IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

**CRIMINAL APPEAL NO. 288 OF 2015**

**ELIYA KUNDASENI SHOO..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Moshi)**

**(Munisi, J.)**

**Dated the 1st day of January, 2015**
**In**
**DC Criminal Appeal No. 24 of 2012**

.....

## JUDGMENT OF THE COURT

19th & 21st July, 2016.

**KILEO, J. A.:**

The District Court of Hai sitting at Hai, convicted the appellant Eliya Kundaseni Shoo of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code. He was sentenced to life imprisonment. He was unsuccessful on his appeal to the High Court hence this second appeal.

It was alleged at the trial court that the appellant, on the 11th day of April 2010 at Nkuu Ndoo village which is in Hai District unlawfully had carnal knowledge of one Irene d/o Elibariki, a girl of six years.

The facts leading to the appellant's conviction were to the effect that on the material date the appellant picked up the victim (PW2) from her residence and took her to a certain valley where he raped her. According to the prosecution evidence the appellant was seen at the crime scene where the victim lay in the early morning of 12/04/2010 but took to his heels and disappeared from the village for about five days. Upon medical examination, the report of which was reflected on exhibit P1, the Police Form no. 3, the victim was found to have bruises of major + minor majora and perforated hymen. Male spermatozoa were seen and the child was reported to have been unable to walk or even urinate.

The appellant who appeared before us in person had filed a memorandum of appeal comprising of nine grounds. The following complaints may conveniently be extracted from those grounds:

1. That there was not sufficient evidence of identification of the appellant as the culprit.
2. That there was variance between the charge and the evidence as regards the time of the commission of the crime.
3. That the PF3 was admitted in evidence without him being afforded an opportunity to challenge it.

4. That there was no evidence of penetration which is an essential element in a case of rape.
5. That there was violation of the law in the receipt of the evidence of the victim of the crime who was a child of tender age.
6. That the proceedings were held in public contrary to mandatory provisions of the law that proceedings of cases of this nature be held in camera.

When we called upon the appellant to address us he merely reiterated his grounds of appeal and insisted that the case was a frame up.

Ms. Elizabeth Swai, learned Senior State Attorney who represented the respondent Republic resisted the appeal fervently. She was convinced that even if the evidence of the victim was to be expunged from the record for non- compliance with the provision of section 127 (2) of the Evidence Act, there was nonetheless other independent evidence that pointed irresistibly to the appellant's guilt. She pointed out that the appellant was seen at the scene of crime where the victim was eventually traced after she had gone missing from their residence. Furthermore, that the appellant hurriedly took to his heels without

responding even as his relative (PW4) who met him in the early morning in search of the missing child called him. Ms Swai considered the disappearance of the appellant from the village in such circumstances as indicative of his guilt. As regards the proof of penetration, the learned Senior State Attorney submitted that there was sufficient proof of that fact from the medical report as well as from the evidence of victim's aunt and grandmother who examined her soon as she was traced.

On the question of variance between the charge and the evidence with regard to the time of the commission of the crime the learned Senior State Attorney, referring to section 234 (3) of the Criminal Procedure Act (CPA), argued that this was immaterial and could not therefore be the basis for allowing the appeal. We agree with the learned State Attorney and we need not belabor ourselves on this complaint. The provision states:

**"234 (1).....**

**(2).....**

**(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need**

**not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."**

On the complaint that the PF3 was admitted in evidence without him being afforded an opportunity to challenge it Ms. Swai rightly pointed out that this complaint was not supported by the record. When PW6, the examining doctor testified and tendered the PF3 (page 11of the record) the appellant was given an opportunity to cross examine him but he had no questions to put to him.

In response to the ground on lack of points for determination Ms Swai submitted that when properly analyzed the judgment of the trial court contained points for determination and hence complying with the provisions of section 312 of the CPA. We also agree with the learned State Attorney on this point. Looking at the concluding statement in the trial court's judgment appearing at pages 20 and 21 of the record there is no doubt that the trial magistrate considered proof of rape and identification as material issues for determination. A reproduction of that part of the judgment will bear us out.

*"From the above evidence, I found that there is no disputed (sic!) that PW1 was raped and she is of the age of 6 years old as per dectors observation and the court as to her age he was she was seen before this court.*

*There is no dispute that both the accused and PW1 are neighbours.*

*There is also no dispute the accused disappeared from his home for five days till he was arrested at another village of Lyamungo.*

*There is no dispute that the accused knows PW1 and they are neighbours.*

*PW1 was taken from her home at about 5.00 while PW2 has left going to the shop. This was still bright day. She was taken for at the valley at the village. She mentioned to know the accused whom she described him as home neighbor who took him at the upper place at their home valley. She described how he covered her mouth and undressed her underwear and raped her. I don't think PW1 could mistake the accused who she said that he was always coming at their home.*

*Her evidence of PW1 was corroborate by that of PW2 who found her at the valley covered with grasses where he also found the accused and recognized him but the accused ran away and on the way he met with PW4 who was going to trace a person who will raise alarm in respect of the same incident. The accused was in a hurry speed and he could not*

*even have a talk with PW4 though PW4 wanted to talk with him.*

*The accused talk of his enemity with PW4 who is not even a family of PW1. He only denied to rape PW1."*

So much for that.

On the complaint that the trial was held in public in contradiction of the mandatory statutory requirement that trial of sexual offences be held in camera Ms. Swai argued that the complaint lacked merit as the provision is intended to benefit the victim and its violation did not occasion a miscarriage of justice to the appellant in anyway. It is quite true that the spirit of section 186 (3) which bars the trials of sexual offences in public is to protect the dignity of victims of such offences and was not intended to benefit an accused. That takes care of appellant's complaint with regard to holding of his trial in public.

Now, there are really only two main issues pertinent to the determination of this appeal. The first one is whether the victim, Irene Elibariki was raped. The second one is whether it was the appellant who raped her.

There is no doubt that the victim, who was aged six years at the time of the commission of crime, was raped. Evidence to prove this fact was overwhelming. There was evidence from two prosecution witnesses

(PW2) and PW3 to the effect that they examined the victim and found her to have been sexually abused. There was also medical evidence from a doctor to the effect that the victim's genital parts suffered injuries including a raptured hymen. Is there any better evidence of penetration than a raptured hymen?

The question that remains is whether it was established that it was the appellant who raped the child.

Conviction was based on the evidence of the victim herself and that of her aunt, grandmother, the doctor and the appellant's own relative. The appellant submitted in his 8th ground that the evidence of the victim should not have been relied upon on the ground of non-compliance with section 127 (2) of the Evidence Act. Ms. Swai conceded to this ground but she was quick to point out that even if that evidence were expunged from the record there was other evidence which conclusively linked the appellant to the crime.

We agree that the trial magistrate did not adhere to the provisions of section 127 (2) of the Evidence Act with regard to the reception of the evidence of a child of tender age. It is not on record as to how he conducted the voire dire examination neither is there a finding as to whether the six year old witness understood the duty of telling the truth

to warrant reception of her evidence. We are satisfied however, and we agree with Ms. Swai, that even if the evidence of PW1 was to be disregarded, there was other and sufficient evidence, which proved the commission of the crime by the appellant. In the first place when PW2 traced the victim in the valley she immediately revealed to her that it was the appellant, their neighbor, who raped her. PW2 also found the appellant at the place where the victim lay but he hurriedly left. Even as he met his relative (PW4) on his way from the crime scene he took to his heels despite being halted. He fled from the village and was not seen until he was arrested far from his village some five days later. His unexplained flight in the circumstances of this case was indicative of his guilt. His flight amounted to suspicious conduct. This Court in Criminal Appeal No. 214 of 2010 – **James @ Shadrack Mkungilwa and Lazaro Mkungilwa versus the Republic** (unreported) had an occasion to discuss the implication of the conduct of an accused who escapes and goes into hiding when he is about to be apprehended. It was there held that suspicious conduct strengthens the prosecution case.

Without much ado, having considered the matter as above, we have reached a conclusion that there is no reason for us to interfere with the findings of the two courts below. The appellant was properly

convicted and sentenced. His appeal is in the event found to be lacking in merit and it is accordingly dismissed in its entirety.

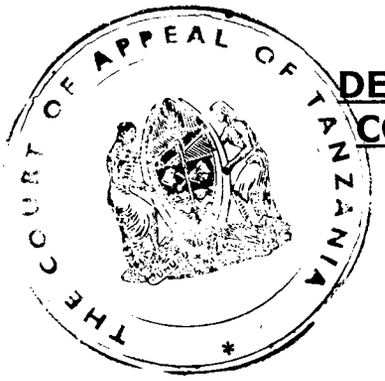
**Dated** at **Arusha** this 20th day of July 2016

E. M. K. RUTAKANGWA
**JUSTICE OF APPEAL**

E. A. KILEO
**JUSTICE OF APPEAL**

S. A. MASSATI
**JUSTICE OF APPEAL**

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




E. F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**