

**IN THE COURT OF APPEAL OF TANZANIA  
AT TABORA**

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

**CRIMINAL APPEAL NO. 18 OF 2008**

**ALLY S/O MAGANGA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Tabora)**

**(Mujulizi, J.)**

**dated the 26<sup>th</sup> day of November, 2007  
in  
Criminal Appeal No. 11 of 2005**

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**JUDGMENT OF THE COURT**

**20 & 21 June, 2011**

**MSOFFE, J.A.:**

Both the District Court of Shinyanga (Sang'udi, RM) and the High Court of Tanzania at Tabora (Mujulizi, J.) were satisfied that on 26/3/2003 at about 18.00 hours at Magobeko village within the Municipality and Region of Shinyanga the appellant raped PW1 Mwajuma Bella, a girl of 12 years of age.

After a well recorded *voire dire* examination the District Court believed PW1 that on 26/3/2003 she and PW2 Merciana Malimi were going back home after attending a traditional dance (ngoma). On the way the two girls met the appellant in the company of one Maduka. The latter held PW1 and fell her on the ground. Thereafter, the appellant undressed PW1 and in the process he tore the latter's underwear. Having done so, he inserted his penis into PW1's vagina. When he was through with the sexual act he left PW1 and allowed her to go home with a warning or threat that she should not reveal the sexual encounter to anyone lest he would "*knife*" her. On arrival at home on that day, PW1 did not reveal the sexual ordeal to anybody in view of the threat she had earlier been given by the appellant. On the following day, she felt much pains in her vagina to the extent that she could not walk properly. Her grandmother PW4 Kundi Maganga noted this sudden change of attitude in PW1 and accordingly decided to examine her. She noted that PW1's recently bought underwear was torn. She then examined PW1's vagina and noted that it had bruises on its "*mouth/lips*". PW1 then revealed to PW4 that the appellant had raped her on the previous day. In the meantime, the appellant escaped from the village until 10/4/2003 when he was arrested in

a fingermillet farm at Galamba by PW5 Mathias Masalu, a village executive officer of Galamba village. On asking the appellant, he allegedly told PW5 that he was living at that farm because he had escaped from his home village after being suspected of having raped a school girl. It is also known that PW1 was medically examined and a PF3 to that effect was eventually exhibited in court.

Essentially, on the basis of the above evidence the appellant was convicted of rape contrary to Sections 130 (2) (e) and 131 of the Penal Code as amended by Sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. He was then sentenced to a term of thirty years imprisonment. His first appeal to the High Court was dismissed, hence this second appeal. He appeared in person, unrepresented, while the respondent Republic had the services of Ms. Lilian Itemba, learned State Attorney.

In his six point memorandum of appeal, and also in his oral submission before us, the appellant essentially raised one major ground of complaint: - That the conviction was against the weight of the evidence.

In elaboration, he was of the view that the prosecution case was a cooked up story. That he was not identified at the scene. That the PF3 ought not to have been believed. That the defence case to the effect that he did not rape PW1 was not considered. That the police investigator of the case did not testify. And finally that having regard to the totality of the evidence on record his guilt was not established beyond reasonable doubt.

On the other hand, Ms. Lilian Itemba was of the view that the evidence of the prosecution witnesses taken as a whole established the appellant's guilt beyond reasonable doubt. On the PF3, Ms. Lilian Itemba submitted that it could be discarded for failure by the trial magistrate to comply with the mandatory provisions of Section 240(3) of the Criminal Procedure Act (CAP 20 R.E. 2002). But, she went on to say, even without the PF3 the other evidence in the case is sufficient to sustain the conviction.

We propose to dispose of the appeal generally as under. To start with, we wish to reiterate that very rarely does a higher appellate court interfere with concurrent findings of fact by the courts below. We can

interfere where the courts below misapprehended the evidence, where there are misdirections or non-directions on the evidence etc. In this case, we are of the settled view that there is no justification for us to interfere with the decisions of the courts below.

The evidence of PW1 was materially supported by PW2 who happened to be at the scene at the time of incident. Further to the evidence of PW2, there was the evidence of PW4 who examined PW1 and saw signs of rape. As if that was not enough, there was the evidence of PW5 who upon asking the appellant the latter told him that he was hiding at the fingermillet farm on suspicion that he had raped a school girl. Surely, in this court of second appeal we see no basis for interfering with the credibility attached to the evidence of the above witnesses by the courts below.

On the PF3, we are in agreement with Ms. Lilian Itemba that the trial court was in error in failing to comply with the mandatory provisions of Section 240(3) of the Criminal Procedure Act of informing the appellant of his right to have the doctor summoned for purposes of cross-examination.

However, even if the PF3 is expunged from the record, the other evidence in the case is enough to sustain the conviction.

The appeal has no merit. We hereby dismiss it.

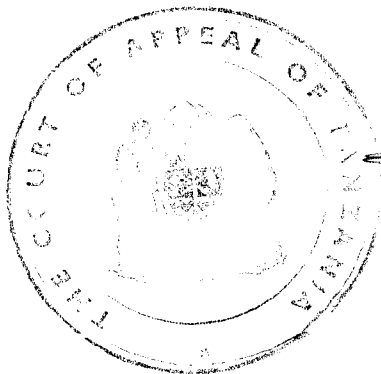
**DATED** at **TABORA** this 20<sup>th</sup> day of June, 2011.

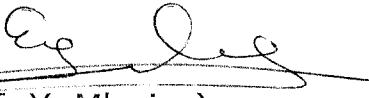
J. H. MSOFFE  
**JUSTICE OF APPEAL**

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**