IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO.162 OF 2009

SHIJA SHILOTO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Mwita, J.)

dated 18th August, 2007
in
Criminal Appeal No.35 of 2004

JUDGMENT OF THE COURT

30 June & 1 July, 2011

KIMARO, J.A.:

The appellant was convicted of the offences of abduction contrary to section 134 of the Penal Code and rape contrary to sections 130 and 131 of the Penal Code, [CAP 16 R.E.2002]. He was sentenced to 12 years imprisonment for the offence of abduction and thirty years imprisonment for the offence of rape. In addition, the appellant was ordered to suffer 12 strokes of the cane in respect of the offence of rape.

His appeal to the High Court was dismissed. He is before the Court for a second appeal. His grounds of complaint are; that there was no sufficient evidence for his conviction because the evidence of the complainant, Angelina Selemani (PW1) was not corroborated, and the evidence of PF3 was admitted in evidence and acted upon while the doctor who conducted the examination was not summoned for cross examination and that the police who investigated the case did not turn up to testify in the trial.

At the hearing of the appeal the appellant appeared in person. The respondent Republic was represented by Ms Lillian Itemba, learned State Attorney.

The appellant adopted his grounds of appeal and opted to reply to them after hearing the response from the respondent.

On her submission to oppose the appeal, the learned State Attorney supported the conviction and the sentence in respect of both offences. Starting with the offence of abduction, the learned State Attorney said that

under section 134 of the Penal Code, the offence of abduction is proved if it is established that an accused person has unlawfully taken an unmarried girl under the age of sixteen years from the custody or protection of her parent. She said that the record of appeal shows that the complainant, PW1, while at the age of 15 years, she was unlawfully taken away by the appellant without the consent of her father Selemani Sindano (PW2). She said the evidence that was led in the trial court showed that the appellant had suggested a marriage to PW1 and without informing the father of PW1, the appellant took her and stayed with her. When efforts to trace PW1 were made by Paschal Seleman (PW3) a brother of PW1 and Bulegu Shitarayomba (PW4), a neighbour of PW1, PW2 and PW3, the complainant PW1 was found in the house of the brother of the appellant with the appellant. She said that evidence was sufficient to sustain the conviction of the appellant on the offence of abduction.

The appellant on his side, repeated what he told the trial court in his defence that the complainant was not found in his house at the time of his arrest. He said the evidence against him was hearsay.

On the offence of abduction we think it is fairly easy to dispose of the same. The evidence that was led by the complainant herself (PW1), was that the appellant while in the company of her brother in law, went to their home in January 2004. Her brother in law told her that her sister who was residing at Mwambale village was calling her. It was at Mwambale village where the appellant made the proposal for the marriage. According to the complainant she accepted the proposal after pressure from other persons who were with the appellant. Later on, the appellant alone went to their house and convinced the complainant to go with him to Mwambale where they stayed in the house of the bother of the appellant and that is where her brother PW2, and their neighbour PW3, found her. The evidence of PW2, the father of the complainant was that, upon discovering that the complainant was missing from the house, he reported the matter to the police and sent his relatives to look for her. He was categorical when being cross-examined by the appellant that he did not allow him to take the complainant.

In sustaining the conviction on the first count, the learned judge on first appeal held:

"With regard to the 1st count, the victim's father testified to the effect that the victim was 15 years old and was under his lawful care. She was unmarried and was taken from his custody against his will. The person who did so was the appellant. The appellant was, therefore, properly convicted."

With this evidence on record, there is no way in which we can fault the first appellate court in upholding the conviction of the appellant on the 1st count of abduction.

On the 2nd count of rape, the learned State Attorney said the complainant PW1 testified that the appellant had sexual intercourse with her. She said the evidence of the complainant PW1 finds corroboration in the PF3 which shows that her hymen was perforated. The learned State Attorney said the complaint by the appellant that in relying on the evidence of the PF3 section 240(3) of the Criminal Procedure Act [CAP 20 R.E.2002] was flouted, has no substance as the record of appeal shows that the

appellant was duly informed of his right to have the doctor summoned for cross examination but he said he did not require him. Moreover, said the learned State Attorney, there is also circumstantial evidence from PW2 the brother of the complainant, and PW4 their neighbour, that the complainant was found with the appellant in the house of the brother of the appellant. She said the evidence to prove the charge of rape was overwhelming because the trial court could convict the appellant under Section 127(7) of the Evidence Act, [CAP 6 R.E. 2002] even without the evidence of the PF3 or the circumstantial evidence. She prayed that the appeal be dismissed.

As already said, the appellant kept on insisting that he did not commit the offence and requested the Court to allow his appeal.

In upholding the conviction on the charge of rape, the learned judge on first appeal said that the practice has been to require corroboration for sexual offences. He was of the view that there was no evidence to corroborate the unlawful sexual act of the appellant on the complainant. However, citing section 127(7) of CAP 6, he said so long as the trial magistrate believed that the evidence of PW1 who was 15 years old then

was nothing but true, the conviction could not be faulted. He then sustained the conviction and the sentence.

In addressing the charge of rape, let us start with the complaint by the appellant on the evidence of PF3. It is true that section 240(3) of CAP 20 imposes a mandatory obligation on the trial magistrate to inform the accused person of his right to have the doctor summoned for cross – examination when the magistrate seeks to rely on such evidence. See the case of **Shaban Daudi Vs R** Criminal Appeal No.28 of 2000(unreported). The record of appeal at page 5 shows that when the evidence on PF3 was sought to be put in evidence that requirement was explained to the appellant . The record shows that PW1 testified as follows:

> "I got the PF3 and went to hospital. This is the PF3
> Accused: No objection. I do not need to call a doctor.
> COURT: P.F.3 admitted as Exhibit P1.

The appellant did not put any question to the complainant when he was given the right for cross examination. Since the appellant was told about his right to have the doctor called for cross examination and he said

that he did not require him, the evidence of the PF3 was properly relied upon by the trial Court as evidence to corroborate the evidence of the complainant.

The evidence of PW3 and PW4 that they found the complainant with the appellant also serves as circumstantial evidence to cement the prosecution case. In this respect we would differ with the learned judge on first appeal that there was no corroborative evidence to support the evidence of the complainant PW1. The evidence of the PF3 was sufficient corroboration. However, and as we have endeavoured to show above, we agree, and with respect to the learned judge on first appeal, and the learned State Attorney, that even without corroborative evidence, the learned judge on first appeal cannot be faulted for sustaining the conviction of offence of rape against the appellant on the uncorroborated evidence of the complainant. The complainant was below the age of 18 years. She was 15 years old when the offence was committed. Whether she had consented to the sexual intercourse with the appellant or not that was immaterial.

On the complaint by the appellant that no police officer testified in the case, we find this ground has n+o merit. The prosecution are entitled to summon the witnesses who are competent to testify.

In the event, we find the appeal by the appellant devoid of merit and we dismiss it in its entirety.

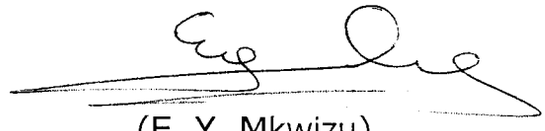
DATED at **TABORA** this 1st day of July, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
HUSTICE 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