IN THE HIGH COURT OF TANZANIA

AT MOSHI

(DC) CRIMINAL APPEAL NO. 95 OF 2003

(ORIGINAL DC MWANGA CR. CASE NO. 93/2001)

RAJABU SHABANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

HON. JUNDU, J.

In the trial court, the Appellant, was charged with Rape c/s 130 (2) (e) of the Penal Code, Cap. 16, Vol. 1 of the laws as amended by the Sexual Offences Special Provisions Act. No. 4/98. The particulars of the offence were that the Appellant on the 10th day of June, 2001 at about 11.00 hours did have unlawful carnal knowledge of one Zulpha d/o Saidi a girl under the age of 18 years.

In order to prove the charge against the Appellant, the prosecution called three (3) witnesses during the trial in the lower court. On the other hand, the Appellant in his defence evidence called two witnesses in addition to himself. The prosecution evidence on record is that PW.1 Zulpha d/o Saidi a girl aged 12 years of age on 10/6/2001 at 9.00 hours at Mbore Village within Mwanga District together with her mother (PW.3), her young brother one Babuu Saidi (PW.2), her other brother one Omari and her young sister one Mariamu had gone to fetch firewood. Having collected sufficient firewood, at about 11.00 hours, PW.1, PW.2 and the said Mariamu were told by their mother, that is PW.3 to go home to send the firewood they had collected. When they arrived at a place called Kwenyekatanga they met the Appellant who asked them to go with him to push his log at a nearby place. On their way towards the said place, the Appellant pulled out a knife and an iron bar and told PW.1, PW.2 and Mariamu they had insulted him.

The Appellant ordered PW.2 and Mariamu to lay down their faces facing down and covered them with a khanga which was transparent. The Appellant ordered PW.1, the victim to undress her clothes while threatening to kill her by the knife and the iron bar if she would shout for help. He ordered PW.1 to lay down and he accordingly inserted his penis into PW.1's vagina

thereby raping her. PW.1 did not shout or raise an alarm while being raped by the Appellant as she feared to be killed by the Appellant. Having finished raping PW.1, the Appellant stood up, dressed his clothes and left towards direction of Butu, an area in Mbore Village within Mwanga District. Thereafter, PW.1 got up crying and they heard their mother (PW.3) calling them, so they went back to the place where they had left their bundles of firewood. PW.1 informed her mother (PW.3) what the Appellant had done to her. PW.3 inspected PW.1's private parts and found her bleeding in her vagina. PW.3 took PW.1 to Kilomeni Dispensary for treatment but they were told to bring PF.3 from Police Station. Having obtained PF3, PW.1 was medically examined and it was established that she was raped or sexually known. PW.1 tendered the PF.3 which was admitted as Exhibit P1 by the trial magistrate there being no objection from the Appellant.

In her evidence, PW.1 had told the trial magistrate that he knew the Appellant well before the material day or incident and that though she did not know him by his name, they were staying in the same village and that he often used to pass at their home while going to his shamba. PW.1 had testified further that as the incident took place in the morning during day light he properly identified the Appellant as the person who had raped her. PW.2 Babuu said aged 10 years corroborated the evidence of PW.1. He stated that the Appellant had covered them with a khanga but as the same was transparent and there was adequate daylight he witnessed the Appellant raping PW.1 who was his sister. He stated that he knew well the Appellant as they were living in the same village and used to see him passing at their home to go to one Hussein Kalanje. He further testified in the trial court that he could not shout or raise an alarm for help as he feared to be killed by the Appellant and that it was until he heard the call from their mother (PW.3) that he responded to it but by then the Appellant was leaving from the scene of crime,. PW.3, the mother of PW.1 and PW.2 in her evidence in the trial court stated what she had been told by them and that she reported the matter to the police and had sent PW.1 to hospital for treatment. He further stated that the Appellant had disappeared from the village after the incident until two weeks when he was found at his home and was reported to the Police and got arrested accordingly.

The Appellant, in his defence evidence in the trial court had stated that from 10/6/2001 to 5/7/2001 he was making bricks. He was arrested on 5/6/2001 by the police who were accompanied by one Rashid without being told the reason for his arrest. He was taken to

Mwanaidi bar where PW.3 was called there and instructed to buy some papers and later on she came back accompanied with two infants (PW.1 and PW.2) and the police started to record their statements and he was told that he was arrested on suspicion of raping the female infant (PW.1). He challenged the evidence of PW.1 that it was not corroborated by any other evidence and that PW.3 was previously his lover and they used to meet in the business at Ngare and that at one time PW.3's in law had seen them that is why PW.3 had concocted that he had raped her daughter (PW.1). He testified that he was a resident of Kirogwe while PW.1 resided at Mbore, a distance of about 7 Kms and that his shamba was at Ngare which was ahead of Mbore. He further testified that the shamba he used to work belonged to his grandfather one Kalaghe and that PW.1 and PW.2 used to see him passing going to his farm that is why it was not difficult for them to identify him. DW.2 Mwanamisi Rajabu, the mother of the Appellant and DW.3 Shabani Ibrahim, the father of the Appellant both testified that on the day the Appellant he was making bucks. They stated in their evidence that Mbore and Lomwe were a distant apart.

Having heard the evidence of the prosecution witnesses and the defence witnesses, the trial magistrate was satisfied that the prosecution case had been proved beyond reasonable doubt. He convicted the Appellant and sentenced him to 30 years imprisonment plus 12 strokes of corporal punishment as well as ordering him to compensate PW.1 Tshs. 500,000/= for the injuries caused. Having been aggrieved by the conviction, sentence and the order of compensation, the Appellant has appealed to this court listing seven (7) grounds of appeal namely that:

(1) The age of the complainant is very significant for sentencing. Unfortunately the real age of the said victim was not medically proved by an expert learned doctor. This defect is a fundamental error which the trial magistrate failed to detect.

(2) PW.1, PW.2, and PW.3 are relatives, so they had an interest to serve to the complainant owing to their filial relationship.

(3) That PW.2 one Babuu Saidi is to be a tender years age. But there was no voire dire investigation taken upon him. In addition to that even his age was not medically observed or known.

(4) That on the issue of identification there was misunderstanding during the testification between PW.1 and PW.2. PW.2 resisted on what has been testified by PW.1. Such resistance creates a slight doubt that the Appellant has only been implicated as a vanisher.

(5) The trial court magistrate erred in law, and in fact in convicting and sentencing the Appellant on mere assertion with no corroborative description or sufficient evidence.

(6) The learned district magistrate according to the trial record papers erred in his decision for failure to analyse and evaluate properly the evidence on record and erred in placing or shifting the burden of proof to the Appellant with no cause.

(7) The trial magistrate failed to inteprete properly the provisions of Act No. 4 of 1998 as a result he arrived at a wrong decision and erred in law for failure to give crucial reasons for his judgment.

Based on the aforesaid reasons, the Appellant in his Memorandum of Appeal prayed to this court to allow the appeal, quash and set aside conviction, sentence and the compensation order imposed on the Appellant by the trial magistrate.

On 10/10/2006, when the appeal was for hearing, the Appellant simply stated that what he had stated in his grounds of appeal in his Petition of Appeal sufficed to be his arguments in pursuance of his appeal before this court. On the other hand, Mr. Juma, learned State Attorney who acted for the Respondent/Republic in his submission he opposed the appeal contending that the prosecution side at the trial court had proved the charge of Rape against the Appellant beyond reasonable doubt. He prayed to this court to dismiss the appeal.

In the first ground of appeal, the Appellant, contends that when he was sentenced no medical expert was called to confirm the age of the victim (PW.1). However, Mr. Juma, learned State Attorney in his submission contended that the Appellant's contention is irrelevant and immaterial because the sentence of 30 years imprisonment plus 12 strokes as well as compensation order of shs. 500,000/= imposed on the Appellants were all lawful under Section 13 (1) of the Penal Code, Cap.16, Vol. 1 of the laws as amended by Section 6 of the Sexual Offences Special Provisions Act, No. 4 of 1998. In my considered view, I quite agree with the submission of Mr. Juma that the sentence imposed on the Appellant by the trial magistrate was lawful in terms of Section 131 (1) of the Penal Code, Cap. 16, Vol. 1 of the laws as amended by Section 6 of Act No. 4/1998 mentioned above. The said provision of law states as follows

> "131 – (1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal

punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person"

It is clear to me from the wording of the above provision of law that the sentence that was imposed on the Appellant was lawful. There is no legal requirement in the said provision of law that in the event the victim of rape is of a tender age than the trial magistrate should ascertain the age of the victim by a medical doctor or expert before imposing sentence on the accused person contrary to what the Appellant contended in his first ground of appeal. Therefore, I hold that the first ground of appeal has no merit.

In the second ground of appeal, the Appellant contends that the evidence of PW.1, PW.2 and PW.3 were evidence of relatives hence evidence of interested parties. However, this contention of the Appellant has shortfalls that makes it redundant. First, PW.1 and PW.2 had given their evidence after the trial magistrate had conducted proper voire dire test on each of them and there were very consistent in their testimony even during the cross – examination by the Appellant. The trial magistrate in his judgment stated in respect of the evidence of PW.1 and PW.3 that he had "carefully examined the evidence of these two infants" and was satisfied that it was "credible and therefore corroborating". Secondly, the evidence of PW.1, PW.2 and PW.3 on record did not show that there existed grudges between them and the Appellant nor did the Appellant show in his cross – examination of PW.1, PW.2 and PW.3 that there were grudges between them or that there was close relationship between them. Thirdly, though the Appellant had in his defence evidence contended that PW.3 was his past lover, he did not cross – examine PW.3 on this point when PW.3 was adducing her evidence. In my considered view, the contention of the Appellant that the evidence of PW.1, PW.2 and PW.3 was that of relatives with interest to serve is an afterthought as he did not cross – examine them on the said point when they were adducing evidence before this court nor did he advance the said contention in his defence evidence. I hold that the second ground of appeal has no merit.

In the third ground of appeal, the Appellant contends that no voire dire test was conducted in respect of PW.2 Babuu Saidi who was aged 10 years by the trial magistrate before receiving his evidence. However, I fully agree with the submission of Mr. Juma, learned State Attorney that this ground of appeal has no merit because my careful reading of the record shows

at page 9 of the proceedings that the trial magistrate had properly conducted voire dire test in respect of PW.2 before receiving his evidence as required under Section 127 (2) of the Evidence Act, 1967.

In the fourth ground of appeal, the Appellant contends that he was not properly identified at the scene of crime because PW.1 and PW.2 in their evidence were contradicting each other on how they had identified the Appellant. However, I fully agree with Mr. Juma that this contention of the Appellant has no merit. The record shows that the identification of the Appellant by PW.1 and PW.2 had no doubt whatsoever because the incident took place in the morning hours (at 11.00 hours) when there was plenty of day light. Further, PW.1 and PW.2 in their evidence in the trial court stated that they knew the Appellant before the incident as they were living in the same village. Also, there was no contradictions in the evidence of PW.1 and PW.2 on the identification of the Appellant because all of them in their evidence stated that they used to see the Appellant passing at their home going to his shamba hence there was no possibility of mistaken identity. Though, the Appellant in his defence evidence in the trial court and in his rejoinder submission before this court tried to show that he was living in a different village from PW.1 and PW.2 he admitted that he used to stay at the home of PW.1 and PW.2 while going to his shamba which in my considered view makes it true that PW.1 and PW.2 had known him before the material day. In any event, as the incident took place during broad day light in early hours of the material day, I am satisfied that the trial magistrate correctly held that the identification of the Appellant was crystal clear. I hold that the fourth ground of appeal has no merit.

In the fifth ground of Appeal, the Appellant contends that the evidence of the prosecution witnesses was not corroborated hence the trial magistrate erred to find him guilty and convicted him on uncorroborated and insufficient evidence. In my considered view, as far as the evidence on record is concerned as well as the current legal position, this ground of appeal has no merit. As submitted by Mr. Juma, learned State Attorney, the record clearly shows that the evidence of PW.1 was well corroborated by the evidence of PW.2 who was an eye witness of the raping incident. Further, in accordance with the provisions of Section 127 (7) of the Evidence Act, 1967, the trial court can convict on the evidence of PW.1 without the need of corroboration it warns itself that PW.1, a child of tender age is speaking the truth. Section 127 (7) of the

Evidence Act, 1967 has therefore removed the need for corroboration as a pre-condition for conviction if a victim is a child of tender age. I hold that ground five of the appeal had no merit.

In grounds 6 and 7 of the appeal, the Appellant contends that the trial magistrate did not give reasons for his decision and that he failed to interprete properly the provisions of the Sexual Offences Special Provisions Act No.4 of 1998. However, as stated by Mr. Juma, learned State Attorney in his submission that the trial magistrate had given adequate and proper reasons in arriving at his judgment. The trial magistrate considered Exhibit "PI" (PF3) and stated that the hymen of PW.1 was perforated and that there was mucous in her (PW.1) vagina meaning that she had been penetrated. As to who raped PW.1, the trial magistrate in his judgment took into account the evidence of PW.1 which he found to have well been corroborated by the evidence of PW.2 that it was the Appellant who had raped PW.1 and that his "identification" appeared to be "crystal clear". In my considered view, the trial magistrate had properly analysed and evaluated the evidence before him such that it fitted properly into the provisions of law under which the Appellant was charged, convicted and sentenced. Therefore, I hold that grounds 6 and 7 of the appeal have no merit.

In the upshot, the appeal filed by the Appellant has no merit. I hereby dismiss the appeal. I uphold the conviction, sentence and compensation order imposed on the Appellant by the trial magistrate. It is so ordered.

F.A.R. JUNDU

JUDGE

13/11/2006

Right of Appeal Explained.

F.A.R. JUNDU

JUDGE

13/11/2006

13.11.2006

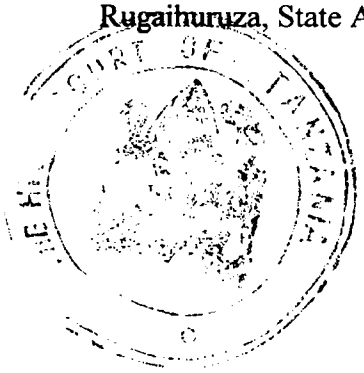
Coram: F.A.R. Jundu, J.

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, State Attorney for the Respondent/Republic.



F.A.R. JUNDU

JUDGE

13/11/2006

AT MOSHI.