IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO. 322 "A" OF 2009

KOMBO KIMEA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Teemba, J.)

dated the 30th day of April, 2009
in
Criminal Appeal No. 42 of 2008

JUDGMENT OF THE COURT

5 & 6 April, 2011

MSOFFE, J.A.:

The District Court of Muheza (Ng'humbu, RM.) convicted the appellant of rape contrary to sections 130(1) and 131(1) of the Penal Code. Consequently the appellant was sentenced to a term of imprisonment for thirty years. There was also an order for compensation of Shs. 200,000/= to the victim of the rape in issue. Aggrieved, the appellant preferred a first

appeal to the High Court of Tanzania at Tanga (Teemba, J.) where he was unsuccessful, hence this second appeal. Before us, the appellant appeared in person while the respondent Republic had the services of Ms. Pendo Makondo, learned State Attorney.

In the memorandum of appeal there are four grounds of appeal. However, in our view all the grounds crystallize on one major ground of complaint. That the evidence was insufficient to ground the conviction in issue.

Briefly, the courts below were satisfied that PW1 Helena Yusuph and Irene Ibrahim, an elder and younger sister and aged 15 and 7 years respectively, were at the material time pupils at Magila Primary School in Muheza District. Both hailed from Kwasemgaya village in the same District. On the 1st day of December, 2006 the two girls, with another girl known as Lucy, were on their way returning home from school. At around 3.00 p.m. they met the appellant seated under a tree eating a fruit. They passed the appellant and also a nearby farm where PW3 Mwinyihamisi Mohamed was picking pepper. After a short while, the appellant followed the girls from

behind. When he was close to PW1 he asked her to wait for him and assist him in carrying some unspecified luggage. PW1 resisted. The appellant forcefully pushed her to a nearby bush leaving the two girls behind. While in the bush the appellant made some sexual advances to PW1 to which the latter resisted. The appellant threatened to beat her if she continued with the resistance. Finally, he undressed PW1 and raped her. When he was through with the sexual intercourse it transpired that PW1 was already bleeding from her vagina. As PW1 wanted to leave, the appellant told her to wait for him. The two went back to the girls who were still waiting for PW1 and the appellant. The girls noticed some blood on the clothes of PW1. On asking her, PW1 told them that the appellant had raped her. Upon that disclosure the appellant left the girls. On arrival at home PW1 narrated the incident to her mother PW4 Helena Mbwana. The incident was reported to PW1's father, the village office and eventually to the police where a PF3 was issued. It is also known that PW1 was admitted to hospital for five days in view of the injuries she sustained in the course of the rape in question.

The appellant's defence was a very brief and general one in which he denied committing the alleged offence of rape.

In our considered view, we are in agreement with Ms. Pendo Makondo that even if the evidence of PW2 is to be expunged for want of a record of *voire dire* examination and also cross-examination by the appellant, still, the evidence against the appellant is watertight. We say so because there is the evidence of PW1 which can still stand on its own in sustaining the conviction. Luckily however, evidence in support of PW1 is to be found in the evidence of other witnesses as follows. PW3 saw the appellant following PW1 from behind. After 15 minutes he was told that PW1 had been raped. He assisted in tracing the appellant after which he saw him in a nearby bush. He thought of reporting the incident to the village office. On his way back, he saw the appellant who decided to flee upon seeing PW3 and the militiamen accompanying him. The evidence of PW3 is carried further by that of PW4 who, at about 4.00 p.m. on the same day, saw PW1 crying and bleeding from her private parts. So, the evidence of PW1, PW3 and PW4 taken as a whole suggests that PW1 was raped on the fateful day. To this end, we will have nothing to fault the courts below in the credibility they attached to the evidence of these witnesses.

Finally, we think it is important to address the question of penetration. In terms of section 130(4) (a) of the Penal Code *"penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."* As already stated, the evidence of PW1, PW3 and PW4 taken in totality suggests that rape was committed. In this sense, the following evidence by PW1 is relevant and instructive in showing that there was penetration:-

> *.....were standing where the accused met us he took me to the place then the accused told me that, "Nataka nikubake ukipiga kelele nakukata panga kama lile fenesi nililokuwa nakula"* ***he fell me down (alinikata mtama) the accused took off my under dress and committed rape on me*****.....**
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> [Emphasis supplied.]

So, the above evidence, coupled with that of PW5 D/C Margaret that in giving the PF3 to PW3 she noticed that PW1 was "severely bleeding",

suggested that the said PW1 was bleeding from her private parts as a result of the sexual encounter which the appellant forced on her.

For the above reasons, we are in agreement with the courts below in their concurrent and respective findings of fact. Thus, there is nothing to fault them.

In the event, there is no merit in the appeal. We hereby dismiss it.

DATED at TANGA this 6th day of April, 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