**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: JUMA, CJ., MUGASHA, J.A., And LILA, J.A.)**

**CRIMINAL APPEAL NO. 421 OF 2015**

**SYLVESTER S/O BONIPHACE.....APPELLANT**

**VERSUS**

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

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

**(Mwita, J.)**

**dated the 5th day of July, 2006**
**in**
**Criminal Appeal No. 100 of 2004**

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## JUDGMENT OF THE COURT

**15th & 20th February, 2018**

**LILA, J.A.**

Sylvester Boniface, the appellant, was arraigned before the District Court of Shinyanga of the offence of Rape contrary to section 130(2)(e) and 131(1) of the Penal Code Cap 16. R. E. 2002. It was alleged that on 9/3/2003, 19/4/2003 and 9/5/2003 at Ngokolo 'B' area within Shinyanga District he had unlawful sexual intercourse with one Khadija Saidi (PW1), a girl aged 14 years old. He was convicted as charged and sentenced to serve 30

years imprisonment, to suffer 12 strokes of the cane and pay Tshs. 500,000/= to PW1 upon completion of his jail term. His first appeal to the High Court was dismissed. Still protesting his innocence, he filed the present appeal.

At the trial, PW1 informed the Court that in all the three nights she was away from home, she slept at the appellant's house and had sexual intercourse with him. She said she was medically examined and she tendered a PF3 (exhibit P1) without any objection from the appellant. Zanura Mohamed (PW2) who was staying with PW1, informed the Court that she made efforts to trace PW1 on all those three nights without success until when one Hamidu told her that PW1 was spending the nights with the appellant. That upon inquiring her she (PW1) admitted. That she summoned the appellant who admitted to have been spending the nights with PW1. As to what followed thereafter, PW2 told the court that: -

> *"We summoned the accused's father. The accused father refused to turn up. On 26/05/2003 I met with the accused's father and informed him that his son (the accused) was having a love affair with my*

*daughter who is still a pupil. He promised he could come at mine for consultation. He did not turn up till on 19/10/2003 when he decided to insult Idd Abbas one of my relatives for allegations that he is the one who had reported this matter to the police.*

*On 21/07/2003 I reported the matter to the police and the accused was arrested... Khadija had sexual intercourse with the accused on 9/05/2003 and was medically examined in July, 2003..."*

Idd Abbas (PW3), informed the trial court that he informed PW2 that he had made investigation and found on 9/5/2003, PW1 slept at the appellant's residence and that both PW1 and the appellant admitted so when he asked them.

Further, C 6729 D/Sgt. Festo (PW4) said the appellant admitted making love with PW1 upon interrogating him and that he recorded his cautioned statement (exhibit P2) on 22/07/2003.

In his sworn defence, the appellant disassociated himself with the commission of the offence and that he was arrested at

the bus stand. He also said he first saw PW1 in Court when she gave evidence.

The trial court believed the prosecution side and went ahead to convict the appellant. It relied on the evidence by PW1, PW2 and PW3 who it found to be credible witnesses. It also relied on the PF3 (exhibit P1) and cautioned statement (Exhibit P2) to convict the appellant which corroborated the evidence by PW1.

The appellant's first appeal was dismissed. The High Court also relied on the evidence by PW1, PW2 and Pw3 as well as exhibits P1 and P2. This is what the trial judge stated at page 2 of the judgment:

> *"I am in agreement with Mr. Njole's contention. Apart from the testimony by PW1, the appellant admitted to PW2 and PW3 to have had carnal knowledge of PW1 at the material time. Also the appellant made a cautioned statement which was recorded by PW4, C.6729 D/Sgt. Festo and admitted without objection as exhibit P2".*

In respect of the evidence by PW1 who was 14 years old, the trial judge simply said the law required a *voire dire* examination be conducted and that was not done. He is silent on what was the status of the evidence by PW1. Further, nothing was said in respect of exhibit P1.

The appellant lodged a seven point memorandum of appeal. The grounds of complaints can, however, be condensed into four grounds as under:

> *"1. That, while the offence was allegedly committed on 9/3/2003, 19/4/2003 and 9/5/2003, the matter was reported to the police in July, 2003 almost two months thereafter which thing casts doubts on the prosecution case.*
>
> *2. That, voire dire examination was not conducted before PW1 gave evidence to test her intelligence and whether she knew the duty to tell the truth. Her evidence was thus illegally received and acted upon to convict him.*

3. *That, the PF3 (exhibit P1) was improperly admitted as exhibit.*

4. *That, the cautioned statement (exhibit P2) was taken outside four (4) Hrs after the appellant's arrest hence taken in violation of section 50 of the Criminal Procedure Act, Cap. 20 R.E. 2002."*

When the appeal was called on for hearing the appellant appeared in person. He fended for himself. Mr. Rwegira Deusdedit, learned State Attorney, represented the respondent, Republic.

The appellant chose the learned State Attorney to first argue the appeal so that he could later reply.

Mr. Deusdedit supported the appeal. He said that the evidence on record did not prove the charge levelled against the appellant.

Elaborating on the grounds of appeal, Mr. Deusdedit generally attacked the credibility of PW2 and PW3, admissibility of the evidence by PW1, the appellant's cautioned statement (exhibit P2) and the PF3 (exhibit P1).

In respect of credibility of PW2 and PW3, the learned State Attorney said their evidence was not free from doubts. He said the two months time taken to report the incident to the Police which was allegedly committed in March, April and May 2003, cast doubts in the truthfulness of their evidence. He said no reasons were given to explain away the delay. He accordingly urged the Court to treat such evidence with caution. In support of his arguments he referred us to the Court's decision in **Juma Shaban @ Juma vs. Republic**, Criminal Appeal No. 168 of 2004 (unreported).

Regarding the caution statement (exhibit P2), the learned State Attorney attacked it on three fronts. First; that it was taken under a wrong provision of the law. He said instead of taking it under section 58 of the Criminal Procedure Act, Cap. 20. R.E. 2002 (CPA) it was taken under section 10 (3) of CPA which is applicable in taking a witness statement. Secondly; it was taken outside the prescribed basic period of four hours stipulated under section 50(1) and (2) of the Criminal Procedure Act, (the CPA) without extension being sought and granted. Third; the appellant was not given his right to call a relative or a lawyer (advocate) to witness the taking of the statement.

Given the above deficiencies, the learned State Attorney urged the Court to expunge the cautioned statement (exhibit P2) from the record.

Lastly, on the failure by the trial magistrate to completely conduct a *voire dire* examination before PW1 gave her testimony, Mr. Deusdedit, said as PW1 was 14 years old, then section 127(2) of TEA mandatorily required the conduct of *voire dire* examination to determine if she possessed sufficient intelligence to understand and give rational answers to questions put to her or whether she understood the nature of an oath and the duty to tell the truth. He said failure to conduct *voire dire* examination vitiated her evidence and the same should be expunged from the record.

Arguing in respect of the PF3 (exhibit P1), the learned State Attorney said it was wrongly tendered by PW1 (the victim) and that the appellant was not informed of his right to have its author of it to be summoned for cross examination in terms of section 240(3) of the CPA. He accordingly urged the Court to expunge it from the record.

Mr. Deusdedit concluded by saying that as the best evidence in rape cases comes from the victim, then when the evidence of PW1 is expunged, there remains no other evidence establishing that PW1 was raped. He accordingly urged the Court to allow the appeal, quash the conviction and set aside the sentence meted to the appellant.

On his part, the appellant had nothing to say. He left upon the Court to determine the appeal according to the dictates of the law. He urged the Court to set him free.

We, indeed, agree with the learned State Attorney that the conviction of the appellant was based on two pieces of evidence. First, the direct evidence of PW1, PW2 and PW3, and secondly, the documentary exhibits which constituted the appellant's own confession (exhibit P2) and the PF3 (exhibit P1).

PW1's evidence, as rightly argued by the learned State Attorney, was problematic. The record vividly shows that she was 14 years old when she gave evidence on 25/09/2003. The reception of her evidence was subject to the conditions stipulated under section 127(2) of TEA that she being a child of tender years,

the Court had satisfied itself that she understood the nature of the oath and the duty to tell the truth. This fact was completely overlooked by the trial court. The obtaining consequences were well elaborated by the Court in the case of **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011. The Court stated that;

> *"Where there is a complete omission by the trial court to correctly and properly address itself on sections 127(2) governing the competency of a child of tender years, the resulting testimony is to be discounted".*

In view of the above decision we have no option but to discount the evidence by PW1. This, no doubt, inflicts a fatal blow to the prosecution case for in the case of **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008 (unreported) the Court reiterated its position that: -

> *"It is now settled that the proof of rape comes from the prosecutrix herself."*

In the instant matter there was no eye witness. The prosecution relied on the evidence by PW1 (the victim) to prove

the commission of rape. In the absence of her evidence, the offence of rape cannot stand.

We turn to the evidence by PW2 and PW3. As indicated above, the offence was alleged to have been committed on 9/3/2003, 19/4/2003 and 9/5/2003 but according to PW2, the same was reported to the police on 21/7/2003. It is evident that this was prompted by the appellant's father failing to turn up to a meeting to discuss the matter and assaulting one Idd Abbas. This implies that had it not been the occurrence of the later event of the appellant's father refusing to attend the consultative meeting, then the matter would not have been reported to the police. Rape is a serious offence and one would not expect PW2 to take the matter so lightly particularly when it concerned a school girl. The unexplained delay in reporting the matter to the police, as rightly argued by the learned State Attorney, cast doubts on whether the offence was really committed. Such conduct was a matter of concern in the case of **Juma Shaban @ Juma Vs. Republic** (*supra*) rightly cited by the learned State Attorney. In that case the Court held that absence of explanation on the cause of delay to report the matter casts doubts on the prosecution case.

Complaints in respect of the admissibility of the PF3 (exhibit P1) was not taken as a ground in the first appellate Court. It is, however, apparent that it was tendered by PW1 and the appellant was not addressed in terms of section 240(3) of the CPA that he had a right to have the doctor called for cross-examination. Its reception was thus improper and the obtaining consequences is to expunge it from the record (See: **Arabi Abdu Hassan Vs. Republic**, Criminal Appeal No. 187 of 2005, and **Hangwa William Vs. Republic**, Criminal Appeal No. 117 of 2009 (both unreported). In **Hangwa William Vs. Republic** (*supra*) the Court stated: -

> *"The law as to the admission of medical evidence under section 240(3) of the CPA is also settled. The section requires that where any medical report is received in any evidence in any trial in a subordinate court, the court must advise the accused of his right to call the one who prepared the report for cross-examination. If such a report is received in evidence without complying with the provisions of section 240 (2) such report must not be acted upon..."*

Last to be considered is the appellant's complaint in respect of the admissibility of the cautioned statement (exhibit P2). We

fully agree with the learned State Attorney that it was improperly taken. The record bears out that the appellant was arrested on 21/7/2003. The caution statement (exhibit P2) indicates that it was recorded on 22/7/2003 at between 14.10 and 15.20 hrs. It is apparent that it was taken beyond the four (4) hours basic period from the time the appellant was arrested. The record does not show that extension was sought and granted. The taking of exhibit P2 violated the mandatory requirements of Section 50(1) and (2) of the CPA.

The Court occasionally confronted identical situations and in all situations, the Court held that non-compliance with section 50 of the CPA vitiated the particular cautioned statement (see **Emilian Aidan Fungo @ Alex and Another Vs. Republic**, Criminal Appeal No. 278 of 2008, **Mussa Mustapha Kusa and Another Vs. Republic**, Criminal Appeal No. 51 of 2010 and **Hamisi Juma @ Nyambanga and Another v. Republic**, Criminal Appeal No. 126 of 2011 (All unreported).

Given the fact that the trial court relied on the direct evidence by PW1 which was illegally received, the evidence by PW2 and PW3 who we have held to be not credible witnesses and

PF3 (exhibit P1) and the cautioned statement (exhibit P2) which were improperly admitted and accordingly expunged from the record, there remains no other cogent piece of evidence implicating the appellant with the offence he was charged. The case was therefore not proved against the appellant beyond reasonable doubt to warrant his conviction.

In the circumstances, we allow the appeal, quash the conviction and set aside the sentence. The appellant to be released from prison forthwith unless held for any other lawful cause.

**DATED** at **TABORA** this 19th day of February, 2018.

I.H. JUMA
**CHIEF JUSTICE**

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

S. A. LILA
**JUSTICE OF APPEAL**

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

A.H. MSUMI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**