IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO. 99 OF 2010

ALLY HUSSEIN KATUA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Teemba, J.)

dated the 16th day of April, 2010
in
Criminal Appeal No. 85 of 2005

JUDGMENT OF THE COURT

30 March & 8 April 2011

MSOFFE, J.A.:

Before the District Court of Muheza (Mussa, PDM) the appellant ALLY HUSSEIN KATUA was charged with the offence of rape contrary to sections 130 (1) and 131 (1) of the Penal Code, as amended. After a full trial he was acquitted for want of sufficient evidence. Aggrieved, the Director of Public Prosecutions appealed to the High Court of Tanzania at Tanga where Teemba, J. set aside the order of acquittal, convicted the appellant as charged, and sentenced him to a

term of imprisonment for thirty years with an order for payment of Shs. 500,000/= as compensation to the victim of the rape in question. The appellant is dissatisfied, hence this appeal.

The memorandum of appeal is a three page document in which there are three basic complaints. In view of the position we have taken on the appeal we will set out the complaints in fairly sufficient detail. **One,** that the charge was defective in that the specific offence under **section 130 (3)** of the Penal Code, as amended, was not stated. To this end, the appellant cited a passage from this Court's decision in **Mhina Hamisi v Republic,** Criminal Appeal No. 83 of 2005 (unreported) thus:-

> *Lack of consent is a vital element in the offence of rape. Yet the charge against the appellant did not disclose this important element. It is trite law that a charge should disclose the nature of the offence so that an accused person may know the nature of the case he has to answer.*

Two, that the evidence of the complainant, PW1 Rehema Athumani, should not have been believed and acted upon wholesale because her own grandmother, PW2 Mwantumu Juma, testified and told the trial court that she had a history of mental illness and confusion. In this sense, the appellant cited portions of the evidence of PW2 thus:-

> *I recall on 20/1/2004 one Rehema Athumani (PW1) complained that his head was confused. However, when Rehema Athumani (PW1) was seriously sick, I fed the occurrence to the accused, hence the accused called at my house and treated Rehema Athumani (PW1). I thus in the following day followed the accused and fed to him of what was happening ... It was thereafter we left and on the way Rehema Athumani (PW1) shouted as usual and cried out ...*

Three, the judge on first appeal did not address her mind to the issue of time frame which was important in checking the veracity of the evidence of PW1 and PW2. We must point here that this point is

not elegantly framed in the memorandum of appeal and in this regard we take the liberty to reproduce the point *verbatim* thus:-

> *... PW1 the victim clarified in court's dock that the scenario accrued on 21/1/2004 at 8.00 p.m. it was on 21/1/2004 at 11.00 a.m. she was informed by PW1 of the rape scenario, it is ridiculous; and with simple arithmetic this was nine (9) hours before the occurrence of the entire offence ...*

At this juncture, we think it is pertinent to state the facts, *albeit* briefly. PW1 was a student at Mlingano Secondary School. She was staying with her grandmother PW2 Mwantumu Juma in the same village in which the appellant, a traditional healer or local medicineman, also lived. Prior to the date of incident PW1 was reported sick and the appellant was approached so that he could treat her. On 21/1/2004 PW1 was taken to the appellant's home. The appellant initiated some treatment. What followed thereafter was a long story which bordered on rituals, sorcery etc. but it will suffice to say that PW1 was taken to a number of places and

ultimately the appellant asked her to undress and she obliged. Then the appellant spread a piece of cloth on the ground, asked her to sleep on it, slept on her chest and then raped her. When the appellant was through with the sexual encounter, which he had earlier told PW1 that it was part of the treatment or healing process, he warned her not to disclose it to anyone. They put on their clothes and went towards the appellant's home. After leaving the appellant's home, and on their way back home she disclosed the rape incident to PW2. The incident was eventually reported to the relevant authorities.

In defence, the appellant admitted to have treated PW1 on the day in question. His only point of departure from the prosecution version was that he denied raping PW1. He was supported by his witnesses on the sickness and treatment of PW1 but none could vouch or say anything on the alleged rape.

This is a second appeal, so to say, in the sense that the case originated from the District Court of Muheza. Under such

circumstances, this Court is cautious and rarely interferes with findings of fact by the court(s) below. The Court can only interfere where there are misdirections or non-directions on the evidence, where the court(s) misapprehended the evidence etc. – See **Director of Public Prosecutions v Jaffari Mfaume Kawawa** (1981) TLR 149, **Amratlal D.M. t/a ZANZIBAR SILK STORES v A.H. JARIWALA t/a ZANZIBAR HOTEL (1980) TLR 31, DPP v NOBERT MBUNDA,** C.A.T Criminal Appeal No. 108 of 2004 (unreported).

As observed by this Court in **Goodluck Kyando v Republic,** Criminal Appeal No. 118 of 2003 (unreported):-

> *... It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness ...*

The crucial issue in this appeal is whether or not PW1, the key and only material witness, was credible and entitled to be believed.

us. It is true, as opined by Mr. Faraja Nchimbi learned State Attorney appearing on behalf of the respondent Republic, that normally the element of lack of consent ought to be reflected in a charge of rape. But with the advent of **section 130 (2) (e)** of the Penal Code consent is no longer relevant where the victim is under eighteen years of age. In this case, there was no dispute that PW1 was aged 17 years at the time and therefore within the ambit of the above provision. As it is, although the charge facing the appellant did not specifically state the above provision there was no harm because the omission was cured by **section 388 (1)** of the **Criminal Procedure Act** (CAP 20 R.E. 2002) in that the appellant knew the nature of charge against him. In fact, we may observe here in passing that the charge against the appellant ought to have been preferred under **sections 130 (1) (2) (e) (d)** and **131 (1)** of the Penal Code. **Paragraph (d)** above would particularly be important in highlighting the fact that the appellant being a traditional healer took advantage of his position and committed rape on PW1 as we shall demonstrate hereunder.

This brings us to the second ground of appeal in which the main complaint really is that the evidence of PW1 should not have been believed wholly more so because he had the history of mental illness. With respect, much as we agree that PW1 had that history but in the circumstances of this case we are satisfied that her evidence was nothing but the whole truth. She was so coherent in her testimony that she must have testified on an event in which she had utmost control of and her mental faculties at the time were quite alive to what the appellant had done to her. She was very much in control of the situation at hand and what was happening in the world around her at the time. To this extent, we are in entire agreement with the judge on first appeal in her assessment of the reliability of the evidence of PW1 thus:-

> *"First PW1 remembered all the stages of her treatment by the respondent. She was able to identify the places and actions performed during the fateful night, and which were not disputed at all. Second, she repeated the same thing to the family meeting and to her school teachers. Third, she was taken to*

police and finally she testified before the trial court on the same accusations against the respondent. Nowhere on record it is indicated that PW1 failed, at any particular moment to remember the occurrence in connection to this incident. PW1 was fine when narrating the incident to PW2. Thus, her credibility was not shaken and therefore, her testimony was nothing but the truth of what exactly happened."

Further to the above passage from the High Court judgment, we also believe that PW1 was truthful when she testified thus:-

"It was thereafter the accused asked me to accompany him so that we could bury the head of the hen. I did follow and we went to a junction. He refused the grandmother to follow. We thus came to a junction and we buried the head of that hen and thereafter asked me we walk to the down at a distance of about 15 paces. It was at that area again the accused asked me to take of my clothes again. I took off all the clothes and the

accused took off all the clothes. The accused thereafter laid down the piece of cloth and he asked me to lay there looking upwards. I did follow his directions, but abruptly the accused who at that juncture had also removed his clothes did lay on my body hence he looked downwards. The accused however, was of carnal knowledge of me in that the penis of the accused entered wholly to my vagina. The accused on doing that act alleged that he was doing the act so called "KUTAMBIKA". However, I believed that he was carrying a "TAMBIKO". However, I informed the accused that I was feeling pains. The accused thereafter he left me and he asked to now accompany him so that we could be back home. However, at that juncture I revealed white solutions at my vagina, here I revealed so at the juncture, I abacked at my house. The accused asked me not to tell anybody otherwise all my things would be distorted and even I will fail to go to school. It was thereafter we turned back at the house of the accused, whereby I met my young brother and my grandmother. It was thereafter the

accused allowed us to leave and we left. However, on the way I fed to my grand mother of the occurrence hence she fed also to others. However, my grandmother a backed to the accused and asked him of the accused, hence my grandmother abacked and informed me that he refused..."

Surely, if PW1 was mentally sick or confused, as the appellant would wish us to believe, she would not have been able to give the above narrative which consisted of even the minutest details. As already stated, her version of the story was coherent and consistent with truth.

We are aware from the evidence of PW1 that on returning to the appellant's house she did not immediately report the rape incident to her grandmother PW2; and that the failure to do so might probably be contrary to the holding of this Court in **Marwa Wangiti and Another v Republic,** Criminal Appeal No. 6 of 1995 (unreported) that:-

> *The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry.*

But the following points should be made here. **One,** that **Wangiti's** case is good law but it did not lay a principle that the failure or delay to name a suspect at the earliest opportunity is fatal. At the end of the day therefore, each case has to be decided in its own context and peculiar circumstances. **Two,** in this case, there was no total failure by PW1 to report the incident at the earliest possible opportunity. On the contrary, she reported the incident to PW2 **immediately** after the two had left the appellant's home. Once PW1 reported to PW2 the latter carried forward the narrative thus:-

> *... It was thereafter we left and on the way Rehema Athumani (PW1) shouted as usual and cried hence I abacked at the accused, hence I fed everything to the accused. The accused took medicine and brought the same to Rehema Athumani (PW1) thereafter she became alright and the accused had already*

> *left. Rehema Athumani (PW1) thereafter fed to me that she cried out because the accused who is her uncle was of carnal knowledge of her. It was thereafter I fed the occurrence to one Habiba Kuziwa the cell leader...*

So, if we may repeat, from the evidence of PW1 and PW2 (above) it is evident that PW1 reported the rape incident immediately after the duo had left the appellant's home. It is also evident that when PW1 shouted and cried PW2 thought that she did so as part of her normal habit but PW1 clarified that she did so in agony due to what the appellant had done to her. **Three,** at any rate, PW1 clarified as to why she did not report the incident to PW2 **immediately** after they had assembled at the appellant's home. This is borne out by, or rather reflected in, her evidence in cross-examination by the appellant thus:-

> *... you told me not to tell and that is why I did not inform your wife* ***and anybody right away ...***
>
> *(Emphasis supplied.)*

The provisions of **section 130 (4) (a)** of the Penal Code are important in an offence of this nature to the effect that penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. In this case, evidence of penetration is abundant and is to be found in the above evidence of PW1 thus:-

> *... The accused however, was of carnal knowledge of me in that the penis of the accused entered wholly to my vagina. The accused on doing that act so called "KUTAMBIKIA". However, I believed that he was carrying a "TAMBIKO". However, I informed the accused that I was feeling pains. The accused thereafter he left me and he asked me to accompany him so that we could be back home. However, at that juncture I revealed white solutions at my vagina...*

The third and final ground of appeal could have been framed under ground two in that it essentially seeks to impeach the evidence of PW1 on ground of alleged contradictions in the latter's testimony. With respect, this ground has no merit. As already stated, like the

So even if there were contradictions, our view is that they were minor and did not go to the root of the overall prosecution case against the appellant.

Without prejudice to the foregoing, under **section 6 (7) (a)** of the **Appellate Jurisdiction Act** (CAP 141 R.E. 2002) an aggrieved party may appeal to this Court on a matter of law (not including severity of sentence) but not on a matter of fact. Strictly speaking, in our reading and appreciation of the evidence on record there is no serious point of law involved in this appeal. The evidence involved in the case essentially centres on matters of fact only.

For the foregoing reasons, we dismiss the appeal.

DATED at TANGA this 6th day of April, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

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

(E.Y. Mkwizu)
DEPUTY REGISTRAR