IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 45 OF 2009

LAYFORD MAKENE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Kaduri, J.)

dated the 4th day of November, 2008
in
Criminal Appeal No. 114 of 2008

JUDGMENT OF THE COURT

28 & 30 June, 2011

MSOFFE, J.A.:

This is an appeal against the concurrent findings of fact by the courts below that one day on a friday at around 10.00 a.m. in the month of August 2006 the appellant LAYTON MAKENE, a teacher by profession, raped his pupil PW1 Celina Cornel, aged 14 years at the time, contrary to Sections 130 (1) and 131 of the Penal Code as amended by Sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. The High Court of Tanzania at Tabora (Kaduri, J.) upheld the District Court of

Kahama (Hassan, RM) that on the date in issue, during recess time, the appellant called PW1 to the staff room. The appellant told her to open a cupboard in order to take out books. As PW1 was in the process of opening the cupboard the appellant covered her mouth and told her that he had admired to have sexual intercourse with her for a long time. He fell her down and laid her upwards and then undressed her underpart. Having done so, he inserted his penis into her vagina to the extent that he eventually ejaculated. She felt much pain since that was her first time to have sexual intercourse. When the appellant was through with the sexual act he released and warned her not to disclose the sexual encounter to anybody. PW1 obliged and did not disclose the affair to anybody until November 2006 when she realized that she was pregnant. Upon telling the appellant about the pregnancy the latter advised that it was better to terminate the pregnancy by way of an abortion. They agreed to travel together to Kahama township for the purpose upon getting permission from her parents, who did not up to that time know about the rape and the eventual pregnancy. PW1 together with the appellant travelled to one Dr. Kamu's hospital at Kahama where the abortion was successfully carried out. On the way back home to the village, PW1 and the appellant hired a bicycle. Some how the pedalist discovered some strange behaviour in PW1

and suspected that she must have aborted and so went around disseminating news about the abortion. The news reached PW2 Cornel Benedicto, PW1's father who reported the matter to the police. The police issued a PF3 to PW1 and also arranged to have the appellant's cautioned statement. Meanwhile, a school committee meeting was convened to deliberate the matter. Before the school committee meeting the appellant admitted having raped PW1 and reduced the admission to writing vide exhibit P1.

In his defence, the appellant denied everything from the alleged rape, the abortion and the school committee meeting. He also stated that he was forced into making the cautioned statement.

The appellant filed a six-point memorandum of appeal. In our view, the memorandum boils down to one major ground of complaint: - That the evidence on record did not establish the prosecution case beyond reasonable doubt. Before us, he repeated the same basic complaint and urged further that he was forced into making the admission before the school committee meeting for fear of *sungusungu* militia. He also wanted to impress upon us that the whole case is a frame up by PW3 against him because he was not in good terms with him. On the alleged frame up we

wish to observe here and now that the appellant is a liar. The allegation is not borne out by the record. On 9/4/2008 when he was responding to questions by the court he is on record as having replied thus: -

> *I taught with the head teacher for four years. We were living at the school vicinity. We had families there.* ***We had good relation with the head teacher...***
>
> (Emphasis supplied.)

Under **Section 6(7) (a)** of the **Appellate Jurisdiction Act** (CAP 141 R.E. 2002) we are mandated to deal with "a matter of law (not including severity of sentence) but not on a matter of fact". Inspite of this clear provision, over the years this Court has held that it can interfere with matters of fact where there was a misapprehension of the evidence, where there are misdirections or non-directions on the evidence by the lower courts etc. – See for instance **The Director of Public Prosecutions v Jaffari Mfaume Kawawa** (1981) TLR 149.

The question is whether in this case there is basis for us to interfere with the findings of fact by the courts below. From the outset, our answer to this question is in the negative.

As correctly submitted before us by Ms. Lilian Itemba, learned State Attorney, even without some other evidence the testimony of PW1 alone was enough to ground the conviction against the appellant. PW1 was so thorough in her evidence that, like the courts below, we too are satisfied that she spoke nothing but the truth. She was so thorough that she was even able to describe the size of the appellant's penis thus: - "your penis is big; but not very big". Taking her evidence in totality, we are satisfied that there was penetration within the provisions of **Section 130(4) (a)** of the **Penal Code** (CAP 16 R.E. 2002).

The evidence of PW1 was corroborated by the school committee meeting in whose minutes it is apparent that the appellant admitted raping PW1 and apologized for doing so. He should not now be heard to deny that he did not admit committing the offence.

As already observed, it is also on record that the appellant's cautioned statement was produced and admitted in evidence. On this, we go along with Ms. Lilian Itemba that it was wrongly admitted in evidence. But even if it is to be expunged from the evidence, the evidence of PW1 is enough to sustain the conviction.

his right provided for under **Section 240(3)** (supra).

[illegible] that PW1 was aged 14 years at the time of incident. So, in terms of **Section 130 (2) (e)** of the Penal Code whether or not there was consent was immaterial.

When all is said and done, we are of the settled view that the appellant's conviction of rape and the sentence of thirty years imprisonment with corporal punishment of 24 strokes of the cane meted on him cannot be faulted. The appeal is devoid of merit. We hereby dismiss it.

DATED at **TABORA** this 29th day of June, 2011.

THE COURT OF APPEAL OF TANZANIA

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
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