. The learned judge was satisfied that **voire dire** examination was conducted in compliance with the provisions of section 127 (2) of the Evidence Act, 1967, Cap. 6 R.E 2002 to establish that the small girl had sufficient intelligence and that she understood the duty to tell the truth, citing the cases of **Dhahlr Ally versus Republic** (1989) TLR 27 and **Elias Joachim versus Republic** (1992) TLR 220 as authority that once voire dire examination is conducted, the evidence of the child of tender years

carries weight like that of an adult. Like the learned judge, we find that voire dire examination was rightly conducted. Thence the trial magistrate correctly found PW2 a credible witness.

The evidence of PW1 and PW3 corroborates the testimony of the victim. When P.W.1 became concerned that it was getting late and the small girl had not returned home, he went to look for her. He heard a coughing voice in the appellant's house and suspecting it was Khadija's voice, kept guard at the door while another villager went to call the village chairman P.W. 3 Wante Lupia. Together, they knocked on the appellant's door and asked him if he had seen Khadija which the appellant denied although he knew that he had entertained the victim with juice and thereafter raped her. We are of the settled view that his guilty mind caused him to tell Khadija to hide under his bed whereupon he lied to PW1 and the arrest party that Khadija was not in his room. In a nutshell, the conduct of the appellant was not consistent with innocence.

We agree with the appellant that it was unethical for Khadija to be examined by her uncle. The correct way of doing things would have



...remains to look for a woman who would have conducted the examination in the victim's private parts. However, the wrong of the uncle examining the victim did not absolve the appellant of the rape he had committed on the victim. We are satisfied that the appellant raped Khadija Juma and ordered her to hide under his bed. This appellant did hoping that the arrest party would not search for P.W.2 which they did and discovered her under the appellant's bed with bruises and a watery fluid in her private parts. This confirmed that the appellant had sexually assaulted her shortly before P.W. 1, P.W. 3 and the other villagers struck at the appellant's room. In view of such glaring evidence, we find no merit in this appeal.

We wish to observe that the Corporal Punishment Act, Cap. 17 R.E 2002 does provide for strokes by installment. Section 8 (3) of Cap. 17 prohibit strokes by installment by sating:

*8(3) no sentence of corporal punishment shall be carried out by installments.*

With that observation, we dismiss the appeal.

DATED at TANGA, this 16<sup>th</sup> day of March, 2010

E. N. MUNUO  
**JUSTICE OF APPEAL**

J. H. MSOFFE  
**JUSTICE OF APPEAL**

N. P. KIMARO  
**JUSTICE OF APPEAL**

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



  
(N. N. CHUSI)  
**DEPUTY REGISTRAR**