IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: KIMARO, J. A., MASSATI, J. A. And M ZIRAY, J. A.)

CRIMINAL APPEAL NO. 220 OF 2013

JUMA FUNGWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court at Tabora)

(Songoro, J.)

dated the 10th day of April, 2013
in
Criminal Appeal No. 17 of 2011

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JUDGMENT OF THE COURT

2nd & 6th October, 2015

MASSATI, J.A.:

The appellant was charged with the offence of rape contrary to section 130 (1) and 2 (e) and 131 (1) of the Penal Code. After a full hearing, the District Court of Igunga convicted and sentenced him to 30 years imprisonment. His appeal to the High Court was unsuccessful; hence the present appeal.

In brief, the prosecution case is as follows: The appellant was a resident of Kilabuni Street, Igunga, and working as a coolie at a grinding machine christened SALUM GRINDING MACHINE. A girl, named SHIJA d/o

MHELA (the victim) was, attending standard seven in 2008 at Chipukizi Primary School. Her father was a watchman, and his name was MHELA SALUM. When he came back home on the morning of 11/8/2008, he found that the girl was, missing. He went to the school to inquire about her. The headteacher advised him to keep on looking for her and let him know once she was located.

On 15/8/2008, at 9:15 p.m., Anna Mhela, the victim's sister, saw the victim entering into a house where the appellant was staying. She and a friend played detective, and after confirming the information they relayed it to the victim's father, at his workplace. The matter was reported to the police. PW2 5923 D/CPL MAGESA, was sent to the appellant's abode from whose room, the victim, (PW1) emerged. He arrested the appellant, and took both him and the girl to the police station. PW3 ZAINABU RAJABU a neighbor was also present and witnessed the arrest of the appellant. And this is what led to arraignment of the appellant.

At the trial court, the victim, testified as PW1. She described her age as 13, and testified on oath, that she had been seduced by the appellant who eloped her since 13/8/2008, and had been at his house since then

until 15/8/2008, when the police apprehended them. During all the time they were together the duo performed sexual intercourse. She tendered, the PF3 as Exhibit P1. PW2, the arresting officer, also took down the appellant's cautioned statement which he tendered as exhibit P2. PW3 was the appellant's co-tenant who was asked by PW2 to knock on the appellant's door and witnessed PW1 coming out of the appellant's room.

In his defence, the appellant denied generally to have committed the offence and stated that the case was fabricated against him as he was living in the said house with this wife.

The trial court believed in the "crucial" evidence given by PW1, as corroborated by PW2, PW3, and the PF3 and rejected the defence evidence, hence the conviction. On first appeal, the learned judge found that the trial court rightly rejected the defence, but agreed that the PF3 was improperly admitted. But that notwithstanding, the first appellate court like the trial court believed in the credibility of PW1, PW2 and PW3, and acting on section 127 (7) of the Evidence Act, proceeded to dismiss the appeal.

Those findings are now under a serious attack by the appellant in this Court. He has presented five grounds of appeal. In the **first** ground the complaint is that, the charge was defective, because while he was arrested on 15th August, 2008 he was taken to court on 18th August, 2008, contrary to law. In the **second** ground, the appellant complained that the first appellate court wrongly relied on the uncorroborated evidence of PW1, the victim. **Thirdly**, the appellant complained that the victim's (PW1's) age was not proved. **Fourthly**, the appellant complained that the burden of proof was shifted to him. And **lastly**, he complained that the prosecution case was not proved beyond reasonable doubt.

At the hearing, the appellant who appeared in person, adopted his memorandum of appeal, and opted to let the respondent begin, reserving his right to reply.

Mr. Ildephonce Mukandara, learned State Attorney, appeared for the respondent/Republic. He at once supported the appeal, and we think, rightly so. He advanced two reasons for not supporting the conviction. First, the evidence of PW1, who was apparently 13 years of age, was taken contrary to the dictates of section 127 (2) of the Evidence Acts as no *voire dire* test was conducted before taking her testimony on oath. Secondly,

since this was a statutory rape, proof of the victim's age was essential which was lacking. Therefore, he urged us to allow the appeal.

Given the opportunity to respond, the appellant said that he was in complete agreement with what the learned State Attorney had said. So he had nothing more to say.

The conviction of the appellant was founded on the evidence of PW1, PW2 and PW3, and Exhibit P2 (the PF 3). The testimony of PW2 and PW3, and the PF 3 could only have corroborative value on that of the victim (PW1) which was the primary and best evidence in each such cases. But as Mr. Mukandara rightly submitted, as she was of or below the apparent age of 14, her evidence ought to have been subjected to a scrutiny or *voire dire* test before being taken down. This is in accordance with the dictates of sections 127 (2) and (5) of the Evidence Act (Cap 6 R.E. 2002) (the TEA). For ease of reference the above provision are reproduced below:-

> 127 *(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.

(5) For the purposes of subsections (2), (3) and (4), the expression "child of tender years" means a child of or below the apparent age of fourteen years.

As to the effect of non-compliance with these provision, case law has travelled through a rough terrain in the legal history of the county but finally, all the views were distilled and settled in the recent decision of this Court in **KIMBUTE OTINIEL v. R.,** Criminal Appeal No. 300 of 2011 (unreported) where the full bench held among others:

"1. Where there is a complete omission by the trial Court to correctly and properly address itself on sections 127(1) and 127(2) governing the competency of a child of tender years, the resulting testimony is to be discounted.

2. Where there is a misapplication by a trial court of section 127(1) and or 127(2) the resulting evidence is to be retained on the record. Whether or not any credibility, reliability weight or probative force is to be accorded to the testimony in whole or in part or not all, is at the discretion of the trial court.

3. *In these same facts and circumstances (i.e. No. 2) where there is other independent evidence sufficient in itself to sustain and guarantee the safe and sound conviction of an accused, the court may proceed to determine the case on its merits bearing in mind the basic duties incumbent upon it in a criminal trial and the fundamental rights of the accused".*

In the present case, there was a total omission. So the evidence of PW1 is to be discounted. This means that the primary evidence of rape itself is lacking. This would be sufficient to dispose of this appeal.

But, for the sake of completeness, let us examine the remainder of the evidence on record. As we said above, PW2 was just the arresting officer and PW3 was just a neighbor who witnessed the arrest of the appellant and PW1 coming from the appellant's room. None of them witnessed the alleged sexual encounter between PW1 and the appellant. Even if they did, none, could prove the victim's age, which was crucial in a case of statutory rape. As rightly pointed out by the first appellate court the PF3 (Exh. P1) was admitted without complying with section 240(3) of the Criminal Procedure Act, whereas the cautioned statement (Exh. P.2) was admitted without giving the appellant opportunity to comment on it before it was admitted (see **JUMA ADAM v. R** (Criminal Appeal No. 79 of

2011 (unreported). These documentary exhibits ought to have been expunged from the record anyway. So in the end, we are left with no evidence at all against the appellant.

For the above reasons, we agree with Mr. Mukandara and the appellant, that this appeal has merit. We accordingly allow it. We quash the conviction and set aside the sentence. We order his immediate release from custody unless he is held there for some other lawful cause.

DATED at **TABORA** this 5th day of October, 2015.

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL