

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

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

CRIMINAL APPEAL NO. 25 OF 2009

1. MOHAMED JUMA 2. BAKARI RAJABU 3. RASHIDI LWAMBO	}	APPELLANTS
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VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the judgment of the Resident Magistrate's
Court (Extended Jurisdiction)
at Tanga**

(Lema – PRM/Extended Jurisdiction)

**dated the 11th day of September, 2008
in
Criminal Appeal No. 48 of 2007**

JUDGMENT OF THE COURT

1 & 8 April 2011

MANDIA, J.A.:

The appellants MOHAMED JUMA, BAKARI RAJABU and RASHIDI LUAMBO appeared in the District Court of Lushoto at Lushoto to answer a charge sheet containing three counts of RAPE c/s 130 (1) and 131 (2) of the Penal Code, Unnatural Offence c/s 154 (1) of the Penal Code and Grievous Harm c/s 225 of the Penal Code. They

were found guilty, convicted and each sentenced to concurrent thirty years imprisonment for the first and second counts and three years imprisonment for the third count. Their appeal to the Resident Magistrate's Court (Extended Jurisdiction) (W.E. Lema, PRM Extended Jurisdiction) was dismissed in its entirety and hence this second appeal.

In the trial court the complainant had a sordid tale to tell. She testified that on 3/8/2003 at 9 p.m. she was just about to close her business of selling local liquor known locally as "BOHA" at Vuga Mohavai Village in Lushoto District. Three people, who she identified by a hurricane lamp burning inside the room, invaded her. One of the three, the third appellant, held a knife. The third appellant forcibly undressed her by taking off her kitenge, underpants and blouse. Thereafter the third appellant proceeded to rape her and then had carnal knowledge of her against the order of nature. When the third appellant finished, the second appellant took his turn at raping and having carnal knowledge of the complainant against the order of nature, an exercise which was completed by the first

appellant who also did what his confederates did. After this orgy the third appellant cut the complainant three times on the right hand, once on the neck and three times on the private parts. While the third appellant was cutting the complainant, the second and first appellants pinned her to the ground. Thereafter the appellants left with the complainant's clothes, and the complainant left for home in pain. On the next day 4/8/2003 the complainant narrated her ordeal to her elder sister PW2 Potina Shemtoi. Potina Shemtoi took the complainant to Vuga Dispensary for treatment which was offered by PW3 Rongo Adolf Michael. PW3 tendered a medical report he filled after treating the complainant as Exhibit P1. The report showed that the complainant sustained bruises and cut wounds in the genital area, injuries which PW3 Rongo Adolf Michael categorized as "dangerous harm." After treatment PW2 Potina Shemtoi reported the matter at Soni Police Station. She visited the scene of the crime in the company of one militiaman Adam Kanyama who was however not called to testify though PW2 mentioned the militiaman as the person who arrested the appellants.

In defence, each of the appellants gave an alibi – that they were not at the scene of the crime.

The appellants appeared in person, unrepresented, at the hearing of this appeal. The respondent/Republic was represented by Ms Pendo Makondo, learned State Attorney, who did not support the conviction and sentence.

The substantive issues raised in this appeal are visual identification and whether or not there was proof of penetration or not.

On the issue of identification we take note that the only witness who testified for the prosecution was the complainant herself. Her testimony was to the effect that there was a hurricane lamp in the room where the assault occurred. She did not describe the scene in detail so as to reach the threshold set in **WAZIRI AMANI v R** (1980) TLR 250. She could have done this by showing how intense the light from the lantern was, where it was placed so as to afford to light up the room sufficiently to recognize the assailants etc. The

observations of this Court in **ISSA s/o MGARA @ SHUKA versus THE REPUBLIC**, Criminal Appeal No. 37 of 2005 and **DEO AMOS versus THE REPUBLIC** Criminal Appeal No. 286 of 2007 are relevant on this point. Matters are compounded by the fact that though the complainant mentioned one MUSA SAID as a witness to the scene, and one who said "muacheni huyu mama mtamuua," MUSA SAID was not called to testify. The harrowing story which the complainant gave to the court was horrifying, and MUSA SAID being an independent observer could have given corroborative evidence. The evidence of PW2 Potina Shemtoi is not corroborative of the events of 3/8/2003 as she came into the picture on 4/8/2003 so she is not an eye witness to the crime.

On the penetration the record shows the complainant only telling the trial court that the appellants "raped and sodomized" her without elaborating. As this court held in **Ex-B 9690 SSGT DANIEL MSHAMBALA vR** Criminal Appeal No. 183 of 2004 saying that such and such a person raped me is too general a statement and that the complainant ought to have been more specific so that

penetration is proved. As the evidence on record stands, there is no proof of penetration so as to comply with the requirements of Section 131 (4) of the Penal Code as amended by the Sexual Offences Special Provisions Act, 1998.

We are therefore satisfied that the convictions and sentences entered cannot be supported by the evidence on record. We accordingly allow the appeal, quash the convictions and set aside the sentences. The appellants should be released from jail forthwith unless they are held on some other lawful cause.

DATED at TANGA this 7th day of April, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
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