IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 250 OF 2008

ABAS SELEMANI MBINGA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of

Tanzania at Mtwara)

(Mjemmas, J.)

dated the 9th day of July, 2008

in

High Court Criminal Appeal No. 71 of 2007

JUDGMENT OF THE COURT

20 & 29 September 2011

BWANA, J.A.:

This second appeal emanates from the decision of the District Court of Lindi at Lindi, in Criminal Case number 84 of 2007 in which the appellant, Abas Selemani Mbinga, was charged with and convicted of the offence of Attempted Rape, contrary to section 132 (1) of the Penal Code, Cap 16 (R.E. 2002). The trial court sentenced him to a prison term of five

(5) years. That sentence was, however, set aside by the first appellate court (the High Court of Tanzania) for being illegal as it contravenes the provisions of section 132 (1) of the Penal Code as amended by Act No. 4 of 1998. That provision states –

> "Any person who attempts to commit rape, commits the offence of attempted rape and except for cases specified in subsection (3) **is liable** upon conviction to imprisonment for life, and in any case **shall be liable to imprisonment for not less than thirty years with or without corporal punishment"** (Emphasis provided).

The sentence of five years imprisonment was therefore, set aside and a sentence of thirty years imprisonment imposed by the said High Court.

Aggrieved by that decision of the first appellate court, the appellant opted for this second appeal.

The appellant was not represented by counsel before us while Mr. Prudens Rweyongeza, learned Senior State Attorney, assisted by Mr. Ismail Manjoti, learned State Attorney, represented the respondent Republic.

In his lengthy memorandum of appeal, the appellant raised nine (9) grounds of appeal but which could be, conveniently, condensed into the following –

- That his statement to the police was recorded in contravention of the provisions of section 50 of the Criminal Procedure Act (the CPA).

- That the court relied upon the evidence of PW1 and PW2, wife and husband respectively, who, according to the appellant, whose credibility was wanting.

- That he was not informed by the court of his rights following the completion of the prosecution case as provided for under section 231 of the CPA.

- The sentence of thirty (30) years imprisonment imposed by the High Court is harsh and excessive in the circumstances of this case.

When this appeal came up for hearing, the appellant did not have much to add to his earlier stated grounds of appeal.

Before we consider the above listed grounds of appeal, a summary of facts of the case, as discerned from the record, is necessary.

Fatuma Amanzi (PW1), the victim of the attempted rape, was married to Adamu Saidi, (PW2), an uncle to the appellant. On the fateful day PW2 left home around 6.00 a.m. to go to his farm. Half way he realised that he had forgotten home his "panga". He decided to return and collect it. While on the way home, he heard his wife, PW1, screeming for help, that she was being raped. He rushed home only to find that truely his wife had fallen on the ground, naked. The khanga and underwear that she had on, had been forcefully removed. PW2 also realised that the assailant of his wife was the appellant, his sister's son. At that time the

appellant was forcefully holding PW1 on the ground. He was just wearing his underwear but that PW2 could see his male organ.

In the fracas that followed, PW1 managed to escape and ran away. PW2 and the appellant fought for a while before the latter managed to run away as well and locked himself in his house. PW2 reported the matter to the village leadership and subsequently the appellant was arrested and charged.

Both the trial court and the first appellate court made assessment of the evidence of both PW1 and PW2 and came to the conclusion that they were credible witnesses and proceeded to convict the appellant. Therefore, there is no good cause shown by the appellant to make us fault the findings of the two courts below on this factual issue. We have found no misdirections or non directions from the findings of the said courts below. There is no dearth of authorities (both from decisions of this Court and other Courts) on that issue. It all evolves around the principle of law enunciated in the case of **Peter v Sunday** (1958) EA 424 at 429 thus –

> "It is a strong thing for an appellate court to fault on a question of fact by a judge who tried the case and who had advantage of seeing and hearing witnesses ----- an appellate court, has indeed, jurisdiction to review the evidence in order to determine whether the conclusion – originally reached upon that evidence should stand. But this jurisdiction which should be exercised with caution ---- it is not enough that the appellate court might have come to a different conclusion ---"

We subscribe to the above views (see for example the decisions of this Court in **Rashid Omari v Republic,** Criminal Appeal No. 289 of 2009; **Emmanuel Mdendemi v Republic,** Criminal Appeal No. 86 of 2007; **Musa Mwaikunda v Republic,** Criminal Appeal No. 174 of 2006; **Dickson Joseph v Republic,** Criminal Appeal No. 1 of 2005; **Issa Mgara v Republic,** Criminal Appeal No. 37 of 2005; **Leonard Maratu v Republic,** Criminal Appeal No. 86 of 2005 – all unreported; **Edwin Mhando v Republic** (1993) TLR 170; **DPP v Jaffari Mfaume Kawawa** (1981) TLR 149).

The two other grounds of appeal raised by the appellant need not linger us. These concern the non compliance with the provisions of section 231 of the CPA; and the evidence of PW1 and PW2 should not be acted upon as the two witnesses are husband and wife, therefore they had an interest in this matter.

Our perusal of the record confirmed that the trial magistrate did-indeed-comply with the requirements of section 231 (1) of the CPA. That provision requires the trial court, at the close of the evidence in support of the charge, if it appears that a case is made against the accused person, explain to him in substance his right to give evidence whether or not on oath or affirmation. He will also be informed of his right to call witnesses in his defence. Page 6 of the record shows that the appellant was accorded such an opportunity and he opted to give his "defence not on oath". Therefore he cannot be heard before this Court asserting that he was not accorded that opportunity.

As to the credibility of the evidence of PW1 and PW2, there is no law – to the best of our knowledge - which requires this Court to discard such evidence.

However, it is now settled **firstly** that there is no law which determines the number of witnesses to be called to testify in a given case (See **Yohanis Msigwa vs Republic** (1990) TLR 148). Section 143 of The Evidence Act, Cap 6 (R.E. 2002) provides:-

> "Subject to the provisions of any other written law, **no particular number of witnesses shall in any case be required for the proof of any fact"** (Emphasis provided).

Secondly and with regard to witnesses who are related, it is now settled that the fact that witnesses are related to each other is not enough to discard their evidence. (See **Samwel Wilfred Mushi vs Republic,** Criminal Appeal No. 236 of 2007 (unreported). What is important is the credibility of the said witnesses. (See **Saada Abdallah and Others vs Republic** (1994) TLR 132; **Juma Senge v Republic,** Criminal Appeal No. 164 of 2008; **Paulo Tarayi v Republic,** Criminal Appeal No. 216 of 1994; **Deo Bazili Olomi v Republic,** Criminal Appeal No. 245 of 2007; **Rashidi Omari v Republic,** Criminal Appeal No. 289 of 2009 – all unreported).

In the instant case, the circumstances were that only PW1 and PW2 could give a credible account of what transpired at the scene of crime. We find as did the two courts below, their evidence to be credible.

On the issue of delayed recording of the appellant's statement by the police, Mr. Rweyongeza, learned Senior State Attorney, did concede, and rightly so in our considered view, that the provisions of section 50 of the CPA were not complied with. Section 50 (1) (a) of the CPA provides the period of four (4) hours commencing at a time when the suspect is put under restraint in respect of the offence. Such period may be extended according to the procedure provided for under section 51 of the CPA.

In the instant case, the appellant was arrested on 1st February 2007 but his statement was taken on 6 February 2007 that is, four days later. No plausible reasons have been given for such delay. No evidence which suggests that extension of time was sought and obtained pursuant to the provisions of section 51 of the CPA. We do not hesitate to come to conclusion therefore, that the said statement so recorded four days later was obtained illegally. If so, it should be expunged from the record. It is so ordered.

Expunging the said statement notwithstanding, the evidence of PW1 and PW2 would still be sufficient proof beyond reasonable doubt that the appellant committed the offence with which he was charged and subsequently convicted. We see no reason to fault the findings of the two courts below.

In so far as the sentence of thirty years imprisonment (in place of the five years originally imposed by the trial court) imposed by the first appellate court is concerned, we find it to be the mandatory minimum provided for under the law. It may appear to be harsh and excessive but we cannot rule otherwise.

In conclusion, we find this appeal is devoid of merit. It is dismissed in its entirety.

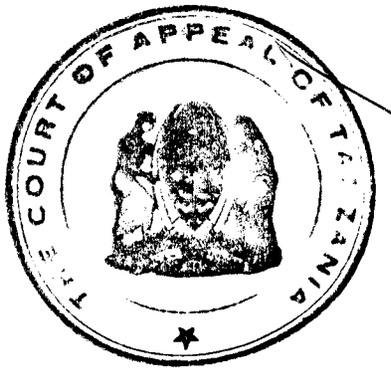
DATED at MTWARA this 21st day of September, 2011.

E.N. MUNUO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S. BWANA
JUSTICE OF APPEAL

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



(M.A. MALEWO)
DEPUTY REGISTRAR