

IN THE COURT OF APPEAL OF TANZANIA
AT TANGA



(CORAM: MSOFFE, J. A., KILEO, J.A., AND KALEGEYA, J.A.)

CRIMINAL APPEAL NO 209 OF 2005

BAZIRI HERMAN APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court
of Tanzania at Tanga)

(Longway, J.)

Dated the 22nd day of March, 2002

In

Criminal Appeal No.16 of 2001

JUDGMENT OF THE COURT

29 June & 10 July 2007

KILEO, J.A.:

In the District Court of Muheza, the appellant Baziri Herman was charged with, and convicted of rape contrary to section 130 (2)(e) and 131(1) of the Penal Code. He was sentenced to a prison term of thirty years as well as twelve strokes of the cane. In addition, he was fined 10,000/= and was ordered to pay compensation to the complainant in the sum of 10,000/=. His appeal to the High Court was unsuccessful hence this appeal.

He has listed four grounds in his memorandum of appeal.

He appeared in person at the hearing of the appeal. Mr. Biswalo Mganga, learned State Attorney, represented the respondent Republic.

The four grounds of appeal listed by the appellant can conveniently be reduced to one main ground: -

That the prosecution did not sufficiently establish their charge against the appellant.

The case against the appellant centred on the evidence of one Elizabeth Nyagawa, a child of twelve years who testified as PW1. Her evidence was briefly to the effect that the appellant raped her at a spot where she had gone in search of mangoes after which he threw away her blood stained pants. Thereafter, according to what can be gathered from the evidence, the appellant who is related to PW1 handed over the child to his father. PW1 claimed that the appellant's father locked her in a room in his house where she stayed until her mother (PW2) collected her at 9.pm.

The appellant before us reiterated his innocence insisting that the charge against him was not proved and that it was a frame up.

Mr. Mganga did not support the conviction. He pointed out that since PW1 was a child of tender age, before her evidence

was taken, a *voire dire* examination should have been conducted in terms of section 127(2) of the Evidence Act, 1967 in order to determine whether the child was possessed of sufficient intelligence to justify the reception of her evidence, and understood the duty of speaking the truth. Referring to the case between **Herman Henjewe** & the Republic - **Criminal Appeal no.164 of 2005** (unreported) the learned State Attorney submitted that in view of the fact that *voire dire* examination was not conducted in accordance with the law, then the testimony of PW1 should have been taken as unsworn testimony, which required corroboration. He was of the opinion that there was no such corroboration.

We have given the matter before us serious consideration. This is probably one of those very pathetic cases, which are very poorly managed from investigation point to trial.

It is true, as pointed out by the learned State Attorney, that PW1, who was twelve years old at the time of her testimony was a child of tender age in terms of section 127 (5) of the Evidence Act, 1967, which defines a child of tender age as a child whose apparent age is not more than fourteen years. Being a child of tender age, a *voire dire* examination under section 127 (2) of the Evidence Act was necessary prior to the reception of her evidence. Section 127 (2) provides as follows:

“(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 an oath, his evidence may be received though not given upon 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."

In the instant case, the trial magistrate did not conduct the *voire dire* examination as was required by the law.

This Court, in a number of previous decisions has held that where a child of tender age gives evidence without a *voire dire* being conducted, her/his testimony is to be treated as unsworn evidence requiring corroboration. See for instance **Selemeni Mwitù v. The Republic – Criminal Appeal No 90 of 2000**(unreported), **Deemay Daati and two others v. Republic- Criminal Appeal No 80 of 1994** (unreported) and **Herman Henjewe v. Republic- Criminal Appeal No. 164 of 2005** (unreported).

The question that follows now is whether there was evidence, which corroborated the evidence that was given by the child of tender age.

We agree with the learned State Attorney that there was no evidence on record, which could amount to corroboration. The PF3 filled by the medical staff did not; unfortunately support

the case for the prosecution. We say unfortunately because the way it was filled in and the way the medical examination report was given leaves a lot to be desired. The PF3 reads thus in Swahili:

" MEDICAL EXAMINATION REPORT
TANZANIA POLISI

MGANGA MKUU WA
HOSP MARA
15/12/98

MGANGA MKUU WA HOSP MARAMBA

YAH. ELIZA NYAGAWA

Mtajwa hapo juu inasemekana kuwa amefanya mapenzi kwa nguvu(RAPE) kwa hiyo tunaomba aangaliwe kama kitendo hicho kimefanyika au mtajwa hapo juu ni mzoefu.

R.L. J.Mkmambea.
MKUU WA KITUO
POLISI MARAMBA.

16/12

KUTOKANA MAELEZO YAKO ULIYONITUMA HAPO JUU MTAJWA
ANAONEKANA NI MZOEFU NA HANA MAUMIVU WAKATI
NIKIMPIMA.
(HANA BIKIRA)."

The signature of the Medical staff on the PF3 is not legible.

Roughly translated in Swahili, the contents of the PF3 show that the Officer in command of the Police Station at Maramba was telling the doctor at Maramba hospital that there were allegations that the one mentioned in the PF3 was said to have been raped and was requesting him to ascertain whether there was rape or whether the complainant was "seasoned" in sex. The doctor in turn reported that the complainant appeared to be "seasoned" in sex and had no pain when examined and also that there was no hymen.

The way the police at Maranda handled the case was very pathetic. They prejudged the complainant and they passed over their biases to the medical staff who might also have had his/her own prejudices. It appears that they were both labouring under the misconception that if a girl is not a virgin and is "seasoned" in sex then a charge of rape in respect of that girl cannot stand. This is very unfortunate. Even if a girl is "seasoned" in sex as they thought, it is no reason why a man should have carnal knowledge of her against her will.

Sometimes rapists get away because of such prejudices and justice remains to be in jeopardy. It also appears that the police at Maramba were unaware of the provisions of law which makes it rape where the victim is a child below 18 years whether or not there is consent. Section 130 (2) (e) of the Penal Code provides as follows:

“(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(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 non- conducting of the *voire dire* examination by the trial magistrate also contributed to the weakness of the case against the appellant. The judge who heard the appeal in the first instance appears not to have addressed herself to the non-compliance, by the trial magistrate with section 127 (2) of the Evidence Act and its effect thereof. We think this was a serious misdirection.

Since the law and evidence guide us in execution of our grave duty, we are constrained to find that the case against the appellant was not proved to the standard required in criminal cases.

In the event, we allow the appeal, quash the conviction and set aside the sentence imposed and all other orders made pursuant to the conviction. The appellant is to be released from custody unless otherwise held for lawful cause.

DATED at TANGA this 3rd day of July, 2007

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

L. B. KALEGEYA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




(I. P. KITUSI)
DEPUTY REGISTRAR