IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 55 OF 2005

(Originating from District Court of Morogoro Cr. Case No. 388 of 2000)

MOHAMED RAJABU..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

Date of Last Order: 16/12/2008

Date of Judgment: 27/2/2009

Shangwa, J.

Mohamed Rajabu hereinafter to be referred to as the Appellant was charged in the District Court of Morogoro with the offence of rape C/SS 130 (1) (2) (e) and 131 (1) of the Penal

Code Cap 16 R.E. 2002. Before the said court it was alleged that on 3.7.2000 at about 14.30 hours at Malowa Kibati village Tuliani Division within the District of Morogoro in Morogoro Region, the Appellant did unlawfully have carnal knowledge of Asha Ibrahim without her consent. The prosecution called three witnesses to support its case. The Appellant defended himself on affirmation. He had no witness to call. After hearing both sides, the trial Magistrate convicted him and sentenced him to 30 years of imprisonment. He was not satisfied with both conviction and sentence. He then appealed to this court. In his Memorandum of Appeal, the Appellant raised six grounds of appeal against the decision of the trial court. However, the 3rd ground of appeal does not sound to be a ground of appeal. The 5th and 6th grounds of appeal are not clear and are of no practical purpose. So, I will not deal with them. Instead, I will deal with grounds 1, 2 and 4 which are sufficient to dispose of this appeal. They read as follows:-

1. *That, the trial Magistrate erred in law and fact in grounding a conviction on the evidence of a child of tender years without conducting a Voire Dire.*
2. *That, the trial Magistrate erred in law and in fact in admitting PF 3 in evidence without calling the Doctor who examined P.W.2 and filled PF3 to appear in court and testify.*
4. *That, the trial court's judgment is bad in law as it does not contain the points for determination and the reasons for his decision.*

On the first ground of appeal, this court is called upon by the Appellant to determine as to whether or not the trial court erred in law and fact in convicting him of the offence charged by relying on the evidence of P.W.2 a child of tender years without conducting a voire dire. Now, was P.W.2 who is called Asha Ibrahim a child of tender years. The trial court's record shows that at the time of giving her testimony, P.W.2 was 14 years old. A person who is aged 14 years as P.W.2 was by then is regarded to be a child of tender years under S. 127 (5) of the

Evidence Act (Cap 6 R.E. 2002). Under subsection (2) of S. 127 of the said Act, evidence of a child of tender years may be received though not given on Oath or Affirmation if in the opinion of the court to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence and understand the duty of speaking the truth.

In this case, it is true as submitted by the Appellant that the trial court did not conduct a voire dire before receiving the testimony of P.W.2 on affirmation. The question here is what is the purpose of conducting a voire dire in cases where a child of tender years is called as a witness in court and what is the effect of omitting to do so. The purpose of conducting a voire dire is to find out whether a child of tender years is intelligent enough to receive his evidence and whether he understands the duty of speaking the truth. The effect of omitting to conduct a voire dire before swearing in a child of tender years was mentioned in the case of **JOSEPH VS R. (1971) HCD No 58** in which it was held by this court that the omission to do so has the effect of reducing such evidence to the level of

unsworn evidence of a child and that a conviction cannot be sustained by such evidence unless it is corroborated by some other independent evidence.

In the light of the aforesaid holding, the testimony of P.W.2 which was received on affirmation without having conducted a voire dire is similar to an unsworn evidence. The question which arises here is whether or not P.W.2's evidence was corroborated by independent evidence. In my view, the evidence of P.W.2 was corroborated by the evidence of P.W.3 who is her mother who received information from her that she had been raped by the Appellant within half an hour of the incident. Apart from that P.W.3 examined her immediately after she was informed about the incident and saw blood on her private parts. As the evidence of P.W.2 was corroborated by the evidence of P.W.3, the trial court was not wrong on basing a conviction on the evidence of P.W.2 who was a child of tender years. Moreover, before convicting the Appellant, the trial Magistrate satisfied himself that P.W.2 as well as P.W. 3 were telling the truth. In fact, he did remark that the evidence

led by the Prosecution was watertight. He described the Appellant's defence that the charge against him was cooked because of the grudges that existed between him and P.W.3's husband Hemed Jumbe as an afterthought. I entirely agree with him. In my view, the Appellant's allegation that he was charged with the offence in issue because of misunderstandings between him and P.W.3's husband over harvested maize which he had cultivated with him is baseless.

The following is what P.W.2 told the trial court in her testimony. She said that she resides at Malowa Village Kibati Ward, Tuliani Division and that on 3.7.2000 a.m at around 8.00 a.m. she went to the shamba with her mother P.W.3 and her young brother called Jumbe who was 3 years old. She said that her mother left her and Jumbe in the hut and went back home. She said, while she was sleeping in the hut, the Appellant whom she knew very well appeared in the hut, undressed himself and pulled her under parts and forcefully inserted his peris into her vagina which destroyed her hymen and that thereafter, she left the hut and went back home. She

said she informed her mother of what happened to her. He said, on 11/7/2000, the matter was reported to the Police at Tuliani who gave her PF 3 (exhibit P.1) which she took to Tuliani Dispensary for Medical examination.

As already mentioned, the evidence of P.W.2 was corroborated by the evidence of P.W.3 who is called Mwajuma Athumani. This witness told the trial court that on 3.7.2000 at around 8.30 a.m, she left home at Malowa village and went to the shamba with P.W.2 together with her son Jumbe for the purposes of chasing wild animals and that after staying in the shamba for sometime, she left P.W.2 and Jumbe there and then went back home. She said, at around 3.00 p.m, she left home and went back to the shamba but before reaching the shamba, she met P.W. 2 on the way who informed her that the Appellant had raped her and that on examining her Private Parts, she found her bleeding. She said, on 11.7.2000, the matter was reported to the Police at Tuliani who gave them PF3 which they took to the Dispensary at Tuliani where P.W.2 was examined and found to have been raped.

In my view, the watertight evidence given by P.W.2 and corroborated by P.W.3 proves beyond reasonable doubt that the Appellant committed the offence charged. Therefore the 1st ground of appeal has no merit and it fails.

On the second ground of appeal, it is true as complained by the Appellant that after receiving PF.3 exhibit P1, the trial court did not summon and examine the medical officer who examined P.W.2 and filled it. The trial court also did not inform the Appellant of his right to require the Medical Officer who made the report on the PF3 exhibit P1 to be summoned for being examined or cross- examined as provided for under S. 240 (3) of the Criminal Procedure Act (Cap 20 R. E. 2002). The said Section Provides as follows:

> " *S. 240 (3) when a report referred to in this section is received in evidence the court may if it thinks fit and shall if so requested by the accused or his advocates, summon and examine or make available for cross –*

examination the person who made the report, and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."

Under the above quoted provisions of law, the accused is required to make a request to the court for summoning and cross – examining the person who made the report. Under the same provisions, the court has to inform the accused of his right to require the person who made the report to be summoned.

In this case, the Appellant did not make a request to the court for summoning the Medical Officer who made the report on PF3 on which it is indicated that P.W.2 had bruises on the vulva due to having been raped. The court did not as well inform the Appellant of his right to require the Medical Officer who made a report to be summoned. In my opinion, as the Appellant did nor request the court to summon and examine

the Medical Officer who made the report on PF3 -exhibit P1, he slept on his right. Therefore, he cannot blame the court for its omission to inform him of his right to do so. As already mentioned, the evidence of P.W.2 which was corroborated by the evidence of P.W.3 is watertight. Therefore the omission to summon the Medical Officer who examined P.W.2 and made his report on PF3, exhibit P1 did not occasion a failure of justice. The authority on this point is the recent case of **MOHAMED MUMBA VS R. Criminal Appeal N. 270 of 2007 (unreported)** in which the Court of Appeal of Tanzania held that as the evidence given by P.W.2 Edith was water tight to prove the offence of rape against the Appellant Mohamed Mumba, the omission of calling a Medical Officer who made the report in the PF3 did not occasion any failure of justice. I think therefore that the 2nd ground of appeal has no merit as well and it fails.

On the fourth ground of appeal, this court has been called upon to consider as to whether or not the judgment of the trial court lacks the qualities of being called a judgment. I

have read the trial Magistrate's judgment in issue and I am of the view that it bears everything that a judgment worthy of the name has to contain. My view is based on the following facts: First, it shows the offence charged namely rape the particulars of the offence charged and the provision of law under which he was charged. Second, it contains the summary of evidence given by P.W.1, P.W.2 and P.W. 3 who testified on behalf of the prosecution. Third, it shows what the Appellant told the trial court in his defence. Fourth, it gives a brief analysis of the facts of the case as established on evidence, the decision of the trial court and the reasons for the decision. Fifth, it is signed by the trial Magistrate and dated. All this makes me conclude that the 4th ground of appeal has no merit as well and it fails.

With regard to the sentence of 30 years imprisonment which was imposed on the Appellant, this court cannot interfere with it because it is the appropriate statutory sentence that has to be imposed on any person convicted of

rape C/SS 130 (1) (2) (e) and 131 (1) of the Penal Code (Cap 16 R. E. 2002).

For these reasons, I hereby dismiss this appeal in its entirety.

A. F. Shangwa

JUDGE

27/2/2009

Delivered in open court this 27th day of February, 2009 in the presence of the Appellant and Ms Saiga, State Attorney for the Respondent.

A. F. Shangwa

JUDGE

27/2/2009