IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 200 OF 2009

BURTON MWIPABILEGE ..... APPLICANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal From the decision of the High Court of Tanzania at Mbeya)

(Lukelelwa, J.)

dated the 25th day of May, 2009
in

(DC) Criminal Appeal No. 53 of 2006

JUDGMENT OF THE COURT

30 June, & 5 July,2011

MASSATI , J.A.:

The appellant and the family of Osia Mbalwa (PW2) were living in the same rented house at Lema village, in Kyela District, Mbeya Region. On the 10th May, 2005 at 1.00 am, PW2 went out for a call of nature. When he looked into his daughter's room, she was not there. He peeped through the appellant's room's door. He saw his daughter (PW1) who was then only 10, in there. He locked the door of the appellant's room and called his wife (PW5); who in turn, invited their neighbours, who included PW3 and PW4. The appellant's door was opened, and both the appellant and PW1

were found inside. The appellant was subsequently arrested, and charged with the offence of rape contrary to sections 130 and 131 (1) of the Penal Code Cap 16 RE 2002. The District Court of Kyela, convicted him as charged and sentenced him to 30 years imprisonment with 12 strokes. His appeal to the High Court was dismissed in its entirety. He has now come to this Court for a second appeal.

Before us, the appellant appeared in person, and adopted his nine – ground memorandum of appeal. Mr. Prosper Rwegerera, learned State Attorney appeared for the respondent/Republic.

The appellant's grounds of appeal may be summed up as follows: First, the *voire dire* examination on PW1, who was below 14 at the time she gave evidence, was not satisfactory. Two, the appellant was not consulted before any exhibit was tendered. Three, no caution statement was tendered to prove that the appellant confessed to the commission of the offence. Four, it was wrong for the trial court to have believed and acted on the evidence of PW5 (who examined PW1) who was not a qualified doctor. Fifth, there was no legal evidence of rape. Sixth, the trial court did not address itself to the contradictions in the evidence of the prosecution witnesses. Sevent, the case was planted by PW2, hence the

contradictions between PW2 and PW3. Lastly, that the defence case was not considered. He therefore prayed that the appeal be allowed.

Mr. Rwegerera did not support the conviction and sentence, because, in his view, on the whole, the prosecution has failed to prove its case beyond any reasonable doubt. All that the witnesses proved was that PW1 was found in the appellant's room, but even PW1 herself only gave a general statement that she was raped, without specifically proving penetration, which was contrary to section 130 (4) (a) of the Penal Code and case law. Besides, he said, the evidence of PW1, a child of tender years was taken contrary to section 127 (2) of the Evidence Act and **GODI KASENEGALA V. R.** Criminal Appeal No. 10 of 2008 (unreported).

We also drew Mr. Rwegerera's attention to the contents of the statement of the offence in the charge sheet. He admitted that it was wrong to charge the appellant under section 130, which was a general provision for rapes of all types, and that in the circumstances of the case, the correct provision was section 130 (2) (e) of the Penal Code. However, he was of the view that the error was curable under section 388 of the Criminal Procedure Act (Cap 20 RE 2002).

We shall first begin with the question of procedure. As pointed out by Mr. Rwegerera, the appellant was charged under section 130 of the Penal Code. That section has 5 subsections; and subsection 2 has also 5 paragraphs. Section 130 itself simply reads "Rape" Subsection (1) defines rape:

> "A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances failing under any of the following descriptions":-

The different descriptions of rape are then listed in paragraphs (a) to (e). In framing a charge and in compliance with section 135 (a) (i) and (iii) of the Criminal Procedure Act (Cap 20 RE 2002) (the CPA), it is important for the prosecution to particularize the paragraph of subsection (2) under which the offence falls. In the present case, since the alleged victim of rape is shown in the particulars to be under 10 years of age, the proper provision would have been subsection (2) (e). So, the proper statement of offence would have cited section 130 (2) (e) of the Penal Code. As for the penalty provision, the section cited was also not proper. Since the victim was 10 years old, the proper punishment section would have been section

131 (3) where life imprisonment is the prescribed minimum sentence, and not section 131 (1) where the minimum sentence is 30 years imprisonment. On the face of it therefore, the charge is illegal in form. But, we agree with Mr. Rwegerera that this is curable under section 388 of the CPA, because the irregularity has not, in our view, occasioned a failure of justice. As the defunct East African Court of Appeal said in **R v NGIDIPE BIN KAPIRAMA AND OTHERS,** (1939) 6 E.A. CA. 118.

> *"An illegality in the form of a charge or information may be cured as long as the accused persons are not prejudiced or embarrassed in their defence or there has* otherwise *been a failure of justice".*

In the present case, we have looked at the record. We are satisfied that, although he was not defended at the trial, the appellant was able to put across relevant questions to the prosecution witnesses and put up the best he could in his defence, including a brief submission on the substance of the prosecution case. He has not complained and we cannot therefore say that he was prejudiced or embarrassed in his defence by the deficiency in the charge.

We now go to the substance of the appeal. Although the appellant has brought in nine grounds of appeal, they could all be summed up in the general ground which appears as the 9th ground-

> *"That the offence of rape against the appellant was not proved by the prosecution side beyond reasonable doubt."*

The two courts below were satisfied that the offence of rape was proved beyond reasonable doubt on the basis of the evidence of PW1, PW2, PW5 and Exh P2. The High Court on first appeal however, discounted Exh P2, (the PF3). So what was left on record was the evidence of PW1, PW2, PW5. The most crucial witness in this case, is PW1 (the victim). Undoubtedly, the best evidence in the case of rape is that of the victim herself (see **SELEMANI MKUMBA V. R.** Criminal Appeal No. 94 of 1999 (unreported). In this case, PW1. There are, however two problems with her evidence depicted from the record. The first is that, as a child of tender years, section 127 (2) of the Tanzania Evidence Act (Cap 6 RE 2002) was not fully complied with before taking her evidence. Section 127 (2) and case law, require that after finding that, a child does not

understand the nature of an oath, a court has to satisfy itself, first that the witness is possessed of sufficient intelligence, and secondly, that the witness understands the duty of telling the truth. (see **GODI KASENEGALA V. R.** (supra). In the present case what happened is this:-

PROCECUTION CASE STATES (sic)

PW1: BUPE @ OSIAH SYPATALI OSKA,

10 years, school girl of KCM

Primary School Standard II.

Court After being examined u/s 127 of TRA 167 (sic) the girl child was found clever who is able to give evidence without oath".

There is no question and answer asked of PW1, or any other mode of preliminary examination. This is then followed by what appears to be substantive evidence of the witness but still led (apparently) by the court. The accused is then given opportunity to cross examine her, and lastly "re examined" by the public prosecutor, and surprisingly again "re cross examined by the accused." Apart from the strange procedure of examining a witness, where the court acted as examiner in chief, there was no

specific finding, first on whether PW1 was possessed of sufficient intelligence, and second that she understood the duty of speaking the truth. The finding that the child was "clever" does not, in our view, satisfy the test set by section 127 (2) of the Evidence Act. It is now settled law that evidence taken in contravention of that provision is illegal and must be discarded. The second problem with PW1's evidence is the substance itself. Assuming it is worthy what it is; the crucial part of her testimony is this:

> *"On 10/5/2005 at 7.00 a.m. I was at home sleeping then accused followed me and sent me to his room where he raped me after removing my clothes".*

Time and again, it has been said by this Court that, it is not enough for the victim of rape to say that she was "raped." She must always go further and allege that there was penetration, however slight. (See **GODI KASENEGALA V. R.** *(supra)* **Ex 139690 SGT DANIEL MSHAMBALA V. R. Criminal appeal No. 183 of 2004 (unreported).** In this case there is no evidence of penetration from PW1.

For these two reasons, the evidence of PW1 is not only worthless, but also even if it were admissible, it does not establish the offence of rape.

The effect of the evidence of PW2, PW3, PW4 and PW5 is in two angles. First, that PW1 was found in the appellant's room at the material time, and that the appellant was half naked, while PW1 was naked. This may well be so, but it is far from proving rape. But secondly, the two courts below have relied heavily on the evidence of PW5, PW1's mother, who according to the first appellate court," examined PW1's private parts and found some fresh sperm looking fluids in her vagina." The appellant has attacked this piece of evidence by saying that it was not conclusive evidence that PW1 was raped, and raped by him. The first appellate court, found that although PW5 was not a medical expert, her opinion was very relevant, and worth taking into consideration. We would have little qualms with the learned judge's observation if he had stopped at that. But, after reading the whole of his judgment, we think the learned judge must have come to that conclusion, after making a finding that:

"PW2 and PW5 who saw the appellant in the act of sexual intercourse with the victim, that is PW1,"

There is no such evidence on record. All that there is, is that PW1 and the appellant were locked in the appellant's room. Even PW2 who was the first to see them through an opening of the door, "just saw PW1 inside." PW5, herself just saw that her daughter and the accused "were naked" and saw Osyapatali (PW1) with sperms. She did not say where about PW1's body the sperms were. Even if the PF3 (Exh P2) was not discounted, it did not mention anything about sperms. All that it reported was that,

"No hymen, injuries free, not first time. Usually on sexually"

We appreciate the position that a sexual offence may be proved by any, other than medical evidence, especially if carnal knowledge is not in dispute (see **ISSA HAMIS LIKAMILA V. R.** Criminal Appeal No. 125 of 2005, and **PROSPER MNJOERA KISA V. R**. Criminal Appeal No. 73 of 2003 (both unreported). In the present case, if the evidence of PW1 would not have been discounted the evidence of PW5 could have corroborated it.

But in the absence of PW1's evidence or medical evidence there is nothing that PW5's evidence could corroborate.

We are therefore at one with Mr. Rwegerera, and the appellant that the prosecution did not prove its case beyond reasonable doubt. The appellant's conviction is therefore unsafe. We accordingly allow the appeal. We quash the conviction, and set aside the sentences. We order his immediate release from prison, unless he is otherwise lawfully held.

It is so ordered.

DATED at **MBEYA** this 4th 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