IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 88 OF 2009

SAID SHABANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dodoma)

(Kwariko, J.)

dated the 17th day of November, 2008
in
Criminal Appeal No. 89 of 2008

JUDGMENT OF THE COURT

4th & 6th April, 2011

ORIYO, J.A:

In the District Court of Singida at Singida, the appellant, Said Shabani, was convicted as charged of rape, contrary to section 130 of the Penal Code, Cap 16 of the laws, read together with sections 5 and 6 of the Sexual Offence Special Provisions Act No. 4 of 1998. He was sentenced to the statutory minimum term of thirty years imprisonment together with an order of paying compensation of shillings fifty thousand (shs 50,000/=) to the victim of rape.

The prosecution case before the trial court was as follows. PW1, Christina Stephano, a girl of 15 years was working as a house girl at the home of the appellant. On 11/9/2003, at about midnight, PW1 was fast asleep in a room with the appellant's child aged 3 years. The appellant went into the room, sat on the bed and told her that there were some witches going around the house. Then the appellant switched off the light, took off the pants of PW1 and had sexual intercourse with her without her consent. In the course of all this, PW1 tried to raise an alarm, but the appellant covered her mouth with a piece of cloth. After satisfying his lust, the appellant left and locked PW1's room from outside. All this happened while PW4, Hafsa Juma, the then appellant's wife, spent the night at her brother's funeral. On 12/9/2003, during morning hours, PW2 Hadija Shabani, a landlady of the appellant, was informed by PW1 that the appellant had raped her in the night.

When PW4, Hafsa Juma, got the news on 12/9/2003, she went to her house and PW1 confirmed to her what the appellant had done and on inspection, she noticed bruises in PW1's private parts.

Subsequently, information was relayed to the ten cell leader, PW3, Mgeni Abdalah, who made arrangements to have PW1 taken to the Police where PW5, F. 128 P.C Enos, issued her with a PF3 and she went to hospital. The PF3 which was admitted at the trial as "PE I, confirmed rape and the presence of active spermatozoa was seen under a microscope. The injury to the complainant was rated as "Dangerous Harm".

At the trial, the appellant denied the allegations and raised a defence of ***alibi***. He stated that the case was a frame-up because at the material time he was at the funeral of his brother - in- law.

In rejecting the appellant's defence of ***alibi***, the trial court stated:-

> *"I have considered accused's defence and for the reasons given above it does not establish a reasonable doubt in my mind that accused was not present at the place where the offence was committed."*

The trial court and the first appellate court found the complainant a credible witness and hence held that the prosecution case had been proved beyond reasonable doubt. The defence of ***allbi*** was discredited by both courts for failure to cast doubt on the prosecution case.

Aggrieved by the trial court's decision he appealed to the High Court. His appeal was dismissed on 17/11/2008, hence the second appeal.

In the High Court the appellant had raised nine grounds of appeal, all of which were dismissed. Before the Court, the appellant's Memorandum of Appeal which also served as a Written Submission with authorities in support of the appeal, raised only two grounds of appeal, namely:-

1. That PF3 was admitted in evidence without complying with the provisions of section 240 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002 and that he was convicted without proof of the ingredients of the offence of rape.
2. That the evidence of PW1 was not corroborated by any other eye witness.

Before us, the respondent Republic was represented by Mr. Peter Mauggo, learned State Attorney while the appellant appeared in person.

On the first ground of appeal, the appellant, in his written submissions made arguments on two limbs. First the appellant challenged the prosecution testimony as insufficient to prove the offence of rape beyond reasonable doubt because there was no sufficient evidence to prove all the ingredients of rape. He submitted that the benefit of the doubt should go to him.

On the second limb, the appellant challenged the authenticity of PF3 admitted as exhibit at he trial in the absence of the medical doctor who authored it.

At the outset, the learned State Attorney submitted that the respondent Republic supported the appellant's conviction because the prosecution evidence tendered established the appellant's guilt beyond reasonable doubt. He stated that PW1's testimony was proof of penetration without consent and the use of force by the appellant.

In respect of the second limb on non-compliance with section 240 (3) of the Criminal Procedure Act, the learned State Attorney stated that even if the evidence of PF3 is discounted, the remaining testimonies of PW2, PW3 and PW4 suffice.

As for the second ground of appeal, the learned State Attorney submitted that the law does not require corroboration of the complainant's evidence in Rape cases.

He prayed that the appeal be dismissed for lack of merit.

Coming to the merits of the grounds of appeal, the first ground can be dealt with relative ease, because the law is very clear in section 240 (3) (*supra*). Where evidence of PF3 is received in evidence, the accused person is entitled to have the medical officer who examined the complainant and authored the report summoned by the trial court for cross examination. In the present case, the appellant was not informed of his right to have the medical officer summoned and in fact he was not summoned. Instead, PF3 was tendered as exhibit at the trial by PW5, a police officer. However, as correctly observed by the learned State

Attorney, the conviction of the appellant was not solely based on the evidence of PF3. We are also in agreement with him that the evidence of PF3 may be expunged from the record without affecting the liability of the appellant.

The second limb of ground one of appeal has merit and is allowed. We therefore order that the evidence of PF3 be discounted.

We now come to the other ground of appeal on lack of corroboration of the evidence of the complainant, PW1, on whether she was raped by the appellant as alleged. The learned State Attorney was of the firm view that the evidence of PW1, standing on its own, established without doubt the offence of rape. Section 130(2) of the Penal Code provides:-

> *"130 (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(a-d) N/A*

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man".

Further "Sexual intercourse" is defined as hereunder:-

"Sexual intercourse" whether natural or unnatural shall, for the purpose of proof of a sexual offence be deemed to be complete upon proof of penetration only not the completion of the intercourse by emission of seed"

So the first consideration whether the evidence of PW1 is sufficient to convict the appellant is whether it proves that a male person had sexual intercourse with a woman who was below the age of 18 years with or without her consent.

Section 130 (4) (a) of the Penal Code defines Rape. It states:-

"(4) For the purposes of proving the offence of rape-

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence".

The complainant, PW1 partly testified on 17/2/2004, as follows:-

"On 11/9/2003 at about 00.00 hours I was asleep with accused's child aged 3 years and accused came to my bed and sat and said there are some witches who are going around our house .....and then he switched off the light, then took off my pants and I raised an alarm and he covered my mouth and then he had sexual intercourse against nature and then he came and had sexual intercourse in the normal way. Then I begged him to let me to help my self and he told me to help in a tin which he gave me and he then shut the door".

In our considered view, the offence of rape is established when the necessary legal ingredients are proved. Therefore the offence of rape must be evidenced by sexual intercourse with a woman below 18 years of age upon penetration with or without consent. As it was stated by this Court in the case of **Mathayo Ngalya @ Shabani vs R**, Criminal Appeal No. 170 of 2006 (unreported).

> *"For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence".*

We fully associate ourselves with the views expressed in the case above.

In view of the foregoing we agree with the learned State Attorney, that the evidence of PW1 was sufficient in law to prove beyond reasonable doubt, that she was raped by the appellant.

And lastly, as it was observed by the learned State Attorney, there is no legal requirement that the testimony of PW1 has to be corroborated. Section 127 (7) of the Law of Evidence Act, Cap 6, R.E. 2002 provides:-

> *"127,- (7)*
>
> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".*

In line with the requirements of the law above, the trial Magistrate stated the following in the last paragraph of the judgment:-

> *"I had an opportunity to hear the witness and observe her demeanour during the trial and I am satisfied that the girl is telling nothing but the truth that it is accused person who raped her".*

Consequently we find the appeal lacking in merit and it is dismissed in its entirety.

DATED at DODOMA this 5th day of April, 2011

E. A. KILEO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL