| Citation | Parties | Legal Principles Discussed |
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| **CRIMINAL APPEAL NO. 1 OF 2006**- COURT OF APPEAL OF TANZANIA AT DODOMA- MUNUO, J, A, KAJI, J, A. AND KIMARO, J, A. | MOHAMED YUSUF VS. THE REPUBLIC- Appeal from the Judgment Decision of the High Court of Tanzania at Dodoma Criminal- Appeal No. 49 of 2005- Mjasiri, J. | PF 3 erroneously admitted in evidence where appellant was not given an opportunity to accept or object to the PF 3 before it was admitted.<br><br>Whether evidence of identification met the required test.<br><br>Sentence of 35 years plus 10 strokes of the cane imposed substituted with the mandatory minimum sentence of life imprisonment for raping a child below the age of ten years. |

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

**CORAM: MUNUO, J, A, KAJI, J, A. AND KIMARO, J, A.**

**CRIMINAL APPEAL NO. 1 OF 2006**

**MOHAMED YUSUF..... APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment Decision of**

**the High Court of Tanzania at Dodoma)**

**( Mjasiri, J.)**

**dated 15th day of August, 2005**
**in**
**Criminal Appeal No. 49 of 2005**

**JUDGMENT OF THE COURT**

**18th & 22nd June, 2007**

**MUNUO, J, A.:**

The appellant, Mohamed Yusuf was convicted of rape c/s 130 (1) and 131 (1) of the Penal Code as amended by the Sexual Offences Special Provisions Act No. 4 of 1998 in that on the 29th December, 2001 at about 19.00 hours at Uzunguni Kikulo Village within Kondoa District, the appellant sexually assaulted a small girl, aged 7 years, one Asha Dismas. The trial Court found the appellant guilty, convicted, and sentenced him to a term of 35 years imprisonment plus 20 strokes of the cane. His appeal to the High Court was partially successful to the extent that the learned judge, Msajiri, J, upheld the sentence of imprisonment but reduced the strokes from 20 to 10 only. Thereafter the appellant lodged this second appeal to challenge the conviction and sentence of 35 years imprisonment plus 10 strokes of the cane.

The facts are not complicated. On the fateful evening, the appellant, a familiar second hand cloth dealer at the complainant's village, passed by the house of the complainant and lured her away pretending to go to buy some oil for her in a nearby shop. The small girl innocently accompanied the appellant. On the way, the latter hurled her down, removed her under pants and sexually assaulted her by the road side.

The complainant raised an alarm. P. W. 1. Amina Athumani, a 56 years old woman, and P. W. 2 Arafa Saidi, then aged 12 years, happened to be passing by and upon hearing an alarm hastened to rescue the victim during which time the appellant rose and ran away. Both P. W. 1. and P. W. 2, like the victim, P. W. 3, knew the appellant before. P. W. 1. stated that the

appellant wore a coat and black beach trousers at the material time. PW1 also knew the victim, the daughter of her neighbour. PW1 further deposed that there was light so she had no difficulty identifying the appellant. Subsequently PW1 took the victim to the village authorities. The next day, the rape was reported to the police who issued a PF 3, Exhibit P1, to the victim for medical examination. Because PW1, PW2 and PW3 identified the appellant by name, he

was apprehended and accordingly charged with the offence of rape as reflected in the charge sheet.

In the first appeal, Mjasiri, J, upheld the conviction and sentence except that she reduced the strokes by half. Before us, the appellant appeared in person. In his two grounds of appeal, the appellant faulted the admission of the PF 3, Exhibit, P1 and also claimed that he was not properly identified because it was night time.

Mr.Mwampoma, learned Principal State Attorney, did not support the conviction. He contended, rightly in our view, that the PF 3, Exhibit P1, was erroneously admitted in evidence because the appellant was not given an opportunity to accept or object to the PF 3 before it was admitted. For that omission, the PF 3 is excluded from the evidence.

With regard to the conviction, the learned Principal State Attorney contended that although the prosecution witnesses claimed that they identified the appellant, it is not clear if there was light for proper identification. He, therefore, found it unsafe to support the

conviction. He stated, however, that the credibility of P. W. 1, P. W. 2 and P. W. 3 was sound and cannot be faulted.

After carefully considering the evidence on record, and after excluding the PF 3 of the victim, we find no cause to upset the conviction. To begin with, P. W. 1 clearly deposed that she identified the appellant because there was light; she saw the appellant lying on the victim who was crying. P. W. 1 raised an alarm which alarm prompted the appellant to rise and flee but she saw him clearly and had no difficulty identifying him. PW1 observed that the appellant was wearing a coat and black beach trousers. P. W. 2 Arafa Saidi, the grand daughter of PW1, who was in the company of the latter at the material time, corroborated the evidence of P. W. 1. The appellant was arrested on the same evening.

In the light of the glaring evidence of P.W. 1, P. W. 2 and P. W. 3, and as the credibility of these witnesses was not challenged, we are bound to uphold the conviction considering that the eye witnesses knew the appellant before, identified him by name and had him arrested on the same evening. In this regard, there was no possibility of mistaken identity because the appellant was found in

the act of rape as he lay on the victim when PW1 and PW2 appeared. He ran away when PW1 raised an alarm. He denied the offence but admitted that he used to sell second hand clothes at the complainant's village. He also admitted that there was no ill will or grudges between him and the prosecution witnesses.

On identification, the learned judge stated at page 48 of the record:

It is my finding that the learned trial magistrate carefully analysed and considered the evidence of identification and all the surrounding circumstances…….there can be no doubt in my mind, and I respectfully agree with the learned trial magistrate that the evidence of identification in this case met the required test.

Like the learned judge we find no cause to interfere with the conviction in view of the strong evidence adduced by the two eye witnesses, PW1, and PW2 who found the appellant lying on the small girl, sexually assaulting her by the road side on the material evening, ; before dusk when there was day light. The victim was aged 7 years so the statutory minimum sentence is life imprisonment as provided for under the provisions of Section 131 (1) of the Penal Code as

amended by the provisions of the Sexual Offences Special Provisions Act No. 4 of 1998.

We according vary the sentence of 35 years plus 10 strokes of the cane imposed on the appellant and substitute therewith the mandatory minimum sentence of life imprisonment for raping a child below the age of ten years.

Save for the variation of the sentence, the appeal is dismissed.

DATED at DODOMA this 22nd day of June, 2007.

E. N. MUNUO
**JUSTICE OF APPEAL**

S. N. KAJI
**JUSTICE OF APPEAL**

N. P. KIMARO
**JUSTICE OF APPEAL**

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

( S.M. RUMANYIKA )
**DEPUTY REGISTRAR**