

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

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 409 OF 2015

ISSA RAMADHAN APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania
at Dodoma)

(Mohamed, J.)

dated the 15th day of July, 2015

in

Criminal Appeal No. 49 of 2012

JUDGMENT OF THE COURT

12th & 14th April, 2016

KILEO, J.A.:

The appellant Issa Ramadhani was, in the District Court of Kondo, convicted of rape contrary to section 130 (1) of the Penal Code, Cap 16, R. E. 2002 and sentenced to thirty years imprisonment. He unsuccessfully appealed to the High Court, hence this second appeal.

The facts of the case upon which the appellant was convicted are simple and straight forward. The victim of the crime who did not testify at the trial was a girl of unsound mind as testified by her father, PW1. On the

material date both PW2 and PW3 participated in the search of the victim after an alarm had been raised from the house of PW1 that the victim had gone missing. In the course of the search they heard a child crying and as they approached the place where they heard the cry coming from, they found the appellant in the act of raping the girl. He was apprehended, taken to the Village Executive Officer and eventually to court for trial. PW4 was a medical doctor at Kondoa District Hospital to whom the victim was taken for attention. In his examination, the report of which is contained in the PF3, exhibit P1; he observed that the victim had bruises on the vagina as well as the anus. In his defence the appellant made a general denial claiming that he was arrested, beaten up and taken to the police and eventually to court for the charge of rape which he had not committed.

The appellant appeared in person at the trial having filed a memorandum of appeal comprising of six grounds of appeal. The six grounds can be conveniently condensed into two grounds, namely:

1. That the charge against the appellant was not proven because the victim of the crime did not testify in court.
2. That the case for the prosecution was not established because no police officer testified in court.

contended that the two witnesses for the prosecution upon whose evidence was used to sustain the conviction were not sufficient. He averred that there was need for more witnesses to support the case for the prosecution.

On the other hand, Ms. Chivanenda Luwongo, learned State Attorney who represented the respondent Republic supported both conviction and sentence asserting that the evidence that was tendered at the trial sufficed and left no doubt as to the appellant's guilt.

Referring to some disparity with regard to the date of the incident, she stated that it was not serious and did not go to the root of the matter. We agree with her on this aspect considering that the inconsistency was merely with regard to the date of the incident with two witnesses saying it occurred on 13/12/2011 and one saying it was on 14/12/2001.

On the question of the failure of the prosecution to call the victim of the crime to testify, the learned State Attorney submitted that this factor alone could not weaken the case for the prosecution as it was in evidence from the father of the victim that the victim was of unsound mind.

This is not the first time that a court has arrived at a conviction without the testimony of the victim of the crime. We have held in a number of cases that conviction can be sustained independent of the evidence of the victim. See for example, **Abdallah Elias v. the Republic**, Criminal Appeal No. 115 of 2009, **Haji Omary v. the Republic**, Criminal Appeal No. 307 of 2009 and **Fuku Lusamila v. the Republic**, Criminal Appeal No. 12 of 2014 (all unreported) to mention, but a few. There is also a litany of cases where the testimonies of child victims of tender years have been expunged for non-compliance with the *voire dire* test and yet the courts arrive at a conviction independent of that evidence. (See **Khamis Samwel v. the Republic**, Criminal Appeal No. 320 of 2010 and **Harrison Mwakibinga v. Republic**, Criminal Appeal No. 196 of 2009 (both unreported)). In **Haji Omary** case supra, like in this case, the child victim did not testify for reason of tender age. Again, like in this case there was no finding made as to the incompetency of the child victim to testify. The Court there held:

"The law recognizes that there are instances where charges may be proved without victims of crimes testifying in court. Take murder for example where the victims are deceased. Senility, tender age or decease of the mind may prevent a

victim from testifying in court (See section 127 of the Evidence Act) but this does not mean that a charge cannot be proved in the absence of the victims' testimony. In this case the victim was a four year old child. He was indeed a child of tender age. Though we agree that ideally the reason for the non-taking of the testimony of the victim should have been entered on record however such failure neither weakened the case for the prosecution nor resulted in a failure of justice."

In the light of the above, we find the appellant's complaint that the case against him was not proved because the victim did not testify to have no foundation. We accordingly dismiss it.

As for the ground that conviction was wrongly entered because no police officer was called to testify, our settled view is that in the circumstances of this case the fact that no police officer testified in court did not water down the case for the prosecution. After all, evidence on record including that of the appellant himself, which appears at page 24 of the record, shows that he was taken to the police station. The appellant is recorded as having stated:

"...Later they took me to Kondoa Police Station. Later on I was brought to this court to answer the charge."

which was adduced at the trial and as a second appellate court we have seen no justification for interference with the two lower courts' findings as to facts.

In the light of the above considerations we have come to the settled view that the appeal by Issa Ramadhani is without substance and for this reason we must, as hereby do, dismiss it.

It is ordered accordingly.

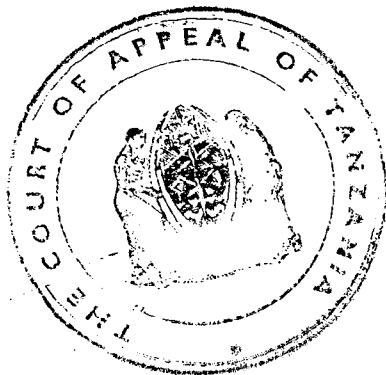
DATED at DODOMA this 13th Day of April 2016.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



E.F. RUSSI
DEPUTY REGISTRAR
COURT OF APPEAL