Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO. 117 OF 2007 – COURT OF APPEAL OF TANZANIA AT DODOMA. Coram: RUTAKANGWA, J.A KIMARO, J.A AND MBAROUK J.A	**DAUDI SHILLA VS THE REPUBLIC**- An Appeal from the Judgement of the High Court of Tanzania at Dodoma) **Criminal Appeal No.37 of 2005** (Mjasiri J)	The evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman, consent is irrelevant, that there was penetration – in Seleman Makumba Vs R. Criminal Appral no.94 of 1999. Also in Nuru Mohamed gulan Vs R [1988] TLR.82 Goodluck Kyando Vs R [Criminal Appeal No.118 of 2003 (Unreported) S.127 (1) of the Law of Evidence Act, [Cap 6, and R.E 2002] makes clear the witnesses who are competent to testify.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., KIMARO,J.A. And MBAROUK, J.A.)

CRIMINAL APPEAL NO.117 OF 2007

DAUDI SHILLA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dodoma)

(Mjasiri, J.)

dated 18th July, 2006
in
Criminal Appeal No.37 of 2005

.....

JUDGMENT OF THE COURT

3 & 5 December, 2008

KIMARO, J.A.

This is a second appeal. It is against the decision of the High Court, Mjasiri J. as she then was. The appellant was prosecuted in the District Court of Iramba at Kiomboi, for the offence of defilement of girls under fourteen years contrary to the then section136 of the Penal Code before it was amended by the Sexual Offences (Special

Provisions) 1998, commonly known as SOSPA. The offence was alleged to have been committed on 7th December, 1996 at 9.00 a.m. The appellant was convicted and sentenced to twenty years imprisonment. He was also ordered to suffer twelve strokes of the cane. On appeal to the High Court, the conviction was sustained and sentence was enhanced to thirty years.

The appellant is still aggrieved and hence this second appeal. He has filed six grounds of appeal complaining that:-

1. The PF3 was admitted in court and relied upon by the trial court to form the basis of his conviction but the doctor was not summoned for cross-examination.
2. The prosecution evidence, particularly that of the complainant (PW1) was very weak.
3. His arrest was delayed.
4. The court wrongly accepted the evidence that he made an admission to the commission of the offence.
5. That his defence was not considered properly in the judgment of the trial court.

6. Since he was prosecuted with a sexual offence there was need for corroboration.
7. The prosecution evidence was comprised of only relatives.

At the hearing of the appeal the appellant appeared in person. The respondent Republic was represented by Mr. Anselm Mwampoma learned Principal State Attorney.

In order to appreciate the essence of the appeal before us it is instructive to set out the facts of the case, albeit briefly.

The appellant and Dorothy Kitundu (PW2) were spouses. On 7th December, 1996, in the morning, he informed his wife that he wanted to go to a place known as Mampanta to look for a tractor. He requested his wife to allow Rehema, (PW1) the complainant to accompany him as the complainant was going to look for mushroom. PW2 became suspicious of that request as the complainant who was the appellant's step daughter had earlier on complained to PW2, her mother, of a previous rape committed to her by the appellant while she was away in Singida. PW2 turned down the request. She told

the appellant to leave alone and the complainant would follow later. The complainant assisted her mother with housework and later left to look for the mushroom at 8.00 a.m.

Upon her arrival at a place called Salala where she went for the mushroom and while in the process of inspecting the vegetables, the appellant appeared and held her arm asking what PW2 told her. The complainant replied that she had told her nothing. Without further discussions the appellant pulled her into the bush, fell her down, boasting that he would do anything to her and PW2 would not do anything. According to PW1 the appellant undressed her underwear and threw it away. He then released his belt, unzipped his trouser, pulled out his penis and inserted it into the vagina of the complainant. The complainant said the act of sexual intercourse took about one hour. She shouted but she could not get any help as the incident took place in the bush and there were no people around.

Thereafter, she took her underwear, got dressed properly and walked back home, where she met her mother (PW2) and reported the incident to her. PW2 said she inspected her vagina and found it

smeared with spermatozoa. The complainant was then taken to hospital where she was examined by a doctor and a PF3 form was filled giving expert medical opinion on the results of the examination. The PF3 was admitted in court as exhibit P1.

The evidence of the prosecution in the trial court came from PW1 and PW2 and John Adama Kilimba(PW3) the natural father of the complainant who testified that the appellant being in the company of his parents and friends followed him, admitted the commission of the offence and requested for an apology. The evidence of the complainant was received on oath after the trial court was satisfied from the "voire dire" examination that the trial magistrate conducted that she understood the meaning of oath and possessed sufficient intelligence to justify receipt of her evidence. She also understood the duty of speaking the truth. The appellant apart from giving a narration of the events that took place on that day in as far as the tractor was concerned, generally denied the commission of the offence. He claimed that the complainant lied because he once beat her for failure to attend school. After weighing the prosecution and the defence evidence the trial court was satisfied that the prosecution

had proved the case beyond reasonable doubt. The trial court was impressed by the demeanor of all the prosecution witnesses and disbelieved the appellant. He was then convicted and sentenced as indicated earlier.

In the High Court the learned judge on first appeal sustained the conviction but enhanced the sentence after forming an opinion that the appellant ought to have been sentenced under the Sexual Offences (Special Provisions) Act. 1998.

Elaborating on his grounds of appeal, the appellant said he was denied the right to cross examine the doctor who conducted the examination on the appellant and filled the PF3 form. He also faulted the first appeal court for not finding that the evidence of PW3 on his confession of the offence was wrongly admitted because in law he did not fall within the category of persons who can receive a confession. As regards his defence, the opinion of the appellant was that it was not given a scrutiny. Instead the trial magistrate mentioned it just in passing and hence the judgment of the trial court did not comply with section 312(1) of the Criminal Procedure Act,

[CAP, 20 R.E.2002]. On the sentence which was enhanced by the High Court, the appellant decided to leave the matter to the Court.

The learned Principal State Attorney on his part supported the conviction and the sentence that was imposed by the trial court. He faulted the first appeal court for enhancing the sentence because the offence was committed before the said law came into effect. Mr. Mwampoma, conceded that the evidence on the PF3 was wrongly acted upon because the doctor was not summoned for cross examination. He said under section 240(3) of the Criminal Procedure Act, it is a mandatory requirement for the court to inform an accused person of his right to have the doctor summoned for cross examination.

In the opinion of the learned Principal State Attorney who requested the Court to disregard the evidence on the PF3, the evidence which remains on the record suffices to sustain the conviction of the appellant. He said PW1 told the court that she was defiled and when PW2 inspected her, she found her with sperms. Moreover, submitted Mr. Mwampoma, PW3 said the appellant

admitted to him that he committed the offence. The circumstances under which the offence was committed, contended the learned Principal State Attorney, at broad day time, the appellant being well known to the complainant, her step father and the court being satisfied with the demeanor of the prosecution witnesses show that the offence was proved and the appellant was identified as the person who committed it. The trial magistrate, said the learned Principal State Attorney, after evaluating the evidence of both the prosecution and the defence was satisfied that the appellant's defence was not true.

On the complaint that it was only family members who gave evidence, the learned State Principal State Attorney said that from the circumstances under which the offence was committed, they could not get an independent witness to testify. After all, said Mr. Mwampoma, the conviction of the appellant was based on the credibility of the witnesses. On the question of corroboration the learned Principal State Attorney said the evidence of the complainant was corroborated by that of PW2 and PW3. He prayed that the appeal be allowed only in respect of the enhancement of the

sentence that was done by the High Court otherwise the appeal should be dismissed and the conviction and the sentence that was imposed by the trial court be sustained.

This appeal is fairly simple and the evidence is straight forward. It was conceded by the learned Principal State Attorney that the evidence on the PF3 form was wrongly acted upon because the doctor who made the medical opinion on the condition of the complainant was not summoned for cross examination. That breached the provisions of section 240(3) of the Criminal Procedure Act, which imposes a mandatory requirement on the court to inform the accused person of his right to have the doctor summoned for cross-examination. The PF3 is accordingly expunged from the record. See **Nyambuga Kamoga Vs R** Criminal Appeal No. 9 of 2003 (unreported).

The appellant's complaint that the evidence of the complainant was weak lacks basis. Her evidence was recorded on oath after the trial court was satisfied from the "voire dire" examination that she met the requirement laid down under section 127(2) of the law of

Evidence Act and the trial magistrate acted on her evidence after he was impressed by her demeanor. Even looking closely at her evidence, she told the trial court what the appellant actually did to her. While testifying she said:-

> "the accused pulled me to the bush and then fell me down...The accused undressed my underwear and threw it away. He released the belt of his trouser and unzipped his trouser and took out his penis. By then I was lying down face upwards. The accused lied on top of me and pulled my gown up to my chest and then he inserted his penis in my vagina, the penis penetrated and the appellant did the act of sexual intercourse with me. He did the act for one hour. I was shouting. I got no help. After that act the accused got up and zipped his trouser and tied his belt and went to the road. I woke up and wore my underwear and went home."

The evidence of the complaint on what the appellant did to her is detailed and she missed no word. All the ingredients of the offence were given in her evidence. By then she was fourteen years. The Court in **Seleman Makumba Vs R** Criminal Appeal No. 94 of 1999 (unreported) said:-

> "The evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman, consent is irrelevant, that there was penetration."

The law on the offence of defilement when the appellant was charged did not require consent from the complainant and so the case we cited is relevant to the circumstances of this case. So long as the trial magistrate was satisfied that the complainant told the truth which in this case she did, we do not see how her evidence can be described as weak. Even the appellant's complaint that there was no corroboration is another unfounded allegation. On record there is the evidence of PW2 that immediately after PW1 reported the incident to her, she inspected the complainant's vagina and found it smeared

with spermatozoa. The trial Court also believed this witness. Even the evidence of PW3 that the appellant made an admission to him that he defiled PW1 cements the evidence of the complainant. There is no law in our statutes which bars any person from receiving evidence of admission of commission of an offence from an accused person. See the case of **Nuru Mohamed Gulam Vs R** [1988] T.L.R.82. What our laws regulate is receipt of confessions when made to a specified category of persons but this does not mean that the court cannot admit evidence of admission of the commission of the offence from persons who do not fall in that category. What matters is the credibility and reliability of the evidence of the witness. See **Goodluck Kyando Vs R** Criminal Appeal No, 118 of 2003 (unreported).

Regarding his complaint that his arrest was delayed we would not like to waste time on this matter because it lacks substance. The offence was committed on Saturday 7th December, 1996 and he was arrested on Monday, 9th December, 1996 after a day which was a Sunday. It is common knowledge that Sundays are not working days.

The appellant also complained that his defence was not considered by the trial court. We do not agree with him. At pages 24-25 of the record of appeal the trial magistrate evaluated the evidence of the prosecution and that of the appellant and he made a finding that the appellant's defence was a cooked up story. This finding also answers the appellant's ground of appeal that the judgment of the trial does not comply with the provisions of section 312(1) of the Criminal Procedure Act, [CAP 20 R.E.2002]. We have carefully gone though the same; it contains points for determination, the decision thereof and the reasons for the decision. As regards the appellant's complaint that it was only family members who testified against him the only observation we make is that it is good to have an independent witnesses testifying, rather that only family members because that removes the likelihood of fabricated evidence. However, that is not the law. In law what matters is the credibility and reliability of the witness who is called to testify. The case of **Goodkuck Kyando**, (supra) is relevant here. We will also add that the question of who will testify in any trial is also dependent on the circumstances under which the offence was committed. Obviously if the offence is committed in the presence of only family members it

cannot be expected to have witnesses who know nothing about the offence to testify. Section 127(1) of the law of Evidence Act, [CAP 6, R.E, 2002] makes clear the witness who are competent to testify.

With what we have endeavored to show above, we are in total agreement with the learned Principal State Attorney that there was sufficient evidence to prove the offence of defilement and that it was no other person who committed it but the appellant. The first appeal court rightly upheld the conviction. We equally agree with the learned State Principal Attorney that the offence was committed before the Sexual Offences (Special Provisions) Act, 1998. The offence was committed in December 1996 almost two years before SOSPA became operative. It was therefore wrong for the learned judge on first appeal to sentence the appellant on a non- existent law. This means that the sentence that was enhanced by the first appeal court was a nullity. We allow the appeal only to the extent of the sentence which was imposed by the High Court. We quash the sentence and set it aside and restore the sentence which was imposed by the trial Court. The appeal succeeds to that extent. Otherwise it is dismissed.

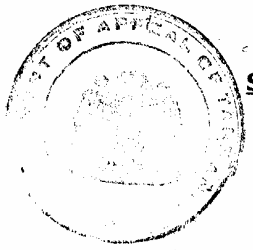
DATED at DODOMA this 4th day of December, 2008.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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



(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR