Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO. 15 OF 2007- COURT OF APPEAL OF TANZANI AT DODOMA- MUNUO, J, A. KAJI, J, A. AND KIMARO, J. A.	**NYAMBUYA MKUYU Vs. THE REPUBLIC-** (Appeal from the Judgment Decision of the High Court of Tanzania at Dodoma- Criminal Appeal No. 86 of 2003 -Sauda Mjasiri, J.)	**A Witness of tender age-** at 17 there was no need of *voire dire* test as she was not of tender years in terms of section 127 (5) of the Evidence Act 1967.

IN THE COURT OF APPEAL OF TANZANI
AT DODOMA

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

CRIMINAL APPEAL NO. 15 OF 2007

NYAMBUYA MKUYU..... APPELANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment Decision of the High Court of Tanzania at Dodoma)

(Sauda Mjasiri, J.)

dated the 19th day of December, 2005
in
Criminal Appeal No. 86 of 2003

JUDGMENT OF THE COURT

20 & 22 June, 2007

KAJI, J, A.:

In the District Court of Dodoma at Dodoma in Criminal case No. 199 of 2001, the appellant, Nyambuya s/o Mkuyu, was charged with and convicted of the offence of rape, contrary to sections 130 (1) (2) and 131 (1) of the Penal Code Cap. 16, as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998. He was sentenced to 30 years imprisonment and 12 strokes of the cane. He unsuccessfully appealed to the High Court.

The facts of this case are very brief. On 3/8/ 2001, at about 5pm, while PW1 Tabu d/o Zephania was alone at home cooking, she was approached by the appellant who shouted at her: "Leo in leo". Suddenly the appellant grabbed her and threw her on the ground and raped her. When her mother PW2 Mwajuma Zefania returned from where she had gone to see a sick relative PW1 told her about what the appellant had done to her. PW2 examined her private parts and saw some blood. The matter was reported to the Village Executive Officer PW3 Michael Mpanduka on the following morning.

PW1 was referred to Zalilwa dispensary where she was medically examined by PW4 Juma Sulu who detected the followings as per PF 3 Ext P1:-

1. Her private parts had swollen up
2. She had suffered a laceration on her private parts and the hymen had been ruptured
3. Spermatozoa
4. Much pain which made her walk with difficulties.

The appellant was arrested and charged as above. In his defence he denied the offence charged and suspected PW2 to have concocted the case against him due to a misunderstanding between PW2 and the appellant's wife over a

shirt which PW2 had intended to buy from the appellant's wife but later declined. The trial court was satisfied with the prosecution evidence. The appellant was found guilty, convicted and sentenced as above. The appellant was aggrieved. He unsuccessfully appealed to the High Court. The court (Sauda Mjasiri.J) found the appeal wanting in merits. Still undaunted the appellant lodged this second appeal.

In his grounds of appeal he contended that, had he really raped PW1, she would have reported to her Ten cell leader and Village Executive Officer on the same day, and that she would not have failed to raise an alarm for neighbours to come to her rescue.

Mr. Vicent Tangoh, learned State Attorney, who represented the respondent Republic, supported the conviction and sentence.

On our part, we think, this is a straight forward case. It is common ground that PW1 and the appellant were living in the

same village and were neighbours who knew each other very well. The event took place during day time when there was plenty of light. Under the circumstances there was no possibility of misidentification or mistaken identity. She properly identified him. PW1 was aged 17 and the learned trial magistrate's observation is that, she understood the nature of an oath and was possessed of sufficient intelligence, and knew the importance of telling the truth. She was sworn in. We are mindful that at 17 there was no need of *voire dire* test as she was not of tender years in terms of section 127 (5) of the Evidence Act 1967. However we are satisfied that the *voire dire* test conducted by the learned trial Senior Resident Magistrate did not prejudice the appellant nor did it cause any failure of justice. There is nothing suggesting that PW1 had any grudge with the appellant. The appellant's allegation that the case was a frame up by PW2 is just an afterthought. He never raised it when cross examining PW2. It has no merits. PW1 explained the whole process from the time when the appellant arrived till when he left her in agony after raping her.

Her mother PW2 found her crying and immediately mentioned the appellant to be the ravisher. PW2 checked her private parts and saw some blood. There is no suggestion by the appellant that PW1 was his wife who was residing with him. All these facts plus the PF 3 Exh P1, show clearly that PW1 was raped and that the rapist was the appellant as testified by PW1. Her evidence did not require corroboration in terms of section 127 (7) of the Evidence Act, 1967. The appellant complained bitterly why he was not medically examined to determine whether his sperms were similar to those found in PW1's private parts. What we can say on this is that, in proving the offence of rape, it is not necessary to prove ejaculation.

On why PW1 did not raise an alarm, there was evidence by PW1 that the appellant covered her mouth with her khanga. On why no neighbour came to her rescue, there was evidence by PW1 that at the material time their neighbours were not present at their respective homes.

Since there was ample evidence by PW1 that she was raped by the appellant, together with other reasons as demonstrated above, and the sentence being the minimum, we have found nothing to fault the concurrent findings of fact of the two courts below.

In the event, and for the reasons stated above, we dismiss the appeal in its entirety.

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

E. N. MUNUO
JUSTICE OF APPPEAL

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