IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 325 OF 2007

KAYOKA CHARLES ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Mujulizi, J.)

dated the 13th day of August, 2007
in
Criminal Appeal No. 136 of 2006

JUDGMENT OF THE COURT

3rd & 7th June, 2010

MBAROUK, J.A.:

In the Resident Magistrates' Court of Tabora at Tabora, the appellant Kayoka s/o Charles was charged with the offence of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 as repealed and replaced by section 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to thirty (30) years imprisonment. The High Court (Mujulizi, J.) enhanced the

sentence by imposing corporal punishment of twelve (12) strokes with an order for compensation to the victim in the sum of Tshs. 1,000,000/= upon his release. Undaunted, the appellant has preferred this second appeal.

Briefly stated, the facts relevant to this appeal are that, on 7th April, 2004 at about 12.45 hours, at Majengo Mapya within the District of Sikonge, Tabora Region, the appellant arrived at the house where Sikujua John (PW1) resides. Upon his arrival, according to PW1, the appellant began making jokes to PW1 and embraced her sexually by touching her hands and breasts. PW1 ran to her bedroom and the appellant followed her and told PW1 not to shout. He caught her, threw her down, undressed her and began to have sex with PW1. After the appellant had finished, he left PW1 and destroyed her belongings. Mary Herman (PW2) witnessed the incident.

In his defence the appellant denied to have raped PW1 for the reason that the victim failed to know the date she was born. He contended that PW1 was old enough not to confuse dates.

In this appeal, the appellant was unrepresented, and Mr. Edwin Kakolaki, the learned Senior State Attorney, represented the respondent /Republic.

The appellant preferred a three grounds memorandum of appeal. **One**, that Section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E 2002 (the Act) was not complied with. **Two**, that penetration was not proved. **Three**, PW1 failed to raise an alarm and that PW1's mother was not called to testify.

At the hearing of the appeal, the appellant opted not to add anything from what he has stated in his grounds of appeal, understandably so being a lay person.

On his part, Mr. Kakolaki started his submission by supporting the appellant's appeal. He gave the following reason, that section 240 (3) of the Act was not complied with. Mr. Kakolaki urged us that the evidence found in PF3 should be discounted. He then posed a question on whether after discounting the evidence found in PF3 there was any other evidence to support penetration and subsequently leading to prove the offence of rape? He answered that question in the negative. He said, this was because, PW1 as the witness depended by the prosecution has failed to state specifically that the appellant had entered his male organ into her female organ (vagina) to prove penetration. He further urged us to find PW1 not a credible witness. Mr. Kakolaki further pointed out that, even the evidence of PW2 who was an eight (8) year old girl is not to be relied upon. He gave the reason that, her evidence does not state specifically whether the offence of rape was committed, let alone that section 127 (2) of the Evidence Act (Cap. 6 R.E. 2002) was not fully complied with before taking her testimony.

In the absence of the evidence of penetration, the learned Senior State Attorney was of the view that the prosecution failed to prove the offence of rape against the appellant.

On our part, we agree with the learned Senior State Attorney that section 240 (3) was not complied with. The said section provides as follows:

> *"when a report referred to in this section is received in evidence* ***the court may, if it thinks fit, and shall, if so requested by the accused*** *or his advocate, summon and examine or made available for cross-examination the person who made the report;* ***and the court shall inform the accused of his right to require*** *the person who made the report to be summoned in accordance with the provisions of this section." (Emphasis added).*

In the instant case, PF3 (Exhibit P1) was admitted in court despite objection from the appellant and without the author who made that report being called. That clearly offends section 240 (3)

of the Act. This Court has repeatedly held that, once the medical report is received in evidence, it is necessary for the trial court to inform the accused person of his right stipulated in section 240 (3) so as to cross examine the author of such medical report. Failure to comply with the provision leads a report not to be acted upon, hence discounted. Several decisions of this Court have reached to that conclusion. (See for instance the case of **Kashana Buyoka V. R.,** Criminal Appeal No. 176 of 2004, **Sultan s/o Mohamed V. R.**, Criminal Appeal No. 176 of 2003 and **Alfa Valentino V. R.**, Criminal Appeal No. 92 of 2006 (all unreported), to name a few).

For that reason, the evidence found in the PF3 in this case is hereby discounted.

Having discounted the PF3 which could have proved penetration can we say with certainty that there is another piece of evidence which proves the offence of rape against the appellant? We, just like Mr. Kakolaki, are of the opinion that there is none. This is because the testimony of PW1 does not specifically state that there

was penetration as the law directs. It is crucial that in a case of rape, the victim has to specifically state in her evidence that there was penetration of the male sex organ into her female sex organ. This Court in the case of **Selemani Makumba V. R.**, Criminal Appeal No. 94 of 1999 (unreported), stated that:

> ***"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 women where consent is irrelevant that there was penetration." (Emphasis added).*

Furthermore, this Court in the case of **Mathayo Ngalya @ Shabani V. R.**, Criminal Appeal No. 170 of 2006 (unreported) further elaborated the point by stating that:

> *"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penal Code Cap 16 as emended by the Sexual Offences (Special Provisions) Act 1998 provides;- "for the purpose of proving the offence of rape, penetration, however slight is sufficient to*

constitute the sexual intercourse necessary to the offence." For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence."

In the instant case PW1, was aged twenty (20) years at the time the offence was allegedly committed, hence an adult. However, her evidence does not specifically state that there was penetration. In the event, we are in agreement with Mr. Kakolaki that PW1's evidence cannot be relied upon to prove the offence of rape against the appellant. This also applies to the evidence testified by PW2.

All in all, we agree with the learned Senior State Attorney that the offence of rape was not proved against the appellant. For that reason, we are constrained to allow the appeal against the conviction for the offence of rape and the sentence of thirty (30) years

imprisonment with the corporal punishment of twelve (12) strokes and the compensation of Sh.1,000,000/= as enhanced by the High Court. In the event, we accordingly quash and set aside the said conviction and sentence imposed upon the appellant.

However, having thoroughly gone through the record, we are of the considered opinion that the facts therein constitute a minor offence of sexual harassment, contrary to section 138D (1) of the Penal Code, Cap 16 R.E. 2002. The said section provides as follows:-

> *"**Any person who, with intention, assaults or by use of criminal force, sexually harasses another person,** or by the use of words or actions, **causes sexual** annoyance or **harassment to such other person commits an offence of sexual harassment** and is liable on conviction to imprisonment for a term not exceeding five years or a term not exceeding two hundred thousand Shillings or to both fine and imprisonment....."*
>
> (Emphasis added).

In the instant case, the facts according to the testimonies of PW1 and PW2 show that when the appellant entered the residence of PW1, he started teasing PW1 by touching her hands and breast, threw her down, and undressed her. In our view this constitutes sexual harassment. There is no iota of evidence to show that the appellant did undressed himself in any way.

Having acquitted the appellant of the offence of rape, we are hereby constrained to substitute therefor, under section 300(1) of the Criminal Procedure Act, Cap.20, R.E. 2002 a conviction for the offence of sexual harassment under section 138D of the Penal Code.

As shown herein above, the maximum sentence for the offence of sexual harassment is five (5) years. In this case, the appellant was convicted and sentence since 5-8-2004, which means he has already served nearly six (6) years in jail. In the event, we are of the opinion that as the sentence for the offence of sexual harassment is the imprisonment term not exceeding five (5) years, we are constrained to impose a sentence which will result in the immediate

release of the appellant from prison, unless he is otherwise lawfully held. The appeal is therefore allowed in part.

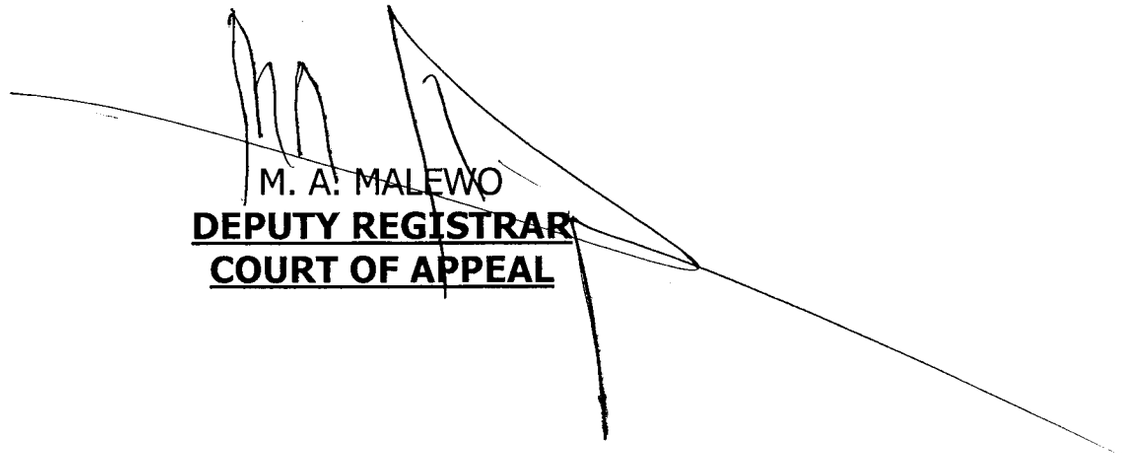
DATED at TABORA this 4th day of June, 2010.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL