IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO.456 OF 2007

IDD DAUDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwita, J.)

dated the 2nd day of July , 2007
in
Criminal Appeal No. 102 of 2002

JUDGMENT OF THE COURT

15 & 20 June, 2011

KIMARO, J.A.:

This is a second appeal in which the appellant is protesting his innocence. He was convicted by the District Court of Tabora of the offence of rape contrary to sections 130 and 131 of the Penal Code and was sentenced to thirty years imprisonment. The first appeal court sustained the conviction and the sentence.

At the trial court the conviction of the appellant was based on the evidence of the complainant alone. The complainant, Hawa Abdallah, (PW1) was a resident of Dar es Salaam. According to her testimony she was working in a hair saloon and was possessed of bad spirits. On 15th August, 2001 she visited a neighbour where she met the appellant and she was informed that the appellant was a native *"doctor"* and could attend to her problem. However, she was informed that medicines for her treatment were available at Tabora. She left with the appellant on the same day to Tabora and they went to Mbiti Village where she was given a room. During the night the appellant followed her and had sexual intercourse with the complainant without her consent, contending that it was part of the treatment. The appellant continued to have sexual intercourse with the appellant for two months before she reported the matter to the police that the appellant raped her. According to the complainant she did not get the opportunity to report the matter earlier because the appellant kept her under surveillance until on 16th November, 2001 when he left for Tabora to attend to his other patients. The complainant said it was one of the appellant's wives who assisted her to escape and she had to sell her clothes to get fare to travel to Tabora for purposes of returning to Dar Es

Salaam. Unfortunately, the appellant found her and seized her clothes to prevent her from leaving. She said efforts were made by the grandmother of the appellant to reconcile them but they proved fruitless.

In his defence the appellant did not dispute having carnal knowledge of the complainant. He said the complainant was his wife. He married her in Dar es Salaam as a second wife and cohabited with her there for a month and 21 days before moving to Tabora where she introduced the complainant as a second wife. Later he travelled to Kondoa and then to Dar es Salaam before returning to Tabora where he found the complainant and her clothes missing. On 16th November, 2001 while at the bus stand at Tabora, he managed to see the complainant disembarking from a motor vehicle. He confronted her as his wife. In the process of sorting out their differences the complainant informed the appellant that he was no longer interested to continue with the marriage because the appellant had another wife. He ended up being charged with the offence of rape. A witness brought by the appellant, one Nassoro Daudi (DW2) corroborated the defence of the appellant that the appellant returned from Dar es Salaam with the complainant and introduced her as his wife whom he

married in Dar es Salaam. DW2 said the appellant and the complainant lived together in the village for about a month and they later moved to live at Tabora town but he later received information that the appellant was charged with rape.

On the basis of this evidence the trial court convicted the appellant, and the conviction was sustained by the first appellate court, as stated above.

The appellant has filed five grounds of appeal but in essence he is challenging the first appellate court for sustaining a conviction based on the evidence of a single witness without assessing the credibility of the witness. During the hearing of the appeal the appellant appeared in person and the respondent Republic was represented by Mr.Mugisha Mboneko, learned State Attorney. The appellant did not have anything additional to his grounds of appeal. He also opted to give an elaboration of his grounds of appeal after hearing the views of the learned State Attorney. The learned State Attorney supported the appeal, faulting the learned judge on first appeal for sustaining a conviction on the evidence of a single witness, while the trial magistrate did not record the reasons for

believing the evidence of the complainant and not the defence of the appellant. He said although section 127(7) of the Law of Evidence Act [CAP 6 R. E. 2002] allows a conviction based on the evidence of a single witness, it is a requirement of the law that the reasons for believing that the witness told nothing but the truth should be recorded. That requirement, contended the learned State Attorney, was not complied with. He urged us to allow the appeal.

The appellant had nothing to say in reply for an obvious reason that the learned State Attorney made the situation for him easy.

This is a straight forward case which need not detain us much. In sustaining the conviction of the appellant, the learned judge on first appeal cited the cases of **Abasi Ramadhani V R** (1969) H.C.D 226 and **Maina V R** (1970) E.A. 370 which show the principle developed by the court on sexual offences involving the evidence of the victim as the sole witness. The practice of the court has always been to require corroboration of such evidence. The purpose is obvious. It is to eliminate the possibility of fabrication of evidence by the victim of the offence. The learned judge

observed that the position of the law has now changed. He said:

> "The need for corroboration in sexual offences has been relaxed by subsection (7) of the Evidence Act (Cap. 6 R.E.2002). Conviction can be sexual offence, (sic) if for reasons to be recorded in the proceedings, the Court is satisfied that the victim of the sexual offence is telling nothing but the truth."

We entirely agree with the learned judge on first appeal that the court can convict an offender charged with the offence of rape on the basis of the evidence of the complainant alone. But the law requires the trial magistrate to record the reasons for believing that the witness told nothing but the truth. Looking at the record of appeal at page 29, all that the trial magistrate said was:

> *"I know the danger of basing my judgment on uncorroborated evidence . Being aware so, I warn myself. Having warned myself I digest myself as follows..."*

The trial magistrate then went on to consider matters irrelevant for proving the offence of rape, like giving the definition of the marriage under the Law of Marriage, speculating on how the business of the appellant of

being a native *"doctor"* should have been carried out, plus shifting the burden of proof to the appellant that he ought to have given some clarification on when he went to Dar Es Salaam for purposes of marrying the complainant, and finally convicted him as charged.

In our considered opinion, given the omission made by the trial magistrate in recording the reasons for believing that the complainant told nothing but the truth, the learned judge on first appeal ought to have re-evaluated the evidence and make an independent finding on the credibility of PW1-the complainant. In our considered view, a close scrutiny of her evidence casts doubts on her credibility. In the case of **Mathias Bundala V R** CAT Criminal Appeal No. 62 of 2004(Unreported), the Court held that:

> "...As in most cases even where witnesses purport to give direct evidence, there is always a common a fear of manufactured evidence ..."

It is generally agreed that in assessing the credibility of a witness, the Court has to adopt a careful and disproportionate approach and critically evaluate the evidence in order to find out whether it is cogent, persuasive and credible. The record shows that the complainant lived with the

appellant from 15th August, 2001 to 16th November, 2001. That was a period of three months. We do not believe that the complainant failed to report this incident of rape to the police in all this period if at all she did not go to Tabora as a wife of the appellant. The long delay by the complainant in reporting the incident to the police creates doubts in our minds on the truthfulness of her evidence. Under the circumstances of this case, more evidence was required from an independent witness to corroborate the evidence of the appellant that she was raped. In **MT.38350 P.T.E. Ledman Maregesi V R** CAT Criminal Appeal No.93 of 1998 the Court said;

> *"We think that where a witness is shown to have positively told a lie on a material point in the case, his evidence ought to have been approached with great caution , and generally the court should not act on the evidence of such a witness unless it is supported by some other evidence."*

Going by the defence of the appellant he raised doubts on the prosecution case. From the evidence on record, there is no way we can

eliminate the likelihood of the defence of the appellant being true. In this respect the appellant ought to have been given the benefit of doubt and be acquitted.

Under the circumstances, we allow the appeal, quash the conviction and set aside the sentence and order for an immediate release of the appellant from prison unless he is held there for any other lawful purpose. It is accordingly ordered.

DATED at **TABORA** this 18th day of June, 2011.

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