IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NSEKELA, J.A., KIMARO,J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO.444 OF 2007

BARIKI ISRAEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(An Appeal from the judgment of the High Court of Tanzania at Arusha)

(Rutakangwa, J.)

dated 21st May, 2005

in

Criminal Appeal No.97 of 2001

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JUDGMENT OF THE COURT

11th & 18th February, 2011

KIMARO, J,A.:

The District Court of Arusha convicted the appellant of the offence of rape contrary to section 130(1) of the Penal Code, CAP 16. R.E. 2002 and

sentenced him to life imprisonment under section 131(3) of the same law. His appeal to the High Court was dismissed, hence this appeal.

The facts of the case were as follows: On 29th November, 1998 Abdul Rashid (PW1) returned home from a journey at 1.45 p.m and noted that his young child, Husna (PW3) was missing. He inquired from his wife, Zuhura(PW2) the whereabouts of his child. Working under the assumption that Zuhura was playing with her friends outside the house, PW2 went outside and called her name. Instead of responding to the call from outside, PW3 emerged from the appellant's room, in the same house, carrying her underpants. PW2 corroborated the evidence of PW1 on this aspect. Both said when PW3 was asked what happened to her, the child said that the appellant pulled her pants down and put his penis in his vagina. PW1 went into the appellant's room where he found him holding his trouser which was down up to his knees and his penis erected. With the assistance of people who responded to an alarm raised by PW2, as PW3 came from the appellant's room, the appellant was arrested and taken to the police station on the same day.

As PW2 inspected PW3's private parts, she found bruises and blood coming there from. PW2 was taken to Mount Meru Government Hospital, where she was examined by Dr. Hassan Kivuyo, (PW5) a gynaecologist. His testimony was that PW3 had suffered multiple lacerations involving the vulva. It was harm. The hymen was intact but vagina swab revealed red blood cells. His medical opinion was that the injuries could have been caused by a blunt object, of which penis was among them. A PF 3 was admitted in evidence without objection from the appellant as exhibit P2. Husna testified as PW3 but because of her tender age, four years at the time of testifying, and voire dire was not conducted properly; her evidence was discounted by the first appeal court. At the police station, the appellant was also said to have his caution statement recorded in which he admitted the commission of the offence. The police officer who recorded the appellant's statement was WP 2070 D/CPL Edith(PW5). The caution statement was admitted in court as exhibit P1.

In his defence the appellant denied the commission of the offence. He said the charge was framed against him because of a grudge with PW1. As already stated, the trial court convicted the appellant and sentenced him according to the provision of the law under which he was charged. The first appeal court sustained the conviction. Out of his four grounds of appeal in the first appellate court, it was only the ground on the credibility of the evidence of PW3 which was sustained. The remaining three grounds were found to have no merit.

Before us, the appellant basically repeated the grounds of appeal he had filed in the High Court. His first ground of complaint is that PW1, PW2 and PW3 were family members and their evidence was not properly evaluated. Another complaint is the admission of his caution statement which did not comply with the time limit for recording such statement. The last one was failure by the first appellate court to make a finding that the ingredients of the offence of rape were not proved, in that the examination by PW5 showed that PW's hymen was intact.

Before us the appellant appeared in person. Mr.Zakaria Elisario, learned State Attorney, represented the respondent/ Republic. At the hearing of the appeal the appellant opted to respond to the grounds of appeal after the response from the learned State Attorney. The learned State Attorney supported the conviction and the sentence.

On the first ground of appeal that PW1, PW2 and PW3 were family members and the first appellate court should have seen the danger of relying on such evidence, the learned State Attorney said this ground is baseless, because the conviction of the appellant was not solely based on the evidence of her parents but their evidence was corroborated by that of PW5 who examined PW3 and found her to have suffered injuries in her private parts. The appellant in reply to this ground vehemently attacked the evidence of PW3 and PW5 claiming that it did not prove the offence of rape because medical evidence from PW5 was that there was no rupture on the hymen of PW3.

For this ground of appeal, we need not waste time as the law is settled. In the case of **Mustafa Ramadhani Kihiyo Vs R** [2006] T.L.R.323 the issue of related witnesses arose. The Court held that the evidence of related witnesses is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited, unless of course, there is ground for doing so. In this case we find no reason for discounting the evidence of the said related witnesses. After all, under section 62(1)(a) of the Evidence Act, CAP 6 R.E.2002 oral evidence must in all cases whatsoever, be direct; that is to say if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. In this case, both PW1 and PW2 were the ones who saw their daughter, PW3 coming from the room of the appellant. They were the necessary witnesses for the prosecution in this respect. The evidence of the doctor will be discussed later when dealing with ground three. The first ground of appeal has no merit. It is dismissed.

As for the second ground of appeal, the learned State Attorney admitted that the caution statement was wrongly admitted in evidence as it

was recorded out of the required time. He said the appellant was arrested on 29th November, 1998 but it was not until 1st December, 1998 that his caution statement was recorded. He referred the Court to the case of **Roland Thomas @ Mwangamba Vs R** CAT Criminal Appeal No. 447 of 2007 (unreported) which held that for a caution statement to be admitted in evidence; it must be recorded in compliance with the provisions of sections 50 and 51 of the Criminal Procedure Act, CAP 20 R.E.2002. According to the testimonies of PW1 and PW2 the appellant was arrested on 29th November, 1998 and his statement was recorded by PW4 on 1st December, 1998. In terms of section 50 and 51 of CAP 20 the statement had to be recorded within four hours of his arrest, unless there was an extension of time granted for recording the same out of time. With respect to the learned judge on first appeal, he erred in law for not finding that the caution statement of the appellant was not admissible in evidence. This ground of appeal has merit and it is allowed.

Lastly is the ground on the conviction of the appellant. His major complaint in respect of this ground is that the medical evidence as given by

PW5 showed that there was no rape committed, as the hymen was not ruptured. The learned State Attorney for the respondent /Republic submitted that the sequence of evidence from the prosecution witnesses showed that the offence was committed, as PW5 said that the victim of the offence, (PW3) was injured in her private parts and the injuries suffered were described as harm. In our considered opinion the offence of rape was committed. Both PW1 and PW2 said as PW3 was called out, she came out of the room of the appellant carrying her under pants. She cried and said the appellant told her to remove her underpants and put his penis in her vagina. When PW1 went into the room of the appellant, he found him pulling his trousers up and his penis was erected. This evidence was not disputed by the appellant when the witnesses testified. PW3 was examined by PW5 on the same date and found her with bruises in her private parts and the doctor, a gynaecologist specialist, confirmed that the bruises were caused by a blunt object. In his defence the appellant confirmed that when PW2 called out PW3, she responded from her room and went out.

Under section 130(4) (a) penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence of rape. Both PW1 and PW2 said that PW3 said the appellant put his penis in her vagina. As PW1 followed the appellant in his room, he found him holding his trousers down on the knees and his penis was erected. The mere fact that the victim's hymen was not ruptured does not mean that the offence of rape was not committed. According to the ingredient of the offence of rape, no matter how slight the penetration is, it constitutes the offence of rape. From the evidence that was adduced in this case, we are satisfied that the offence of rape was committed. We therefore, have no reason to fault the learned judge on first appeal for sustaining the conviction.

Under section 131(3) of CAP 16 if the girl is less than 10 years old, the offender shall be sentenced to life imprisonment. At the time of the commission of the offence, PW3 was three years old. He was properly sentenced to life imprisonment. The appeal therefore is devoid of merit. It is dismissed in its entirety.

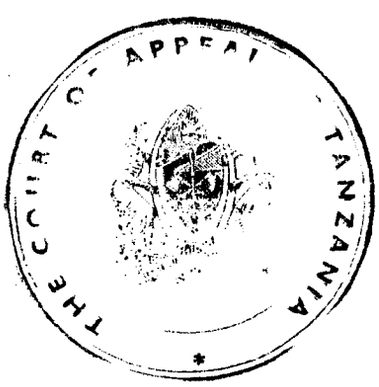
DATED at **ARUSHA** this 15th day of February, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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



Z. A. Maruma
DEPUTY REGISTRAR