IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MBAROUK, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 297 OF 2008

GETABAKI MALLO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Mmila, J.)

dated the 26th day of August, 2008
in
Criminal Appeal Case No. 128 of 2007

JUDGMENT OF THE COURT

12th & 17th October, 2011

MBAROUK, J.A.:

The appellant Getabaki Mallo, was convicted by the District Court of Hanang at Katesh of the offence of rape contrary to **Sections 130** and **131** of the Penal Code as amended by the Sexual Offences Special Provisions Act No. 4 of 1998 (the Act). He was sentenced to life imprisonment as the victim was a girl under the age of ten years. Aggrieved, the appellant unsuccessfully appealed to the High Court before Mmila, J. where the conviction was substituted to that of attempted rape under **Section 132(1)**

of the Act. The sentence of life imprisonment was not disturbed. Still aggrieved, the appellant has filed this second appeal.

A brief account of the prosecution's case at the trial which led to the conviction of the appellant is as follows. On 10/4/2002 at 6.00 p.m, the appellant visited the house of PW1, Maria Yaghembe who is the appellant's sister in law purporting to have gone, to greet them. Having found that PW1's husband was not present, the appellant left with PW1's daughter (a girl aged four years- victim) without PW1's knowledge. After noticing that her daughter Winfrida d/o Mishoni was absent, PW1 thought that Winfrida could have probably followed her brother PW4, Maganga Mishoni who was grazing calves at a place not very far from their home.

Sometimes later, PW1 decided to look for her daughter. She called PW4 and asked him the whereabouts of his sister Winfrida Mishoni. PW4 told his mother that he had seen her in the bush

with the appellant, and that the appellant was lying on top of her. That information worried PW1 and hence intensified the search. After a while, she saw her daughter coming, she was crying and limping. When PW1 asked her daughter what befell her, the little girl told PW1 that she was forcefully grabbed by the appellant who led her in the bush and raped her. Upon that information, PW1 examined her daughter and found that she had sperms on her vagina which was reddish but her hymen was not ruptured. Thereafter, PW1 relayed that information to her mother in law, later to the Village Chairman who advised her to report the incident to the Police Station at Katesh, which she did.

The police gave a PF3 to PW1 with instructions to send the victim, the little girl to hospital for medical examination, which she did and returned the document to the police. PW5, Dr. Francis Garasma, an assistant Medical Officer of Hanang District Government Hospital examined Winfrida Mishoni and observed that her vagina was reddish and not normal. However, PW5 saw no sperms in her vagina, and her hymen was intact. Having received

that report, the police tracked the appellant, arrested and charged him accordingly.

In his defence, the appellant denied to have committed the offence charged. He claimed not be in good terms with PW1 since 1993. However, he said, on 9/4/2002 at 10.00a.m in the morning he went to PW1's house and asked her whether her husband had already left for the cattle auction, PW1 answered him rudely. He then left to follow his brother at Balangdalalu cattle auction. The appellant raised a defence of *alibi* to the effect that on 10/4/2002 he left for Mweru Village Balangdalalu and returned to his residence at Ming'enyi Village the same day at 7.30 p.m.

Before us, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Mr. Zakaria Elisaria, learned State Attorney.

In this appeal, the appellant preferred a memorandum of appeal containing three grounds of appeal namely:-

1. *That, both the learned trial magistrate and the first appellate judge erred in law and fact by basing their conviction on the appellants confession statement which was not tendered in court.*

2. *That, the learned trial magistrate and first appellate judge erred in law and fact for not taking into consideration that the victim was not brought before the trial court to testify.*

3. *That, the learned trial magistrate and the first appellate judge misdirected themselves in law and fact by ignoring the issues raised by the appellant in his defence, that grudges existed between PW1 and the appellant.*

On his part, the learned State Attorney for the Respondent/Republic from the outset supported the appeal. He submitted that the trial court relied upon the evidence of PW4 to

convict the appellant. However, he said, the evidence of PW4 was unsworn evidence, hence required to be corroborated. He further submitted that, the trial court believed that the evidence adduced by PW2 and PW3 corroborated the evidence of PW4. In essence, he contended that such evidence was based on a confession of the appellant made before them which was not signed by appellant hence not a proper confession to rely upon. For that reason, he urged us to find that there was no evidence which corroborated the evidence of PW4.

In addition to that, the learned State Attorney submitted that even if the High court reduced the offence of rape to that of attempted rape, there is no evidence showing that threats have been used as per **Section 132(2) (a)** and **(b)** of the Penal Code. Not only that, he said, the victim was not called to testify in court.

He finally urged us to find that the prosecution evidence was not enough to prove the offence against the appellant beyond reasonable doubt.

We too are of the same opinion that the prosecution's evidence was not enough to prove the offence against the appellant beyond reasonable doubt for the reason that, the evidence of PW4 relied upon by the trial court to convict the appellant was not credible. This is because, as shown at page 19 of the record where she stated that:-

> *"When I was driving back the calves to our homestead I saw the accused lying down on the bushland with my younger sister Winfrida.* ***The accused covered her with a long cloth worn by passing it over the shoulder*** *(mgolole)."* (Emphasis added).

The question we ask ourselves is how could PW4 be able to see a person covered by *"mgolole"* while the victim was covered.

Not only that, as the record shows, PW4 saw the victim with the appellant lying in the bushland, but when he met PW1 he remained silent until he was asked by PW1 on the whereabouts of his sister Winfrida. We again ask ourselves as to why didn't he report the matter to PW1 at once. Those two questions remain unanswered, hence create doubt on PW4's credibility.

The trial court believed that the evidence of PW4 was corroborated by the evidence of PW2 and PW3 when it stated that:-

> *"The evidence of PW4 a child of tender years was corroborated by the evidence of PW2 and PW3 who are the accused's Village Executive Officer and sub Village Chairman respectively. The two witnesses interrogated the accused after his arrest on whether he defiled the victim. The accused confessed to them in immediate presence of the Ming'enyi Primary School Head teacher that it was true that he raped the complainant."*

However, just as the learned State Attorney has noted, the appellant refused to sign the alleged confession made before PW2 and PW3. For that reason, we agree with him that the said confession was not properly made, hence cannot be relied upon. In that regard, it cannot be said with certainly that PW2 and PW3's evidence corroborated the evidence of PW4. After all, PW4's evidence by itself as shown earlier is doubtful.

All in all, that means the evidence relied upon by the trial court in convicting the appellant was not enough to prove the case against the appellant. We also agree with the learned State Attorney that even the offence of attempted rape was not proved, because no element of threat or intimidation was established as directed by **Section 132(2)(a)** and **(b)** of the Penal Code. In addition to all that, the prosecution failed to call the victim to testify in court in proving the offence against the appellant.

In the circumstance, and for the reasons stated herein above we are of the considered opinion that, had the two courts below considered those issues we have raised, they would have reached to a different conclusion.

In the event, we are constrained to allow the appeal. Hence, the appeal is hereby allowed, the conviction is quashed and the sentence set aside. The appellant is to be set free forthwith unless he is lawfully held. It is so ordered.

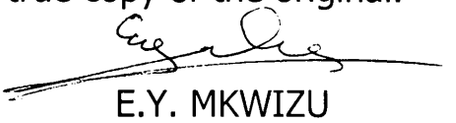
DATED at ARUSHA this 14th day of October, 2011.

S.M. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A MASSATI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL