IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 22 OF 2008

JOHN MARTIN @ MARWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court (extended jurisdiction) at Tabora)

(Mbuya, PRM. Ext. Jur.)

dated the 14th day of December, 2007
in
Criminal Appeal No. 56 of 2006

JUDGMENT OF THE COURT

21 & 23 June, 2011

MSOFFE, J.A.:

Mbuya (PRM, Ext. Jur.) in exercise of his extended jurisdiction affirmed the sentence of thirty years imprisonment meted on the appellant upon his conviction of rape contrary to Sections 130 and 131 of the Penal Code by the District Court of Nzega. Still aggrieved, the appellant has preferred this second appeal. He appeared in person before us while the

respondent Republic was represented by Ms. Lilian Itemba, learned State Attorney.

In the memorandum of appeal there are four grounds of complaint. It occurs to us, however, that the grounds crystallize on the following major complaints. That the complainant PW1 Oliver Katuga lied to the court that she was raped. That there were contradictions in the prosecution case. That the PF3 did not show that there was penetration in PW1's vagina. That the whole case was a frame up that was orchestrated by PW4 Clement Peter.

Very briefly, the prosecution case was that the appellant was a temporary teacher at Puge Secondary School in Nzega District. PW1 was not only a student at the school but she was also the Head girl at the material time. According to PW1, in the evening of 2/11/2005 the appellant called her and asked her to assist him in chasing up absentee students. PW2 Stella Makunenge and PW3 Nshoma Malale saw the appellant leaving together with the appellant. On the way back, the appellant raped PW1. On arrival at the school PW1 immediately informed

PW2 that the appellant had raped her. She also reported to PW4 and PW5 Daniel Mabala. The matter was reported to the police and a PF3 was issued. The PF3 disclosed, among other things, that there were *"marked spermatozoa 12/cmm"* in PW1's vagina.

Before us, the appellant essentially repeated the complaints in the memorandum of appeal. In the process, it appeared to us that the thrust of his complaint was, as stated above, that he was framed up by PW4.

On the other hand, Ms. Lilian Itemba was of the affirmative view that the prosecution case was credible. She carried us through the evidence of the prosecution witnesses and urged that they were witnesses of truth. In her view, even without the other evidence in the case, the evidence of PW1 alone was enough to ground the conviction in terms of **Section 127(7)** of the **Evidence Act** (CAP 6 R.E. 2002).

The first question we have to address is whether PW1 was raped. It is important to address this point because, according to the appellant, PW1 was a liar. It is also important for us to address this point because we are

aware that in a case of this nature the best evidence of rape is that of the victim. The evidence of PW1 on this point is very clear. She stated thus: -

> *As he attacked me, he held my hands. I wanted to shout, he held my neck tightly. I was now still standing. He threw me down. He started threatening and that I would be slaughtered.* ***He undressed the khanga then my underskirt and skin tight and my underwear****. He said he will be my husband right then.* ***He began to rape me. He came on my top and on my chest and begun. I was pained as he placed his penis into my vagina. He placed in thrice,*** *and I managed to throw him out of me and then left him, I ran to school right then...*
>
> (Emphasis supplied.)

Like the courts below, we see no justification for doubting PW1 on her evidence above. The above evidence established that there was penetration within the provisions of **Section 130 (4) (a)** of the **Penal Code** (CAP 16 R.E. 2002) to the effect that: -

> *Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence.*

Before us, the appellant repeated his evidence and oral submission before the trial District Court and the Resident Magistrate's Court with extended jurisdiction, respectively, that there were contradictions in the evidence of witnesses on time, etc. On this, we are in agreement with Ms. Lilian Itemba that contradictions, if any, were minor and did not go to the root of the prosecution case against the appellant. At any rate, the courts below adequately addressed the so called contradictions and opined and found that they were minor and did not affect the vital and overrall case against the appellant. With respect, we have nothing to fault the courts below in their findings and conclusions on the point.

As for the PF3, contrary to what the appellant said, it infact showed that there were sperms in PW1's vagina, as pointed out above. However, the PF3 in question had no strong probative value in the case because the appellant was not informed of his right to have the doctor who made the report summoned for cross-examination in terms of **Section 240(3)** of the **Criminal Procedure Act** (CAP 20 R.E. 2002). However, in our view, even without the PF3 the other evidence in the case was sufficient to warrant the conviction in issue.

Finally, as stated above, before us the appellant repeated his earlier testimony at the trial that the case was a frame up by PW4 against him. On this, we wish to adopt the reasoning of the trial Resident Magistrate, which Ms. Lilian Itemba also emphasized before us, that even if it was true that there were grudges it was inconceivable that the other prosecution witnesses would lie against him. As pointed out above, the appellant was seen leaving with PW1. On arrival back to the school compound PW1 immediately reported the incident to the witnesses. We do not see how PW1, PW2, PW3 and PW5 could have told lies against the appellant in the circumstances of this case.

Before we conclude this judgment we note that no order for compensation to the victim of the rape was made in the case. The failure to make such order offended the mandatory provisions of **Section 131(1)** of the Penal Code which mandates the court to make an order for compensation of an amount to be determined by the said court.

When all is said and done, we are of the settled view that the appeal is devoid of merit. We hereby dismiss it. In exercise of our revisional

jurisdiction under **Section 4(2)** of the **Appellate Jurisdiction Act** (CAP 141 R.E. 2002) we hereby order the appellant to pay shs. 500,000/= compensation to PW1 Oliver Katiga.

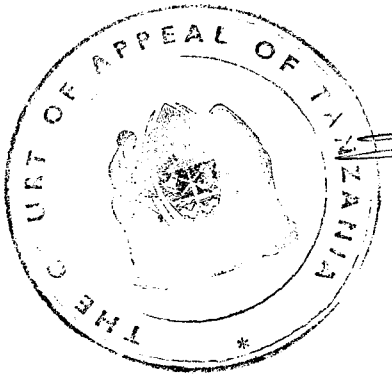
DATED at **TABORA** this 22nd day of June, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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



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