Citation	Parties	Legal Principles Discussed
CRIMINAL NO. 39 OF 2005- COURT OF APPEAL OF TANZANIA AT DODOMA- MUNUO, J, A. KAJI, J, A. AND KIMARO, J. A.	**OMARY KIJUU Vs. THE REPUBLIC (Appeal from the** Judgment Decision of the High Court of Tanzania at Dodoma- Criminal. Appeal No. 23 of 2004-S. J. AWASI, PRM EXT. JURD)	**Rape-**What amounts to penetration in terms of section 130 (4) (a) of the Penal Code- **Proof of Penetration in Rape-**the doctor's observation coupled with PW1's explanation/ evidence on how those bruises came there, that is, they were caused by a male organ, amounted to penetration and capable of proving the offence of rape. **Conviction of Rape without corroboration-** enactment of the Sexual offences Special Provisions Act 1998 amended section 127 of the Evidence Act, 1967 by adding sub section (7). That amendment allowed conviction of rape even on uncorroborated evidence of a child of tender years as a single witness where the court is satisfied that she is telling nothing but truth, as in this case. **Disappearance of an accused after the event**- act of disappearing immediately after the event and reappearing after so long is inconsistent with his innocence.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL NO. 39 OF 2005

OMARY KIJUU……APPELLANT

VERSUS

THE REPUBLIC……RESPONDENT

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

(S. J. AWASI, PRM EXT. JURD)

dated the 19th day of October, 2004
in
Criminal. Appeal No. 23 of 2004

JUDGMENT OF THE COURT

13 & 22nd June, 2007.

KAJI, J, A.:

On 28th May, 2003, the appellant, Omary Kijuu, was convicted of the offence of rape, contrary to sections 130 (1) (2) (b) and 131 (1) of the Penal Code Cap. 16, as amended by the Sexual offences Special Provisions Act No. 4 of 1998, in Criminal Case No. 9 of 2003

of Singida District Court at Singida. He was sentenced to 30 years imprisonment and 4 strokes of the cane. He was also ordered to pay PW1 Safina d/o Amiri shs 50, 000/= as compensation for the injuries

she suffered through the rape. On first appeal his appeal was dismissed for want of merits.

At the trial the prosecution had adduced evidence to the effect that, PW1 Safina d/o Amiri and the appellant are closely related in the sense that, the appellant is her patrilineal uncle (baba mdogo). They resided in the same area.

On 26th December, 2000, at about 8pm, while PW1 was asleep with her young sister and elder brother, was woken up by the door of the room in which she was sleeping being forced open. She saw a man bursting in whom she identified to be the appellant. The appellant threatened to kill them if they raised an alarm. They obeyed the order. The appellant grabbed PW1, by then aged 11 and led her to a nearby Primary School and had carnal knowledge of her. She felt much pain but the appellant threatened to kill her if she

raised an alarm. She obeyed the order. At almost the same time, PW1's mother Mwajuma d/o Mussa (PW2) who was selling pombe at a pombeshop, was informed by one of her children who was in the same room with PW1 that PW1 had been taken by the appellant.

She rushed home but she found PW1 missing. She raised an alarm which was responded to by some villagers. They started looking for her. In so doing they met her on the way coming. She was walking slowly and with some difficulties. She told her mother PW2 that she was taken by the appellant who raped her. PW2 took her to Mtinko Police Post where she was issued with a PF 3. She was taken to Mtinko Health Centre where she was medically examined and found with the following injuries:-

> "Minor bruises at the genital area with some discharges from the anus."

The appellant, who had disappeared from his village immediately after the event, was arrested on 22/1/ 2003 when he reappeared in the area. He was charged as demonstrated above.

In his defence the appellant denied the charge. He denied even to have known PW1 and PW2 and to be related to them. However at the end of the day he was convicted and sentenced as *supra*. He was aggrieved. But as already stated, on first appeal his appeal was

dismissed for want of merits. Still undaunted he lodged this second appeal.

Before us the appellant appeared in person. The respondent Republic was represented by Mr. Vicent Tangoh, learned State Attorney.

The appellant's grounds of appeal are mainly based on the PF 3 Exh P1, corroboration of PW1'S evidence and the overall circumstances surrounding the case. The appellant's complaint on the PF 3 is that it does not indicate whether there was any penetration, and that, in his view, the words "Minor bruises at the genital area and some discharges from the anus" are not sufficient to prove the case of rape against him.

Submitting on the need of corroboration, the appellant submitted in his grounds of appeal that, whilst it is not a rule of law that an accused person charged with rape cannot be convicted on un corroborated evidence of the prosecutrix, it has long been the practice of the courts to look for and required corroboration in sexual

offences. He cited the case of **Andrea Maginga VR (1979) LRT No. 29**.

In his oral submission the appellant wondered why he was not medically examined to find out whether his male seeds (sperms) resembled those found with PW1. He also wondered why PW1 did not raise an alarm. He also expressed much concern on why the event was not reported to village leaders. He denied to have known PW1 and PW2 or to have been related to them.

Responding to these submissions Mr. Tangoh, learned State Attorney, pointed out that the observations appearing on the PF 3 Ext P1, in law, amount to penetration in terms of section 130 (4) of the Penal Code Cap. 16, as amended by the Sexual Offences Special

Provisions Act, 1998 and that they are sufficient to prove the offence of rape against the appellant.

On corroboration, the learned that State Attorney observed that, under Section 127 (2) of the Evidence Act, 1967, a court may convict an accused person on uncorroborated evidence of a rape victim of

tender years where it is satisfied that the child of tender years is telling nothing but the truth. The learned state Attorney contended that PW1, although of tender years, was possessed of sufficient intelligence and understood the duty of speaking the truth as observed by the trial magistrate while conducting a *voire* dire test. The learned state Attorney remarked that, there were also some other corroborative facts such as the evidence of PW2 and the disappearance of the appellant from his village immediately after the event.

Finally the learned State Attorney observed that, the overall circumstances of the case do not suggest that, PW1 and PW2, close

relatives of the appellant, and who had no grudge with the appellant, could have concocted this case against the appellant.

We have carefully considered whether there was any rape committed on PW1. On this we were guided by the evidence of PW1, the PF. 3 Ext P 1 and the law.

There was ample evidence by PW1 that she was raped. Her mother PW2 checked her private parts and confirmed that she had really been raped. The PF 3 also confirms the same. The appellant expressed some doubts whether the doctor's observation that there were minor bruises at the genital area with some discharges from the anus amounted to penetration. Indeed it may sound strange to the appellant, a layman, that that amounted to penetration. But in law, for the purpose of rape, that amounted to penetration in terms of section 130 (4) (a) of the Penal Code Cap. 16 as amended by the Sexual offences Special Provisions Act 1998 which provides:-

> "For the purposes of proving the offence of rape – penetration however slight is sufficient
>
> to constitute the sexual intercourse necessary to the offence."

That is the law and there is no magic one can do about it.

Thus the doctor's observation coupled with PW1's explanation/ evidence on how those bruises came there, that is, they were caused by a male organ, amounted to penetration and capable of proving

the offence of rape. We are therefore satisfied, as the courts below were, that the offence of rape on PW1 was established beyond all colours of doubt.

The next question is as to who raped her.

There was ample evidence by PW1 that it was the appellant who raped her. The learned trial Magistrate had observed Pw1 and was satisfied that, although of tender years, (13 years), she was possessed of sufficient intelligence and understood the duty of speaking the truth and that she told nothing but the truth. It is true, in the past, courts used to hold the view that, whilst it was not a rule

of law that an accused person charged with rape could not be convicted on uncorroborated evidence of the prosecutrix especially if of tender years, yet as a matter of practice courts used to look for and required corroboration in sexual offence as stated by the appellant relying on the case of **Andrea Maginga** cited above. But those days when the position used to be so are long gone. They were swept away by the enactment of the Sexual offences Special Provisions Act 1998 which amended section 127 of the Evidence Act, 1967 by adding sub section (7). That amendment allowed conviction

of rape even on uncorroborated evidence of a child of tender years as a single witness where the court is satisfied that she is telling nothing but truth, as in this case. The case of **Andrea Maginga** was decided in 1979 before the above Act was enacted.

Next is the question of identification, that is, whether the appellant was properly identified at the scene of crime. PW1 described the whole process from when the appellant forced open the door, grabbing her and leading her to Mtinko Primary School, having carnal knowledge of her, escorting her back home and instructing her what

she would tell her mother if she asked about what had befallen her. She knew the appellant before. She mentioned his name immediately when she met her mother PW2. We are satisfied that under those circumstances taken as a whole, PW1 was able to identify the appellant and she properly identified him.

We are minded also that the appellant is the patrilineal uncle of the appellant as stated by PW1 and confirmed by PW2. His denial on this had no merit and was properly rejected by the courts below.

There was also another fact which the courts below considered and, in our view, properly so. The appellant disappeared from his village immediately after the event. He emerged two (2) years later and got arrested. This act of disappearing immediately after the event and reappearing after so long is inconsistent with his innocence.

Lastly, the appellant complained why he was not medically examined to determine whether the male seeds (sperms) found with

PW1 resemble his. This complaint has no merit. The PF 3 Ext P1 did not show PW1 was found with sperms. The appellant complained also as to why the event was reported to the police straight away without first reporting the same to the village Leaders. We considered this too. In our view, this neither prejudiced the appellant nor vitiated the merits of the prosecution case. Another complaint by the appellant is as to why PW1 did not raise an alarm. The answer is obvious. PW1 said the appellant threatened to kill her if she raised an alarm. Such a threat is so serious that no sane person can take it lightly.

Since the prosecution had established the guilt of the appellant beyond all reasonable doubts as demonstrated *supra*, and since the sentence imposed is the minimum, there is nothing to fault the courts below.

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

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 true copy of the original.

S. M. RUMANYIKA
DEPUTY REGISTRAR