IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 171 OF 2011

[Originating from Morogoro District Court in Criminal Case No. 831 of 2010]

DIVISHENI VALERY . . . . . APPELLANT

Versus

REPUBLIC . . . . . RESPONDENT

Date of last order – 26/3/2013
Date of Judgment – 24/6/2013

J U D G M E N T

Shangwa, J.

The Appellant whose name is Divisheni Valery was charged in the District Court of Morogoro with the offence of rape c/ss 130 (1) (2) (6) and 131 of the Penal Code Cap. 16 R.E. 2002. He was convicted of the offence charged and sentenced to 30 years of imprisonment and given corporal

punishment of 3 strokes of the cane. He was aggrieved by both conviction and sentence. Hence, this appeal.

In his petition of appeal, the Appellant raised six grounds of appeal which appear not to have clearly been framed and are intertwined. During the hearing of his appeal, he stated that he has nothing to add to his grounds of appeal. In effect, considered as a whole, the Appellant's grounds of appeal are critical of the evidence given by P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5 for being inadmissible in evidence and contradictory in nature. For instance, on ground 3 of his appeal, the Appellant alleges that the trial Magistrate accepted the evidence of P.W.1 and P.W.2 which is hearsay. On ground 4 of his appeal, the Appellant alleges that the trial Magistrate accepted the evidence of P.W.2, a child of tender age. On grounds 1, 2 and 5 of his appeal, the Appellant alleges that the trial

Magistrate wrongly accepted the evidence of P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5 that he committed the offence charged while he did not do so. The Appellant alleges also that the trial Magistrate was wrong in accepting the evidence of P.W.3 which was contradictory about her age in the sense that whereas the charge sheet shows that she was 70 years old on the date of the incident, in her testimony, she told the court that she was 64 years old. On ground 6 of his appeal, the Appellant alleges that the trial Magistrate wrongly accepted PF3, exhibit P1, which indicates that no spermatozoa was seen in the victim's vaginal carnal.

To start with, I wish to consider the Appellant's allegation on the 3rd ground of appeal. That is as to whether or not the evidence given by P.W.1 and P.W.2 which is alleged by the Appellant to be hearsay is hearsay.

During his reply submissions, the learned State Attorney Miss Mshanga stated that the evidence of P.W.1 and P.W.2 is not hearsay as alleged by the Appellant. I have gone through the evidence of P.W.1 Antongig Kanuti and the evidence of P.W.2 Greyson Jones. After doing so, I found that their evidence, as correctly pointed out by the learned State Attorney for the Respondent is not hearsay. In my view, although P.W.1 testified before the trial court that when he went to his mother in law's house at Pinde village in Mgeta Division, Mvomero District in Morogoro Region, his children namely Greyson and Elizabeth Kalori told him that they saw the Appellant taking his mother in law Tassiana Grioni – (rape victim) to the banana trees, it does not mean that what he told the trial court is that he was told by his two children that they saw the Appellant raping Tassiana Grioni. What P.W.1 told the trial court is direct evidence that after being informed by his children that the

Appellant had taken Tassiana Grioni to the banana trees, he went there and saw the Appellant running away from Tassiana Grioni and that he found Tassiana Grioni lying down and feeling pain for having been raped. He said that the incident was reported to the police and Tassiana Grioni went to Hospital for being examined. P.W.2 also told the trial court of what he saw and not of what he was told by anybody. This witness told the trial court that he saw the Appellant taking Tassiana Grioni to the banana trees from where Tassiana Grioni complained that she was raped by him. Thus, as the evidence of P.W.1 and P.W.2 is not hearsay, it was correctly admitted by the trial court.

Let me now consider the Appellant's allegation on the 4th ground of appeal. It is true that when P.W.2 Greyson Jones gave his testimony on 23/3/2011, he was a child of tender age within the meaning of s. 127 (5) of the Evidence

Act Cap. 6 R.E. 2002 which defines a child of tender age to be a child whose age is not more than 17 years. However, in law, the evidence of a child is admissible in evidence. It is admissible under s. 127 (2) of the Evidence Act, Cap. 6 R.E. 2002 in cases where the court is of opinion that the child is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth. In this case, it is patently clear that the learned trial Magistrate accepted his evidence after being satisfied that he possessed sufficient intelligence and he understands the duty of speaking the truth. She was so satisfied after conducting a VOIRE DIRE.

Let me now go to the Appellant's allegation on the 1st, 2nd and 5th grounds of appeal. On these grounds of appeal, P.W..3's evidence is described by the Appellant to be scanty and contradictory.

In my view, the evidence of P.W.3 is neither scanty nor contradictory in any material way. Her testimony was quite brief. She said that she knew the Appellant before the incident. That on 23/12/2010, the Appellant went to her home, caught her hand and took her to the banana trees from where he took off her clothes and raped her.

It is true as alleged by the Appellant that the charge sheet shows that the complainant is 80 years old and that in her testimony before the trial court she said that she is 64 years old. However, as correctly pointed out by the learned State Attorney, the issue of the complainant's age is immaterial in so far as his appeal against conviction and sentence is concerned.

On grounds 1, 2 and 5 of his appeal, the Appellant is also saying that the evidence which was given by P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5 is untrue and that therefore

the trial Magistrate was wrong in accepting it and convicting him on it. In my opinion, I do not agree with the Appellant's allegation that the evidence of P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5 is untrue. The totality of their evidence proves beyond reasonable doubt that the Appellant raped P.W.3. The following is what each of those witnesses told the trial court.

P.W.1 Antongig Kanuti told the trial court on oath that he saw the Appellant running away from P.W.3 in the Banana trees. P.W.2 told the trial court that he saw the Appellant taking P.W.3 to the Banana trees from where he raped her. P.W.3 herself told the trial court on oath that she was raped by the Appellant. P.W.4 told the trial court that after examining P.W.3's private parts, he concluded that she might have been raped. P.W.5 told the trial court that he is the one who investigated the crime in issue and

decided that the Appellant should be charged and prosecuted for raping P.W.3 who is a dumb woman.

As I have already stated, the totality of the evidence given by the prosecution's witnesses proves beyond reasonable doubt that the Appellant did rape P.W.3. Again as correctly pointed out by the learned State Attorney in her reply submissions, the question of assessing the credibility of any witness in any case entirely rests on the trial court.

The appellant's allegation on the six ground of appeal appears to be true that the Doctor who examined P.W.3 indicated on the PF3 that no spermatozoa was seen in her vaginal carnal. In my opinion, despite the fact that no spermatozoa was seen in P.W.3's vaginal carnal, there were minor bruises seen inside there. Let alone that, there is sufficient and independent evidence to show that P.W.3

was raped by the Appellant. Moreover, in order to establish that rape has been committed, it is not necessary that spermatozoa should be seen in the complainant's vaginal carnal taking into consideration the fact that sometimes a man may fail to ejaculate when sexual intercourse takes place.

For these reasons, I find that the Appellant was properly convicted of rape by the trial Magistrate. The sentence of 30 years imprisonment which was imposed on him was well imposed under s. 131 (1) of the Penal Code Cap. 16 R.E. 2002. I therefore dismiss the Appellant's appeal in its entirety.

A. Shangwa

JUDGE

24/6/2013

Delivered in open court this 24th day of June, 2013 in the presence of the appellant and Mr. Lugaju State Attorney.

A. Shangwa

JUDGE

24/6/2013