IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 591 OF 2015

GERALD DAUDI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Singida at Singida)

(Lema, PRM - Ext. J)

Dated 4th day of December, 2015
in
PRM Criminal Appeal No. 43 of 2015

18th & 20th April, 2016

JUMA, J.A.:

JUDGMENT OF THE COURT

This is a second appeal by Gerald Daudi @ NG'UNDA against the conviction and sentence for the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16. The District Court of Iramba at Kiomboi (Criminal Case No. 62/2013) convicted the appellant and sentenced him to serve life imprisonment. His first appeal to the High Court was transferred to the Resident Magistrate's Court of Singida to be

heard by W. Lema- PRM on extended jurisdiction. The first appellate court upheld his conviction and the sentence prompting this second appeal.

The particulars of the offence were that at around 18:30 on 25/6/2013 at Ndala Village in Iramba District of Singida Region, the appellant had carnal knowledge of a six year old girl, Hilda d/o Elia.

Briefly, the prosecution case against the appellant was built around five witnesses. It all began when Grace Hamisi (PW1) sent her daughter Hilda Elia (PW2) to her grandfather's house to collect a knife. The girl did not return from her errand as soon as her mother had expected. PW1 was together with her mother Mwanaidi when Hilda returned after an hour and half. She was crying. According to PW1, Hilda told her that the appellant that is her own grandfather had carried her to his bedroom and "slept over her". After *voire dire* examination PW1 gave unsworn evidence and explained how her grandfather had removed her underwear and lied on top of her, inserted his penis into her. This caused her much pain and she was bleeding.

PW1 took it upon herself to examine her daughter's private parts, which she described to be dirty and swollen. PW1 asked Samwel Martin

(PW3) who was the local chairman and other people, to come over to her house. The Chairman asked women who had gathered to inspect the child. Six women including Felicia d/o Said (PW4) went in to inspect Hilda. The matter was reported to police, who issued her with PF3 to take to Nkungi Hospital for medical examination and treatment. Dr. Lucas Amin Ngowi (PW5) was the Medical Officer who received and examined the complainant. He concluded that the girl had been raped, and he tendered the medical examination report which was admitted as exhibit P1.

The appellant gave a sworn testimony and called no witnesses. His defence was a complete denial. He was all the time seated outside his house listening to news over the radio. He insisted that he was in the bush collecting fire wood when the girl came over to his house to pick a knife. She had left by the time he returned with his firewood.

Although the appellant's memorandum of appeal, filed on 23/3/2016 appears to disclose four grounds of appeal, in essence, there are two broad areas of complaints. First area of complaint is over the way the voire dire examination of the complainant was conducted. The appellant contends that because the complainant was a child of tender age, the trial

magistrate should have complied with section 127 (2) of the Evidence Act on the conduct of *voire dire* examination. He pointed out that after completing that *voire dire* examination, the trial magistrate did not make any finding on whether the complainant understood the nature of an oath, and whether she was possessed of sufficient intelligence to justify the reception of her evidence, and understood the duty of speaking the truth. In so far as the appellant is concerned, the two courts below should not have received and acted upon the unsworn evidence of the complainant because it was taken without complying with section 127 (2) of the Evidence Act.

The second broad area of complaint is what the appellant regards as contradiction between the charge sheet and evidence of the complainant's mother (PW1) regarding the time when the complainant was raped. While the charge sheet puts the time at 18:30, in her evidence, PW1 put the time at 19:00.

At the hearing of this appeal, the appellant appeared in person and fended for himself. Ms. Beatrice Nsana learned State Attorney appeared for the respondent Republic. The appellant urged us to allow the learned State

Attorney to submit on the grounds of appeal first. Initially, the learned State Attorney supported the appeal on the same reason as advanced in the appellant's first ground of appeal to the effect that the voire dire examination of the six year old complainant did not comply with the conditions set under section 127 (2). She submitted that the learned trial magistrate failed to make a specific finding on whether the complainant understood the duty of speaking the truth. But, when we referred the evidence of other witnesses, including that of the Medical Officer and the medical examination report, learned State Attorney came around to support the conviction of the appellant.

When he was called upon to respond, the appellant insisted that he did not rape the girl and that the area chairman and other people found him innocently listening to his radio. He wondered how the girl who was by then six year old could still walk home if he had indeed sexually penetrated her private parts. He also wondered why the girl was not taken to hospital immediately till the following day.

Sitting as this Court is on second appeal, our role is not to interfere with concurrent finding of facts by the two courts below. In **Wankuru**

Mwita vs. R., Criminal Appeal No. 219 of 2012 (unreported) the Court gave examples of few occasions where the Court may be called upon to interfere with concurrent findings of facts:

> *"....unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; mis-directions or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice...."*

In the instant appeal, the appellant has mainly invited us to disregard the evidence of the complainant on the reason that it was received in violation of section 127 (2) of the Evidence Act governing the conduct of *voire dire* examination. Before we dwell on the probity of the evidence of the complainant, we shall first determine whether there is any other evidence on record which corroborated the evidence of the complainant that she was raped by the appellant.

We think, there is evidence of other witnesses besides the complainant, which proves the ingredients of the offence of rape including

sexual penetration and the age of the complainant. Sections 130 (1) (2) (e) and 131 (1) of the Penal Code in the charge sheet, sufficiently drew the appellant's attention to the fact that the victim of his offence is a girl of under the age of eighteen whose consent to sexual intercourse cannot absolve him from offence albeit as a defence. His attention was similarly drawn to the fact that since the girl concerned is of under the age of ten years, the sentence if he is convicted is a mandatory life imprisonment.

It seems clear to us that the age of the complainant (PW2) was proved by the evidence of her mother, PW1:

> *"...I live with my husband Elia Pandi. We have three children one boy and two girls. The first is Hilda Elia 7 years another is Elisheba Elia 1.8 months and another is Bariki Elia 4 years."*

The evidence on record similarly proves that there was penetration which was perpetrated by the appellant. The evidence on this ingredient traces back to the moment when the complainant was sent by her mother to collect a knife from the appellant's household, creating an opportunity for the appellant to meet the complainant. The complainant was late in returning back home. When she returned, she was in tears. In narrating

was swollen. They said it was possible that she was raped."

In her testimony, Felicia d/o Said (PW4) also recalled the incident:

"...On 25/6/2013 about 19:00 hours I was at home. My husband was called by my cousin that there was an incident at Grace's mother house... I went to the scene as well.... At the scene, I found other women,.... the Chairman told us to go inside and inspect the victim. It was Hilda Elia. We were about six women. I did examine her on her private parts on her vagina. She was swollen, there was mucus and the vagina was expanded... According to her age, the vagina was to be small and intact since she was very young. The swellings were caused by the rape....."

The Medical Officer (PW5) who examined the complainant testified on penetration during the sexual intercourse:

"...As I examined her, I found her to be bruised on the inner and outer parts and her hymen was torn. The injuries were caused by soft blunt object like a male penis... According to her age she should have her hymen

intact as well as safe because at her age she is not engaged into sex."

In **Thomas Mlambivu vs. R.**, Criminal Appeal No. 134 of 2009 (unreported) the Court underscored the significance of naming the suspect at an earliest opportunity possible:

> *"...Indeed, the ability to name the appellant at that early opportunity was an all - important assurance of her reliability. In this context, the following passage from this Court's decision in* ***1. Marwa Wangiti. 2. Boniface Matiku Mgendi v Republic,*** *Criminal Appeal NO.6 of 1995 (unreported) is instructive:-*
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> > *'The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry.'..."*

As we said earlier, having found the evidence of other prosecution witnesses sufficient to prove the ingredients of the offence of rape beyond reasonable doubt, we shall not spend any more time to discuss the probity

of the evidence of the complainant. We also find no reason to disturb concurrent finding of facts made by the two courts below.

In the final analysis, this appeal against conviction and sentence is dismissed.

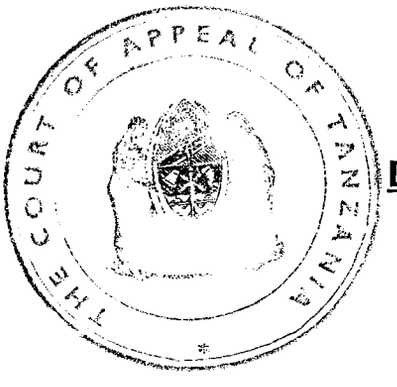
DATED at **DODOMA** this 19th day of April, 2016.

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. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL