

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

(CORAM: MUNUO, J.A., KIMARO, J.A. And MJASIRI, J.A)

CRIMINAL APPEAL NO. 303 OF 2010

NGUSA S/O SHIJA APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the Judgment of the High Court of
Tanzania at Tabora)**

(Kihio, J)

dated 29th day of August, 2002

in

Criminal Appeal No. 5 of 2006

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JUDGMENT OF THE COURT

16 & 23 May, 2012

MUNUO, J.A:

The appellant, Ngusa Shija, was convicted of rape contrary to sections 130 (2) and 131 (1) of the Penal Code Cap. 16 R.E 2002 for allegedly unlawfully having sexual intercourse with a child aged 5 years on the 20th November, 2004 at about 17.00 hours at Kahama Village within Kishapu District in Shinyanga Region. The appellant denied the charge.

The facts of this case are straight forward. On the material afternoon, the victim, one Joyce Samwel went to play in the neighbourhood with other children. Her mother, PW1 Lucy Kishike was at home. Joyce took her little brother, a one year infant with her. Later on PW1 heard the little boy called Salum crying so she went out to find out why he was crying where upon she found Joyce missing. She learnt from the other children that Joyce was in another house nearby. Pw1 followed Joyce and found her emerging from the particular house. She told her mother that the appellant had been carnally knowing her. She also pointed out the appellant as the culprit.

P.W.L examined Joyce and found spermatozoa in her private parts which also had minor bruises. PW1 raised an alarm and some women from the neighbourhood converged at the scene. They too inspected the victim and saw sperms in her private parts. PW1 reported the matter to the police where the victim got a PF3 for treatment at Negezi dispensary on the same day. A clinical officer, PW2 Joshua Sumuni examined the victim and noted on the PF3, Exhibit PI, that the girl's private parts had bilateral bruises, semen and were swollen indicating she had been raped. The

victim deposed as PW3 after passing the voire dire test conducted by the learned trial Resident Magistrate. The trial court found that PW3 possessed sufficient intelligence and understood the duty to speak the truth but her knowledge of an oath was doubtful. Hence, she gave unsworn evidence narrating how the appellant called her into a house and sexually assaulted her after removing her underwear. While penetrating into her private parts, she cried out but the appellant told her to keep silent. The victim stated that when the appellant sexually assaulted her, "*a watery liquid*" wetted her thighs, dress and other parts of the body whereafter the appellant let her out. She further stated that she responded to her mother's call and told her what the appellant had done to her. Thereafter her mother took her to the hospital where she was medically examined. Subsequently the appellant was arrested and charged with the offence of rape.

The appellant gave a sworn defence denying the charge alleging that the victim's mother was his former girl friend but that she abandoned him because he was impecunious.

Having lost the case in courts below, the appellant lodged this second appeal. He filed eight grounds of appeal contending that the prosecution failed to establish his guilt beyond all reasonable doubt. He complained that the evidence of the victim lacked independent corroboration, that the charge was concocted by the victim's mother and that the case was not investigated so he should not have been convicted.

Mr. Juma Masanja, learned State Attorney who represented the respondent Republic supported the conviction and sentence on the strong prosecution evidence adduced at the trial. The evidence of the complainant was fully corroborated by the evidence of the clinical officer who examined her shortly after the rape, the learned State Attorney argued. He contended, furthermore, that Pw1 checked the private parts of the victim and found sperms and bruises therein thence confirming that she had been raped. The victim pointed out the appellant as the person who raped her, Mr. Masanja observed, noting that she knew him well as her, neighbor. PW1, the mother of the victim, the learned State Attorney, further contended, found the appellant in the house from which the victim was emerging in response to her mother's call. Under the circumstances,

the prosecution proved the guilt of the appellant at the required standard of proof and the defence of the appellant was not the least probable so the conviction and sentence was properly grounded, the learned State Attorney maintained.

The issues are whether the appellant raped the small girl, Joyce d/o Samwel, and whether the prosecution established the guilt of the appellant beyond reasonable doubt.

The learned judge, Kihio J. observed that :-

" The evidence of Pw1, Pw2 and the Medical Report in the PF.3 (Exhibit PI) which clearly indicates that there were bruises at the vagina bilateral walls and hyperemic skin in Pw3's vagina strongly corroborate the evidence of Pw3 that a male organ penetrated in her (Pw3's) vagina and the penetration sufficiently constitute the rape offence".

The appellant complained that no independent witnesses corroborated the testimony of the victim. The record has the testimonies of Pw1 and Pw2 which supported that evidence of the victim. As the learned State Attorney rightly observed, the victim was a minor and not an

adult woman so the issue of the victim consenting to sexual intercourse was irrelevant in the present case. The learned State Attorney cited the case of **John Martin alias Marwa Criminal Appeal no. 22 of 2008 (CAT) at Tabora (unreported)** wherein the Court held that in a case of rape, the best evidence is the evidence of the victim. The Court further held that under the provisions of Section 130 (4)(a) of the Penal Code Cap. 16 R.E 2002;

"Penetration however slight is sufficient to constitute sexual intercourse necessary to the charge".

In this case, we agree with the learned judge that the evidence of Pw3 as supported by the testimonies of Pw1, Pw2 and the PF3, Exhibit PI strongly corroborate the evidence of Pw3 that a male organ penetrated in her private parts. Pw3 knew the appellant well as a neighbour; she pointed him out and he was in the house in which the rape was committed. There is no speck of doubt on the identification of the appellant by the victim considering that the offence was committed at 5 pm during the day when conditions of identification and visibility are favourable. We also wish to note here that it is not the number of witnesses which ground a conviction. It is the credibility of the witness or witnesses and the weight of the evidence which anchor a conviction. The Court reiterated the same in the

cases of **Joseph Athanas versus Republic Criminal Appeal no. 284 of 2007 (CAT at Arusha) (unreported)**, **Selemani Makumba versus Republic Criminal Appeal no. 94 of 1999 (unreported)** and **Rajabu Yusuf versus Republic Criminal Appeal no. 457 of 2005 (CAT)(unreported)**. In the case of **Speratus Theonest Alex versus Republic Criminal Appeal no. 135 of 2008 (CAT) (unreported)** the court observed that –

"...the obligation to produce witnesses irrespective of consideration of their number.. the evidence has to be weighed and not counted."

Under the provisions of section 143 of the Evidence Act, Cap.6 R.E 2002, no number of witnesses is scheduled for any particular case to prove a fact or facts. The absence of evidence from the persons who responded to the alarm Pw1 raised is of no materiality in this case. We are satisfied that the evidence of Pw3 was fully corroborated by the testimonies of Pw1, Pw2 and Pw4. We accordingly sustain the conviction.

With regard to the mandatory sentence of life imprisonment for raping a child below the age of ten years, we find no cogent evidence on

record to prove that Joyce Samwel was aged 5 or 6 years at that time. PW1 Lucy Kishike, the mother of Joyce, did not say when the victim was born or how old she was. Pw2 Joshua Sumuni stated that Joyce was 6 years but he did not depose that he knew or that he medically established the victim's age. Hence, it is not certain when Joyce was born or what her exact age was then. In that situation, we vary the sentence from life imprisonment to the minimum sentence of 30 years imprisonment for rape c/s 130 (2)(e) and 131(1) of the Penal Code Cap 16.

Save for the variation of the sentence from life imprisonment to 30 years imprisonment, the appeal is dismissed.

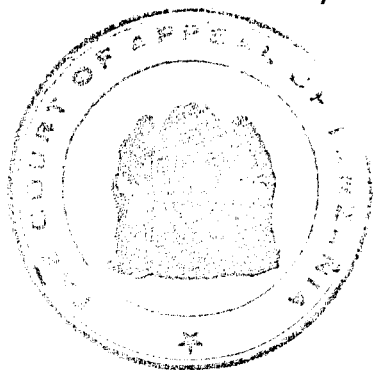
DATED at **TABORA** this 16th day of May, 2012

E. N. MUNUO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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




(Z.A. Maruma)
DEPUTY REGISTRAR
COURT OF APPEAL