IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And MSOFFE, J.A.)

criminal appeal no. 63 of 2002

KUDURA ALLY @ KIJONJU ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Ihema, J.)

dated the 21st day of August, 2000
in
HC. Criminal Appeal No. 131 of 1999

REASONS FOR THE JUDGMENT OF THE COURT

23 June & 3 July 2006

MROSO, J.A.:

The District Court of Kibaha convicted the appellant of attempted rape, contrary to section 132 (1) of the Penal Code, Cap. 16 of the Laws. In arriving at the decision to convict the appellant the trial Senior District Magistrate said, *inter alia* –

> ... I am bound to make a decision one way or the other. On evaluating the complainant's evidence, I am inclined to say that there is enough evidence to

base a conviction for an attempt to commit rape.

When we heard the appeal, we allowed it by quashing the conviction and setting aside the sentence of thirty years which the trial court imposed on the appellant; which conviction and sentence had been upheld by the High Court when it heard an appeal by the appellant. We reserved our reasons which we now give. It may be helpful to give brief facts of the case relating to the appellant.

A young girl of 11 years called B (PW4) of Visiga kwa Kipofu lived at the home of one Wilbert Kayombo who was a brother- in-law of her father. During the night of 8th of March, 1999 the appellant entered the room in which B and another girl known as Theresia slept. At about 10.30 p.m. of the same night one Kalistus Wilbert Kayombo (PW2) suspected that the appellant might be in the girls' room. So, he knocked on the door of the girls' room and Theresia opened. He claimed in his evidence that he saw the appellant under B's bed. He then went out, locking the door from outside. He informed Wilbert Lucian Kayombo (PW1) and other people about the presence of the appellant in the girls' room. All these people together with a ten cell leader, one Hashim Shawa, and a member of the village militia, one Pendo (PW3), went to the room where the appellant and two

girls were. The appellant was found sitting on B's bed and B herself was also sitting on the bed. Both were dressed in their respective clothes. It was agreed that some people including Pendo (PW3) should remain in the room keeping an eye on the appellant until the following day when they took him to the police station. B was issued with a PF3 and was taken to hospital for examination. Although the PF3 was produced in evidence by B, the contents were not disclosed.

In her evidence in court B (PW4) claimed that the appellant after entering her bedroom, put her on her bed, parted her legs and slept on her, placing his male organ on her female organ without attempting penetration.

The appellant gave evidence on oath. He agreed to have entered the girls' bedroom to visit "wadogo zangu", as he put it. He used to work for the owner of the home, Wilbert Kayombo (PW3), by selling pombe at the home. He denied sleeping on B or placing his male organ on the girl's female organ.

The trial court convicted the appellant of attempted rape contrary to section 132 (1) of the Penal Code and sentenced him to 30 years imprisonment, as already mentioned earlier. The appellant's appeal to the High Court was dismissed in its entirety. Hence his resort to this Court

by way of an appeal.

We appreciate that a court sitting in a second appeal does not lightly interfere with concurrent decisions of the trial court and of the first appellate court. In this case, however, the two lower courts were so obviously in error that it is necessary for this Court to interfere.

To begin with, even the trial Senior District Magistrate does not appear to have found the prosecution case proved beyond a reasonable and his words which we have deliberately quoted at the beginning of this judgment are testimony for this view. The words – **“make a decision one way or the other”** and **“I am inclined to say there is enough evidence”** do not portray a state of mind of being satisfied beyond reasonable doubt about the guilt of the appellant. They are in fact alien to criminal standard of proof.

Both courts below should have realized that PW4 – B does not appear to have reported to any one about the things she alleged against the appellant when she gave her evidence in court. PW1 – Wilbert, PW2 – Kalistus and PW3 – Pendo all talked about finding the appellant in the girls’ room and nothing else of incriminating nature beyond that was said about the appellant. PW1 when questioned by the

court simply said –

> I did not ask anything and B did not tell me anything about Kudra (the appellant).

PW2 said he found the appellant sitting on B's bed and B was sitting there as well. The witness then proceeded to say –

> I then went out and what happened later, I do not know.

PW3 on his part said –

> On opening (the door to the room) I saw Kudura sitting on a bed and a girl was sitting on the same bed. There was another girl sitting on a different bed. Accused was dressed and the girl was dressed.

Those are the three prosecution witnesses, apart from B herself, who testified at the trial. As mentioned earlier in this judgment, none of those three witnesses said B reported to them of anything untoward which the appellant may have

done to her. And, surely, if the appellant had done what B told the trial court he did, the appellant and B would not have been found by the three witnesses sitting calmly on a bed. The irresistible conclusion is that B's evidence in court was mere afterthought; her vain attempt to explain away the finding of the appellant in the room by the other three witnesses.

It may have been a very foolish thing, and conduct which must be deprecated most strongly, for the appellant to go into the young girls' room at night and sit with B on her bed, but that is far from saying there was proof of attempted rape. Curiously too, the other girl – Theresia – who was all along in the room when the appellant was there and would have known if the appellant did what he is alleged by B to have done, was not called as a witness at the trial and no explanation was offered by the prosecution for not calling her.

There is also the complaint by the appellant, and the record supports him, that although he told the trial court that he had two witnesses who would testify in his favour, the trial court did not call them nor did it allow opportunity for the appellant to call them. Immediately the appellant finished giving his evidence, the trial court straight away fixed the date for judgment. The trial court, therefore,

denied the appellant the chance to present his defence case fully to the court, thus occasioning an injustice to him. That is a valid ground vitiating the conviction.

It is for the above reasons that we allowed the appeal, quashed the conviction and set aside the imprisonment sentence.

DATED at DAR ES SALAAM this 28th day of June, 2006.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR