IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUNUO,J.A., MSOFFE, J.A., And KIMARO,J.A.)

CRIMINAL APPEAL NO. 79 OF 2009

AYUBU HASSAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court

of Tanzania at Tanga)

(Mussa, J.)

dated 11th day of January, 2009

in

Criminal Appeal No. 5 of 2008

.....

JUDGMENT OF THE COURT

10th & 12th March, 2010

KIMARO, J. A.

In the District Court of Lushoto at Lushoto, the appellant was charged with the offence of rape contrary to sections 130(2) (e) and 131(A) (1) of the Penal Code as amended by sections 5 and 6 of the

Sexual Offences (Special Provisions) Act, No. 4 of 1998. He was convicted and sentenced to a term of thirty years imprisonment. Aggrieved by the conviction and sentence, he appealed to the High Court but his appeal was dismissed. Still protesting his innocence, the appellant is before the Court with this second appeal.

The appellant filed five grounds of appeal but substantially they are three. In the first ground of appeal the complaint is that the whole of the prosecution case is based on evidence from family members. As for the second ground the appellant lamented that contrary to the law, the burden of proof was shifted to him as his conviction is based on the weakness of the defence case instead of the prosecution proving the charge beyond reasonable doubt. In the last ground of appeal the appellant says that there was no corroboration of the evidence of the complainant.

When the appeal was called on for the hearing, the appellant was not represented. The respondent Republic was represented by Mr. Tumaini Kweka, learned State Attorney.

In the trial court the evidence upon which the conviction of the appellant was founded was as follows: On 26th August 2006 at about 8.00

p.m. the appellant who was with other people met Khadija Miraji (PW1). The appellant approached PW1 and informed her that he wanted to marry her, but PW1 protested. It was then the appellant caught her by force and with threats, he whisked her to his house. While at the house of the appellant, he took his clothes off, undressed PW1 and by force he had sex with her. Although PW1 cried for help no one came to her assistance because the appellant boasted that he was in his house and no one was allowed to interfere. PW1 completed her primary school education in 2005. On the fateful day, she was returning home from a tuition class because she was preparing herself for further education.

One Amina Mbwana(PW2) testified that on the same date the appellant and his colleagues went to her house and asked for PW1 but he was told that she was not present. On that day PW1 did not return home. PW2 informed her son about the absence of PW1. Later on that day, the appellant went to her and informed her that he had marred Khadija. PW2 said she had not permitted PW1 to be married. Ramadhani Hakimu(PW3) said the appellant went to him on 27th August 2006 in the evening and informed him that he had married PW1 and he paid him a dowry of T. Shs

20,000/= which PW3 said he accepted as an exhibit. Like PW2, PW3 said he did not allow PW1 to get married. Hakimu Ramadhani (PW4) said in his evidence that he was sent by PW3 to find out whether PW1 got married. He went to the residence of the appellant where she met PW1 crying. PW1 informed PW3 that the appellant took her by force and threats and had sex with her. According to PW4 the appellant kept on insisting that he got married to PW1. PW4 reported the matter to the police and the appellant was charged as earlier on indicated. In his defence the appellant claimed that the case was framed up because of grudges between his father and PW3. The trial court was satisfied that the evidence led by the prosecution proved beyond reasonable doubt that the appellant committed the offence of rape and he was accordingly convicted and sentenced to a term of thirty years imprisonment.

The first appellate court in sustaining the conviction said:

> "She gave an account of how she was waylaid; dragged upon to the appellant's home of residence and; finally, her being forced into

sexual intercourse. There was a time she actually cried for help to which nobody came to her assistance. Not without significance, the appellant was, rather vividly, a bully having boasted to Hadija that nothing gets in his way so long as he was at his home ground. To this end, it is patently clear, Khadija was subjected to some form of pressure of which it was not easy to overcome, whereupon she unwillingly succumbed to sexual intercourse."

During the hearing of the appeal, the appellant opted to hear the sponse from the respondent Republic before giving an elaboration of his grounds of appeal. The learned State Attorney for the respondent Republic supported the conviction and the sentence. In respect of the ground of appeal on witnesses who are relatives, the learned State Attorney conceded that all the prosecution witnesses were relatives. However, he contended that that there is no law which forbids relatives to testify in a

case involving a relative. In terms of section 127(1) of the Law of Evidence, CAP 6 R.E. 2002, the learned State Attorney submitted, what matters is the competence and credibility of the witness and nothing more. He urged us to dismiss this ground for being baseless. The appellant in response had nothing to add to his grounds of appeal.

In as far as we are concerned the answer to this ground is fairly simple. Truly as stated by the learned State Attorney, the Evidence Act under section 127(1) attaches importance on competence and credibility of witnesses and not their relationship. The rationale is simple. In terms of section 61 of the same law, except where contents of documents are concerned, all facts must be proved by oral evidence. Under section 62(1) oral evidence must be given by the person who saw, heard or perceived the event. At times incidences occur in the presence of relatives only. This means that it is only the relatives who saw, heard or perceived the event who can give evidence. Commenting on evidence of relatives the Court in the case of **Paulo Tayari Vs The Republic** Criminal Appeal No. 216 of 1994 (Unreported) said:

"We wish to say at the outset that it is, of course,

not the law that whenever relatives testify, to any event they should not be believed unless there is also evidence of non- relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also be the totality of the story told by them. The veracity of their story must be considered and gauged judiciously, just like the evidence of non-relatives. It may be necessary, in given circumstances for a trial judge or magistrate to indicate awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction based on such

evidence cannot hold unless there is supporting evidence by a non-relative."

We entirely agree with this observation. The learned judge on first appeal was satisfied that the trial court found the witnesses credible and there is no reason for us to interfere with the findings of the courts below. The proceedings do no show that there was any reason to doubt the credibility of the witnesses. This ground lacks merit and it is dismissed.

As for the second ground of appeal the learned State Attorney said that there was no shifting of the burden of proof because the appellant's conviction was based on the totality of the evidence that was on record. Commenting on the witnesses, the learned State Attorney said the conviction of the appellant was based on the evidence of PW1 whom the trial court found trustworthy. Her evidence was corroborated by that of PW2 who was living with her. This witness said the appellant went to her residence and inquired about PW1 who was absent then. PW1 did not return home on that day and on the next day the appellant reported that he married her and paid dowry to PW3. The learned State Attorney submitted further that the complainant explained in detail how she was

way laid by the appellant and forced to go to his residence and also forced to have sex with him. Since the age of PW1 was sixteen years and the law does not permit sex with a female who is below the age of eighteen, contended the learned State Attorney, the appellant committed statutory rape and he was properly convicted. Moreover, argued the learned State Attorney, the age of the appellant was not disputed. He requested us to dismiss this ground as well. As already stated, the appellant did not elaborate on the grounds of appeal.

We agree with the learned State Attorney that this ground has no merit. The learned judge on first appeal was satisfied that the trial court properly convicted the appellant on the basis of the evidence of PW1 whom the Court found to be a credible witness and the appellant has not been able to persuade us that the circumstances were different.

Lastly is the ground of appeal on corroboration. We do not intend to waste time on this ground. Suffice to say that there was no need for corroboration at all. As already shown above, the first appellate court was satisfied with the credibility of PW1 that she was a trustworthy witness and she gave the true accout of what took place between her and the

appellant. The first appellate court did not doubt the credibility of the witness and we have no reason to interfere because even if corroboration was needed there is plenty of such evidence on record.

Eventually, we find that the appeal has no merit and we dismiss it in its entirety.

DATED at TANGA this 11th day of March 2010.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

(N. N. CHUSI)
DEPUTY REGISTRAR