IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 195 OF 2009

ANANIA TURIAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya)

(Msuya, J.)

Dated the 28th day of April, 2009
In
Criminal Appeal No. 26 OF 2008

JUDGMENT OF THE COURT

21 & 27 June, 2011

RUTAKANGWA, J.A.:

Before the District Court of Mbeya at Mbeya, the appellant was facing a charge of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16. The particulars of the charge read thus:-

> "That ANANIA s/o TULIAN charged on 24th day of August, 2001, at about 19.00 hrs at Umalile Ilembo village area within Mbeya rural district and Mbeya Region did unlawfully have carnal knowledge with

one ZERA D/O LACKSON a girl under the age of 8 years."

When the charge was first read out to him on 5th September 2001, the appellant denied committing the alleged offence. On 3rd October, 2001, the trial court conducted a preliminary hearing under section 192 of the Criminal Procedure Act, Cap 20. When reminded of the charge, the appellant again pleaded not guilty. The facts narrated by the Public Prosecutor showed the appellant had carnal knowledge of Zela on 24th August, 2001. The appellant disputed all the alleged facts except his name. Then a full trial followed.

At the appellant's trial, the prosecution called four witnesses in all. The material witnesses were Samwala Kalindwana (PW1), Zela Lackson (PW2) and Maria Lackson (PW3). These three witnesses gave evidence going to show that the appellant had carnal knowledge of PW2 Zela on **22nd August 2001** at about 18.00 hrs.

In his defence the appellant unequivocally denied committing the alleged offence. He raised a defence of alibi, claiming that on the material

day he was at his farm at Ilewele village from where he was arrested and taken to the office of the Division Executive Officer of Ilembo.

The learned trial District Magistrate was not impressed by the defence evidence. He rejected it simply because, it "was not supported by any defence witness." Having thus rejected the defence of alibi the learned trial magistrate, convinced that the three prosecution witnesses were witnesses of truth, found the appellant guilty as charged, convicted him and sentenced him to thirty years imprisonment.

The appeal of the appellant to the High Court (Msuya, J.) was dismissed in its entirety. The learned first appellate judge found the appeal wanting in merit because PW1 Samwala had seen the appellant "raping" PW2 Zela.

This appeal seeks to challenge the High Court decision. The appellant's memorandum of appeal lists eight grounds of appeal. However, the nub of his grievances is that the charge against him was not proved beyond reasonable doubt.

The appellant fended for himself before us, while the respondent Republic was represented by Mr. Prosper Rwegerera, learned State

Attorney. Mr. Rwegerera supported the appeal. Among the reasons advanced by Mr. Rwegerera in supporting the appeal, two are worth mentioning. It was his contention, firstly, that all things being equal, the prosecution evidence fell far too short of proving the offence of rape, as no iota of evidence was led to prove penetration, an essential ingredient of the offence. Secondly, no scintilla of evidence was given by the prosecution to show that the appellant had carnal knowledge of PW2 Zela on 24th August, 2001.

After scanning the prosecution evidence, we have found ourselves in agreement with the position taken by Rwegerera. Settled law is that to prove the offence of rape, it is not enough for the witnesses to make bare assertions that the prosecutrix was raped. Evidence ought to be given to prove penetration, even to the slightest degree, of the accused's penis into the prosecutrix's vagina – see **Ex B 9690 SSGT. DANIEL MSHAMBALA v. R,** Criminal Appeal No. 183 of 2004 and **GODI KASENEGALA v. R**, Criminal Appeal No. 10 of 2008 (both unreported). In **MSHAMBALA's** case this Court explicitly stated that in a rape case the alleged victim must "be more forthcoming in her evidence" and "explain whether or not the appellant inserted his penis into her vagina" in order to enable the court to

make a meaningful finding on whether or not rape was committed. We subscribe wholly to this holding. The evidence of PW2 Zela in this case failed to meet this test. On this ground alone we would have been prepared to quash the appellant's conviction for rape. But there is another equally compelling reason why this appeal should succeed.

The charge against the appellant was that he had raped PW2 Zela at about 19:00 hrs. on 24th August, 2001. As we have already sufficiently demonstrated, no evidence was given by the prosecution to prove this. Indeed none of the four prosecution witnesses alluded to this date in their evidence. No charge was preferred against the appellant to show that he raped PW2 Zela on 22nd August, 2001. In our considered opinion, it was wrong for the two courts below to find the appellant guilty as charged and proceed to convict him.

This Court has faced identical situations before. The more recent were in the cases of **RYOBA MARIBA @ MUNGARE V. R.**, Criminal Appeal No. 74 of 2003 and **CHRISTOPHER RAFAEL MAINGU V. R.,** Criminal Appeal No. 222 of 2004 (both unreported).

In the case of **RYOBA** *(supra)*, the appellant was charged with raping one Sarah Marwa on 20th October, 2000. Sarah testified generally that she "was raped in October and November, 2000 without more." The Court in allowing the appellant's appeal against conviction, held that it was incumbent upon the Republic to lead evidence showing exactly that Sarah was raped on 20th October, 2000 as alleged in the charge the appellant was facing and was expected and required to answer. The same situation arose in **CHRISTOPHER MAINGU's** case *(supra)*, whose conviction for rape was similarly quashed. The rationale for this is not far to find. When a specific date of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built on the basis of that specified date. This defence invariably includes the defence of *alibi*. If there is a variation in the dates, then the charge must be amended forthwith and the accused explained his right to require the witnesses who have already testified recalled. If this is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that, a failure of justice will occur.

For the two reasons given above, we have found ourselves constrained to agree with Mr. Rwegerera and the appellant that the prosecution failed absymally to prove that the appellant raped PW2 Zela on

24th August, 2001. We accordingly allow his appeal. The conviction for rape and the jail sentence as well as the order to pay compensation of Tshs. 500,000/= are hereby quashed and set aside. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

DATED at **MBEYA** this 22nd day of June, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL