IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 76 OF 2007
ORIGINAL CRIMINAL CASE NO. 39 OF 2007
FROM THE DISTRICT COURT OF MASASI
BEFORE: M.O. LILIBE, ESQ: PDM
JOHN MUSSA MALAVI ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

DATE OF LAST ORDER - 22/10/2007
DATE OF JUDGMENT - 05/12/2007

JUDGMENT

MJEMMAS, J.

The appellant, John s/o Mussa @ Pointer was charged, tried and acquitted of rape c/s 130 and 131 of the Penal Code by the District Court of Masasi. He was, however, found guilty of alternative offence of grave sexual abuse c/s 138 C (1)(a) and 2(b) of the Penal Code, Chapter 16 of the Laws as amended by Act No.4 of 1998. The appellant was aggrieved hence the present appeal.

The background of this matter is, in brief, as follows. It was alleged that the appellant on 27/2/2007 at or about 1600 hrs at Migongo area within Masasi District in Mtwara Region did have carnal knowledge of one Olispa d/o Kaspali aged two and a half ($2^1/_2$) years old.

At the hearing of the case in the District Court, PW.1 – Olispa d/o Kaspal (the victim) was found to be incompetent witness because she could not speak properly and did not possess sufficient intelligence to testify. PW.2 who is the mother of the victim told the court that on 27/2/2007 at around 1600 hrs when she came back from work her daughter (the victim) told her that "mama huyu Mjomba amenichezea huku" pointing to her private parts. PW.2 undressed her daughter and found some bruises and blood clots around her vagina. PW.2 said also that she was informed by Mama Bonge a co-tenant that she had seen the girl (victim) coming out from the room of the appellant. PW.4 informed the court that on the material date she saw the girl (victim) coming out from the room of the appellant and when they asked her what she was doing in the room of the appellant she said "Mjomba alikuwa ananichezea huku" showing her private parts. PW.4 examined the girl's private parts but she did not see any harm. Later she informed the girl's mother about the incident.

PW.5 – a Clinical Officer told the Court that she examined the girl who was suspected to have been raped and found red blooded skin and some bruises around her vagina. In her opinion the victim was contacted by an abnormal instrument. Answering a question by the Court she said that she did not see hymen as it was also damaged but she did not endorse that finding in PF.3.

PW.6, a thirteen year old girl who after a voire dire examination gave evidence under oath told the Court that on 27/2/2007 at around 1200hrs a woman called Mama Bonge told her that the appellant was with Olispa (victim) in his room. They did not know what was going on.

They went to the appellant's room whereby he opened his door and the girl came out. The girl told them that the appellant played with her private parts.

On his part, the appellant denied to have raped the girl. He said that on the material day he saw Mama Bonge standing outside his window while he was alone. Later in the evening he was told by the mother of Olispa (victim) that he had raped her daughter. He was arrested and taken to Police Station.

At the hearing of this appeal the appellant appeared in person, unrepresented while the respondent-Republic was represented by Ms. Shio, learned State Attorney. The appellant had nothing to add or elaborate. He merely relied on his petition of appeal. He has listed about eight grounds of appeal which for purposes of clarity could be reduced into four.

(a) There is no eye witness who saw him committing the offence.
(b) The trial Court erred in believing witnesses who said that the girl (victim) told them that the appellant played with her private parts. If the girl could not express herself in court how could she make such a statement.
(c) The appellant should have been given the benefit of doubt in view of the conflicting evidence of PW.2, PW.4 and PW.5.
(d) A child of $2^1/_2$ years could not endure the pain of being raped without crying or shouting.

Ms. Shio, learned State Attorney for the respondent-Republic did not support the conviction of the appellant. Ms. Shio submitted that there was conflicting evidence between PW.2, PW.4 and PW.5. She pointed out that all those witnesses claimed to have examined the victim but there were different findings. For example PW.4 who examined the victim immediately after coming out of the appellant's room said that she did not see any harm but PW.2 and PW.5 found some blood clots and bruises.

The learned State Attorney went on to argue that if the victim was injured as alleged by PW.2 and PW.5 why didn't she cry or shout keeping in mind her tender age of $2^1/_2$ years. In her opinion since there were people outside the room of the appellant they would have heard the child crying or shouting. It was the view of the learned State Attorney that there is a doubt on the evidence of PW.2, PW.4 and PW.5 which should be resolved infavour of the appellant.

Ms. Shio doubted if the procedure laid down under section 186(3) of the Criminal Procedure Act, 1985 was followed by the trial court. She said that the record does not show that the case was conducted in Camera as required by law. She "speculated" that the omission could be the reason why the girl victim failed to give evidence in the open court. According to her the omission has caused a miscarriage of justice because the court failed to get the evidence of the victim. She therefore suggested that the case be heard de novo. Responding to a question by this court the learned State Attorney said that from the available evidence it was not proper to convict the appellant with the

offence of grave sexual abuse contrary to section 138 C (1)(a) and 2(b) of the Penal code as amended by Act No.4 of 1998.

Let me start with what the learned Magistrate said in his judgment. He said:

> "In my view going through the evidence on record, the offence of rape cannot be said to have been proved beyond reasonable doubts on the following grounds:
>
> The child being aged $2^1/_2$ years could have been severely hurt around her private parts and could have cried for help had the accused committed rape on her during the incident and the cries could have been heard by PW.4 Edisa d/o John and PW.6 Herieti d/o Mbata who were present during the incident. While testifying before the court PW.4 Edisa d/o John told the court that having seen the accused in his room with Olispa, and on seeing Olispa getting out, she asked her what the accused had done to her she said "Mjomba amenichezea huku" and PW.4 managed to check her private parts but found no harm, and when further cross examined she said she did not check her properly, indicates that there was no harm on her private parts amounting to rape. In order for rape to be complete, there must be at least slight penetration and on a child aged $2^1/_2$ years like Olispa (PW.1) such slight penetration could have been serious.

The trial Magistrate went on to say:

> "The alleged victim Olispa d/o Kaspali, though could not testify before this court, but PW.2, her mother and PW.4 and PW.6 told the court that Olispa had told them that "Mjomba alinichezea huku" which does not amount to rape."

Although the trial Magistrate did not refer to the conflicting evidence of PW.2, PW.4 and PW.5 he nevertheless, in my opinion, came to the correct finding that the evidence on record did not establish the offence of rape hence acquitted the appellant.

The issue which arises is what then made the trial Magistrate to convict the appellant with the offence of grave sexual abuse contrary to section 138 C (1)(a) and 2(b)? In his judgment the trial Magistrate held I quote:

> "Even the findings by PW.5 Lilian Kirangi the Clinical Officer who had examined the alleged victim, were that there were lacerations and bruises around her private parts, which could have been caused even by playing and touching using a finger. From the circumstance, I find the accused to have committed the offence of grave sexual abuse under section 138 C (1)(a) and (2) (b) of the Penal Code Cap.16 R.E.2002, but not the offence of rape c/s 130(2) (2)(e) and 131(1) of the Penal Code as charged." [Emphasise mine]

Section 130 C (1)(a) of the Penal Code provides:

> S.130 C (1) "Any person who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 130, commits the offence of grave sexual abuse if he does so in circumstances falling under any of the following descriptions, that is to say –
>
> (a) without the consent of the other person:

Section 138 C (2)(b) of the Penal Code provides:

> S.138 C (2) "Any person who –
> (a) ..... (Not relevant)
> (b) commits grave sexual abuse on any person under fifteen years of age, is liable on conviction to imprisonment for a term of not less than twenty years and not exceeding thirty years and shall also be

ordered to pay compensation of an amount determined by the Court to the person in respect of whom the offence was committed for the injuries caused to that person."

It appears that in convicting the appellant under the above quoted provisions of the law the trial Magistrate was convinced that the appellant used his finger or fingers to "touch and, or play" with the private parts of the girl – victim. The learned State Attorney was of the view that the evidence available does not bring the case within the four corners of section 138 C (1)(a) of the Penal Code. I think I agree with her because there is no evidence on record to support what the trial Magistrate said about the appellant, using his fingers to touch or play with the girls private parts. It is true that PW.5 – the Clinical Officer said that when she examined the victim she found the girls private parts to be red blooded and had some bruises. PW.5's findings were that the victim was contacted by an abnormal instrument.
According to this witness the girl had no hymen as it was also damaged although she did not indicate that in the PF.3.

The finding that the girl (victim) was contacted by an abnormal instrument could have many explanations. For instance the girl (victim) could have injured herself while playing either knowingly or unknowingly. However, whatever happened must be ascertained by evidence. From the record there is no evidence to show or prove what the trial Magistrate said about the appellant. As correctly argued by the appellant and the learned State Attorney there is conflicting evidence as to whether the girl was injured or not. PW.4 who first examined the girl said that she was not injured although upon cross examination she

said that she did not examine the girl properly. However, if the girl was injured the way or to the extent that PW.2 and PW.5 put it there is no way PW.4 could have missed to see that situation. Another issue with regard to the evidence of PW.5 is that she said on examination by the court that she did not see hymen of the girl as it was also damaged but did not show that in the PF.3. The question which arises is why? The girl (victim) was sent to the Hospital to be examined because she was suspected to have been raped and a damaged hymen finding could be a useful information to investigators. Again if the girl of $2^1/_2$ years was ravished or what ever was done to her until the hymen was damaged or destroyed why didn't she cry or shout? How could she manage to walk properly? All those questions make the evidence of PW.5 doubtful. I agree with the appellant and the learned State Attorney that considering the age of the victim ($2^1/_2$ years old) she could not endure the pains of whatever instrument or part of the body of the appellant alleged to have been used to her (girl's) private parts without crying or shouting. I therefore find that whatever the victim told PW.2, PW.4 and PW.6 there is no truth in it. I also decide that the conflict in the evidence of PW.2, PW.4 and PW.5 should be resolved in favour of the appellant.

The learned State Attorney raised the issue that the trial Court did not follow the required procedure under section 186(3) of the Criminal Procedure Act, 1985. She therefore asked this Court to order a retrial of the case so as to get the evidence of the victim incamera. I have gone through the court record but I could not find anything to show whether the case was conducted incamera or otherwise. The learned State Attorney submitted that if the proceedings were held in camera

the record should have shown clearly that the matter was held in camera. Although what the learned State Attorney said could be true it could also be the case that the matter was held incamera but the trial Magistrate forgot to indicate so. I think it could not be in the interest of justice to order a retrial. After all the evidence available shows that the victim did not possess sufficient intelligence to justify receiption of her evidence.

Another reason for rejecting the prayer of the learned State Attorney is that if in April, 2007 the girl could not speak properly and had no sufficient intelligence to justify receiption of her evidence will she be able to recall what happened on 27/2/2007 if she is re-called to testify?

For the reasons given herein above I uphold this appeal, the conviction of the appellant is hereby quashed and the sentence of twenty years imprisonment imposed on the appellant is set aside. It is further ordered that the appellant be set free from prison unless otherwise lawfully held for some other cause.

Order accordingly.

G.J.K. Mjemmas,
Judge
5/12/2007

Date: 5/12/2007

Coram: Hon. G.J.K. Mjemmas, J.

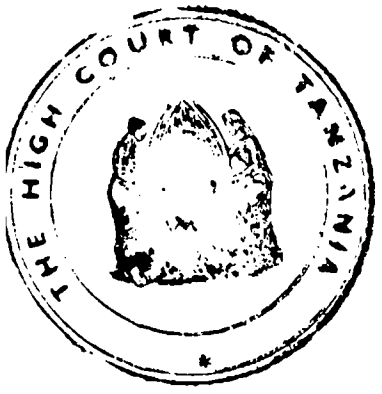
Appellant: Present

Respondent: Ms. R. Shio, State Attorney for the Republic

B/C: G. Luoga, RMA

Ms. Shio: This appeal is coming for judgment.

Order: Judgment delivered in Chambers this 5th day of December, 2007 in the presence of Ms. Shio, learned State Attorney for the Republic and the appellant.



G.J.K. Mjemmas,
Judge
5/12/2007