IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO. 333 OF 2009

EDIMO SHABANI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mussa, J.)

dated the 31st day of July, 2009
in
Criminal Appeal No. 206 of 2002

JUDGMENT OF THE COURT

24 & 29 March, 2011

LUANDA, J.A.:

The above named appellant was charged in the District Court of Handeni with rape contrary to Sections 130 (2) (e) and 131 (1) of the Penal Code, Cap. 16. He was convicted as charged and sentenced to thirty (30) years imprisonment and ordered to pay Tsh 100,000/= as compensation to the victim of rape.

Aggrieved by that decision, the appellant unsuccessfully appealed to the High Court, hence this appeal.

In his memorandum of appeal, the appellant has raised four grounds. However, having gone through them, the four can be divided into two parts. **One**, it is procedural aspect that the trial court to have not conducted the preliminary hearing properly. **Two**, the evidence of the victim of rape alone was not enough to ground a conviction.

In this appeal, the appellant appeared in person whereas the respondent/Republic was represented by Mr. Faraja Nchimbi and Ms. Pendo Makondo learned State Attorneys. Mr. Nchimbi supported the conviction that the prosecution had proved its case solely by relying on the testimony of the victim of rape to the standard required. This is after discounting the other sets of evidence namely PF 3 and cautioned statement by the High Court for failure to comply with the mandatory provisions of S. 240 (3) of Criminal Procedure Act, Cap 20 in informing the appellant his rights of calling the maker of it and ascertaining the

voluntariness of the cautioned statement by way of an inquiry after it was objected to by the appellant.

With regard to sentence Mr. Nchimbi prayed that in additional to custodial sentence of (30) years imprisonment, we should also order the appellant to undergo corporal punishment as dictated by S. 131 (1) of the Penal Code, Cap. 16.

The appellant on the other hand maintained that he is innocent. Further, he questioned the age of the complainant whether she was 16 years of age at the time of the rape in view of the evidence of her mother who said she was born in 1978.

Briefly the prosecution case as recorded by the trial court was to this effect. On 17/10/2002 at around 5.00 pm Hadija d/o Ally (PW2) a girl of 16 years left her home place Kwesapo Village and went to fetch water from a well at Kwanyanye area a place a bit far from her village.

On the way, PW2 met the appellant who was familiar. The appellant was her village mate. The duo proceeded towards the direction of the well.

Suddenly, the appellant got hold of PW2, dragged her away from the foot path and fell her down. The appellant took off his shirt and gagged PW2's mouth ostensibly to prevent her from raising an alarm; he then took off her underwear and raped her. On completion he took his shirt and took to his heels leaving PW2 behind. PW2 returned home crying and bleeding from her private parts as a result the clothes she was putting on namely, underwear, gown, k/itenge and khanga were blood stained. On arrival she immediately narrated the ordeal she encountered to her mother Mwajabu Ally (PW3) and mentioned the appellant as the one who raped her. PW3 in turn informed her husband Halifa Hussein (PW4). The matter was reported to the village government whereby the appellant was arrested and eventually charged.

As regards to the manner in which the preliminary hearing was conducted, Mr. Nchimbi conceded that it was not conducted according to the provisions of S. 192 of the Criminal Procedure Act, Cap. 20. However, he was quick to observe that in this case failure to conduct a proper preliminary hearing did not vitiate the proceedings. The record shows that

after the conduct of the preliminary hearing, the Court is reported to have recorded thus, we quote:-

> "Court: *Accused is denying facts of the case*"

This shows that the appellant did not agree to any of the facts enumerated therein. So, it was the duty of the prosecution to call witnesses and prove its case. The prosecution had done that: it called four witnesses to prove it case. In **Tundubali Yumbu vR** Criminal Appeal No. 70 of 2008 the Court observed, we quote:-

> *"It is common ground that the purpose of conducting a preliminary hearing is to accelerate trial and disposal of cases. Towards this end, by conducting a preliminary hearing, matters which are not in dispute are identified so as to reduce the number of witnesses to be called at the trial. In so doing, fair and expeditious trial is facilitated."*

In our case it was not shown or indicated whether the non compliance with S. 192 of the Criminal Procedure Act, Cap 20 had caused delay and the appellant was prejudiced or had an unfair trial. We entirely agree with Mr. Nchimbi that non compliance with S. 192 of the Criminal Procedure Act, Cap 20 in this case was not fatal. This ground has no merits at all.

Turning to the evidence of PW2 and her age both courts below were satisfied that the witness was 16 years of age. PW2 said so before she testified. And that version was confirmed by her mother PW3. Their evidence was not challenged in any way. As to whether she was raped, PW2 was seen with blood stained clothes and bleeding. She informed her mother that she was raped. She did not end there, she mentioned the appellant to be the person who raped her. The courts below were satisfied that what the witness had said was nothing but the truth that she was raped by the appellant. The appellant was familiar to her – her village mate. The incident took place during broad day light and it took some time. Under the aforesaid circumstances the question of mistaken identity did not arise. And to crown it all, by mentioning the appellant immediately on arrival was further assurance of her reliability. (See **Marwa Wangiti**

Mwita And Another vR Criminal Appeal No. 6 of 1995 (unreported). In view of the foregoing, we are unable to fault the concurrent finding of facts of the courts below. The appeal lacks merits and the same is dismissed.

Mr. Nchimbi urged us to impose corporal punishment. We think Mr. Nchimbi was right.

Section 131 (1) of the Penal Code, Cap. 16 read together with Sections 4 and 8 (2) of the Corporal Punishment Act, Cap. 17 R.E 2002 is very clear that once an accused is convicted with an offence of rape under S. 131 of the Penal Code, he is also liable to undergo corporal punishment. Since the courts below did not impose that sentence, exercising our revisional powers as they are provided under Section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, we order the appellant to undergo corporal punishment of 12 strokes.

Order accordingly.

DATED at TANGA this 28th 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
COURT OF APPEAL