IN THE HIGH COURT OF TANZANIA

AT MOSHI

(DC) CRIMINAL APPEAL NO. 76 OF 2002

(ORIGINAL DC ROMBO CR. CASE NO. 253/98)

ERASMI FOCAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

HON. JUNDU, J.

The record of the trial court shows that the Appellant was initially on 23 /9/1998 charged with Defilement of a girl under 14 years of age c/s 136 (1) of the Penal Code, Cap.16, Vol. 1 of the laws. The particulars of the offence were that the Appellant on the 13th day of September, 1998 at about 13.00 hours at Kamwanga Juu Village within Rombo District in Kilimanjaro Region did have carnal knowledge of one Elaika d/o Manase a girl of 5 years of age. On the said date of 23/9/1998, the charge was read over and explained to the Appellant and on being asked to plead, he stated "It is not true" hence the trial magistrate entered the said plea as "PNG" which meant "plea of not guilty".

On 17/3/1999, the prosecution side opened or started its case whereby PW.1 one Manase Anael testified. However, on 12/5/99, the Public Prosecutor one Sgt. Clemence in the presence of the Appellant prayed to withdraw the above named charge under Section 98 (a) of the Criminal Procedure Act, 1985 and substituted with another charge. The new charge was Rape c/s 130 (1) (2) (e) and (3) of the Penal Code as amended by Section 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. The particulars of the offence were that the Appellant on the 13th day of September, 1998 at about 13.00 hours at Kamwanga Juu Village within Rombo District Kilimanjaro Region did have carnal knowledge of one Elaika d/o Manase a girl of 5 years old. The record does not show that the new charge was read over and explained to the Appellant and called to plea thereto but the record shows that he entered "a plea of not guilty" (pg. 3 of proceedings).

In order to prove the said charge of Rape against the Appellant, the prosecution in the trial court had called four witnesses. PW.1 Manase Anael, the father of the victim (PW.3) testified in the trial court that on 13/9/1998 at 1.00 hours PW.2 Manase Anael came to him and told him that PW.3 was sick and bleeding in her private parts. He testified further that he went and met PW.3 and Matesha, the wife of one Paul checked her and found that she (PW.3) had bruises in her private parts. PW.1 testified further that it was on 18/9/1998 that PW.3 told him that she was raped by the Appellant on 13/9/1998 in the presence of PW.1's mother. He testified that the incident was reported at Rongai Police Station and the Appellant was arrested at Kamwanga on 19/9/1998 and taken to Mkuu Police Station and that PW.3, the victim was taken to Huruma Hospital. PW.2 Maria Anael in her evidence in the trial court testified that when she returned home from her farm she was told by her mother that the Appellant had raped PW.3. She looked and checked PW.3's private parts and found that she (PW.3) was raped and was bleeding in her vagina and had bruises. She took PW.3 to his father (PW.1) and the latter took PW.3 to the Police and to the hospital. PW.3 in her unsworn evidence told the trial magistrate that on the material day she was at her elder mother playing with Kadadaa and that the Appellant came and told her (PW.3) he would give her some money. PW.3 testified further in the said court that the Appellant took her to a place where there was some timber and put his penis ("dudu") in her private parts and that she bled when the Appellant did that thing to her. PW.4 one Nyikusuria Anael testified in the trial court that on the material day when she returned home where she left PW.3 and other children playing, she found the Appellant lying above PW.3 but on seeing her (PW.4) he threw her down and ran away. She called PW.2 who upon checking PW.3 she found that she was already raped. Thereafter, the prosecution recalled PW.1 to tender the PF3 for PW.3 which it was admitted by the trial magistrate as Exhibit P1.

In his defence evidence, the Appellant had told the trial magistrate that on 13/9/98 in the morning time he was at Kijiweni and he returned home at 5.00 p.m. He further testified that on 19/9/98 he was at his farm with some labourers and when he returned home he was arrested by two militiamen who beat him up and took him to the Police Station at Rongai, and that on 20/9/1998 he was taken to Tarakea and on 21/9/1999 he was taken to the trial court. In cross – examination, he alleged to have known PW.3 the victim and PW.1 when they appeared before the trial court.

Having heard the evidence of the prosecution witnesses and the defence evidence, the trial magistrate was satisfied that the prosecution evidence had proved the guilty of the Appellant beyond reasonable doubt. He convicted the Appellant as charged and sentenced him to 30 years imprisonment plus six (6) strokes of the cane. Having been aggrieved by the conviction and sentence imposed on him by the trial magistrate the Appellant has appealed to this court listing seven (7) grounds of appeal in his Memorandum of Appeal.

On the day of hearing of the appeal, that is Wednesday, 6th September, 2006, the Appellant acted in person and simply prayed to this court to adopt what he had stated in his seven grounds of appeal in his Memorandum of Appeal filed in this court as his arguments in pursuance of his appeal before this court. Miss Mlay, the learned State Attorney who acted for the Respondent/Republic in her submission did not support conviction and sentence.

The first issue that Miss Mlay, the learned State Attorney brought to the attention of this court is based on ground six in the Memorandum of Appeal filed by the Appellant in this court. It is framed as follows

> "With due regard to the age of the victim PW.3 a tender age girl, there needed to be conducted a voire dire. But in this instant case nothing of this kind was carried upon the victim. This, however, is illegal in law"

Indeed, according to the particulars of the offence stated in the charge sheet, the victim of the Rape by the Appellant was one Elaika d/o Manase a girl aged 5 years old. As rightly stated by Miss Mlay in her submission, the said girl who testified as PW.3 in the trial court was a "child of tender age" in terms of Section 127 (5) of the Evidence Act, 1967.

As submitted by Miss Mlay, Section 127 (2) of the Evidence Act, 1967 states how evidence of a child of tender age should be received by a trial court. The said Section states as follows

> "127 – (2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify

the reception of his evidence and understands the duty of speaking the truth".

In terms of the above named provision of law, the evidence of a child of tender age can be received by the trial court though not on oath or affirmation if the trial court in its opinion to be recorded in the proceedings the child possesses sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth.

There is a chain of authorities of this court and the Court of Appeal that to ascertain the above named position the trial magistrate must record in the proceedings that such investigation has been conducted and specific findings of the said facts must also be made (see Dhahir Ally Vs R. [1989] TLR 127). This conduct of investigation is what is known as conducting the voire dire test. My reading of the proceedings of the trial court (page 5) shows me that when the trial magistrate was receiving or taking down the evidence of PW.3 who as I have earlier stated was aged 5 years old, he only stated

> "She is tested whether she knows the meaning of an oath and she does not know. She is not sworn"

Thereafter, the trial magistrate proceeded to receive or take down the evidence of PW.3. However, the said trial magistrate did not state in the proceedings as to how he had arrived at his findings above quoted. In other words, the trial magistrate did not comply fully with the requirements of Section 127 (2) of the Evidence Act, 1967 to warrant the reception of the evidence of PW.3 who in terms of Section 127 (5) was a child of tender age witness. In my considered view this shortfall was fatal and not curable under Section 388 of the Criminal Procedure Act, 1985.

Again, this court on its thorough perusal of the proceedings have discovered other procedural irregularities that vitiate the proceedings in the trial court. First, the trial court did not conduct preliminary hearing as mandatorily required under Section 192 (1) – (5) of the Criminal Procedure Act, 1985. Section 192 (1) of the Criminal Procedure Act, 1985 states as follows

> "192 – (1) Notwithstanding the provisions of Section 229, if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters

as are not in dispute between the parties and which will promote a fair and expeditious trial"

In my considered view, the trial magistrate by not conducting the preliminary hearing as mandatorily required under Section 192 (1) – (5) of the Criminal Procedure Act, 1985, he rendered the proceedings and the judgment thereof a nullity. This non-compliance of Section 192 (1) – (4) caused injustice to the Appellant and is not curable under Section 388 of the Criminal Procedure Act, 1985.

Secondly, as I had earlier stated the Appellant was initially charged with Defilement of a girl under 14 years of age c/s 136 (1) of the Penal Code, Cp. 16, Vol. 1 of the laws. However, on 12/5/1999, the Public Prosecutor one Sgt. Clemence in the presence of the Appellant prayed to withdraw the said charge under Section 98 (a) of the Criminal Procedure Act, 1985 and substituted it with the charge of Rape c/s 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16 as amended by Section 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. In my considered view, there were a number of anomalies that were committed in the process. First, the record does not show that the trial magistrate had made an order to accept the withdraw of the charge of Defilement and the substitution of the same by the other charge of Rape against the Appellant. Secondly, the record does not show that the charge of Rape was read over and explained to the Appellant and called upon to plead on the same as mandatorily required under Section 234 (2) (a) of the Criminal Procedure Act, 1985. Thirdly, though the trial magistrate had entered "a plea of not guilty" in the proceedings (page 3) in respect of the new charge of Rape against the Appellant, that was redundant because the record does not show that the Appellant made any plea of any sort in his own words. So the "plea of not guilty" that the trial magistrate had entered in respect of the charge of Rape had no source from the Appellant. Fourthly, the reason for substituting the charge was not stated by the Public Prosecutor to the trial magistrate. However, my careful reading of the Penal Code shows me that the offence of Defilement of which the Appellant was initially charged with had long been repealed on 1st July, 1998 when the Sexual Offences Special Provisional Act No. 4 of 1998 commenced. Hence on 23/9/1998 when the Appellant was charged with the said offence it was no longer in existence therefore the substitution of the same with the charge of Rape on 12/5/1999 against the Appellant was in law questionable.

There is yet another procedural irregularity committed by the trial magistrate. On page 5 of the proceedings, it shows that on 25/2/2000 when the trial magistrate was about to receive the evidence of PW.3, the Public Prosecutor stated as follows

> "PP: Your honour I pray this case to proceed in Chamber as the PW.111 is a young girl".

The trial magistrate having considered the said matter he stated

> "Court: Application granted"

In my considered view, the Public Prosecutor in calling upon the trial magistrate to receive the evidence of PW.3 in camera because she was a young girl might have had in mind Section 3 (5) and (6) of the Children and Young Persons Act, Cap. 13 of the laws. But this was not the only provision of law that the trial magistrate was required to take into account in respect of receiving of evidence of witnesses in a trial where a sexual offence is involved. He was also required to mandatorily comply with Section 186 (3) of the Criminal Procedure Act, 1985 which states as follows

> "186 – (3) Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bonafide intended for circulation among members of the legal or medical professions".
> (Underlining mine).

There is no doubt in mind that the offence of Rape with which the Appellant was charged c/s 130 (1) (2) (e) and (3) of the Penal Code, Cap. 16, Vol. 1 of the laws is a sexual offence falling under Chapter XV of the said law. Therefore, in terms of Section 186 (3) of the Criminal Procedure Act, 1985 the trial magistrate was mandatorily required to receive the evidence of all witnesses (not PW.3 alone) in camera. The proceedings shows that it is all the evidence of PW.3 that was received in camera, the rest of the witnesses (PW.1, PW.2, PW.4 and DW.1) it was not so

received. This shortfall in my considered view is not curable under Section 388 of the Criminal Procedure Act, 1985. It vitiated the proceedings of the trial court making them a nullity.

This court has taken this responsibility of pointing out the above procedural irregularities because the Appellant being a layman may not be in a position to detect them and address the same to this court in this appeal. Further, this serves as a reminder to the trial magistrates in the subordinate courts to be much more resourceful in observing and complying with the mandatory provisions of the law in conducting criminal trials in the subordinate courts. Otherwise, they stand the risk of the proceedings as well as their judgments being nullified by this court in the event of non-compliance of the said mandatory provisions of law as there could be injustice caused to accused persons during trial which is not curable under Section 388 of the Criminal Procedure Act, 1985 save to order a retrial of the cases or the accused persons in respective cases.

The remaining six grounds of appeal in the Memorandum Appeal filed by the Appellant can be considered and determined collectively because the main issue in all of them is that the evidence of the prosecution witnesses adduced in the trial court was not sufficient to prove the charge against the Appellant. The Appellant also contends that the evidence of the said witnesses is contradictory hence casts doubt on credibility of the said witnesses. In considering these issues, I wish to recall what the trial magistrate evaluated. On page 2 – 3 of the typed Judgment, the trial magistrate stated as follows

> "In this case, the first witness who is the father of PW.111 stated that he knows the accused very well as he was his tenant. All the prosecution witnesses know the accused very well by his name and also his nick name of Kobee. Even PW.III who is a young girl of 5 years although she gave unsworn evidence but she knows the accused's names. PW.11 was told that PW.111 was raped and when she checked her she found that she was raped and took PW.111 to her father and later the matter went to police. After two days the accused was arrested and admitted to have committed this offence. Also PW.111 stated she was raped although she gave unsworn evidence and was of tender years but his evidence was fully corroborated by

the evidence of PW.4 a woman of 60 years old. This offence occurred during the day and it was at 1:00 pm and there is no doubt that they didn't identify the accused. The evidence of PW.4 was a direct evidence which proved this offence and was corroborated by PW.111 plus the PF3 was also proved that PW.111 was raped. There was also the evidence of PW.1 and PW.11 of which was circumstantial evidence that the accused was a tenant of PW.1 and the evidence of PW.11 which stated that accused admitted to have committed this evidence.

The accused did not at all rebutted nor challenged the prosecution evidence. The prosecution evidence was enough to convict the accused as has proved this case beyond reasonable doubt that the accused is guilty. The accused is then convicted as charged under Section 238 of Act 9/1985".

The above evaluation of evidence by the trial magistrate of the prosecution witnesses is not without shortfalls which I shall shortly demonstrate.

First, as submitted by Miss Mlay, learned State Attorney, PW1 in his evidence stated that the incident of raping PW.3 by the Appellant took place on 13/9/1998 and that he was informed of the same on the same date by PW.2. However, in the same evidence, PW.1 stated that PW.3 informed him of the incident on 18/9/1998 which is a difference of five (days). This time variation is so big that it casts doubt on the evidence of PW.1. This doubt is much more enhanced by the fact that PW.1 when recalled to testify in the trial court he tendered PF3 in which it was shown that PW.3 had been medically examined and established that she was raped. However, this evidence of PW.1 leaves a lot to be desired. The Appellant on cross – examination to PW.1 put it to him that it was alleged that he committed the offence on 13/9/1998 how came the PF3 was filed on 19/9/98? PW.1 did not reply the said question. Indeed, the PF3 (Exhibit P1) itself shows that it was stamped 5th October, 1998. It is not known whether this was the date on which PW.3 was examined by the medical officer who attended her. Worse, the trial magistrate when admitting the said PF3 as evidence, the record does not show that he reminded the Appellant of his right under Section 240 (3) of the Criminal Procedure Act, 1985 to require the medical officer who had examined PW.3 to be called before the trial court for cross –

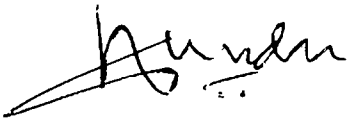
examination by the Appellant. In the circumstances, the said shortfall made the evidence of PW.1 in respect of the PF3 and the PF3 itself of very little value.

Second, though the trial magistrate in his judgment stated that the evidence of PW.2 showed that the Appellant had admitted to have committed the offence of rape against PW.3, the record does not show that contention of PW.2 in her evidence was supported by any concrete evidence by way of a confession or caution statement to a police officer as required under Section 27 of the Evidence Act, 1967. In my considered view, it was unsafe for the trial magistrate to act on such evidence of PW.2 to convict the Appellant.

Thirdly, the trial magistrate in his judgment acted on the evidence of PW.3, the victim to convict the Appellant. However, in my considered view, the evidence of PW.3 was not properly before the trial court for non-compliance of Section 127 (2) of the Evidence Act, 1967 which we have above explained hence the trial magistrate was wrong to act on the said evidence to convict the Appellant. This shortfall, then, left the evidence of PW.4 which the trial magistrate stated that it was direct evidence and corroborated the evidence of PW.3 in isolation. It could not corroborate evidence of PW.3 which was not itself properly before the trial court for the reason which I have stated.

In the upshot, based on the several procedural irregularities that I have above demonstrated in respect of the proceedings of the trial court in respect of the Appellant and the fact that there were shortfalls in the evidence of the prosecution witnesses such that it could not be concluded that the guilty of the Appellant had been proved beyond reasonable doubt, I am satisfied that this appeal has merit as submitted by Miss Mlay, learned State Attorney.

The appeal is hereby allowed. I hereby quash and set aside conviction and sentence imposed on the Appellant by the trial magistrate. The Appellant is hereby set free unless lawfully held under the law. It is so ordered.



F.A.R. JUNDU

JUDGE

20/10/2006

Right of Appeal Explained.

F.A.R. JUNDU

JUDGE

20/10/2006

20.10.2006

Coram: F.A.R. Jundu, J.

For the Appellant: present

For the Respondent: Miss Rugaihuruza, State Attorney

C/C: Muyungi

Court: Judgment delivered in the presence of the Appellant and in the presence of Miss Rugaihuruza, learned State Attorney for the Respondent/Republic.

F.A.R. JUNDU

JUDGE

20/10/2006

AT MOSHI