

A boarder – Uganda-Tanzania or Kenya Tanzania or Rwanda-Tanzania, for example – which she crossed when entering Tanzania. Those words did not contradict anything in the particulars of offence in the first or second counts on the charge sheet. I, therefore, reject the argument that the pleas are equivocal. The cases of *Shija Mhambo v. Republic* (1) and *Republic v. Omari Isumail* (2) which the learned advocate for the appellant cited to Court in support of his submissions are distinguishable. In those cases the statement of facts did not disclose any offence, which was not the case here. The offences of unlawful entry into Tanzania and unlawful stay in Tanzania were in my view disclosed by the particulars of the offence together with the narrated facts. I dismiss ground 2 of the petition of appeal.

D As regards sentence, let me hasten to say that the order that the imprisonment sentences in default of payment of the fines were to run concurrently was wrong. Just like the fines could not run concurrently, the prison sentences in default of the fines could not be ordered to run concurrently. See the proviso to section 36 of the Penal Code where it stated that it shall not be lawful for a court to direct that a sentence of imprisonment in default of a fine to be executed concurrently with a former sentence under section 29(iii)(a) of the Penal Code.

F I agree with the appellant that the additional sentence of one year imprisonment was illegal and amounted to sentencing her twice on each count.

G The sentences of a fine of shillings TZS. 60 000 or two years imprisonment in default may possibly be considered severe but not excessive. I, however, allow the appeal on the first ground but dismiss it on the second and third grounds. It is so ordered.

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## MARCO s/o GERVAS v. REPUBLIC

HIGH COURT OF TANZANIA  
AT TABORA

(Mwita, J.)

## CRIMINAL APPEAL No. 76 OF 1999

(From the District Court of Shinyanga District at Shinyanga, L Masolwa Esq,  
Principal District Magistrate in original Criminal Case No. 268 of 1998)

*Criminal Law – Rape – Rape where the victim is a child of tender years – Section 130(2)(e) of the Penal Code as amended by Act number 4 of 1998.*

*Evidence – Witnesses – Credibility of witnesses – Assessing the credibility of a witness – Trial Court is best placed to assess the credibility of a witness.*

*Evidence – Evidence of a child of tender years – Unsworn evidence of a child of tender years needs corroboration.*

*Evidence – Corroboration – Sexual offences – Corroboration the evidence of a child of tender years – Section 127(7) of the Penal Code as amended by Act number 4 of 1998*

The appellant was convicted of rape contrary to section 130(2)(e) of the Penal Code as amended by Act number 4 of 1998 and sentenced to life imprisonment. The facts were briefly that the complainant, a girl aged four years, was sent by her mother to take a crying child to its mother in a neighbouring house but the mother of the child was absent. The appellant, who also resided in the same house as the crying child's mother, then took the complainant, undressed her and had sexual intercourse with her. The girl returned to her mother, crying loudly. The mother noticed that she was bleeding from her private parts and the hymen was ruptured. The mother went to see the appellant but he ran away when he saw her. Medical examination on the complainant revealed bruises in the vulva. The complainant was the only eye witness. The Trial Court magistrate stated that he had carefully considered the evidence of the complainant, who was of tender years, and was fully satisfied that she had told the truth.

A **Held:** (i) The Trial Court that sees and hears a witness in the best judge to assess the credibility of such witness rather than an appellate Court that sees only the script of the evidence, often translated;

B (ii) The unsworn evidence of the complainant, who was of tender years, needed corroboration;

(iii) The evidence of the mother of the complainant who had seen the complainant crying was sufficient corroboration in this case.

C **Appeal dismissed**

Cases referred to:

- 1) *Republic v. Ramazani bin Mawingu*, 3 E.A.C.A. 39
- D 2) *Republic v. Kasengedo* [1967] HCD n. 204
- 3) *Jeremius Boramwendo v. Republic* [1967] HCD n. 191
- 4) *Republic v. iddi Noel* [1967] HCD n. 195
- E 5) *DPP v. Hester* [1972] All ER 1056
- 6) *Republic v. Cherop arap Kinei* 3 E.A.C.A. 124
- 7) *Republic v. Wadingombe bin Mkwanda and Said bin Msailanga* (1941) 8 E.A.C.A. 33
- F 8) *Republic v. Manilal Ishwerial Purohit* (1942) 9 E.A.C.A. 58

Statutory provision referred to:

- G 1. Penal Code, sections 127(7), 130(2)(e) and 130(4)

## JUDGMENT

(5 June 2000)

H **Mwita, J.:** Marco s/o Gervas was convicted of the offence of rape contrary to section 13(2)(e) of the Penal Code as amended by Act Number 4 of 1998 and sentenced to life imprisonment by the Shinyanga District Court. Dissatisfied with both conviction and sentence he  
I has appealed to this Court.

A At the hearing of this appeal the appellant appeared and argued the appeal in person. The Republic was represented by Mr Ndunguru learned Senior State Attorney.

B There is evidence on record to the effect that PW1 the complainant, was on 3 August 1998 directed by PW2, her mother, to take a crying child to its mother residing in a neighbouring house. PW1 did as directed. The mother of the crying child was by then absent from the said house. The appellant who also resided in the said house, took PW1 into his room, kissed her on the mouth, undressed her, C put her in bed and raped her. PW1 returned to her mother crying loudly. Her mother, PW2, noticed that PW1 was bleeding from her private parts and that her hymen was ruptured. PW1 informed PW2 that she had been raped by the appellant. PW2, decided to go and D see the appellant regarding the matter. On seeing PW2 approaching his residence the appellant ran away. Medical evidence indicates that there were bruises in PW1 vulva. Laboratory examination revealed no sperms. The bruises in the vulva are a clear indication that there E was penetration. Section 130(4) of the Penal Code provides:

For the purposes of proving the offence of rape:

- (a) Penetration however slight is sufficient to constitute the sexual intercourse F necessary to the offence.

Section 3 of the Sexual Offences Special Provisions Act 1998 provides, *inter alia*:

G Sexual intercourse – whether natural or unnatural, shall, for the purpose of proof of a sexual offence, be deemed to be complete upon proof of penetration only not the completion of the intercourse by the comission of seed.

H In the instant case, so long as there is evidence of penetration, sexual intercourse necessary for the offence of rape has been established. As the victim was below 18 years of age in terms of section 130(2)(e), it is immaterial whether sexual intercourse was carried out with or I without her consent.

A There was only one eye witness to the commission of the offence of rape in this case. That eye witness was PW1, the complainant. It is an established practice that corroboration is looked for the sexual offence: *Republic v. Ramazani bin Mawingu* (1); *Republic v. Charles Kisengendo* (2). Corroboration is also required in case of evidence of children of tender years: *Jeremius s/o Beramwendo v. Republic* (3). DW1 was aged about 4 years old. As she did not give evidence on oath, corroboration was required: *Republic v. Iddi Noel* (4).

C In discussing the reason for the requiring corroboration in respect of evidence by complainants in sexual offence, accomplices and children of tender years, Lord Diplock in *DPP v. Hester* (5) at page 1073 said:

D The danger sought to be obviated by the common law rule in each of these three categories of witnesses is that the story told by the witness may be inaccurate for reasons not applicable to other competent witnesses: Whether the risk be of deliberate inaccuracy, as in the case of accomplices, E or an inattention and accuracy as in the case of children and some complainants in cases of sexual offences. What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged. F

In *Republic v. Cherop arap Kinei and another* (6) the East African Court of Appeal said:

G On a charge of indecent assault or any sexual offence, even though the person against whom the offence is alleged to have been committed be an adult and not a child of tender years, the jury should be directed that it is not safe to convict upon the uncorroborated testimony of the complainant but that if they are satisfied of the truth of the complainant's evidence, H they may, after paying attention to that warning nevertheless convict.

It was held that if such warning be not given the conviction cannot stand.

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A It would appear however, that the legislature has decided to do away with the need for corroboration in sexual offences in certain circumstances. Section 127(7) of the Penal Code as amended by Act Number 4 of 1998 provides:

B Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of child of tender years or of a victim of the sexual offence, the Court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the Court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth. D

The trial Magistrate referred to the above provisions and concluded that in the light of the circumstances of this case the accused did commit the crime with which he is charged. He went on to say:

E To arrive at this conclusion I have first of all warned myself quite carefully on the testimony of the child of tender years (PW1) yet am fully satisfied that due to her credibility she has told nothing but the whole truth.

F When it comes to assessing the credibility of a witness the Trial Court that sees and hears the witness is the best judge rather than an appellate Court that sees only the transcript often translated. I have no reason to fault the finding of the trial magistrate.

G I have one comment to make. The trial magistrate appears to have been of the view that there was no corroborative evidence in this case. In my opinion the evidence by PW3 appears to be corroborative evidence in this case. In my opinion the evidence by PW3 appears to corroborate PW1's story. PW3 told the Court that on the material day and time he saw PW1 crying, seated and leaning against the appellant. H It is not necessary that corroborative evidence should by itself be sufficient to support a conviction: *Republic v. Wadingombe Bin Mkwanda and Said Bin Mailanga* (7); *Republic v. Manilal Ishwerial* I

A *Purohit* (8). What is required is that there should be independent testimony corroborative of the evidence of the complainant in some material particular implicating the accused or tending to connect him with the crime with which he is charged.

B For the above reasons the appeal is dismissed.

C **NCHAMBI KIIJA v. FRANCIS MSALIKA AND MHELA KAYOKA**

D **HIGH COURT OF TANZANIA  
AT TABORA  
(Mwita, J.)**

E **CRIMINAL APPEAL No. 11 OF 1998**

(Original Criminal Case No. 49 of 1997 in the District Court of Meatu District, at Meatu, MR Mlawa, Senior District Magistrate)

F *Criminal Practice and Procedure – Appeals – Whether an aggrieved victim of a crime can appeal against a decision of a District Court where the DPP does not appeal – Sections 20(1) and 25(1) of the Magistrates Courts Act 1984.*

G *Criminal Practice and Procedure – Appeals – Whether the High Court can order the DPP to lodge an appeal.*

H The respondents were charged with cattle theft in the Meatu District Court. At the conclusion of the trial they were found not guilty and acquitted. The DPP did not appeal against the acquittal. However Nchambi Kija who was the complainant and gave evidence as PW1, being aggrieved by the District Court's decision appealed to the High Court.

I **Held:** (i) In cases originating from District Courts, only the DPP has the right of appeal;

(ii) The exercise of prosecutorial discretion appertains to the DPP and is not subject to the judicial control except in rare cases where such discretion is exercised in such a way as to result in an abuse of the Court process.

***Appeal struck off***

Cases referred to:

- 1) *Fanuel Msengi v. Peter Mtumba* [1992] T.L.R. 109
- 2) *Sylvery Nkangaa v. Rafael Alberto* [1992] T.L.R. 110
- 3) *Umbwa Mbegu v. Republic* [1969] HCD n. 312
- 4) *Paul v. Republic* [1971] HDC n. 124

Statutory provisions referred to:

1. Magistrate Courts Act 1984, sections 20(1), 20(1)(a) and 25(1)
2. Penal Code, section 268
3. Criminal Procedure Act 1985, sections 90, 359, 359(1), 378(1)
4. Criminal Procedure Code Chapter 20, section 312

*Mr Mtaki*, for the Appellant

*Mr Kayaga*, for the Respondents

*Mr Kabuguzi*, appeared as a friend of the Court.

**JUDGMENT**

(Delivered 5 June 2000)

**Mwita, J.:** Francis Msalika and Mhela Kayoka stood trial at Meatu District Court charged with the offence of cattle theft contrary to section 268 of the Penal Code in that on 18 March 1997 at Mwabasalu Village, Meatu District the said Francis Msalika and Mhela Kayoka did steal 8 cows the property of one Luhende Hunda. At the conclusion of the trial the accused persons were found not guilty and acquitted. The Director of Public Prosecutions did not appeal against the acquittal.