IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO. 58 OF 2012

(Original Mtwara District Court Criminal Case

No. 290 of 2009 before F. A. Kahamba Esq. – RMD)

MUSA SAIDI ----------APPELLANT

VERSUS

THE REPUBLIC ----------RESPONDENT

JUDGMENT

7th August 2013 and 13th September 2013

M. G. MZUNA, J.:

Musa Said, was charged with Rape contrary to section 130 (2) (e) of the Penal Code Cap 16 R.E. 2002 but he was convicted with the offence of Attempted Rape contrary to section 132 (1) (2) (a) of the Penal Code and was sentenced to serve thirty years imprisonment. The appeal is against both the conviction and sentence.

The first issue is whether the evidence was received in accordance to the law?

That issue is founded on the following facts:

(PW1) Fatuma Shafii the victim, a child then aged 14 years old, said that she went to the shamba with her mother and PW2 Duwa d/o Abdallah aged 13 years old. In compliance with their mother's direction

PW1 and PW2 went at Likweta to pick up mangoes. They found the appellant whom they greeted him. Upon going to the mango trees, the appellant followed them and was holding a matchet (panga), and *bisibisi*. He then started to throw to them mango covers, and blocked the way, the appellant told them "mimi nataka miili yenu, mkipiga kelele nawaua". PW.2 ran away, PW1 wanted to run too but the appellant way laid her then she fell down. He proceeded to undress her and then inserted his penis into her vagina. She shouted for help but the appellant covered her mouth and threatened to kill her with bisibisi and upanga. The appellant ran away after he had seen Salma Ahmad Lihuhunga (PW3). She was however told about what transpired by Pw.1 herself. She in turn told PW.4 Said Mchaga. The matter was reported to the police where the PF. 3 (Exh. P. 1) was issued.

The appellant denied to have committed this offence.

During the hearing of his appeal, the appellant appeared in person to argue his appeal while Mr. Mseti, the learned State Attorney appeared for the Republic Respondent.

It was the argument of Mr. Mseti, the learned State Attorney that he supports the appellant's appeal for the reason that the evidence which connected the appellant with the offence is that of PW.1 and PW.2 who were the children of tender age but their evidence was received in contravention of Section 127 (5) of the Tanzania Evidence Act as the magistrate did not conduct ***voice dire*** test under section 127

(2) of the said Act so as to know if they possessed sufficient intelligence and if they knew the duty to speak the truth. He cited the case of **Mohamed Sainyeye vs. R.** Criminal Appeal No. 57 of 2010, CAT at Arusha (unreported).

The appellant joined hands with the submission of the learned State Attorney.

It is not disputed that the evidence which connected the appellant with the offence he was charged with is that of PW1, PW2 and PW3 and the PF3.

As rightly submitted by the learned State Attorney, the record shows that though PW.1 and PW.2 are children of tender age as provided under section 127 (5) of the Tanzania Evidence Act, CAP 6 R. E 2002 but the magistrate never conducted ***voire dire*** test as well spelt out under section 127 (2) of the said Act.

That provision of the law had received the interpretation of the court in the case of **God Kasenegala vs. R** criminal Appeal No. 10 of 2008 CAT at Iringa (unreported). Rutakangwa, J.A had this to say at page 29:

> "...unsworn evidence of a child received outside the ambit of the provisions of section 127 (2) is as good as no evidence at all in criminal trial. It should always be discarded or discounted".

His lordship was making emphasis on the need for the court before receiving the evidence of the child of tender age to ensure that two prerequisite conditions were met namely that "**she possessed sufficient intelligence to justify the reception of her evidence** and that **she understood the duty to speaking the truth.**" The above conditions must go in conjunction that is, must go hand by hand not in isolation.

The record of the trial court is silent and the ultimate effect is to have the evidence of Fatuma Shafii (PW.1) the key witness discounted as her evidence just like that of PW.2 were wrongly received and acted upon without conducting ***voire dire*** examination which is mandatory as it was so held in the case of **Mohamed Sainyeye vs. R. (Supra).**

The second issue is whether there was a material irregularity for failure to inform the appellant the right to call the Doctor who examined the victim and filled the PF.3?

The learned State Attorney never commented on this aspect which appears in the seventh ground of appeal.

According to the court record, the PF3 was tendered by PW.1 the victim and the trial court received and admitted it as exhibit P1. So the PF.3 was wrong received and admitted by the court that is so because the PF. 3 was tendered by PW.1 instead of the Doctor who filled it. Further, the appellant was not informed of his right to require the doctor who made the PF. 3 to be summoned/make available for cross

examination of the said PF3 he made. Therefore the PF3 was wrong admitted, as it contravenes the provision of section 240 (3) of the Criminal Procedure Act Cap 20 R.E. 2002 and it is hereby expunged from the evidence. That position of the law was reiterated in the case of **Nyambuya Kamuoga vs. R,** Criminal Appeal No. 90 of 2003 CAT at Dodoma, unreported. The court reaffirmed the earlier on decision in the cases of **Sultan Mohamed vs. R,** Cri m. Appeal No. 176 of 2004 (unreported) where it was held that:

> "We are of the settled view that the trial court's omission to explain to the appellant his right to have the medical doctor who prepared the PF3, Exhibit P1, summoned to testify at the trial, was a fundamental irregularity which could have occasioned miscarriage of justice".

I would adopt the same stand that there was a miscarriage of justice for the trial magistrate's failure to inform the appellant to have the medical doctor who prepared the PF3 summoned as a witness. The said PF.3 has to be expunged from the record. The second issue is answered in the affirmative.

The third issue is whether it was imperative to conduct the identification parade?

The learned State Attorney attacked the evidence of PW3 in that in her evidence she did not state on the issue of identification. That, though she said she saw the appellant running but she never said the clothes he wore and if she knew her before. He further stated that there

was no identification parade which was conducted. PW2 said "kuna mtu asiyefahamu amembaka" and that the absence of the identification parade rendered the evidence of the prosecution weak.

It was also the argument of the appellant in the memorandum of appeal that there was need to conduct the identification parade.

PW.3 in her evidence stated that she heard somebody crying when she was picking mangoes. She then met with PW.2 who told her that her sister PW.1 "ameshikwa". PW.3 went to look for PW1 and she met PW1 holding her skin tight and told her that she was raped by unknown person. PW3 went to tress the suspect and she saw the appellant running while in short dress holding a panga. That she identified him even after he was apprehended.

The point which raises some doubt is how could PW3 have indentified the appellant at the back while running? I am in agreement with Mr. Mseti, the learned State Attorney that the appellant was not identified by PW3 and therefore the identification parade could have cleared any doubt because identification parade is conducted in the occasions where a witness alleges to have seen and identified the accused at the scene of crime but such person is not known to him prior to the incident. None of the prosecution witness claimed to know the appellant prior to the date of the incident.

The last issue is whether this appeal should be allowed?

The appellant has said that it was wrong to convict him with the offence of Attempted Rape while the witnesses said PW.1 was raped. The learned State Attorney say the appeal should be allowed.

I agree. The trial magistrate was convinced that there was no evidence of rape. This logical conclusion can be seen in the PF.3 (though as I have said should be expunged but even assuming it was anything worth to be used in evidence, it did not corroborate the evidence of PW.1). Seemingly though, the magistrate was filling the gap while knowing for sure that it was upon the prosecution to prove the case beyond all reasonable doubt. The prosecution never discharged that burden to the required standard of proof.

In the result and for the foregoing reasons, I quash the appellant's conviction and set aside the sentence imposed. The appellant is to be set at liberty forthwith, unless otherwise lawfully held.

M. G. MZUNA,
JUDGE.
13/9/2013

Court: Judgment delivered this 13th day of September in the presence of the appellant and absence of the State Attorney, though aware.

M. G. MZUNA,
JUDGE.
13/9/2013