

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

**(CORAM: MBAROUK, J.A. MASSATI, J.A., And ORIYO, J.A.**

**CRIMINAL APPEAL NO. 205 OF 2009**

**AYOUB MOSES ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of  
Tanzania at Mbeya**

**(Msuya, J.)**

**dated 19<sup>th</sup> day of June, 2009**

**in**

**Criminal Appeal No. 55 of 2008**

-----

**JUDGMENT OF THE COURT**

30 June, & 6 July, 2011

**ORIYO, J.A.:**

On the 25<sup>th</sup> August 2008, the District Court of Mbarali at Rujewa convicted the appellant, Ayoub Moses, of the offence of Rape of a child of two (2) years of age contrary to sections 130(2) (e) and 131 of the Penal Code, Cap 16, R.E. 2002. He was sentenced to life imprisonment.

Being aggrieved, he unsuccessfully appealed to the High Court of Tanzania, Mbeya, hence this second appeal. The appellant's memorandum of appeal has six (6) grounds of appeal which can safely be reduced into two (2) grounds of appeal that;

1. The circumstantial, prosecution evidence was insufficient to prove the charge of rape beyond all reasonable doubt.
2. The defence case was not considered

Essentially the case for the prosecution was that the victim, Faustina Emanuel and her twin brother, Faustino Emanuel, both aged two (2) years were in the care of Nice James (PW1), a girl of 11 years on 22<sup>nd</sup> February, 2007 at 16 hrs watching a video show at Igurusi village within Mbarali District, Mbeya Region. In the meanwhile, the appellant, who is a relative of PW1 and the twins came over and took away the twins allegedly to buy them some biscuits. Not long thereafter the appellant returned both twins. However, he left Faustino with PW1 while he carried the victim, Faustina, away with him again. Later, when the appellant returned Faustina to PW1, she was crying and bleeding from her private parts. This information was relayed to the twin's grandmother, PW2, Mwanne Ibrahim, by PW1. PW2 examined the victim and confirmed that she was bleeding from the vagina. PW2 reported the matter to the Police who issued her with a PF3 and she took the victim to a Doctor. The report of the Medical Officer of Chimala Mission Hospital who examined Faustina confirmed that the victim's

genitalia had suffered grievous harm caused by a blunt object. The Medical Officer's remarks were:

"Seen the child female. Examination done. Genital – vaginal Third degree tear and Bruises, severe pain, perineum of female clotted. Grievous Harm."  
(signed)

The appellant was arrested and subsequently charged in court. At the trial the appellant admitted to be a relative of the victim, PW1 and PW2. He also admitted that on the material date he took the victim Faustina from PW1's custody. Otherwise he denied to have raped the victim.

The first appellate court was satisfied that the victim was raped by the appellant who was the last person to be with the victim before she was found crying, bleeding from the vagina and walking with difficulty.

At the hearing of the appeal, Mr. Tumaini Kweka, learned State Attorney appeared for the respondent/Republic while the appellant was unrepresented and appeared in person.

Mr. Kweka, learned State Attorney who from the outset did not support the appeal conceded that in taking the evidence of PW1, a child of tender years, the trial court did not strictly comply with the provisions of section 127(2) of the Penal Code. He urged us to discount the evidence of PW1. We agreed with him and discounted the evidence of PW1 on the strength of the various decisions of this Court, for instance, see the Court's decision in the case of **Godi Kasenegala v. R.**, Criminal Appeal No. 10 of 2008 (unreported).

Submitting on the grounds of appeal generally, the learned State Attorney justified the appellant's conviction on the evidence of PW1, PW2, PW3, PW4, PW5 and Exhibits 'P1' and 'P2'. Having discounted the evidence of PW1, Nice James above, we are now left with the testimonies of PW2, PW3, PW4, PW5 and Exhibits 'P1' and 'P2' and the appeal fails or succeeds on the basis of these testimonies.

The issue before us for determination as it was in the lower courts is: "Whether, Faustina was raped". If the answer is in the affirmative, the next question is: "Who raped Faustina?"

Both the lower courts were satisfied on the evidence on record that it was true that Faustina was raped. Starting with the evidence of

PW2, the grandmother of Faustina, she testified that PW1 took the victim to her when the latter was crying and on examining her she found blood was coming from the victim's vagina. And in answer to a question from the appellant in cross examination, PW2 categorically stated:-

"I don't know what injured the child but  
you was (sic) with the child".

Further evidence was given by DW1, the appellant who admitted at the trial that he was with Faustina at the material time. Exhibit 'P2', the Medical Examination Report of the appellant tendered at the trial by PW4, Dr. Albert Sichone of Igurusi Dispensary, showed that upon examining the appellant he found him with bruises in his fore glands and dried blood on his penis. The medical report by Dr. Sichone was made following the appellant's complaints to PW3, F 3853 DC Cosam, the investigator of the case, that the appellant had pains in his upper left leg. But upon visual examination, PW3, noted there were no injuries on the leg but on his penis. PW3 stated:-

"I saw his penis had some injuries as if  
he was struggling to enter his penis into  
something".

PW3 also testified that he had an occasion to see Faustina in the hospital and he noted that she was seriously injured in her private parts. It was his observation that the injuries seen on the appellant's penis were similar to those inflicted on Faustina in her vagina. The opinion of PW3 was corroborated and confirmed by that of PW5, Francis Nyabusanya, then, an Assistant Medical Officer at Chimala Hospital, Rujewa. He examined Faustina and wrote a Medical Report, PF3, which was tendered as exhibit 'P2' and confirmed that Faustina was raped. The totality of the incriminating testimonies of PW2, PW3, PW4, PW5, and as corroborated by that of DW1 together with Exhibits 'P1' and 'P2' considered together constitute quite a strong circumstantial evidence that lead to nothing else but the guilt of the appellant. We therefore agree with Mr. Kweka that on the evidence, an accusing figure points to no one else but the appellant as the person who raped Faustina.

In the event, we find that the conviction of the appellant is sound and the appeal thereon is dismissed.

As shown above, the appellant was sentenced to life imprisonment. However, we are of the view that section 131 of the Penal Code was not fully complied with. Section 131 provides:

"131. -(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in anycase for imprisonment of not less than 30 years **with corporal punishment, and with fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person"**

(2) N/A

(3) Subject to the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment."

[Emphasis provided]

In view of the mandatory nature of the law, it is obvious the omission to impose corporal punishment and an order of compensation was an error. Unfortunately the first appellate court also erred in upholding it. In the exercise of the Court's revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141, R.E. 2002, we substitute the sentence. In addition to life imprisonment, the appellant is sentenced to corporal punishment of 12 strokes of the cane and to pay compensation of shs 200,000/= to the victim. The corporal punishment to be executed in two installments of 6 strokes each.

For the reasons stated above, save for the substituted sentence, the appeal is therefore dismissed in its entirety.

**DATED at MBEYA 5<sup>th</sup> day of July, 2011.**

M.S. MBAROUK  
**JUSTICE OF APPEAL**

S.A. MASSATI  
**JUSTICE OF APPEAL**

K.K. ORIYO  
**JUSTICE OF APPEAL**

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

  
P.W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**