

IN THE HIGH COURT OF TANZANIA

AT MTWARA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.22/2002

ORIGINAL CRIMINAL CASE NO.292/2000

OF THE DISTRICT COURT OF MTWARA AT MTWARA

BEFORE: P.M. MABULA, ESQ DISTRICT MAGISTRATE

HAMISI TAUSI-----APPELLANT

Versus

THE REPUBLIC-----RESPONDENT

JUDGEMENT

KAGANDA,J

The appellant was charged and convicted of the offence of Rape contrary to section 130 of the penal code cap.16 Vol.1 as amended by section 5(2) of the sexual offence Special Provision Act No.4 of 1998. The Appellant is appealing against both the conviction and sentence. It is argued that the charge was defective, that the appellant was not seen committing the offence by any witness. Honourable Judge Mandia on admitting the appeal made the following comment:-

" Voire dire conducted improperly. No evidence of arrest and charge".

The record of the trial Court show that the appellant in this case was charged under the above mentioned law. He was sentenced to 30 years imprisonment. The evidence of the principal witness PW.1 was not properly conducted as such it was inadmissible. As stated by this Court in cases like this one that:-

" Dhahini Ally VR.(1989)TLR.27

that in cases of rape and defilement, the victim is normally the principal witness for the prosecution and in most cases the conviction is based on her evidence.

In this case the victim was 8 years old as such her evidence was to be received under section 127(5) of the Evidence Act. The trial Magistrate after recording PW.1's name one Happy Ainas went on by merely noting that

"VOIRE DIRE EXAMINATION CONDUCTED. She only testified in five sentences that:-

" I know the accused is Hamis. He raped me.
He took me in his room.
He striped off ~~my~~ under wear and took
his penis. I felt pain".

These sentences as they stand are not clear because the description to the act is not sufficient to disclose an offence. The mere stripping off an underwear and taking the penis does not constitute rape.

not.
PW.1 did state on which part of the body the pains were felt. The Oxford Dictionary of Law fourth Edition defines rape as follows:-

" Sexual intercourse (vaginal or anal) with a woman or another man without their "consent, as a result of physical force or threats, or because the person was unconscious"

Similarly, sexual intercourse is defined as:

" The penetration of the vagina by the penis for the purposes of sexual offences the penetration need only be slight.

In this case the medical report was that the victim PW1 was found with bruises genitalia that means the medical officer found bruises on the sexual organ of PW1 without specifying a particular organ. There was no evidence of penetration. As such the offence or act of sexual intercourse has not been disclosed.

The appellant argued on the age, that on the day the offence was committed he was 16 years old but the charge showed he was 19 years. The learned State Attorney disputed on this issue because it was not raised in the memorandum of appeal. I do agree and uphold the objection. The appellant did not raise that issue even before the trial Court. On his mitigation he prayed for leniency claiming that he was young, without disclosing his age. Lastly he argued that all prosecution witnesses were of the same family. This argument is baseless because a witness can be anybody who is conversant with the facts of the case. PW1 is a young girl it is therefore expected that her parents or close relatives would be the first people to get the information.

The learned State Attorney submitted that the conviction was definitely bad and not worthy to be supported. Reasons advanced were that the charge was defective and contradicting on the date when the offence was committed. According to the charge the offence was committed on 1st day of July, PW.2 said the offence was committed on 30th day of June. She recalled her memory and said she reported the matter at Police after a day impliedly suggest the error was made by the Police.

The State Attorney further submitted on this issue that the trial court ought to have resolved it in his judgement. It is therefore not clear as to the date when the offence against the accused was committed. In the event it shades a doubt on the prosecution case. The crucial Issue is on the evidence of PW.1, it was argued that such evidence ought to have been dealt with according to section 127. That Law states:-

(2) " Where in any criminal cause or matter

any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be, received, though not given upon 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".

Defining that Law, this court held in the case of Joseph V.R. (1971) HCD NO. 131 that:

" It is a condition of the reception of such evidence that the trial Magistrate must not only be satisfied that the child understands the duty of speaking the truth but that he must canifestly appear to be so satisfied because section 127 (2) requires him to record such fact in the proceedings ----- and should appear as part of the proceedings relating to the child's evidence".

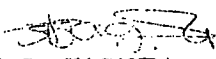
The learned State Attorney cited the case of F. Manji V.R (1966) EA. 343, which had similar decision on same issue. The same was observed in Kibangony Arap Kōlil V.R (1959) EA. 92, Robert s/o Sakila V.R (1967) 57 and William s/o Petro (1968) HCD. 260.

In this case the trial Magistrate failed to comply with the requirement of this Law because he merely recorded that voire dire Examination conducted. In Sakila's case this was held to be a sufficient ground of appeal. Similarly, In Dhahiri's case it was observed that:-

" Such an investigation under S.127(2) need not be a length one but it must be done and the court record must bear witness to it. Failure to comply with renders the evidence inadmissible.

If that is so then there was no evidence to prove the offence and the conviction can not stand. As presented by the learned state attorney a retrial in this case is not a proper cure because their several faults on the prosecution case.

In the event the appellants conviction can not be upheld. The conviction is hereby quashed and sentence set aside. The appellant is to be released from prison forthwith unless he be lawfully held therein. It is so ordered. Appeal allowed.


S.S. KAGANDA

JUDGE

28/10/2003.

Date. 28/10/2003

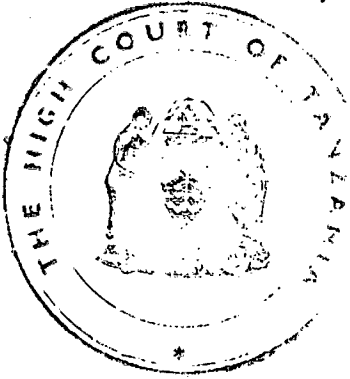
Coram. Hon. S.S. Kaganda, J

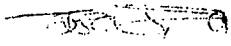
For the Republic: Absent

For the Appellant: Present in person

B/c Tenzi

Court: Judgement read over and delivery to the appellant this 28th
October, 2003.




S.S. KAGANDA

JUDGE

28/10/2003.