IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO. 246 OF 2009

ANDREA PETRO @ CHOMBO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mussa, J.)

dated the 1st day of June, 2009
in
Criminal Appeal No. 86 of 2008

JUDGMENT OF THE COURT

17 & 22 March, 2010

MSOFFE, J.A.:

PW1 Hilda Sylvester, a girl of 17 years of age and a standard VI pupil at Misozwe Primary school in Muheza District, said that on 21/12/2005 at about 21.00 hours the appellant raped her. Apparently she was in the appellant's home at the material time with a view to helping him in the domestic chores because he was sick. Instead, the

appellant, her own uncle, abused the trust, turned against her and raped her. About two or so months later, i.e. on 8/2/2006, PW2 Sylvester John suspected that PW1 was pregnant as she was vomiting quire often. PW2 requested her sister PW3 Blandina Hussein to confirm her suspicion. PW3 questioned PW1 who admitted that s was pregnant and that the appellant was responsible for the pregnancy. A report was made to the police and the appellant was arrested.

Before the police the appellant made a cautioned statement confessing to have raped PW1. The appellant was accordingly charged, convicted of rape contrary to sections 130 (1) and 131 (1) of the Penal Code by the District Court of Muheza and sentenced to thirty years imprisonment and corporal punishment of four strokes of the cane. His first appeal to the High Court at Tanga was unsuccessful, hence this second appeal.

In their respectively and concurrent findings of fact the courts below were satisfied that the evidence of PW1 and the cautioned statement established the appellant's guilt, hence that the case

against him was proved beyond reasonable doubt. The questioned is whether there is basic for us to interfere with the above findings of fact:

On the memorandum of appeal and in his oral submission before us, the appellant canvassed a number of points. In essence, however, his basic complaint is centred on the cautioned statement. He is of the view that the statement was introduced and admitted in evidence without being asked by the court if he had any objection to its production and admission in evidence.

Arguing in the respondent Republic Mr. Tumaini Kweka learned State Attorney, had at first intimated that he was to support the appeal. On reflection, he changed his stance and argued in opposition to the appeal. With respect, Mr. Kweka was justified in not supporting the appeal as we shall attempt to demonstrate hereunder.

In his defence at the trial, the appellant admitted being attended by PW1 when he was sick. As in the alleged rape, he did not categorically demy it. All he said was that there was a time when

PW1 is father seduced PW1 with a view to having sexual intercourse with her. We wonder if this allegation, even if it was true, had any significance in the case facing him. On substance, therefore, the appellant did not seriously deny or dispute the rape and the resultant pregnancy.

As for the cautioned statement, it is true that when it was admitted in evidence on 20/9/2006 the appellant was not asked if he had any objection to its being produced and admitted in evidence. Ideally, that was wrong because before a document is admitted in evidence the other party is asked if he/she has any objection. However, it is also true that on 12/3/2007 when the appellant was cross-examined he stated as follows:-

> *It is true that I admitted while at the police station. The police who recorded my statement did not beat me.*

By the above words which were stated on oath, if we may respectfully borrow the words used by the judge on first appeal, the

appellant actually ***"nailed himself"***. In this sense, although the cautioned statement was admitted in court of without asking the appellant if he had any objection he was not prejudiced because of his own testimony under cross-examination that made the statement and that he made it without duress. In the statement recorded on 9/2/2006 at 18.40 hours the appellant confessed the rape in the following words:-

> *.....ninakiri kufanya kosa la kufanya mapenzi na Hilda na kumpa mamba ..... Nia ilikuwa ni kufanya mapenzi tu siyo kumwoa au kumpa mamba.....*

Surely, with the evidence on record, any properly constituted court directing itself to the law and the evidence would convict. Therefore, therefore, there is nothing to fault the courts below in their findings of fact. In fact, we may as well say here that this is a case in which we could have easily summarily rejected the appeal by involving the provisions of Section 4 (4) of the **Appellate Jurisdiction Act,** 1979 as amended by the **Appellate Jurisdiction (Amendment) Act No. 17** of **1993.**

The appeal is dismissed.

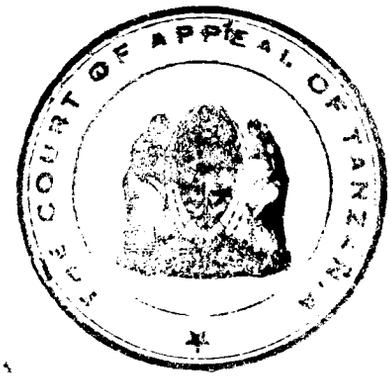
DATED at TANGA this 19th day of March, 2009

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