IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 39 OF 2008

SAID MFAUME ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Bwana, J.)

dated the 13th day of September, 2007

in

Criminal Appeal No. 138 of 2006

JUDGMENT OF THE COURT

20th & 22nd SEPTEMBER, 2011

MSOFFE, J.A.:

The High Court (Bwana, J. as he then was) sitting at Arusha upheld the appellant's conviction of Rape contrary to sections 130(1)(2)(e) and 131 of the Penal Code as amended by section 5 of Act No. 4 of 1998, by the District Court of Kiteto (Charaza, SDM). As for the sentence of thirty years imprisonment meted on the appellant consequent upon the conviction, the said High Court opined, correctly in our view, that the sentence offended the clear provisions of Section 131(3) of the Penal code to the effect that whoever commits an offence of rape to a girl under the

age of ten years shall on conviction be sentenced to life imprisonment. Since, in this case, the victim of rape was aged three years the High Court substituted the above sentence to one of life imprisonment. The appellant is aggrieved, hence this second appeal. At the hearing of the appeal he appeared in person, unrepresented. On the other hand Mr. Zakaria Elisaria, learned State Attorney, appeared on behalf of the respondent Republic and argued in support of the appeal. For reasons which will emerge hereunder Mr. Zakaria Elisaria was justified in taking the above course of action.

In both the memorandum of appeal and the additional grounds of appeal the appellant is essentially faulting the judge on first appeal in two main areas:- **One,** that the prosecution case as stated by PW1 Mary Mbuta, PW2 Leonard Laurent Mbuta, PW3 Augustino Daniel and PW4 Malima Gombeni did not establish the appellant's guilt beyond reasonable doubt. **Two,** that the said judge misdirected himself on the interpretation of the true import of Section 240(3) of the Criminal Procedure Act (CAP 20 R.E. 2002).

Briefly, the facts of the case as they unfolded at the trial were to the effect that the victim of the alleged rape (Sabrina Mbuta) was aged three years at the time. In the evening of 23rd November, 2005 her mother (PW1) wanted to bathe her but she was nowhere to be seen. Her disappearance was reported to the village authorities and a search was mounted. In the morning of the following day the appellant was spotted at a nearby forest where the victim was sleeping on the grass. According to PW1:-

> *..... After found seeming her we met the girl raped there was sperms to her vagina .....*

In similar vein, PW2 had this to say:-

> *... After girl found it was said the girl raped sent to hospital and was given PF3 for checking hospital.....*

Likewise, PW3 stated as follows:-

> *..... We met the girl to the forest with the girl (sic). We met the accused standing girl kept sleeping to*

the grass. We asked him where did he get the girl said the girl followed him was drunked .....

As for PW4, this is what he had to say:-

..... We met the girl with this accused we met accused standing girl sleeping said the girl followed him....

Section 130(4)(a) of the Penal code (CAP 16 R.E. 2003) is clear. It reads:-

(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.

In this sense, penetration is the essence of rape. In the absence of clear evidence of penetration the offence cannot be safely said to have been established. One of the crucial issues in this case is whether there was evidence of penetration.

With respect, we are in agreement with Mr. Zakaria Elisaria that the prosecution did not prove the alleged rape to the required standard i.e. proof beyond reasonable doubt. As demonstrated above, none of the witnesses was positive that the appellant penetrated his penis into the victim's vagina. At best, the evidence of the above witnesses was that the appellant raped the victim, without more. For example, one would have expected PW1 to be more forthright and forthcoming and state exactly whether or not she examined the victim. And if she examined her, whether she detected any signs of rape! In similar vein, PW3 did not say anywhere whether PW1 examined the victim! Apparently no evidence was forthcoming along the above stated lines. As it is, the witnesses' pieces of evidence were mere general statements which were insufficient to establish the offence charged against the appellant. Indeed, we may respectfully say here by way of emphasis that the fact that the appellant was met with the victim was not conclusive evidence or proof that he raped her. The prosecution ought to have led clear evidence that the victim was raped on 23rd April, 2005 by the appellant as the charge particularized. In fact, we may respectfully add here that the appellant was uncontradicted in his evidence that the victim followed him. The fact

that the victim followed him did not necessarily establish that he eventually raped her. Indeed, what we have stated above, was properly and adequately underscored by this Court in **Mathayo Ngalaya @ Shabani V. Republic,** Criminal Appeal No. 170 of 2006 (unreported) thus:-

> *For the evidence 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.*

This brings us to the other major complaint on the misinterpretation by the judge on the provisions of Section 240(3) (supra). As pointed out by the appellant in ground two of the additional grounds of appeal and supported by Mr. Zakaria Elisaria in his oral submission before us, this complaint arises from that portion of the judgment in which the judge opined thus:-

..... The doctor's proof on present (sic) would have been necessary if the accused complied with the provision of Section 240(3) by demanding the maker of the document to be produced for cross-examination.

Apparently the judge made the above statement after quoting Section 240(3) and holding that the PF3 was wrongly admitted in evidence. On this, of course we agree with the judge that the PF3 was wrongly admitted in evidence for failure by the trial court to comply with the requirements under Section 240(3). But we do not agree with him in his interpretation of the subsection as evidenced by the above statement. Section 240(3) reads:-

When such report is received in evidence, the court may, if it thinks fit, and shall if so requested by the accused or his advocate, summon and examine or make available for cross-examination, the person who made the report. The court shall inform the accused of his right to require the person who

made the report to be summoned in accordance with the provisions of this subsection.

With respect, under the sub-section it was not for the appellant to comply *"with the provisions of section 240(3) by demanding the maker of the document to be produced for cross-examination."* Rather, it was for the court to *"inform the accused of his right to require the person who made the report summoned ....."* before an accused or his advocate can make a request to *"summon, and examine or make available for cross-examination, the person who made the report."*

Admittedly, this is a second appeal in which we are expected to deal with matters of law only and not matters of fact. However, the law is now settled that we can interfere with findings of fact by the courts below where it is shown that there has been a misapprehension of the evidence, a miscarriage of justice, misdirections or non-directions on the evidence, etc - See **DPP V. Jaffari Mfaume Kawawa** (1981)TLR 143, **Amratlal D.M t/a Zanzibar Silk Stores V. A.H. Jariwala t/a Zanzibar Hotel** (1980) TLR 31, **Salum Bungu V. Mariam Kibwana,** Civil Appeal No. 29

of 1992 (unreported), etc. As demonstrated above, this is a fit case for us to interfere with the findings of the courts below.

For reasons stated, this is a case in which the appellant ought to have been given the benefit of doubt and thereby earn an acquittal. We accordingly allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison unless lawfully held.

DATED at ARUSHA this 21st day of September, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL