IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: RAMADHANI, Ca, MUNUO, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 216 OF 2005

MUSA MOHAMED .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(LUKELELWA, J.)

Dated the 28th day of October, 2005

in

Criminal Appeal No. 86 of 2005

JUDGMENT OF THE COURT

November 24 & 27, 2009

MJASIRI,, J.A.:

This is a second appeal. The appeal arises from the decision of the Resident Magistrate's Court at Lindi, Tanzania. The Appellant MUSSA MOHAMED was charged and convicted of the offence of rape contrary to section 130 and 131(1) of the Penal Code, Cap 16 R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998). He was sentenced to thirty (30) years imprisonment and 9 strokes of the cane. He was also ordered to pay Shs 20,000 compensation to the victim. Being aggrieved with the decision of the District Court, the Appellant appealed to the High Court of Tanzania at Mtwara against both conviction and sentence. His appeal to the High Court was also unsuccessful.

The appellant filed six (6) grounds of appeal. The main grounds of appeal crystallize on the following:

1. *The prosecution failed to prove the case against the Appellant beyond reasonable doubt.*
2. *The conviction of the appellant was against the weight of evidence.* At the hearing of the appeal the Appellant was unrepresented. The Republic was represented by Ms Angela Kileo, learned State Attorney.

The background to the case is that the Appellant was the complainant's neighbour, PW4. On the fateful date, December 21, 2000, PW1 the mother of the complainant left PW2, a child of tender years alone in the house and went to her farm. Upon her return she found PW4 crying. She informed her that she was raped by the appellant. When she examined she found blood stains and spermatozoa in her genital area. PW2 could not even walk properly. The appellant was her neighbour and was only 20-30 paces away from her home. The appellant asked PW4 to pound his cassava. She went to the toilet before commencing the task given by the appellant. He followed her there, put his hand over her mouth to prevent her from screaming and raped her. He then threatened to kill her if she let the secret out. PW1 reported the matter to the police. She took PW4 to Mandawa dispensary and then to Ruangwa District Hospital.

In his defence the Appellant denied any involvement of the offence in question.

Ms Kileo opposed the appeal. She readily conceded on the anomaly of the PF.3 report and the fact that the appellant was not informed of his right to have the doctor who prepared the medical report summoned for cross examination as provided under section 240(3) of the Criminal Procedure Act, Cap 20 R.E. 2002. However she submitted that even if the PF.3 report is expunged from the evidence, there was still enough evidence to sustain the conviction of the appellant.

In relation to the testimony of PW4, she submitted that a *voire dire* section 127(2) of the Evidence Act, Cap 6, R.E. [2002]. The Court also warned itself on the dangers of convicting the appellant on the uncorroborated evidence of a child of tender years.

As for sentence, Ms Kileo was of the view that it was illegal. In terms of section 131(3) of the Penal Code as amended by the Sexual Offences Act 1998, the appellant ought to have been sentenced to life imprisonment, she contended.

After reviewing the evidence on record and the submissions made by the Appellant and the learned State Attorney, we are of the view that the whole appeal centres on the issue of whether or not PW4 was raped and whether the Appellant committed the rape.

We have no doubt in our minds that the evidence on record clearly establishes that PW4 was raped. The evidence of PW1 and PW4 is very crucial to the case. Both the trial magistrate and the first appellate Court went to a great length to analyse their findings and to show the basis of their decision. PW4 gave her account of what transpired. PW1 examined PW4 and confirmed that she was raped. Even though the PF.3 report cannot be used as evidence for non compliance with the law, there is sufficient evidence to establish the offence of rape. Section 130(4) (a) of the Penal Code, Cap 16 provides as under:

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence"*

See **Daniel Nguru** & **Others v Republic_CAT** (Criminal Appeal No. 178 of 2004 and **Omari Kijuu v Republic,** CAT Criminal Appeal No. 39 of 2005 (unreported).

In **Prosper Mnjoera Kisa and the Republic,** Criminal Appeal No. 73 of 2003 (unreported) this Court observed that lack of medical evidence does not necessarily in every case have to mean that rape is not established where **all** the other evidence point to the fact that it was committed.

The only evidence linking the appellant with the offence is that of PW4, a child of tender years. A *voire dire* examination was properly conducted in accordance with the requirement of section 127 (2) of the Evidence Act, Cap 6 R.E. 2002. The Court found PW4 competent to give evidence as she was possessed of sufficient intelligence and understood the duty of speaking the truth. Corroboration is not necessary in terms of section 127 (7) of the Evidence Act, Cap 6 R.E. 2002. A Court may convict an accused person on uncorroborated evidence of a child of tender years who is a rape victim where it is satisfied that the said child is telling the truth.

The lower courts found PW1 and PW4 credible witnesses and relied on their testimony. The conclusion reached was that the case against the Appellant was proved beyond reasonable doubt.

As this is a second appeal, the principles to be followed in dealing with the finding of facts and conclusion reached by the lower courts is clearly set out in various decisions of the Court of Appeal for East Africa. The legal position is well established as clearly demonstrated in the following decisions. See R v Hassan bin Said (1942) 9 E.A.C.A 62; R v Gokaldas Kanji Karia and another, (1949) 16 E.A.C.A 116; Reuben Karari **s/o** Karanja v R (1950) 17 E.A.C.A. 146; and Peter v Sunday Post 1958 EA 424.

The decision of the High Court gave us no cause to interfere. In the light of the authorities cited hereinabove we are satisfied that the evidence against the appellant is sufficient to support the conviction.

We are therefore, on the evidence on record satisfied that the learned judge was entitled to reach a finding that the case against the Appellant had been conclusively proved beyond reasonable doubt.

We have however discovered that the trial magistrate inadvertently sentenced the appellant without convicting the appellant of the offence of rape. The first appellate Court proceeded to hear the appeal and went ahead to uphold the conviction of the appellant without taking into consideration this anomaly. Our research has given us two instances at the High Court where such an omission occurred. First it was in George Mhando v R [1983] T.L.R. 118. Here the Resident Magistrate wrote the summary of the evidence but did not complete the judgment. He left a whole page presumably intending to complete the judgment but overlooked to do so and instead he later on proceeded to sentence the accused person. MAINA, J. on appeal held that in essence there was no judgment as provided by section 171 of the Criminal Procedure Code. The learned Judge ordered a retrial and the law Report had the following note as held:

> *"It would not be unfair to order a re-trial in the case where a failure of justice has been manifested but where the appellant has not served a substantial part of the sentence."*

The second instance in Ramadhani Masha v R, [1985] T.L.R. 172 where the Resident Magistrate sentenced the accused person without having first convicted him. Four months later the Resident Magistrate realized his error

and wrote a judgment convicting the accused person. On appeal SISYA, J. held that since there was no conviction then the sentence was illegal and the error was incurable now, under section 388 of the Criminal Procedure Act. The learned Judge's final paragraph of the judgment at page 175 is as follows:-

> *"The question that now arises is what order is befitting in this case with regard to the sentence. The answer is simple. In so far as the said sentence has been found and declared to be unlawful the same cannot be allowed to stand and it is accordingly quashed and set aside. I have considered the possibility of remitting this record to the District Court with directions that the Court now proceeds to pass a proper sentence on the appellant. However, I am of the view that that cannot be done without prejudicing the appellant who must have, by now, completed serving the sentence unlawfully passed on him by the trial Court. In the circumstances I am loathe to make any further orders"*

In the present case the appellant was sentenced unlawfully according to the two decisions we have quoted above. It is most unfortunate that the learned first appellate judge overlooked that error and he proceeded to uphold the 'conviction', which was not there, and the unlawful sentence of 30 years. That is a substantial period unlike what was in George Mhando. We are also not sure whether the witnesses for a matter which took place on 21st December, 2000 would still be around virtually ten (10) years later. So, ordering a retrial would be prejudicial to the appellant just as was in the case before SISYA, 1 But we surely cannot allow the illegality to remain in the Court records.

The learned Resident Magistrate went at length to review the evidence before him and then sentenced the accused person. It is abundantly clear to us that the learned magistrate had made up his mind to

convict the accused person but for some oversight he did not write that down, instead he rushed to sentencing.

This Court being the final court of justice of the land, apart from rendering justice according to law also administer justice according to equity. We are of the considered opinion that we have to resort to equity to render justice, but at the same time making sure that the Court records are in order.

One of the Maxims of Equity is that "Equity treats as done that which ought to have been done". Here as already said, the learned Resident Magistrate for all intents and purposes convicted the appellant and that is why he sentenced him. So, this Court should treat as done that which ought to have been done. That is, we take it that the Resident Magistrate convicted the appellant.

In relation to the sentence, we are inclined to agree with the first appellate Court that the age of PW4 has not been determined. Given the circumstances we will not interfere with the 30 years term of imprisonment. We also have no reason to interfere with the order for compensation.

In the event, we find no merit in the appeal; the appeal is hereby dismissed in its entirety. It is so ordered.

DATED at MTWARA this 27th day of November, 2009.

A.S.L. RAMADHANI
CHIEF JUSTICE

E.N. MUNUO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(K I T U S I)
SENIOR DEPUTY REGISTRAR