IN THE HIGH COURT OF TANZANIA

AT MOSHI

(DC) CRIMINAL APPEAL NO. 52 OF 2003

(ORIGINAL DC MOSHI CR. C. NO. 526/99)

SALUM RAMADHANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

HON. JUNDU, J.

The Appellants, in the trial court, were charged with Rape c/s 130 and 131 of the Penal Code, Cap. 16, as amended by Sections 5 (1) (2) (e) and 6 (3) of Act No. 4/98. The particulars of the offence were that the Appellants jointly and together on 18th day of April, 1999 at about 19.30 hours at Majengo Mji Mpya within the Municipality and District of Moshi Kilimanjaro Region did carnally known one Happy d/o Shio aged 13 years without her consent.

In order to prove the charge against the Appellants, the prosecution side in the trial court had called four (4) witnesses. The victim of the alleged rape one Happy Shio testified as PW.2 aged 10 years old. She told the trial magistrate that on the material day she was keeping watch at the kiosk of her mother (PW.1) then the two Appellants came and carried her to the milling machine room, they undressed her and raped her. She further testified there that her brother one Fred passed by and both Appellants ran away into the machine house. She stated that she knew the 1st Appellant by the name of 'Sele" but did not know that of the 2nd Appellant though she used to see him selling "mitumba" Kwamtei. On cross – examination by the 2nd Appellant, PW.2 stated that four people had raped her in the machine room at 7.00 p.m. PW.1, the mother of PW.1 in her evidence told the trial magistrate that PW.2 is her daughter and that she suffers from an ailment that makes her fall from time to time and that on the material day she had left PW.2 at the kiosk but when she (PW.1) returned did not find her there only to find her running and crying along the road to the milling machine and was dirty with dust on her back. PW.2 told her that the young brother of one Sele together with another person who run the milling machine had dragged her to

the milling machine, undressed her and raped her. She testified further in the said court that she knew the Appellants as they had the habit of coming to draw water from her house and that the younger brother of Sele was the 1st Appellant and that both were operating the milling machine. She examined the private parts of PW.2 and noticed thick liquid substance in her vagina which appeared to be male semen. She reported the incident to her husband (PW.3) who reported the same to the ten cell leader (PW.4). They reported the matter to the Police Station at Majengo where they were issued with PF3 and took PW.2 for medical examination to Mawenzi Hospital. She tendered the said PF3 in the trial court and the same was admitted as Exhibit "P1". PW.3 and PW.4 their evidence on how PW.2 was raped was similar to that of PW.1.

The Appellants in their defence evidence at the trial court denied to have raped PW.2. The 1st Appellant told the trial court that his work is to sell "sambusa" for Mirajis wife from 6.45 in the morning to 3 pm. The 2nd Appellant in his evidence stated that on the material day he was in the premises of his boss preparing "chapatti" and "sambusa" and the next day he went to sell them in town while the 1st Appellant went to sell the same at Kiborloni. They denied that they had the habit of drawing water from PW.1's house and that the house of their boss (Mrs. Miraji) is very far from the milling machine. The 1st Appellant on cross – examination stated that his brother Selle is the one who operates the milling machine. DW.1 Zaina Miraji in her evidence told the trial magistrate that the Appellants were her employees who were selling "sambusas" for her and that his husband runs a milling machine and that one Selemani Ramadhani operates it with one Amiri Saidi who both stay in the premises of the said milling machine. She had employed them and that Selemani Ramadhani is the elder brother of the 1st Appellant.

Having heard the evidence of the prosecution witnesses and the defence evidence, the trial magistrate found the Appellants guilty of the charged offence. He convicted them and sentenced them to 30 years imprisonment each plus 10 strokes of corporal punishment. Aggrieved by the conviction and sentence the Appellants have now appealed to this court. Each had initially filed a separate appeal. The 1st Appellant had filed initially filed (DC) Criminal Appeal No. 52/2003 while the 2nd Appellant had filed (DC) Criminal Appeal No. 99 of 2003. However, upon application by the Appellants which the Republic did not object, the two appeals were consolidated together under (DC) Criminal Appeal No. 52 of 2003 because both appeals arise from the same original Criminal Case No. 526 of 1999 of the Moshi District Court.

The 1st Appellant had listed 8 grounds of appeal in his Petition of Appeal while the 2nd Appellant had listed 7 grounds of appeal in his Petition of Appeal. On the day of hearing of the Appeal, each of the Appellant simply stated that what he had stated in his grounds of appeal sufficed to be his arguments in pursuance of the appeal before this court and prayed to adopt the said grounds of appeal as their arguments in support of the appeal before this court. Miss Mlay, the learned State Attorney who represented the Respondent/Republic in the appeal in her submission did not support conviction and sentence imposed on the Appellants by the trial magistrate.

Miss Mlay brought to the attention of this court a number of procedural irregularities that in her view vitiates the proceedings and the judgment of the trial court. First, she submitted that the trial magistrate commenced the trial of the Appellants without first conducting preliminary hearing as mandatorily required under the provisions of Section 192 (1) – (5) of the Criminal Procedure Act, 1985. Section 192 (1) states as follows

> "Notwithstanding the provisions of Section 229, if any accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in an 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"

As above shown Section 192 of the CPA, 1985 has five sub-sections which go consecutively which all of them need to be complied by the trial magistrate without fail. My careful perusal of the proceedings of the trial court clearly shows me as stated by Miss Mlay, learned State Attorney that the trial magistrate did not invoke the provisions of Section 192 (1) – (5) of the Criminal Procedure Act, 1985 completely. In other words, he did not conduct preliminary hearing as mandatorily required by the said provisions of the law. This non-compliance of the said provisions of the law occasioned injustice on the part of the Appellant (Benjamin Holela's case [1992] TLR 121).

Secondly, Miss Mlay in pursuance of ground 2 of the appeal of the 2nd Appellant brought to the attention of this court another procedural irregularity committed by the trial magistrate, that is he did not comply with the mandatory requirements of Section 127 (2) of the Evidence Act, 1967 in respect of PW.2, the victim of rape who according to the charge sheet was aged 13 years old but shown to be 10 years old in the proceedings. The argument of Miss Mlay of which I fully subscribe to is that the said witness was in terms of Section 127 (5) of the Evidence Act, 1967 a child of tender age and that under Section 127 (2) of the Evidence Act, 1967 it is stated how evidence of such witness can be received by the trial magistrate or court. My reading of the said provision of law shows me that before the trial magistrate receives evidence of such a witness he must conduct investigation, what is known as a voire dire test, to satisfy himself that the child of tender age about to adduce evidence before him/her understands the nature of an oath and possesses sufficient intelligence to justify reception of its evidence and understandings the duty of speaking the truth. The trial magistrate must show in the record that he did the investigation and has made specific findings to that effect (Dhahir Ally V.R [1989] TLR 127). The record of the trial court does not show that the mandatory requirements of Section 127 (2) of the Evidence Act, 1967 were complied with before the trial magistrate received the evidence of PW.2 who was a child of tender age. In other words, the trial magistrate did not conduct the voire dire test. I quite agree with the submission of Miss Mlay that the said non-compliance of Section 127 (2) of the Evidence Act, 1967 had occasioned injustice to the Appellant.

Thirdly, Miss Mlay brought to the attention of this court non-compliance of Section 186 (3) of the Criminal Procedure Act, 1985 by the trial magistrate in that the offence of Rape being a sexual offence, the evidence of all witnesses had to be received in camera. Having read that provision of the law I found that it is stated in mandatory terms but my thorough perusal of the proceedings of the trial court does not show that the evidence of the witnesses was received in camera as mandatorily required by the said provisions of law. Therefore, again I quite agree with the submission of Miss Mlay, learned State Attorney that the said non-compliance of the law occasioned injustice on the part of the Appellant and the witnesses who testified in the trial court including the victim, that is PW.2. Indeed, even under Section 3 (5) & (6) of the Children and Young Persons Act, Cap. 13 of the laws, the evidence of PW.2 was mandatorily required to be received in camera. This was yet another procedural irregularity on the part of the trial magistrate.

The Appellants in their appeals have contended that PW.2 was of unsound mind hence the trial magistrate ought to have warned of the dangers of basing conviction of the Appellants on the evidence of PW.2. They further contended that the evidence of the prosecution was insufficient to warrant conviction of the Appellants. The trial magistrate acted on the evidence of PW.1, PW.2 and the defence side that the 1st Appellant was known by the name of "Sele Mdogo' and the 2nd Appellant by the name of "Mwenzake na Sele" and that the 1st Appellant operated milling machine, they were closely related and had a habit of drawing water at PW.1's house. However, it was the evidence of PW.1, the mother of PW. 2, that the latter was suffering from mental ailment and memory deficiency. In the circumstances, there was a need on the part of the trial magistrate to warn himself of the dangers of convicting the Appellants based on the evidence of PW.2. Further, PW.1 in her evidence stated that PW.2 had told her that the persons who raped her were youths at the milling machine, a young brother and his colleague. However, on cross - examination by 2nd Appellant, PW.2 stated that she was raped by four people. There was no evidence as to who were the other two assailants. Further, PW.2 stated when she was being raped his brother one Fred passed by causing the rapists (the Appellants) to run away. The said Fred, the alleged brother was an important witness to the incident but was not called by the prosecution to give evidence at the trial court. The evidence of PW.1 and PW.2 was to the effect that it is "Sele mdogo", the brother of the 1st Appellant who was working at the milling machine. However, the owner of the milling machine testified in the trial court as DW.3. In her evidence she stated that the youth who was working at the milling machine was Selemani but the Appellants were staying with her at home and were her employees who were selling "Sambusas" for her. In my considered view, had the trial magistrate taken into account the evidence of DW.1, he would have seen that it had raised a doubt as to the people who had raped PW.2. Therefore, the evidence of the prosecution could not have been said to be watertight in view of the evidence of DW.3 one Zaina Miraji (wrongly referred as DW.1 in the proceedings).

The Appellants have also in their appeals contended that they were not properly identified. The trial magistrate as far as the issue of identification is concerned made much reliance on the evidence of PW.4 and that of PW.1 and PW.2. PW.1 and PW.2 according to the trial magistrate knew well the Appellants and that both the 1st Appellant and his elder brother were known by the name of "Sele". He also relied on the evidence of PW.4 who had left PW.2 at the police station and then brought elder brother of the 1st Appellant but PW.2 stated that this was not the one who

raped her. PW.4 went to the milling machine and brought another person at the police station and PW.2 identified him as the 2nd Appellant.

However, in my considered view, the above process of identification of the Appellants was unreliable. First, with the evidence of PW.1 that PW.2 was suffering from mental ailments and memory deficiency one cannot vouch that at the time of identification that was conducted by PW.4 at the police station PW.2 was mentally fit so as to rule out any possibility of mistaken identity on the part of the Appellants. Secondly, the kind of identification parade that PW.4 was conducting at the police station it is unknown to law in terms of Section 60 (1) of the Criminal Procedure Act, 1985 as submitted by Miss Mlay, the learned State Attorney. In law an identification parade has to be conducted by a police officer incharge of a police station or any police officer investigating an offence. Even the manner how PW.4 conducted the identification of the Appellants was improper because he called the suspects in turns or individually before PW.2 for identification. In sum, I quite agree with the contention of the Appellants and the submission of Miss Mlay, learned State Attorney that in law the Appellants were not properly identified.

In the upshot, having stated the procedural irregularities that vitiates the proceedings and the judgment of the trial court as above shown as well as the shortfall in the evidence of the prosecution witnesses in the trial court in respect of the identification of the Appellants, I hold that the appeals that were filed by the Appellants and thereafter consolidated have merit and are hereby allowed. I quash and set aside the conviction and sentence imposed on the Appellants by the trial magistrate. The Appellants are 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 1st Appellant: present

For the 2nd Appellant: present

For the Respondent: Miss Rugaihuruza, State Attorney

C/C: Muyungi

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

F.A.R. JUNDU

JUDGE

20/10/2006

AT MOSHI