IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 309 OF 2007

JUMA MWANJA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Arusha)

(Bwana, J.)

dated the 1st day of August, 2007
in
HC. Criminal Appeal No. 65 of 2004

JUDGMENT OF THE COURT

30 Aug. & 1 September, 2010

MSOFFE, J.A.:

Briefly, PW1 Halima Tsino, a girl of 14 years of age at the time of the alleged incident, testified and told the trial District Court of Babati that on 1/9/2002 at 4.00 p.m. she and PW2 Daniel Slaa took the cattle they were herding to Mutuka river to drink water. While there the appellant appeared, seized her hand and dragged her to a nearby bush where he raped her while holding her throat in order to stop her from raising an alarm. After the sexual act she followed PW2 and told him about the rape in issue. In

the meantime, at about 5.00 p.m. PW3 Halima Lele was going to her mother's house when she met PW1 and PW2. PW1 was crying at the time. Upon enquiry PW1 told her that she had been raped by a person she did not know. According to PW3, PW1 was covered with dust all over her body. The matter was reported to the police where a PF3 was issued. On 2/9/2002 PW4 Joseph Baynet attended PW1. In his evidence in court, and also in the PF3 which he eventually filled in and tendered in court as an exhibit, PW4 was positive that PW1 was not raped.

On the basis of the above evidence the District Court was satisfied that the offence of rape contrary to section 130 and 131 of the Penal Code to which the appellant was charged with was not established. Rather, the evidence established the offence of grave sexual abuse contrary to **Section 138 C (2) (b)** of the **Sexual Offences Special Provisions Act No. 4** of **1998**. The said court accordingly convicted the appellant of the latter offence and sentenced him to a term of twenty years imprisonment. On appeal, the High Court at Arusha upheld the conviction and the sentence. The appellant is still aggrieved, hence this second appeal.

At the hearing of the appeal the appellant appeared in person. The respondent Republic was represented by Mrs. Neema Joseph Ringo, learned Principal State Attorney, who argued in support of the appeal. With respect, Mrs. Ringo was justified in not supporting the conviction and the sentence for reasons which will emerge hereunder.

As correctly submitted by Mrs. Ringo, identification was the central issue in the case. In other words, the key issue is whether the evidence on record established that the appellant was identified on the date and time of incident. Admittedly, the incident was alleged to have taken place in broad day light. However, in the justice of this case that was not enough. PW1 said that she did not know the appellant prior to the date of incident. Indeed, none of the other prosecution witnesses ever claimed to have known the appellant before that date. In that situation PW1 ought to have given a description of the appellant as she saw him at the time of the incident. Apparently she did not give a description of the appellant to PW2, PW3, and her father PW6 Tsino Ibrahim. The assertion that she identified the appellant without anything more was not sufficient. Such identification is not free from mistaken identity. As this Court said in

Ayubu Zahoro v Republic, Criminal Appeal No. 177 of 2004 (unreported):

> *In considering whether conditions are favourable for correct identification, the court has consistently held that in identifying an accused person, where a witness saw the accused for the first time, there is need for the witness to describe the identity in detail.*

So, since PW1 admitted seeing the appellant for the first time during the incident that day it was necessary in her evidence of identity to describe in detail the identity of the appellant when she saw him at the time of incident. Apparently no such evidence was forthcoming in the case.

It follows that the above point alone would be enough to dispose of the appeal. However, in the interests of justice we will proceed to address three other issues as under.

One, it is in evidence that the appellant was arrested on 17/9/2002 at around 1.00 p.m. at Gendi Market where he was seated under the shade of a tree drinking "pombe." PW1 claimed to have identified him because

he wore the same clothes that he had put on on 1/9/2002. PW1 did not say however, whether the clothes were special to the appellant only. In the absence of such evidence it was probable that the clothes put on by the appellant on 17/9/2002 were common ones and which could have easily been worn by anybody. As such, it would be unsafe to opine and hold that the person PW1 saw and identified on 17/9/2002 was necessarily the same person who allegedly raped her on 1/9/2002.

Two, the credibility of PW1 was put to question by the evidence of PW4 to the effect that there was no rape committed on PW1. In view of the evidence of PW4 the courts below ought to have found that the evidence of PW4 was not necessarily true.

Three, as stated above, both the District court and the High Court were satisfied that the evidence established the offence of grave sexual abuse contrary to **section 138C (2) (b)** of **Act No. 4** of **1998**. With respect, the courts below missed two points here. **Firstly,** an offence of grave sexual abuse is created under **section 138C** of the **Penal Code**.

Secondly, the ingredients of the offence of grave sexual abuse are as stipulated under the provisions of **section 138 C (1)** which reads: -

> *138C (1) Any person who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument or any orifice or part of the body of another person, being an act which does not amount to rape under section 130, commits the offence of grave sexual abuse if he does so in circumstances falling under any of the following descriptions, that is to say –*
>
> *(a) without the consent of the other person;*
>
> *(b) with the consent of the other person where the consent has been obtained by the use of force, threat, or intimidation or putting that other person in fear of death or of hurt or while that other person was in unlawful detention;*
>
> *(c) with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or*

was in a state of intoxication induced by alcohol or any drugs, matter or thing.

In our reading, understanding and appreciation of the evidence on record there is nothing from the said evidence of the prosecution witnesses, especially PW1, to show that the appellant *for sexual gratification* did *any act* to PW1 by the *use of his genital, or any other part of the human body* or *any instrument or any orifice or part of the body of another person*. At best, the evidence of PW4 was that PW1 sustained bruises on the neck, without more. As such, in an ideal case, the charge would have probably been an assault causing actual bodily harm or grievous bodily harm. Certainly, the "bruises on the neck" would not establish the offence of grave sexual abuse in this case.

Accordingly, the appeal is allowed, the conviction quashed and the sentence set aside. We also set aside the order of compensation of 50,000/= to PW1 made by the District Court. The appellant is to be released from custody forthwith unless otherwise lawfully held.

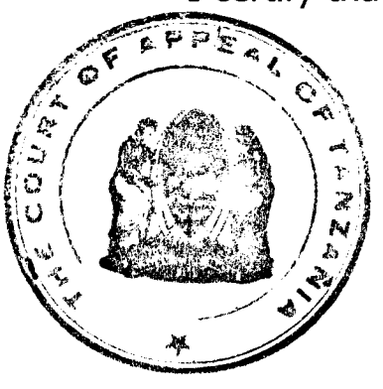
DATED at **ARUSHA** this 31st day of August, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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



(E. Y. MKWIZU)
DEPUTY REGISTRAR
COURT OF APPEAL