IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 94 OF 1999

SELEMANI MAKUMBA ..... APPELANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court
Of Tanzania at Songea)

(Mwipopo, J.)

dated the 13th day of April, 1999
in
Criminal Appeal No. 23 of 1980

JUDGMENT OF THE COURT

9 & 21 August 2006

MROSO, J.A.:

The appellant was convicted of rape contrary to section 130 of the Penal Code by the District Court of Tunduru and was sentenced to a prison sentence of five years. That was in April, 1997 before the enactment of the Sexual Offences Special Provisions Act, 1998. He was aggrieved by the conviction and sentence and appealed to the High Court. The High Court dismissed the appeal and enhanced the sentence to one of ten years imprisonment. It also imposed six strokes of corporal punishment and ordered payment of shillings

15,000/= as compensation to the victim of the rape. Still aggrieved, he appealed to this Court, filing two grounds of appeal, the second ground being alternative to the first. At the hearing of the appeal the respondent Republic was represented by Mr. Boniface, learned Senior State Attorney, and the appellant chose not to appear.

In his first ground of appeal the appellant made three points. He criticized the first appellate court for upholding the conviction by the trial court. He further criticized the High Court for enhancing the sentence. Thirdly, he complained that the trial court did not call any witness or the doctor who examined the victim to ascertain that rape had been committed. On the second ground of appeal which, as already mentioned, was alternative to the first ground of appeal, he argued that the High Court should have ordered a trial **de novo** because the offence was committed at night.

In supporting the conviction Mr. Boniface responded to all the three points which were raised in the first ground of appeal. It was his submission that the trial court was not obliged to call the doctor

as a witness at the trial. The circumstances, under section 240 (3) of the Criminal Procedure Act, 1985 which would have compelled the trial court to summon a doctor for cross-examination did not exist in this case. As regards the soundness of the conviction Mr. Boniface argued that there was cogent evidence which was not contradicted by the appellant. He, however, agreed with the appellant that the High Court was not justified to enhance the sentence. The trial court had acted within its discretion to impose the sentence of five years imprisonment and there was no need to interfere with that discretion. He submitted that the powers of the High Court under section 366 (1) (ii) of the Criminal Procedure Act, 1985 are exercised within certain limitations. The High Court on appeal would interfere with sentence where it is manifestly excessive or inadequate or where the trial court acted on a wrong principle or where the trial court took into account irrelevant matters. Mr. Boniface also impugned the corporal sentence which the High Court imposed on the appellant. He submitted that imposition of corporal punishment for that conviction was a matter within the discretion of the trial court which had decided not to impose such sentence. The High Court did not

give reasons for interfering with the discretion of the trial court. This Court should quash and set aside both the enhanced sentence and the corporal punishment. However, the learned Senior State Attorney supported the order of compensation arguing that the trial court may have overlooked the need for ordering compensation of the victim and that the High Court properly acted under section 31 of the Penal Code to step into the shoes of the trial court to make the order of compensation.

The Senior State Attorney submitted that the second ground of appeal had no merit and that the Court should dismiss it. There were no valid grounds for the High Court to order a trial *de novo.*

In the record of appeal there are proceedings which were before Manento, J. as he then was. The learned judge purported to preside over proceedings which were supposed to be before the Court of Appeal and he gave a ruling dismissing what he considered was an application for enlargement of time to file a notice of appeal.

Mr. Boniface invited the Court to invoke its revisional powers to nullify those proceedings and ruling.

Before we discuss the points raised in the memorandum of appeal we would like to give a brief account of the case which was before the trial court.

An adult woman, Ayes Adam, who was PW1 at the trial, claimed she was raped by the appellant at a place behind a building known as Tudeco Guest House at Tunduru during the early night of 20th December, 1996. The woman was engaged in the business of preparing food for sale, what used to be popularly known as "Mama Ntilie". Before she was raped the appellant was said to have taken the woman's pot of rice and ran away with it to the back of the Tudeco building. Apparently in an attempt to retrieve the pot of rice PW1 followed the appellant. The appellant is said to have torn her dress and underwear and raped her. Bibie Adam (PW2) a Standard VII girl who was also selling food with PW1, witnessed the rape.

Although both PW1 and PW2 shouted for help no one responded,

apparently because it was then raining and the shouting could not be heard. Both PW1 and PW2 said they knew the appellant because he used to buy rice from their neighbours. PW1 sustained bruises on her body when the appellant dropped her down. She reported to the police and apparently also went to a medical facility where she was examined. It is not, however, clear if a PF3 had been issued to her or what the medical report if any said about her condition. The appellant did not give any defence at the trial and when questioned by the trial court he is recorded as saying:-

> I elect to keep quiet. I have no witnesses to call.

The trial court believed the evidence of PW1 and PW2 and since it was said that the place where the rape took place was lit by electricity, the appellant was convicted as charged and was sentenced to a term of five years imprisonment. When the appellant appealed against conviction and sentence the High Court, Mwipopo, J., dismissed the appeal as already mentioned earlier in this judgment.

It is, of course, for the prosecution to prove the guilt of an accused person beyond a reasonable doubt and an accused person does not assume any burden to prove his innocence. It means, therefore, that failure by an accused person to say anything at the trial in his own defence does not imply admission of guilt. The question in this appeal is whether notwithstanding that the appellant did not give or adduce evidence in his own defence the evidence against him had proved the offence of rape beyond reasonable doubt.

Both the trial court and the first appellate court reached a concurrent finding that the appellant had sexual intercourse with PW1 without her consent. The two courts below reached that finding after believing the evidence of PW1 which was materially corroborated by PW2. The record is silent on how or when the appellant was arrested and no police officer gave evidence at the trial. Also, although, according to PW2, a medical examination was done on PW1, no medical report was tendered as evidence and no medical doctor was called as a witness. Was the trial court entitled

to find that PW1 was raped and that the offence was committed by the appellant?

We are of the firm view that once PW1 and PW2 were believed and the question of mistaken identity eliminated and there were no circumstances or evidence which could give rise to doubt in the mind of the trial court, we can find no justification for interfering with the concurrent findings of the two lower courts that PW1 was raped and that the person who raped her was the appellant. We can find no merit in the complaint by the appellant that the prosecution had failed to prove the offence beyond a reasonable doubt. A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is unconsented sex, even if bruises are observed in the female sexual organ. True 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 where consent is irrelevant, that there was penetration. In the case under consideration the victim – PW1 – said the appellant inserted his male organ into her female organ. That was penetration

and since she had not consented to the act, that was rape, notwithstanding that no doctor gave evidence and no PF3 was put in evidence. The appeal against conviction, therefore, fails.

Was the High Court, Mwipopo, J., entitled to enhance the imprisonment sentence? We deliberately mentioned earlier in this judgment that the offence was committed and the conviction and sentence given before the Sexual Offences Special Provisions Act, 1998 was enacted. The law then was, under Section 131 of the Penal Code, that a person who committed rape was liable to imprisonment for life. There was no minimum sentence for the offence. A subordinate court was therefore entitled to sentence a person convicted of rape in accordance with powers conferred on it under Section 170 (1) (a) and (2) (a) (ii) of the Criminal procedure Act, 1985. Under the provisions just cited the trial Principal District Magistrate was free to impose a sentence of up to 5 years imprisonment but subject to confirmation by a Judge since it exceeded 12 months imprisonment.

With respect, we agree with Mr. Boniface that although the High Court in an appeal is empowered under Section 366 (1) (a) (ii) and (b) to alter the sentence by enhancing it, it does not normally interfere with the discretion of the trial court unless the sentence was illegal or was manifestly inadequate or excessive or the trial court acted on a wrong principle or took into account irrelevant matters. See recent decisions of this Court in:- **Musa Ally Yusuf v R** (DOD) Criminal Appeal No. 72 of 2006 (unreported), **George Mdalichi and Two Others v R** (DOD) Criminal Appeal No. 186 of 2004 (unreported) and **Elias Mangwela v R** (DOD) Criminal Appeal No. 136 of 2003 (unreported).

In the case under appeal none of the above circumstances obtained and, therefore, there was no need for the High Court to interfere with the sentence which was passed by the trial court. The High Court judge had merely substituted his own view of what a proper sentence should be for the view of the trial court. We quash the enhanced sentence by the High Court and restore the sentence of five years imprisonment which was handed down by the trial

court. We also, for the same reasons, quash and set aside the sentence of corporal punishment but sustain the order of compensation.

As for the alternative second ground of appeal we do not have to discuss it at any length because the first ground adequately disposed of the appellant's appeal. Suffice it here to say that there was no reason whatever for the High Court to order a fresh trial. A fresh trial is ordered where the original trial was fundamentally defective and had caused a miscarriage of justice, which was not the case with the appellant's trial. The appellant chose not to make any defence and if that worked against him, he had only himself to blame.

Finally, we are grateful to Mr. Boniface for bringing to our attention the wholly unnecessary proceedings which Manento, J. (as he then was) entertained. The appellant had filed a Chamber Application titled:

"In The Court of Appeal of Tanzania In The High Court of Tanzania Songea, Criminal Appeal No. 22 of 1998 –

Selemani Makumba - Appellant

Versus

The Republic - Respondent"

This so called Chamber Application speaks of an "Appeal from the judgment of the High Court of (T) Songea before Mwipopo – Judge dated 13rd (sic) April, 1999 in Criminal Appeal No. 22 of 1998 --- "

It is not clear what the purpose of the Chamber Application was but it gives the impression that it was meant to be a notice of appeal and is dated 26th July, 2000. On reflection, it could neither be a notice of appeal nor an application for extension of time to lodge a notice of appeal against the decision of the High Court – Mwipopo, J. because a proper and timely notice of appeal had been duly filed on 16th April, 1999.

Manento, J. heard the Chamber Application in the absence of the appellant (he did not wish to be present) and in his ruling

dismissed it for want of merit because, according to the Judge, there were no reasons why the appellant could not file a notice of appeal in time and that the intended appeal did not raise any point of law for consideration by the Court of Appeal.

As already indicated, whatever the intended nature of the application, it was meant for the Court of Appeal and so Manento, J. had no jurisdiction to hear a matter intended for the Court of Appeal. We invoke the revisional powers of this Court under Section 4 (2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 to nullify the whole of those proceedings for want of jurisdiction. We so order.

To summarize, the appeal against conviction is dismissed but the appeal against sentence is partially allowed.

DATED at MBEYA this 21st day of August, 2006.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

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