IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 304 OF 2007

FADHILI RAMADHANI @ TEMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bwana, J.)

dated the 9th day of June, 2007

in

HC Criminal Appeal No. 132 of 2006

JUDGMENT OF THE COURT

18 & 20 August, 2010

KILEO, J.A.:

This second appeal emanates from the decision of the District Court of Arusha in Criminal Case No. 324 of 2005 in which the appellant Fadhili Ramadhani @ Tembo was convicted on two counts. On the first count he was charged with and convicted of rape contrary to sections 130 and 131 of the Penal Code. He was sentenced to 30 years imprisonment. In addition it was ordered that he suffer (9) strokes of the cane. On the second count he was charged with and convicted of assault causing actual bodily harm. His conviction on this count earned him a term of five years

imprisonment. He appealed to the High Court but he was unsuccessful, hence this second appeal.

At the hearing of the appeal the appellant appeared and argued his appeal in person. The Respondent Republic was represented by Mr. Juma Ramadhani, learned Senior State Attorney.

The facts upon which the appellant was convicted show that while the victim of the offence (PW3, Jackline d/o Peter) was returning home from a saloon at around 19.30 hrs on 19/3/2005 she was waylaid by the appellant who not only raped her but stabbed her with a knife as well. Just after the appellant had finished raping the girl her father and her uncle (PW1 and PW2 respectively) who acted in response to her cries arrived at the scene. PW1 witnessed the appellant strangling PW3. The appellant ran away upon the arrival of PW1 and PW2. The matter was reported to the Police and the victim was taken to hospital.

The appellant's memorandum of appeal contains six grounds. In his submission before us he did not mention ground no. three therefore we

take it as abandoned. The gist of complaint in the remaining grounds can be summarized as follows: -

(1) *That both High Court and the trial court erred in failing to appreciate the fact that the case against him was framed.*

(2) *That the High Court and trial court erred in arriving at a conviction in the absence of the evidence of the police investigating officer and other vital witnesses.*

(3) *That the PF3 of the victim was wrongly acted upon as the appellant was not informed of his right to have the doctor who examined the victim to be summoned for cross-examination.*

(4) *That the High Court and the trial court erred in relying on contradictory evidence.*

Addressing us, the appellant urged us to find that the case against him was framed up. Referring us to the PF3 tendered in court as Exhibit P1 he wondered how the victim could have stayed for three days without going to hospital. Apparently, the PF3 was issued by the Police on 20/3/2005 but the examining medical officer recorded his findings on 22/3/2005. The appellant also insisted that reliance by the lower courts on

the PF3 was not proper as he was not informed of his right to have the doctor who examined the victim appear in court for cross-examination.

Mr. Juma Ramadhani supported both conviction and sentences imposed.

Regarding the appellant's complaint that both the High Court and the trial court erred to have arrived at a conviction in the absence of the testimony of the investigating officer and other vital witnesses, the learned Senior State Attorney argued that in terms of section 143 of the Evidence Act, the law places no requirement for any particular number of witnesses in the proof of a certain fact.

The said section stipulates: -

> **143. Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.**

The learned Senior State Attorney referred us to **Shehe Hamza v Republic** Criminal Appeal No. 114 of 2004 (unreported). In that case this

Court in the discussion of the above provision made reference to **Yohanis Msigwa v Republic**, (1990) TLR 148 which stated:

> *"(i) As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility".*

We need not linger on this point. The decision of a trial court or a first appellate court cannot be faulted merely because some witnesses were left out. What is important as stated in the **Yohanis Msigwa** case *supra*, is the witness's opportunity to see what she/he claimed to have seen and his/her credibility.

In his address before us the appellant made reference to the entry on the PF3 by the doctor which was dated 22/3/2005. He wondered how PW3 could have stayed for 3 days without being taken to hospital. The learned Senior State Attorney explained however, that the PF3 was dated 20/3/2005 by the Police which was the next day after the incident which occurred on the evening of 19/3/2005. He explained further that the

doctor made his entries after completion of investigation, thus 22/3/2205. We agree with the learned Senior State Attorney's response. The date written on the PF3 by the police shows that the victim was sent to hospital on 20/3/2005. The mere fact that the doctor recorded his findings on 22/3/2005 does not mean that the victim went to hospital on this day. It is not uncommon for medical investigations to take a day or more. A doctor would not be expected to return to the police an incomplete report. The appellant's complaint on this aspect therefore lacks merit.

In ground two of his memorandum of appeal the appellant faults the decision of the lower courts for non-compliance with section 240 (3) of the Criminal Procedure Act. This provision requires a trial court to inform an accused of his right to require the attendance, for cross-examination of the person who made the report received in evidence. Section 240 provides:

> **240. (1) In any trial before a subordinate court, any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be receivable in evidence.**

(2) The court may presume that the signature to any such document is genuine and that the person signing the same held the office or had the qualifications which he possessed to hold or to have when he signed it.

(3) 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 make 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 subsection.

Subsection (3) is couched in mandatory terms. Even though the appellant did not object to the production of the PF3 the trial court was nevertheless obliged to inform the accused of his right to require the attendance of the maker of the PF3 for cross-examination if he so wished.

The question that follows is, would the case for the prosecution crumble if the PF3 was expunged from the record?

Mr. Ramadhani submitted that there was ample evidence apart from the PF3 which linked the appellant to the crime. We agree with him. In the first place there is the evidence of the victim which the trial magistrate found to be credible. This is a second appeal. We can only interfere with the findings of fact if we are to find that both courts below completely misapprehended the substance, nature and quality of the evidence resulting in an unfair conviction – See **Salum Mhando v Republic** [1993] TLR 170. In this case we see no justification for interfering with the findings of fact by the lower courts. Further still, in terms of section 127 (7) of the Evidence Act, a trial court can convict on the evidence of a single witness who is the victim of a sexual offence if the court is satisfied that the victim is telling nothing but the truth. In the present case, the trial magistrate was satisfied with the credibility of PW3. But that was not all. There was the evidence of PW1 and PW2, who though did not catch the appellant *inflagrante delicto* they however found him in quite compromising circumstances. PW1 saw the appellant strangling the victim.

Another complaint raised by the appellant was the failure by the lower courts to take into account contradictions in the testimonies of the prosecution witnesses. Mr. Ramadhani in response submitted that there were no contradictions. He argued further that even if there were contradictions they were so minor and could not affect the outcome of the case. In elaboration of this point he referred to **Shihobe Seni v Republic** (1992) TLR 330. In this case the Court which was dealing with illiterate witnesses who had contradicted themselves on estimates of time held:

> *(iv) in case of illiterate witnesses, it is not fair or desirable to tie them down too closely to estimates of time. On a careful review of the whole of the evidence the discrepancies relied upon by the defence were apparent rather that real.*

The High Court judge did not find any material contradictions in the testimonies of the prosecution witnesses. In his written submission to the High Court the appellant claimed that there were contradictions between the testimonies of PW2 and PW3. He stated that whereas PW2 claimed that they succeeded to arrest the appellant on the way from the Police

post, PW3 stated that the appellant threatened to stab her father. She also said that his friends came and they let him go. PW2 is also on record as having stated that the appellant "fight" (sic) when they were trying to arrest him.

We have carefully considered the totality of the evidence adduced and we have reached the same conclusion that the High Court reached with regard to inconsistencies in the testimonies of the prosecution witnesses. We find no material contradictions that can affect the findings of the courts below.

The appellant also challenged the courts below for their failure to consider his defence. He argued that they should have found that the case against him was a frame up. In his defence at the trial court the appellant claimed that PW1 who was formerly his employer framed him up in order to silence him from claiming for his unpaid salary. The trial magistrate considered his defence to be an afterthought. The High Court judge affirmed the finding of the trial court on this aspect. We see no reason to interfere with the findings of the lower courts. We note that the issue of frame up because of demand for unpaid salary came up for the first time

which the appellant was giving his defence. He did not raise it during cross-examination of the prosecution witnesses. The trial magistrate correctly found that line of defence to have been an afterthought.

In the end result, we find the appeal by Fadhili Ramadhani @ Tembo against both conviction and sentence to be lacking in merit. We accordingly dismiss it. It is accordingly ordered.

DATED at **ARUSHA** this 19th 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