IN THE HIGH COURT OF TANZANIA
AT MOSHI

(DC) CRIMINAL APPEAL NO.141 OF 2003
(IN THE DISTRICT COURT OF SAME AT SAME
ARISING FROM CRIMINAL CASE NO.80 OF 2003)

MSAFIRI SIDONI .....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

JUDGEMENT

Hon.Jundu,J.

The Appellant, in the trial court was charged with two counts. In the first count, the Appellant was charged with Rape c/s 130(1) (2) and 131(1) of the Penal Code, Cap.16 Vol.1 of the laws as repealed and replaced by Sections 5 and 6 of the Sexual Offences Special Provisions Act No.4 of 1998. The particulars of the offence were that the Appellant on the 14th day of May, 2003 at about 15.30 hours at Ruvu Muungano within Same District in Kilimanjaro Region did have carnal knowledge of one Salima d/o Adamu, a girl aged 10 years. In the second count, the Appellant was charged with threatening with violence c/s 89(2) (a) of the Penal Code, Cap 16 of the laws. The particulars of the offence were that the Appellant on the 20th day of June, 2001 at 13.00 hours at Ruvu Muungano within Same District in Kilimanjaro Region did threaten to kill one Vuza s/o Halima by a spear in such a manner likely to cause a breach of the peace.

In the trial court, the prosecution side had called seven witnesses to prove its case. These were Halima Adamu (PW1) who was aged 10 years according to the charge sheet, she was the complainant, Hadija Adamu (PW2), the grandmother of PW1, Hassani Selemani (PW3) who was of tender age, Hussein Selemani (PW4) who was also of tender age, Vuzo Halima (PW5) aged 59 years, Jacob Lambala (PW6) aged 29 years, and Dr.Raymond Urasa (PW7) who had examined and treated PW1 as per PF3 (Exhibit "P1"). The Appellant Msafiri Sidoni (DW1) and his wife Rose William (DW2) testified for the defence side.

Having heard the evidence of the above witnesses, the trial magistrate was satisfied that the complainant (PW1) was carnally known by the Appellants as far as the first count was concerned. He stated that

> "I am satisfied that the prosecutrix (PW1) was carnally known due to the evidence of PW1 and the evidence of PW2 who was told by PW3-4 that PW1 was carnally known and PW3 did follow PW1 to the wilderness and saw her being carnally known and she was so known due to the hymen being perforated and I presume that it was perforated by male organ.
> Although PW1 is somehow having mental retaradation but I think she knew that she was raped or carnally known and the fact that PW2 was told by accused that PW1 was there to be fucked."

As far as the second count was concerned, the trial magistrate stated as follows:

> " Also I am satisfied that the complainant (PW5) was threatened by the accused person on 20/6/2001 due to the evidence of PW5 which was corroborated by the evidence of PW6."

As regards the defence evidence of the Appellant the trial magistrate stated

> "The accused person Msafiri Sidoni (DW1) in his evidence said that on 14/5/2003 he was caught, sent to Ward Office in Muungano and on the following day he was taken to Police. On 16/5/2003, he was arraigned in this court but that he could not commit such offence."

The trial magistrate as far as the defence of the Appellant was concerned stated further that

> "I have considered the evidence of the accused person that he did not commit such offences and I have viewed it to be just an afterthought for he did not say that prosecution witnesses have had grudges with him so as to frame him for the offence of rape and that of threatening."

Having so found as above stated, the trial magistrate convicted the Appellant on both counts as charged and sentenced him to 30 years imprisonment on the first count and to one year imprisonment on the second count. The sentences were to run concurrently and he also ordered the

Appellant to pay shs.40, 000/= as compensation to the complainant (PW1). Aggrieved by the conviction, sentence and order by the trial magistrate, the Appellant has appealed to this court listing five (5) grounds of appeal in his Memorandum of Appeal namely:-

(1) That the learned trial court magistrate erred in both law and fact for convicting the Appellant with an offence which was not established beyond the standard required by the law.

(2) That the learned trial court magistrate erred in law for convicting the Appellant without first considering that PW1, PW3 and PW.4 were young children under the tender age and therefore the evidence which they adduced before the court they claimed that they were taught e.g. refer to page 3 paragraph of the typed court proceedings and page 4 of the typed court proceedings paragraph 6.

(3) That the learned magistrate failed to consider that the evidence which was adduced by the prosecution side was insufficient to warrant conviction against the Appellant as it lacked enough elements.

(4) That the learned magistrate gravely erred both in law and fact for convicting the Appellant with a hearsay evidence and uncorroborated which is against the law.

(5) That the learned magistrate ought to note that PW5, and PW6 lied before the court that PW5 was threatened by the Appellant and the spear was thrown at by him.PW5 having created fabrication, the evidence could not be relied on.

Based on the aforesaid grounds of appeal, the Appellant in his Memorandum of Appeal prayed to this court to allow the appeal, quash and set aside the conviction, sentence and the compensation order imposed on him by the trial magistrate and that he be released from the prison immediately. The Appellant argued the appeal in person while Mr.Maugo, the learned State Attorney appeared for and represented the Republic/Respondent.

In my considered view, the grounds of the appeal in the Memorandum of Appeal can be considered and determined collectively as submitted by Mr.Maugo, the learned State Attorney. The main contest in these grounds of appeal is that the prosecution side at the trial court did not prove its case beyond reasonable doubt and that the trial magistrate therefore erred to convict the Appellant on insufficient, hearsay and uncorroborated evidence. Mr.Maugo, the learned State Attorney in his submission insisted that based on the evidence of PW1, PW3, PW4 and PW7, the prosecution had proved its case beyond reasonable doubt hence the conviction on the Appellant was proper. He contended that the evidence on record shows that the Appellant took PW1, in the presence of PW3 and PW4 to the bush and that PW3 witnessed the Appellant raping PW1 in the said bush as he found the Appellant to be on top of PW1. He also referred to the evidence of PW7 who medically examined PW1 and tendered PF3 that is Exhibit "P". In the circumstances, he argued that all the ingredients for the offence of rape existed and referred this court to Section 130(2) (b) and (e) of the Penal Code. He further argued that as the evidence showed that PW1 was mentally retarded and aged 9 years old it is clear to him that she did not consent to the act of rape by the Appellant. He submitted that the evidence of PW1, PW3 and PW7 did not need corroboration nor was it hearsay evidence. Save that Mr.Maugo contended that whereas in the charge sheet the Appellant is said to have committed the offence at 15.30 hours, PW2 who is the grandmother of PW1 in her evidence alleged that the Appellant committed the offence at 15.00 hours. He argued that the evidence on record showed that PW1 at the said 15.00 hours was coming back from her shamba and on arrival home she met grandsons PW3 and PW4 who told her that the Appellant had taken PW1 to the bush and thereafter PW2 saw PW1 coming back and told her that she had been taken by the Appellant to the bush and had raped her. Based solely on the said difference on the time when the act of rape was committed by the Appellant, Mr.Maugo prayed to this court to order a retrial of the Appellant.

In his short rejoinder submission, the Appellant contended that there is evidence on record to show that PW.1 did not recognise or identify him but the trial magistrate bruished it aside. He also contended that the evidence of PW.2 as to the time when the offence was committed differs to the time stated in the charge sheet and that there was also a time lag of 2 days from the day PW.1 alleged to have been raped on 14/5/2001 to the time PW.7 conducted medical examination on PW.1 on 16/5/2002. Infact, he argued that Exhibit "P1", the PF3 should not have been relied upon by the

trial magistrate because PW.7 stated in the said exhibit that he did not see any sperms in her examination of PW.1

In my considered view, the finding of the trial magistrate that he was satisfied that PW.1 was carnally known by the Appellant due to the evidence of PW.1 and the evidence of PW.2 who was told by PW.3 and PW.4 that PW.1 was carnally known and PW.3 did follow PW.1 to the bush and saw her being carnally known is not free from legal shortfalls. First, the evidence of PW.2 who stated that she had been told the story by PW.3 and PW.4 should not have been acted upon by the trial magistrate to convict the Appellant as it was hearsay evidence. Secondly, the evidence of PW.1 who was a witness of tender age was not reliable in that when cross-examined by the Appellant, PW.3 stated

> "PW.2 did tell me to say that Msafiri of Ruvu raped PW.1
> I have not been couched by my grandmother".

Indeed, the evidence of PW.2 showed that PW.3 was his grandson, it followed therefore that if what PW.3 testified is to be believed that PW.2,that is his grandmother had told him to tell the court that, "Msafiri", that is the Appellant had raped PW.1, it means that PW.3 had been couched by PW.2 his grandmother to frame the Appellant in the commission of the offence. The trial magistrate should not have acted on the evidence of PW.3 therefore to convict the Appellant. Thirdly, though in his finding the trial magistrate indicates that he also acted on the evidence of PW.4 to convict the Appellant but the record of the lower court (page 4 of the proceedings) shows that the said witness never adduced any evidence that could be acted upon by the trial magistrate to convict the Appellant. The said witness was of tender age and the trial magistrate stated as follows in respect of the said witness

> "Court: The witness has declined to answer questions and
> I have disqualified him from testifying although at a later
> stage he speaks."

It followed, in my considered view that there was no evidence adduced by PW.4 that could move the trial magistrate to convict the Appellant.

Could the evidence of PW.1 and PW.7 suffice to convict the Appellant? My careful reading of the charge sheet shows that as stated in Count No.1 that the complainant, Halima d/oAdamu (PW.1) was aged 10 while Mr.Maugo in his submission before this stated that the said witness was aged 9 years at the time of commission of the offence. In my considered view, this particular witness (PW.1) was a witness of tender age in terms of Section 127(5) of the Evidence Act, 1967 hence under Section

127(2) of the said Act, the trial magistrate was in law mandatory required to conduct a voire dire test before receiving and acting on the evidence of the said witness. The record (page 2 of the typed proceedings) does not show that the trial magistrate conducted the said test. In my considered view, this procedural defect vitiated evidence of PW.1 adduced in the trial court and the proceedings thereof. The trial magistrate could not act on the evidence of PW.1 to convict the Appellant. This being the case, it followed that the evidence of PW.7, the PF3 (Exhibit "P1") remained in isolation from the evidence of PW.1 hence it could not be acted upon to convict the Appellant.

My careful reading of the proceedings of the lower court shows further procedural irregularities that vitiated them. First, on page 2 of the proceedings, the trial magistrate is on record to have conducted Preliminary hearing. In my considered view this was in compliance with section 192(1) to (3) of the Criminal Procedure Act 1985. However, from what is stated in the proceedings, it is very clear to me that the trial magistrate did not fully comply with the, mandatory provision of Section 192(3) of the said Act. The said provision of the law provides that

> "(3) At the conclusion of a preliminary hearing held under this Section the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed."

The record of the trial court shows that the trial magistrate conducted preliminary hearing and thereafter recorded as follows after the facts of the case had been narrated to him by the public prosecutor:-

"**Admitted facts**: Name, age, tribe and address only."

In my considered view this was grossly insufficient record for the purposes of the mandatory provision of Section 192(3) of the Criminal Procedure Act,1985. First, the scanty "admitted facts" were not reduced in a memorandum as mandatorily required by the said provision. Secondly, the record does not reveal that the same matters were read over and explained to the Appellant who was the accused person in a language that he understands as mandatorily required by the said provision of law. Thirdly, it was not signed by the accused (the Appellant) and the public prosecutor as required under the said provision of law. In my considered view, this non-compliance of the mandatory provision of Section 192(3) of the Criminal

Procedure Act, 1985 vitiated the proceedings and rendered them irregular and a nullity.

Again my close perusal of the charge sheet clearly shows me that it was defective in both counts. Had the trial magistrate exercised due diligence he would have detected the defects and taken the necessary steps to remedy the situation. In the first count, the Appellant, as far as the charge sheet is concerned was charged with "Rape c/s 130(1) (2) and 131(1) of the Penal Code, Cap,16,Vol.1 of the laws as repealed and replaced by sections 5 and 6 of the Sexual Offences Special Provisions Act No.4 of 1998". Section 130(1) of the Penal Code above named declares that

"130-(1) It is an offence for a male person to rape a girl or a woman." Section 130(2) states various "circumstances" ranging from (2) (a) to 2(e) under which a male person commits the offence of rape if he has sexual intercourse with a girl or a woman. It follows that in framing the charge it must state or cite the relevant subsection to specify the circumstances under which the accused is alleged to have raped the victim or the complainant. It must state whether an accused has committed the offence under which subsection of Section 130(2) of the said Act. Now, the charge sheet against the Appellant in the trial court did not specify the relevant subsection of Section 130(2) of the Act under which he was charged.

Further, the second count in the charge sheet was also defective. First, there were typing errors in the "Offence section and law" in which the Appellant was charged. The Appellant in the said court was charged as follows:-

> "**OFFENCE SECTION AND LAW**: Threatening with violence c/s 89 2(a) of the Penal Code Cap.16 of the laws".

Had the trial magistrate been very diligent he would have ordered correction of the charge sheet to read

"**OFFENCE SECTION AND LAW**: Threatening with violence c/s 89(2) (a) of the Penal Code, Cap.16 of the laws."
Secondly, in my considered view, the so called "PARTICULARS OF OFFENCE" stated in the said count left out necessary and indispensable ingredients of the offence created by Section 89 (2)(a) of the Penal Code, Cap.16,Vol.1 of the laws. Section 89(2) (a) of the said law reads as follows

"89(2) Any person who:-

(a) with intent to intimidate or annoy any person, threatens to injure, assault, shoot at or kill any person or to burn, destroy or damage any property,.....
is guilty of an offence and is liable to imprisonment for one year and if the offence is committed at night the offender is liable to imprisonment for two years."

It is clear from the above reading of Section 89(2)(a) of the Penal Code, Cap.16,Vol.1 of the laws that the words "with intent" to intimidate or annoy any person are a necessary and indispensable ingredient of the offence created by the said section. Now, the particulars of the offence in the second count in the charge sheet reads as follows without embodying the said necessary and indispensable ingredient of the offence

"**PARTICULARS OF OFFENCE**: That Msafiri s/o Sidoni charged on 20th day of June, 2001 at 13.00 hrs at Ruvu Muungano within Same District in Kilimanjaro Region did threaten to kill one Vuzo s/o Halima by a spear in such a manner is likely to cause a breach of the peace"

Therefore, the above named particulars of the offence have been stated or framed in such away that they omitted the necessary and indispensable ingredient of the offence created under Section 89(2)(a) of the Penal Code,Cap.16,Vol.1 of the laws.

It may be contended that the Appellant was made aware of the substance of the charges hence he was not prejudicial by the said defects and that the said defects could be curable under Section 388 of the Criminal Procedure Act,1985 or simply that a retrial of the Appellant could be ordered. However, in the present case under appeal, there is more than defective charge and procedural irregularities, there is the problem of the substantive evidence adduced by the prosecution witnesses which as we have seen should not have been acted upon to convict the Appellant. On defective charges, this court wishes to remind trial magistrates what this court(by my brother, the late Sisya, J) had stated in the case of Republic Vs Karim Taibale [1985] TLR 196 that

"Finally, this court wishes to emphasize, once again the desirability of magistrates to go through the charge before admitting the

same, such any exercise should not be done perfunctorily but diligently and for a purpose."

In my considered view, the aforesaid position stated by this court still remains valid todate.

As regards the second count, I have already stated that the charge was defective on the said count for not embodying the necessary and indispensable ingredient of the charged offence. In my considered view, even the finding of the trial magistrate on the said count lacked the said necessary and indispensable ingredient of the offence. He simply stated that

" Also I am satisfied that the complainant (PW5) was threatened by the accused person on 20/10/2001 due to the evidence of PW5 which was corroborated by the evidence of PW6"

The necessary and indispensable ingredient of the offence under Section 89(2) (a) of the Penal Code, Cap.16, vol.1 of the laws as far as the offence of "Threatening violence" is concerned are the words "with intent to intimidate or annoy any person." The finding of the trial magistrate stood short of the said ingredient. Infact, he only held that the complainant (PW5) was threatened by the accused person but he did not go further to state that he was threatened to be killed by a spear as stated in the charge sheet. In my considered view, even the prosecution side in its evidence had failed to vividly establish the said necessary and indispensable ingredient of the offence as created under Section 89(2) (a) of the Penal Code,Cap.16,vol.1 of the laws.

Having pointed out and analysed the problems of the evidence on the prosecution witnesses and the various non-compliance of the mandatory provisions of the law or the procedural irregularities, I find and hold that this appeal has merit and I hereby allow the same. I hereby quash and set aside the conviction sentence and compensation order passed by the trial magistrate on the Appellant. He is hereby set free unless lawfully held under the law. It is so ordered.

F.A.R.JUNDU
JUDGE
24/7/2001