

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

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

CRIMINAL APPEAL NO. 278 OF 2008

**WILFRED MALLYA.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT**

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

(Sheikh, J)

Dated the 10th day of October, 2007

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Criminal Appeal No. 5 of 2005

JUDGMENT OF THE COURT

28th Sept. & 5th October, 2011

MJASIRI, J.A.:

This is a second appeal. The appellant, Wilfred Mallya was charged and convicted by the District Court of Monduli of the offence of rape contrary to section 130(1) (b) and 131 (3) of the Penal Code Cap 16, R.E. 2002(hereinafter "the Penal Code" as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was sentenced to 30 years imprisonment. His appeal to the High Court was unsuccessful. His sentence was enhanced from 30 years to the mandatory life imprisonment as provided under section 131(1) and (3) of the Penal Code as amended.

Being aggrieved by the decision of the High Court, the Appellant is now appealing to this Court against both conviction and sentence.

At the hearing of the appeal the appellant appeared in person and was unrepresented and the Respondent Republic was represented by Mr. Ponziano Lukosi, learned Senior State Attorney.

When the appeal was called on for hearing, the appellant sought leave of the Court to file three additional grounds of appeal. There being no objection by the Counsel for the Republic, the additional grounds of appeal were duly presented to the Court. The appellant therefore had a total of seven (7) grounds of appeal. The said grounds can be summarized as under:

- 1. There were inconsistencies and contradictions in the evidence of PW1, PW2 and PW4.*
- 2. The prosecution failed to prove the offence of rape.*
- 3. The defence of the appellant was not considered.*
- 4. The conviction of the appellant was based on uncorroborated evidence. The requirements under section 127(7) were not met.*
- 5. The medical report was wrongly rejected by the Court.*

Briefly the background to this case is as follows. The appellant is a resident of Kisongo, Namanga, in Monduli District where he owned a shop. The complainant Asia Omary (PW1) a seven (7) year old girl also resides at Kisongo, Namanga with her family. On November 27,2002 at around 06:00 hours, PW1 was sent by her mother, Maimuna Hussein (PW2) to buy salt at the appellant's shop which was not far from her home. However it took a long time for PW1 to return. Her inordinate delay worried PW2 who went out looking for her. She stopped at the shop of one Gasper but did not see her. She then went to the appellant's shop. She asked the appellant whether he had seen her daughter. He responded that he did not see her. She then spotted her daughter heading home. Upon her return, PW1 informed her mother that she was raped by the appellant. According to PW1, the appellant got hold of her arm dragged her inside the shop, laid her in bed, removed her undergarment and raped her. PW2 raised an alarm, neighbours came by and the matter was reported to the police. This led to the arrest of the appellant. In his defence the appellant denied any involvement with the offence.

The appellant in his submission stated that PW1 was not a credible witness. He made reference to the PF. 3 report where the doctor stated that PW1 was not raped. The evidence of PW4, No. 2837 PC Itikisaeli, who examined PW1 and who confirmed that she was raped had no weight, as she was not a medical doctor. The appellant also submitted that the evidence of PW3, Farida Shabani who is a neighbor of PW3 should be discarded as she did not see PW1 coming out of the appellant's shop. The appellant also complained that his defence was not considered. He asked the Court to set him free.

Mr. Elisaria opposed the appeal. He submitted that the evidence of PW1, PW2 and PW4 clearly established that it was the appellant who committed the rape. PW1 knew the appellant well and she clearly narrated what had taken place. PW3 saw PW1 standing outside the appellant's shop. He argued that there were no contradictions between the evidence of PW1, PW2 and PW3. It is not expected that all the witnesses will give uniform evidence, there is bound to be a variation. He however emphasized that even if there were inconsistencies they what ever did not go to the root of the matter.

In relation to the PF3 report, he submitted that this was just expert evidence of a medical doctor and the Court was not bound to accept the medical evidence. He made reference to the case of **Hilda Abel v Republic** [1993] T.L.R. 246. He submitted further that the conduct of the doctor left a lot to be desired. His refusal to examine PW1 on the date the rape occurred did not augur well and demonstrated lack of professionalism. As a medical doctor he knew very well that a victim of rape has to be examined promptly. He submitted further that the evidence of PW1 was valid under section 127 (7) as long as the Court found him to be a credible witness. According to the trial Magistrate all the prosecution witnesses were truthful.

After reviewing the evidence on record and the submissions made by the appellant and the learned State Attorney, we are of the view that the whole appeal centres on the issue of whether or not PW1 was raped and whether it was the appellant who committed the rape. The evidence on record clearly established that PW1 was raped. The trial court relied on the evidence of PW1, PW2 and PW3 to establish the guilt of the appellant. PW1 gave her account of what transpired. Her testimony was corroborated

by the testimony of PW2 who went looking for PW1 after she took long to return home from the shop and PW3 who testified in Court that she saw PW1 outside the shop of the appellant. The appellant was known to PW1 as he was their neighbor. The incident occurred before it was dark, at around 06:00 hours. Even though the PF.3 report prepared by the doctor indicated that the appellant was not raped, there was sufficient evidence to establish the offence of rape given the evidence of PW1, PW2 and PW4. As rightly pointed out by the learned Senior State Attorney the Court is not bound by the evidence of a medical doctor, which is expert evidence. See **Hilda Abel v Republic** (supra).

In the case of **Ryoba Mariba@ Mungare v R**, Criminal Appeal No. 74 of 2003 (unreported), this Court held that it was essential for the Republic to lead evidence showing that the complainant was raped. See **Christopher R.Maingu v R**, Criminal Appeal No. 222 of 2004 (unreported).

The lower Courts found all the witnesses credible and relied on their testimony. The conclusion reached was that the case against the appellant was proved beyond reasonable doubt.

This is a second appeal, the principles to be followed in dealing with the finding of facts and conclusion reached by the lower Courts is clearly set out in various decisions of the Court of Appeal for East Africa. In **R v Hassan bin Said** (1942) 9 E.A.C.A. 62 it was held that the Court of Appeal is precluded from questioning the finding of fact of the trial Court, provided that there was evidence to support those findings, though it may think possible or even probable, that it would not have itself come to the same conclusion. See also **R v Gokaldas Kanji Karia and another**, 1949 16 E.A.C.A. 116; **Reuben Kararis/o Karanja v R (1950)** 17 E.A.C.A. 146. See also **Salum Mhando v R** [1993] TLR 170.

Given the status of the evidence of PW1 and PW2, PW3 and PW4, we are satisfied that such evidence is sufficient to establish the guilt of the appellant and can therefore be relied upon.

For the foregoing reasons, we are satisfied that there was sufficient evidence to warrant the appellant's conviction. We therefore dismiss the

appeal against the conviction, and, as the sentence imposed is the statutory minimum, we cannot disturb that.

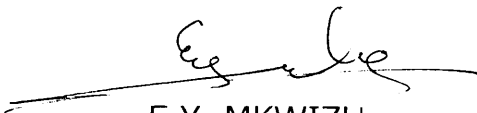
DATED at **Arusha** this 4th day of October, 2011.

H.R. NSEKELA
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