**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: MSOFFE, J.A., ORIYO, J.A. And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 319 OF 2013**

**BENARD BALELE.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania at Mwanza)**

**(Bukuku, J.)**

**dated the 7th day of August, 2013**
**in**
**Criminal Appeal No. 17 of 2013**

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# JUDGMENT OF THE COURT

21st & 29th October, 2014

**ORIYO, J.A.:**

The appeal is against the concurrent findings of fact by the courts below that on the 29th day of October, 2008, at around 18:30 hours at Katoro Village, within Geita District, Mwanza Region, the appellant raped one Rose d/o Richard, a girl aged seven (7) years at the time, contrary to sections 130 and 131 of the Penal Code, Cap 16, R.E 2002. Upon conviction by the District Court of Geita at Geita, he was sentenced to life imprisonment. In addition, he was ordered to pay Shs 100,000/= compensation to the complainant,

PW1. On appeal to the High Court at Mwanza, the decision of the District Court was upheld. He has now come to this Court on a second appeal.

Before proceeding further, we think, it will serve a useful purpose to briefly state the facts of the case. It was alleged that PW2, the mother of PW1, had on the material day, sent her daughter to buy some cooking oil. PW2 became apprehensive when PW1 was late to return and decided to make a follow up, in vain. Upon her return home she found PW4, a neighbour, who had escorted PW1 home crying because she had been raped. PW2 checked her daughter and found blood oozing from her private parts. She took her to a Police Station where she reported the incident and was issued with a PF3 for PW1 to get medical treatment.

On the next day, 30/10/2008, at around 6:00 pm, PW1 saw the appellant in the company of two others pass by near their home. PW1 called her father, PW3, and pointed out the appellant to him as the one who raped her the day before. Upon seeing PW1, the appellant fled. PW3 raised an alarm for help to which the neighbours positively responded and the appellant was put under arrest and subsequently taken to court.

The appellant denied any criminal responsibility claiming that the case was fabricated against him by PW3 who had paid the appellant shs 10,000/=

as advance payment towards the cost of constructing a house for him. The appellant allegedly claimed to be a mason by profession and had moved to the Katoro Village in early September 2008, from Mwanza. When he failed to initiate the construction of a house for PW3, the latter gave him threats, though he did not specify on the type of threats he received.

When the appeal came before us, the respondent Republic was represented, by Mr. Emmanuel Luvinga learned State Attorney. The appellant appeared in person, unrepresented. The learned State Attorney argued in support of the appeal, and specifically zeroed on ground one thereof, which was to the following effect:-

> *That the court erred in convicting the appellant, solely on the uncorroborated visual identification evidence or PW1, a stranger she saw in the village for the first time, without giving any description of him as to his physical appearance, clothes worn, height, colour; etc, on the fateful date.*

The learned State Attorney observed that this state of affairs of unsatisfactory visual identification explains why, PW1, when reporting the incident to Pw4, stated that she was raped by a **certain old man** who took her into the forest.

He submitted that the said visual identification of the appellant by PW1 creates doubts that it was correct. He made reference to the case of **Raymond Francis vs R** [1994] TLR 100 at 103, where the Court stated:-

> *"It is elementary that in criminal case whose determination depends essentially on identification, evidence on* ***conditions favouring a correct identification is of utmost importance."***
>
> [Emphasis ours].

We hasten to state that the case of **Raymond Francis** is distinguishable from the present case in that apart from the visual identification at the scene, there is the further independent testimonies of **PW3**, appearing at **page 10** and that of **PW1** at **page 7** of the record as follows:-

> **"PW3 Richard s/o John states:-**
>
> **XD by Prosecutor:-**
>
> *".....On 30/10/2008 at about 6:00 pm, I was at my home with family including PW1. While there the accused who was with 2 others passed near my home and there PW1 pointed the accused to be the*

*one who has (sic) raped her. I called the accused and when he saw PW1 wanted to run away but I raised an alarm for help where neighbours came and assisted me in arresting the accused who was taken to the Police Station. That is all."*

The testimony of **PW3** above corroborates that of **PW1** at page 7 thereof where she testified the following:-

"**PW1 – Rosemary d/o Richard,** partly states:-

**XD by Prosecutor:-**

*".....On 30/10/2008 in the evening I saw the accused person passing on the way near our home and there I told my father that this was the man who had raped me. And there the accused was arrested when the accused saw me wanted to run away. The accused was taken to the Police Station. The accused was wearing the same clothes which he is wearing before this court. That is all."*

**XXD BY ACCUSED**

*"On that day you were wearing the very clothes you are wearing. You took me to the forest when holding me. You wanted to run away after seeing me."*

Therefore, this corroborative evidence from PW1 and PW3, respectively, distinguishes the present case from that of **Raymond Francis** (supra), in that the evidence in the present case was not solely dependent on the evidence of visual identification but on some other corroborative testimonies, as well.

There is also another positive aspect to the testimony of PW1 of visual identification of the appellant. The incident took place at around 6 p.m. when it was not yet dark. The appellant grabbed the hand of PW1, walked her to the **locus in quo** where the rape took place. There is no gainsaying that the whole process of rape does not normally take a short time to the end. The time taken to walk PW1 to the scene until the time the appellant abandoned her after the rape, gave ample time to PW1 to observe, correctly identify and point out the appellant as the ravisher, the next day the appellant passed by her home in the company of two other fellows. In our view, had PW1 erroneously mistaken the appellant as her ravisher among

the three fellows, who had passed by their home, he would have had no reason to run away, as he did. This conduct was not consistent with innocence, on the part of the appellant.

Further, PW1 identified the appellant for the third time at the trial when the latter cross examined her and she stated:-

> *"On that day you was wearing the very clothes which you are wearing, you took me to the forest when holding me. You wanted to run away after seeing me."*

We have amplified, albeit briefly, that in the circumstances of this case, the evidence of PW1 and the other corroborative evidence of PW3 was sufficient evidence of visual identification which eliminates any possibility of mistaken identity - see, **Waziri Amani v R** [1980] TLR 250; **Masumbuko Charles vs R**, Criminal Appeal No. 39 of 2000; **Fungile Mazuri v R Criminal** Appeal No. 147 of 2012 (both unreported).

As stated earlier, the learned State Attorney supported the appeal from the outset solely in the basis of ground **one** of appeal. We are; with respect, however, of a different view.

On his part, the appellant, being a layman readily agreed with the learned State Attorney.

We have also taken note of the appellant's complaint challenging the visual identification of PW1 on the basis of her tender age of seven (7) years.

It is now settled law that before a trial court receives the evidence of a child witness it must at first conduct a **voire dire** examination to satisfy itself on whether the intended child witness is competent to testify, in terms of Section 127(1) and (2) of the Evidence Act, Cap 6, R.E 2002.

In the present case, PW1, was only seven (7) years old, going by the testimonies of PW1, PW2 and PW3. The trial magistrate conducted a **voire dire** examination to establish whether PW1 knew the meaning of an oath and the duty to speak the truth, before deciding on whether she was to testify on oath or without an oath. The examination carried out by the trial magistrate established that PW1 did not understand the meaning of an oath and however, proceeded to receive her unsworn testimony.

In terms of the recent decision of the Full Bench of the Court delivered on 17/06/2014, in **Kimbute Otiniel vs R**, Criminal Appeal No. 300 of 2011, (unreported), the decision of the courts below to receive the evidence of PW1, was legally correct and in order. Having considered at length, the

consequences of the misapplication of or non-compliance with subsections (1) and (2) of section 127 of the Law of Evidence Act, in the conduct of a **voire dire** of a child of tender years, the Full Bench stated as follows:-

> *"Having deeply reflected on the matter, with respect, in our opinion the approach to have been taken by the court was not as we had proceeded in some of the cases cited earlier, to* ***expunge*** *or* ***summarily wipe off the record the evidence of a child of tender years in each and every instance of misapplication or non-direction of section 127 (2). To that extent we proceed to hold that much as those decisions were valid to the individual cases that concerned them, they should no longer be followed from the date of this decision ..."***
>
> (Emphasis ours.)

Therefore, in the event and for the reasons stated, we are satisfied that the case against the appellant was proved beyond reasonable doubt. Accordingly, we dismiss the appeal in its entirety.

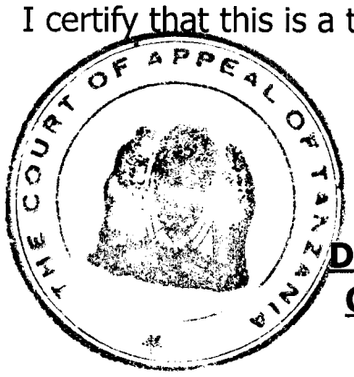
DATED at MWANZA this 28th day of October, 2014.

J.H. MSOFFE
**JUSTICE OF APPEAL**

K.K. ORIYO
**JUSTICE OF APPEAL**

B.M. MMILLA
**JUSTICE OF APPEAL**

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




Z.A. MARUMA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**