IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC CRIMINAL APPEAL NO. 4 OF 2010

(ORIGINATING FROM IRINGA DISTRICT COURT

CR. CASE NO. 416/2004

LUKAS NYAKUNGA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

MKUYE, J

The appellant LUCAS NYAKUNGA was arraigned before the District Court of Iringa at Iringa for an offence of rape contrary to sections 130 (1) and 131 (1) of the Penal Code, Cap 16 R.E. 2002. Following a full trial the appellant was not found guilty with the offence of rape instead he was found guilty with an offence of attempted rape. He was then convicted accordingly and sentenced to imprisonment of the term of 30 years. Dissatisfied with both conviction and sentence, he has appealed in this court.

The appellant has fronted 7 grounds of appeal which after a careful scrutiny, they all hinge on one ground that is the prosecution

did not prove the case beyond reasonable doubts. The appellant appeared in person while Mr. Mwandalama learned State Attorney represented the respondent Republic who sought to support the appeal.

The learned state attorney in support of his position of not supporting the conviction and sentence argued that **one**, though PW1, the victim, was aged 14 years old so as not to require proof of lack of consent on her part as per section 130(2) (e) of the Penal Code, her evidence was recorded without viore dire examination being conducted. Hence, he argued, her evidence was reduced to an unsworn evidence that required corroboration. He cited the case of Harman Henjewele V R Crim. App. No. 164 of 2005 Mbeya Registry (Unreported) at pg 17 in support. He further argued, such evidence for corroboration lacked.

Two, PW2, the victims' father and PW3, PW1's young sister's evidence could not corroborate as the two witness did not explain how they identified the appellant when considering that the offence was committed at about 19.00 hrs (night). PW1 also did not clearly establish how she identified the appellant as she said when appellant arrived he kicked the lamp, got hold of her and raped her.

The learned state attorney further attacked PW3's evidence in that though viore dire examination was conducted, the trial magistrate did not satisfy himself that PW3 understood the duty of speaking the truth. And that rendered PW3's evidence to the level of unsworn evidence which could not corroborate the evidence of PW1.

Three, there were irregularities in the proceedings, Mr. Mwandalama contented, in that the preliminary hearing was not

conducted as provided for under section 192 of the Criminal Procedure Act and that the trial of this case was not conducted in camera as required under section 186 (3) of the CPA and Section 3 (5) of the Children and Young Persons Act, Cap 13 R.E.2002.

It is quite true that where the offence of rape is committed to a girl under the age of 18 years the prosecution is not required to prove lack of consent. Section 130(2) (e) of the Penal Code is clear on this. It provides:

> *"A male person commits an offence of rape if he has sexual intercourse with a girl or a woman under the circumstances falling under any of the following description:*
>
> *a) .....*
> *b) .....*
> *c) .....*
> *d) .....*
> *e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man"*

The major issue, however, is whether, even without proving lack of consent there is sufficient evidence to warrant conviction of the appellant.

It is common ground that PW1, the victims' evidence was relied upon in convicting the appellant. PW1 was 14 years old when she testified and as such, under section 127 (2) of the Evidence Act viore

dire test was required to be conducted before the reception of her evidence.

Section 127 (2) of the Evidence Act provides:

> *"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 oath, his evidence may be received though not on 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".*

Subsection (5) of section 127 defines "a child of tender age" to mean "a child whose apparent age is not more than fourteen years".

In the instant case, though PW1 was not aged 14 years, no viore dire examination was conducted so as to ascertain whether she possessed sufficient knowledge to justify reception of her evidence or not (See Dhahiri Ally V Republic (1989) TLR 27, Also See Vernard Costa V R Crim. App No. 229 of 2007 (Arusha) Unreported. It is therefore not known whether PW1 understood the nature of oath or not. Nor is it established whether she possessed enough intelligence to justify the reception of her evidence and she understood the duty of speaking the truth. Under this situation, the trial magistrate failed to comply with the mandatory provisions of section 127 (2) of the Evidence Act.

Many authorities of the Court of Appeal, however, have set a clear position that where the evidence of a child of tender age is received without conducting a viore dire examination, such evidence has to be treated as unsworn evidence (See Deemay Daat and 2 Others V R Crim App. No. 80 of 1994 (CAT) Unreported. Such evidence would, however, require to be corroborated as was held in Harman Henjewele Case (supra). In that case it was held:

> *"..... the evidence of a child of tender age which is given on oath but without conducting viore dire examination under section 127(2) of Evidence Act should be treated as unsworn evidences which requires corroboration".*

PW1 gave unsworn evidence. As such as explained above it requires corroboration.

The question is whether there is evidence that can corroborate it.

As quite rightly expounded by the learned state attorney, the evidence that would be taken to corroborate PW1's evidence is that of PW2 and PW3. The evidence of the two witnesses, however, as rightly explained by Mr. Mwandalama cannot be taken to corroborate PW1's evidence because, **one**, PW1's evidence that on arrival the appellant kicked the lamp, got hold of her and raped her shows that it was dark. Thus a lamp was lit to provide illumination. PW3 then rushed to call her father (PW2) who was at a neighbouring house. This witness did not explain how she was able to identify the appellant at night and for that matter when taking into account that the lamp was kicked away. PW2 as well said, at his arrival at the scene of crime he saw the appellant whom overpowered him and he failed to apprehend him.

This witness as well did not explain how he managed to identify the appellant during darkness. Moreover, PW1 herself did not explain the light and its intensity which enabled her to identify the appellant. It means, none of the three witnesses explained the light which enabled him/her to identify the appellant. Light is very crucial in visual identification especially so during the night. Not only that, but its intensity has to be explicitly stated (See Kulwa Makwajape and 2 Others V R Crim. Appeal No. 35 of 2005.

In totality PW1, PW2 and PW3's evidence regarding identification was not watertight. PW2 and PW3's evidence which in essence hinged on identification was not sufficient to corroborate PW1's evidence.

Further to that, the evidence of PW3 fell short on its reliability. It did not as rightly submitted by the learned state attorney comply with the requirements of Section 127(2) of the Evidence Act and also as was stated in Dhahiri's case (supra).

PW3 was 11 years old. After viore dire examination was conducted, the trial magistrate was satisfied that she did not understand the duty of speaking the truth. This means, her evidence was treated as unsworn evidence which required corroboration in itself as it was held in Vernard Costa @ Nsuri V R Crim. App. No. 229 of 2007 (Unreported) where it was held:

> *"The unsworn statement of PW1 required corroboration to found a conviction of the appellant".*

It is however, trite law that the evidence requiring corroboration cannot corroborate other evidence required to be corroborated. (See

Hatibu Gandhi and Others V R (1996) TLR 12 at pg 61 while citing the case of Palalar Melaram Bassan and Wathiobia s/o Kyambuu V R (1961) E A 521 at pg 530 where the East African Court of Appeal stated:

> *"It is true that as a general rule evidence which itself requires corroboration cannot provide corroboration for other evidence also requiring corroboration".*

Under the circumstances, the evidence of PW3 for this reason could not also corroborate PW1's evidence.

At the end of the day after going through the whole record, I could not find any evidence which corroborated PW1's evidence that it was the appellant who raped her.

There were procedural issues raised by the learned state attorney regarding non conducting of preliminary hearing under section 192 of Criminal Procedure Act and failure to hold the trial of this case in camera inaccordance to the provisions of section 183(3) of the CPA and section 3 (5) of the Young Persons Act Cap 13 R.E. 2002 since it involved a child of a tender age. I find the observations to be valid as indeed, preliminary hearing was not conducted. Equally, the proceedings of this case were not held in camera. The learned state attorney did not, however, state whether the shortcomings were fatal or not so as to invalidate the proceedings.

With regard to failure to conduct preliminary hearing it was held in Pagi Msemakweli V R TLR 331:

"That unless the omission to conduct a preliminary hearing had resulted in an unfair trial leading to a failure of justice, which was not the case in casu, it could not be held to be fatal to a proceedings".

In this case as well, I did not see any indication that unfair trial was occasioned to the appellant due to failure to conduct the same. The appellant had cross examined the prosecution witnesses and was also given an opportunity to defend himself.

With regard to non compliance with section 183 (93) of CPA and section 3 (3) of the Children Young Persons Act it is equally true. There are ample authorities that if failure to comply with the same occassioned miscarriage of justice to the appellant then the irregularity is fatal. (See Laureno Mseya V R Crim. App. No. 430 of 2007 (Mbeya) (Unreported). In this case equally I find that there was no failure of justice on the part of the appellant as he cross examined the children of tender age and they gave rational answers to the questions posed to them. After all, if anything that failure of justice would have affected the victim due to her age and not the appellant. (See Laureno Mseya's case) (supra).

But be it as it may, in this case, since the identification evidence was not watertight together with the absence of corroboration evidence to corroborate PW1's evidence, I like the learned state attorney, am of the firm view that there was no sufficient evidence to found conviction of the appellant.

In the event, with the aforegoing reasons, I allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released forthwith unless otherwise lawfully held.

R.K.MKUYE

JUDGE

21/7/2010

Right of appeal explained.

R.K.MKUYE

JUDGE

21/7/2010

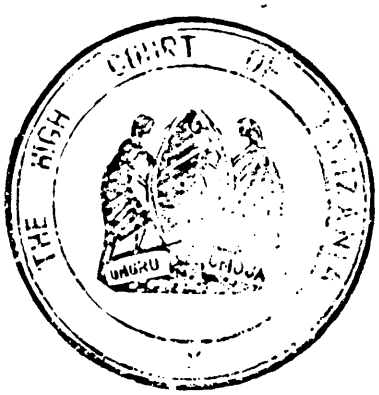
Coram: R.K.Mkuye, J

For Appellant: Present

For Respondent: Ms Ngilangwa State Attorney

C/C: Mr. Charles

Delivered on this 21st day of July 2010 in the presence of Lucas Nyakunga the appellant and Ms Ngilangwa State for Republic.



R.K.MKUYE

JUDGE

21/7/2010