IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 188 OF 2008

MAHONA SELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the RM's Court of Tabora at Tabora)

(Mbuya, PRM Ext. Jur.)

dated the 9th day of June, 2008
in
Criminal Appeal No. 6 of 2007

JUDGMENT OF THE COURT

29 & 30 June, 2011

MANDIA, J.A.:

On 26/6/2005 at 7 p.m. the appellant went over from Kadonge village where he lives to Mbutu village where PW1 Shida d/o Donald lives. There the appellant asked Shida to escort him to Ngomani Mbutu. Shida agreed. The two were seen together at Ngomani Mbutu by Shida's step-mother PW3 Regina d/o John, who served the appellant with tea. After taking the tea, the appellant left with Shida. On the way back the appellant and Shida arrived at a mango tree

and the appellant sat under the mango tree. Shida implored the appellant to walk on. The appellant called on Shida to go to where he was seated. When Shida arrived there the appellant lifted her up and carried her over his shoulder into a shamba where he undressed her, laid her on the ground, laid on top of her and inserted his penis into her vagina while at the same time pressing his hand over her mouth. Thereafter the appellant turned Shida over and inserted his penis into her anus.

In the meantime PW3 Regina d/o John, who had served tea to the appellant at Ngomani Mbutu, went home at about 9 p.m. She found that Shida had not arrived back home despite leaving Ngomani Mbutu well before her. Regina d/o John informed her husband PW2 Donald s/o Mgema of Shida's absence, and the fact that she left Ngomani before her (PW2) in the company of the appellant. The couple then started searching for Shida. During the search they arrived at the mango tree with PW2 Donald s/o Mgema flashing a torch. A voice came from under the mango tree asking who was flashing a torch and that whoever was flashing the torch did not

know how to seduce. Donald s/o John testified that he recognized the voice as that of the appellant who is a cousin to him as is the son of his (i.e PW2's) aunt. PW3 Regina d/o John testified that she recognized the voice of the person complaining about the flashlight as that of Mahona. PW2 and PW3 went over to where the appellant was and found him standing completely naked with PW1 Shida d/o Donald beside him, also naked except for an underskirt which she wore. Regina d/o John raised an alarm which drew PW4 Fabiano s/o Leonard to the scene. At the scene PW4 Fabiano s/o Leonard found the appellant still naked, and the three PW2, PW3 and PW4 took the appellant, still naked, to the Ward Executive Officer. From there the girl was taken to hospital for medical examination after getting a PF3 from the police. The PF3 was put in evidence by PW1 Shida d/o Donald as Exhibit P1. Apart from the medical examination, PW3 Regina d/o John testified that she also examined Shida and what she found is found at page 14 of the record:-

> *"The accused was naked and I saw my daughter with sperms around her thighs. At Mbutu hospital the doctor saw the*

prosecutrix to have been raped and sodomized. I checked the vagina of the prosecutrix and found that a bit her vagina was tampered with...."

The evidence gathered by the prosecution led the police to file in the District Court of Nzega District at Nzega a charge sheet containing two counts, one of committing an Unnatural Offence c/s 154 of the Penal Code, and a second count of Rape c/s 130 of the Penal Code as amended by Section 5 of the Sexual Offences Special Provisions Act, Act No. 4 of 1998.

After the prosecution had closed its case, the accused was put on his defence and in his defence he admitted that he had visited the Ngomani area and that when he was apprehended he was in the company of PW1 Shida d/o Donald, whom she took along to assist in finding her mother. He however claimed that he was not arrested while naked, and that his arrest came by as a result of quarrel between his father and PW2 Donald s/o Mgema after Donald was sent to court and fined for letting his cattle graze in the shamba belonging to his (i.e appellant's) father.

His protestations of innocence did not help the appellant. He was convicted of both offences he was charged with and sentenced to thirty years imprisonment for each of the two counts. The sentences were ordered to run concurrently. The appellant was aggrieved by both the conviction and the sentence and he preferred an appeal to the High Court of Tanzania at Tabora. The High Court transferred the appeal to the Court of Resident Magistrate, Tabora where it was heard by L.J. Mbuya PRM (Extended Jurisdiction) who dismissed the appeal against conviction.

During the trial, the District Court noted that there was a dispute as to the age of the victim. The charge sheet gave her age as ten years. While testifying the girl herself gave her age as nine years. During his defence the appellant, who is related to the victim, gave her age as six years. The trial court did not make a finding as to the age of the victim of the offence but noted these discrepancies in age. What the trial court did was to give the benefit of doubt to the appellant and find the age of the child to be ten years as shown in the charge sheet. On appeal, the learned PRM (Extended

Jurisdiction|) made another finding that the age of the victim is less than ten years old without giving the particular age. The PRM (Extended Jurisdiction) vacated the sentence of thirty years imprisonment imposed on the appellant for each of the two counts and in its place substituted life imprisonment for each are of the two counts and ordered the two sentences to run concurrently. The appellant was aggrieved by the decision of the PRM (Extended Jurisdiction) hence this appeal.

The appellant has filed a memorandum of appeal containing five grounds which essentially raise the following grounds of complaint, namely:-

1. That the lower court erred in acting upon the PF3 in contravention of Section 240(3) of the Criminal Procedure Act.
2. That the case against him is a frame-up by members of the same family.
3. That the case against him arose out of a grudge between his father and the victim's father.

The appellant appeared in person, unrepresented, to argue his appeal while the respondent was represented by Mr. Juma Masanja, learned State Attorney. The appellant reiterated the ground as it appears in the memorandum, that the PF3 was admitted in evidence against the provisions of S. 240(3) of the Criminal Procedure Act, 1985.

On his part, Mr. Juma Masanja, learned State Attorney, conceded that the PF3 was admitted in breach of the Provisions of Section 240(3) of the Criminal Procedure Act, 1985 which require the trial court to inform an accused person of his right of having the medical officer who made a medical report summoned in court to testify as to the contents of such medical report - **See Kayoka Charles v R** Criminal Appeal No. 325 of 2007 (unreported). Mr. Juma Masanja, learned State Attorney, urged this court to discount the PF3. He however argued that even if the PF3 is discounted the evidence of PW2 Donald s/o Mgema and PW3 Regina d/o John places the appellant clearly at the scene of the crime where he was found naked with the victim also naked beside him. Mr. Juma Masanja, learned State Attorney, also argued that apart from these two witnesses who

are family members there is the evidence of PW4 Fabiano s/o Edward who is a neighbour. This witness went to the scene in response to an alarm raised by PW3 Regina d/o John and in his testimony he said he found the appellant naked at the scene with the victim also naked beside him.

There is also the evidence of the victim herself. Mr. Juma Masanja, learned State Attorney, conceded that the evidence of the victim was taken in offence of Section 127(2) of the Evidence Act because a proper voire dire examination was not conducted. We agree. The introductory remark by the trial Resident Magistrate cannot by any stretch of the imagination amount to voire dire examination. We note that the evidence of PW1 Shida d/o Donald was taken on oath despite the perfunctory nature of the so called voire dire test conducted by the trial court. We however take note that despite this default, the evidence of PW1 Shida d/o Donald is cogent and detailed on all aspets and she stood firm even under cross-examination by the appellant. We agree with the learned State Attorney that such evidence should be treated as unsworn evidence as we have held in

Herman Henjewele v R Criminal Appeal No. 164 of 2005 (unreported). We also take note that the unsworn testimony of PW1 Shida d/o Donald shows that the appellant penetrated her when she testified thus:-

> *"His penis entered into my vagina a bit inches."*

This evidence of penetration is corroborated by her stepmother who testified thus:-

> *"I checked the vagina of the presecutrix and found a bit her vagina was tampered with."*

As PW2 was below the age of consent, and penetration has been proved all the ingredients of the offence of rape have been established.

The appellant took issue with the fact that the prosecution witnesses were members of the same family that is the father PW2, stepmother PW3 and daughter PW1 who is the victim. We agree with the learned State Attorney that this complaint lacks merit. The

witnesses testified as a family because they are the only persons who found that their daughter, had not arrived home after leaving the step-mother PW3 Regina d/o John at Ngomani Mbutu ostensibly going home. The non-arrival at home is what made the parents get concerned and trace the whereabouts of their daughter, only to find her naked in the grass and in the company of the appellant who was also naked. The witnesses therefore gave evidence on what they saw and did. At any rate there is no law preventing family members giving evidence. What matters is the competence and credibility of the witness. So much was held by this court in **Kabalagala Kudumbagula & Another v The Republic** Criminal Appeals No. 128 of 2007 (unreported). We also note that apart from the evidence of PW2 and PW3 there is the evidence of PW4 Fabiano s/o Edward along the same lines. We are satisfied that the appeal against conviction in the charge of rape has no merit and we dismiss it.

The learned State Attorney did not support the conviction on the first count of committing an Unnatural Offence. The testimony of the victim on this aspect of the charge is unsworn as we have said

earlier. It therefore required to be corroborated. The corroborating evidence of PW3 Regina d/o John shows that she examined the victim with regard to the allegation of rape only, and her testimony did not touch on the charge of Unnatural Offence. We have discounted the medical report PF3. This means the first count has no evidence upon which it couid be based. The appeal is therefore allowed in respect of the first count of Unnatural Offence c/s 154 of the Penal Code.

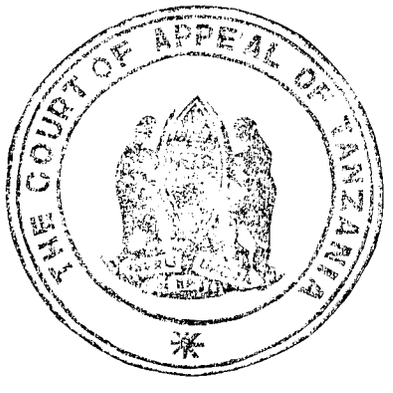
The appellate Court of Resident Magistrate exercising extended jurisdiction vacated the sentence of imprisonment on the charge of rape on the ground that the victim was found to be less than ten years old. We have examined the record. It shows as we pointed out earlier that different ages were shown in the charge sheet and during the trial when PW1 was testifying. Though the mother and step-mother were witnesses during the trial, they did not testify on the age of their child. The evidence of the parents show that they are the ones who reported the matter to the police, and they are the ones who presumably mentioned the age of their child to the police as ten years. The trial court was therefore correct in finding that the victim

was aged ten at the time the offence was committed. The learned PRM reversed this finding and found the age of the victim to be less than ten. No reason was given for such finding, and in any case it was the duty of the trial court to make a finding on age under Section 16 of the Children and Young Persons Act Chapter 13 R.E. 2002 of the laws and not the appellate court. We find that the appellate court erred in revising the finding of age made by the trial court. We would invoke the provisions of Section 4(2) of the Appellate Jurisdiction Act, Chapter 141 R.E. 2002 of the Laws and reverse the finding on age made by the appellate court. We restored the finding made by the trial district Court. As a consequence of this we would also vacate the sentence of life imprisonment imposed by the first appellate court and restore the sentence of thirty years imprisonment imposed by the trial court.

Lastly the learned State Attorney argued that under Section 131(1) any conviction for rape carries a mandatory punishment of corporal punishment which was not made by the trial court and was overlooked by the first appellate court. We would go further and

point out that there is in addition to the imprisonment and corporal punishment, a mandatory order of compensation which the trial court is obliged to make. Again invoking our provisional powers as shown above, we order that the sentence of imprisonment shall carry with it corporal punishment of twelve strokes of the cane. We also order that the appellant pay compensation to the victim of the crime PW1 Shida d/o Donald amounting to sh. 500,000/=

DATED at **TABORA** this 30th day of June, 2011.



J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL