IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPAL NO. 308 OF 2010

BAKARI RASHIDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court
of Tanzania at Tanga)

(Teemba, J.)

dated the 31st day of May, 2010
in
Criminal Appeal No. 75 of 2008

JUDGMENT OF THE COURT

23 & 25 March 2011

MANDIA, J.A.:

The appellant was convicted in the District Court of Lushoto at Lushoto of the offence of Rape c/s 130 (1) and 131 (1) of the Penal Code and sentenced to thirty years imprisonment plus twelve strokes of the cane. He was aggrieved by the conviction and sentence in the trial court and he preferred an appeal to the High Court of Tanzania at Tanga. The High Court dismissed the appeal in its entirety, hence this second appeal.

Evidence led in the trial court tended to show that on 2/4/2008 PW1 Dawia Mbwana went to her farm for cultivation. At 11 a.m. she prepared boiled cassava outside a hut at the farm while at the same time eating a piece of sugar cane. Her villagemate, the appellant came along holding a knife and threatened to kill her. Apparently PW1 was not threatened by the appellant who she thought was joking, and asked the latter what was wrong. Despite being unfazed by the appellant's action of pointing a knife at her, we next see the appellant standing up and running with the appellant tearing off her pants. Next the record shows PW1 saying:-

> *"He then sexually assault me. I cried for help, whereby Solomon Kibanga came. I told him of what he did to me. There was on my top. I was sleeping. He stripped off his trouser to the knees."*

PW2 Solomon Kibanga in turn testified that on 2/4/2008 at 11 a.m. he was passing near PW1's farm and he heard PW1 crying out for help. When he went to the scene he found the appellant on top

of PW1 and he asked the appellant what he (appellant) was doing. The appellant did not reply but zipped up his trousers and ran away. PW2 testified that he could not apprehend the appellant because the latter was holding a knife.

The report of the alleged rape was made to PW3 E 9744 Detective Sergeant Evalist who issued PW1 with a PF3. PW1 was medically examined on 14/4/2008 and the remark of the medical officer shows that no medical examination was conducted because the report was made more than 24 hours after the alleged incident. All the same the appellant was charged with rape.

Both the trial court and the appellate High Court found PW1 Dawia Mbwana to be a credible witness and convicted the appellant on the basis of her evidence.

The appellant appeared in person, unrepresented, and the respondent/Republic was represented by Mr. Faraja Nchimbi, learned State Attorney. Mr. Faraja Nchimbi, learned State Attorney, did not support the conviction and sentence for the simple reason that there

was no evidence on record to suggest, let alone prove, penetration. We acknowledge the position in this case where both the trial court and the first appellate court made a concurrent finding that rape was proved. We are also minded of the position in law that in a second appeal the Court does not normally interfere with concurrent findings of fact by the courts below. The record before us, however, shows the complainant PW1 Dawia Mbwana giving a bare assertion when she said:-

> *"He teared of my under pant. He then sexually assaulted me."*

As we held in **Ex – B 9690 SSGT DANIEL MSHAMBALA versus THE REPUBLIC** Criminal Appeal No. 183 of 2004 (unreported), it is not enough to make a bare assertion that the appellant was sexually assaulted without elaboration. We form this opinion because in her evidence PW1 Dawia Mbwana said when PW2 Solomon Kibanga arrived at the scene she told her what had happened, but this narrative of what had happened is not on record. If it was we would perhaps have had the basis of forming an opinion in law that what had occurred amounted to rape. To make things

worse, the only eye-witness account of the incident is that of PW2 Solomon Kibanga, whose evidence consists of seeing the appellant "on top" of PW1 Dawia Mbwana. The PF3 issued to PW1 Dawia Mbwana and tendered in the trial court as Exhibit P1 was discarded by the first appellate court because it offended the provisions of Section 240 (3) of the Criminal Procedure Act, Chapter 20 R.E. 2002 of the laws. Even if it was admitted in evidence it would not have been of any probative value because the doctor remarked that on the date he filled in the report 14/4/2008 he could not make any clinical finding of an incident which occurred twelve days earlier i.e. 2/4/2008. The two courts below therefore relied on the verbal testimony of PW1 Dawia Mbwana and PW2 Solomon Kibanga who were adjudged to be credible. We are of the view that the trial court and the appellate High Court misdirected themselves in relying on the veiled language of the witnesses. The statement by PW1 Dawia Mbwana that the appellant "sexually assaulted her", and that of PW2 Solomon Kibanga that he found the appellant "on top" of Dawia Mbwana fell short of proving the offence of rape. For the offence to exist any of the elements listed in Section 130 (2) of the Penal Code must be shown to be present, and in addition penetration must be

Sexual Offences Special Provisions Act, 1998 requires the use of explicit terms in proof of the offence of rape. Veiled language which requires the use of imagination to fill in the gaps has no place in proof of the offence of rape. We are satisfied that the reliance on the veiled language in proof of the offence of rape as we have shown above is a non-direction by the courts below. In such a situation we are entitled, as a second court of appeal, to look at the relevant evidence and make our own findings of fact. In this we are supported by the authority of **THE DIRECTOR OF PUBLIC PROSECUTIONS v JAFFARI MFAUME KAWAWA** (1981) TLR 149. We are satisfied that since penetration has not been proved, the offence of rape has not been proved. We accordingly allow the appeal, quash the conviction and set aside the sentence of thirty years imprisonment as well as the sentence of twelve strokes of the cane. The appellant should be released from custody forthwith unless he is held on some other lawful cause.

DATED at TANGA this 24th day of March, 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