IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 33 OF 2012

AMOS KABOTA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Lukelelwa,J.)

dated the 9th day of August, 2011

in

Criminal Appeal No. 159 of 2009

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JUDGMENT OF THE COURT

6th & 10th March 2014

KIMARO,J.A.:

The appellant was aggrieved by the judgment of the High Court of Tanzania, (Lukelelwa,J) which sustained the conviction and the sentence of thirty years imprisonment that was imposed on him by the District Court of Nzega at Nzega for the offence of rape.

In the trial court the appellant was alleged to have raped one Cecilia Paulo who was aged 12 years. Four prosecution witnesses gave evidence to prove the commission of the offence. The complainant, Cecilia Paulo, (PW1) testified that in the afternoon of 5th March, 2009, the appellant who is a tailor sent her to a shop to buy sweets which she shared with her brother Kasiga. He also gave her shillings 200/=. Later on during the evening of that day, he called her again and sent her to buy a matchbox for him. After she bought the match box for him, the appellant took her into his room, forced her to lie on a mattress and inserted his penis in her vagina. PW1 said she suffered serious pain in that process. She cried but the appellant covered her mouth to prevent her shouting.

The mother of the complainant, Tabu Shipya (PW2) said in her testimony that on that same date, at a around 9.00 p.m. as she was making a follow up of her daughter (PW1) after she found her missing, she heard her crying. She followed where the voice was coming from and she eventually found her coming from the room of the appellant. PW2 said she knew the appellant. When she asked him what he was doing with her daughter, he replied that they were roasting maize. The complainant

revealed to her mother that she was feeling serious pains in her private parts. PW2 said her daughter left the room of the appellant carrying her underpants. The matter was reported to a militiaman and to the police.

Other witnesses who visited the scene of crime were Paulo Kasiga (PW3) the father of the complainant and Mgote Juma (PW4) the Chairman of Kigongoji Village. Both witnesses said that the appellant admitted before them that he raped the complainant. PW4 said when the appellant was queried, his reply was: "mambo unayoyaona ndio hivyo...msichana huyu amekuja hapa siku tegemea kuwa nitambaka..." Translated in English it means that "this girl came here but I did not expect to rape her." He asked for pardon and was ready to pay compensation for what he did.

The appellant denied in his defence to have committed the offence. He claimed that the offence was framed against him because he had grudges with the village chairman (PW4).

The trial court was satisfied that the evidence led by the prosecution sufficiently proved the commission of offence by the appellant on the standard required, convicted him and sentenced him as aforesaid.

The appellant's memorandum of appeal contains several- points. His main complaint is that there was no sufficient evidence to sustain the conviction because the evidence of the complainant was not properly taken. She was a witness of tender age (12 years) and there was no proof of penetration and there was no evidence to corroborate the evidence of the complainant. Another ground of complaint is the relationship of the prosecution witnesses. The appellant said they were related. The appellant also faulted the learned first appellate judge for failure to take into consideration the sour relationship that existed between him and the prosecution witnesses 3 and 4. Lastly he faulted the admission of the evidence of PF3 without explaining to the appellant his right to have the doctor summoned for cross–examination.

During the hearing of the appeal, the appellant appeared in person. He had no counsel to represent him. The respondent Republic was represented by Mr. Ildephonce Mukandara learned State Attorney.

Although the appellant responded to his grounds of appeal after the learned State Attorney, he had nothing new to add. He insisted that he was innocent and that he was convicted on weak prosecution evidence. He prayed that the appeal be allowed.

The learned State Attorney supported the conviction and the sentence. Starting with the charge sheet, the learned State Attorney said it was defective in the sense that the appellant was charged under section 130 and 131 of the Penal Code, [Cap.16 R.E.2002] while the victim of the offence was a girl aged 12 years. For this ground we need not detain ourselves. This ground was properly dealt with by the first appellate court. The learned judge said the trial magistrate correctly spelt out the correct provision of the law under which the appellant had to be charged. He said since the appellant was aged 12 years at the time the offence was

committed, the correct section under which he should have been charged, was section 130(2) (e) of the Penal Code.

Regarding the testimony of the complainant, the learned State Attorney said that since she was 12 years, a "voire dire examination" had to be conducted to establish whether she knew the meaning of oath and the duty to speak the truth before the trial court made a decision on whether the witness had to testify on oath or without oath. He said the examination conducted by the trial magistrate did not establish that the complainant understood the meaning of oath. Her evidence was therefore not supposed to be taken on oath. In his view, her evidence had to be taken not on oath and had to be corroborated. Even though her evidence was wrongly taken on oath, the learned State Attorney said, the practice has been to treat such evidence as unsworn, and seek for corroborative evidence before entering a conviction against the accused person. In this case, said the learned State Attorney, the evidence of PW1 was corroborated by that of PW2, the mother of the complainant who said her daughter came out of the room of the appellant carrying her underwear on her hands, and that of PW3 and PW4 who said that the appellant admitted

the commission of the offence and asked for pardon. He said that the evidence of PW1 was therefore corroborated.

The learned State Attorney's submission on the evidence of PF3 was that it was erroneously relied upon to convict the appellant. He requested the Court to expunge the evidence from the record. He referred the Court to the case of **Mahona . Sele V R** Criminal Appeal No.188 of 2008 (unreported) to augment his submission. He then prayed that the appeal be dismissed.

We start with the evidence of PF3. This matter was also correctly dealt with by the learned judge on first appeal. He agreed that the evidence of PF3 was wrongly relied upon by the trial court as the procedure for its admission contravened section 240(3) of the Criminal Procedure Act, [CAP 20 R.E.2002]. The appellant was not informed of his right to have the doctor who examined the complainant called for cross examination. The record of appeal at page 50 shows that that evidence was expunged from the record. The case of **Kayoka Charles V R**

Criminal Appeal No 325 of 2007(unreported) is just one among many decisions of the Court on this point.

We find the complaint by the appellant that the prosecution evidence was made up of related witnesses to have no merit. The learned judge on first appeal correctly held that the law does not forbid related witnesses from giving evidence. That is the true position of the law and we need not say more. The criteria for witnesses to testify are their competency and credibility (section 127 of the Law of Evidence Act, [CAP 6 R.E. 2002]. See also the case of **Kabalagala Kudumbaga & another V R** Criminal Appeal No. 128 of 2007 (unreported).

Coming to the evidence of PW1, it is true that the "voire dire examination" was poorly conducted. The nature of the question that the trial court put to the witness did not show that the witness knew the meaning of oath. The only question which satisfied the trial magistrate that the witness knew the meaning of oath was the answer she gave to a question of the effect of telling lies of which she replied that it is a sin. In our considered view this question alone did not establish that the witness

knew the meaning of oath and the duty to speak the truth. The trial court had to make a specific finding on this aspect before her evidence was received on oath.

The learned State Attorney said since there was a procedural irregularity in the manner in which the evidence of PW1 was recorded it had to be treated as unsworn evidence. We agree with the learned State Attorney that this had been the practice of the Court for years. The case of **Herman Henjewele V R** Criminal Appeal No.164 of 2005 (unreported) is among the decisions made by the Court on this aspect.

The question for determination before us on this aspect is whether the evidence of PW1 was corroborated by other independent evidence. The evidence of PW1 was that the appellant inserted his penis into her vagina. The learned judge on first appeal held that the evidence of PW1 was corroborated by that of PW2, PW3 and PW4. We must admit that we do not see where the learned judge on first appeal went wrong. Looking at the evidence in totality, we must say, with respect, that we agree with the learned judge on first appeal that the evidence of the complainant was

corroborated. First, PW2 said as she traced PW1 who was missing from the house at the evening hours she found her in the room of the appellant and she came out of the room holding her underpants in her hands. PW2 the father of the complainant, and PW4 the village chairman said that the appellant admitted to have committed the offence. We have shown the admission of commission of the offence the appellant made, when going through the evidence of the trial court which was sustained by the first appeal court. When the appellant cross-examined the witnesses on his admission of the commission of the offence, both insisted that the appellant made the admission. The learned High Court judge said he could not fault the credibility of the witnesses because that fell in the domain of the trial court. We will also add that although the appellant said in his defence that he had grudges with both PW3 and PW4 and hence the prosecution case was framed against him, we consider it an afterthought because he never raised the issue during cross –examination of the witnesses. The offence of rape is proved where there is penetration however slight (section 130(4) of Cap. 20). See also the case of **Mahona Sele** (supra) cited by the learned State Attorney.

The overall assessment of the evidence leaves no doubt that the offence of rape was proved against the appellant. We see no reason for faulting the learned judge on first appeal. The appeal has no merit and it is dismissed in its entirety.

DATED at TABORA this 8th day of March 2014.

J. H. MSOFFE
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.

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