

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUNUO, J.A., KILEO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO 115 OF 2009

ABDALLAH ELIAS.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

**(Appeal from the judgment of the High Court
of Tanzania at Moshi)**

(Jundu, J.)

dated the 1st day of September 2005

in

Criminal Appeal No 53 of 2003)

JUDGMENT OF THE COURT

15th & 21st February, 2012

KILEO, J.A:

This is an appeal against the decision of the High Court sitting at Moshi in Criminal Appeal No. 53 of 2003 in which the appellant's appeal against his conviction for rape entered by the District Court of Mwanga was dismissed. He has come to this Court on a second appeal.

The facts of the case are brief and straight forward. The victim of the rape, Zita d/o Ablahi was a child aged 3 years. On the day of the incident her mother had left her along with other children with the appellant who was her neighbor while she went to fetch water in the company of the appellant's wife. On her return she found the victim who was still at the appellant's compound crying and upon examination she was found to be bleeding from her vagina. The appellant's conviction was based on the testimonies of the victim's parents, on the PF3 (Exh. PE1) and on his cautioned statement which was tendered in court as exhibit PE2. The provisions of section 240 (3) of the Criminal Procedure Act (CPA) were not complied with when the PF3 was admitted. Section 240 of the CPA deals with statements by medical witnesses and the subsection in issue states:

(3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made

***the report to be summoned in accordance
with the provisions of this subsection.***

The appellant was not informed of his right to require the person who made the report to be summoned in court so that he could be examined with regard to his report. In view of a number of decisions of this Court on the admission of PF3 where the provisions of section 240 (3) of the Criminal Procedure Act have not been complied with we will straight away do away with the PF3. (See for example **Mbwana Hassan vs. Republic**- Criminal Appeal No. 98 of 2009 (unreported))

The appellant appeared before us unrepresented. His nine point memorandum of appeal can conveniently be condensed into the following two main grounds:

- 1. That the prosecution failed to prove that the victim was actually raped*
- 2. That the courts below erred in basing conviction on his cautioned statement which was not voluntarily made.*

The Respondent Republic was represented by Mr. Zakaria Elisaria, learned Senior State Attorney. While agreeing that the victim had suffered grave sexual abuse at the hands of the appellant he was however of the view that penetration which is an essential element in rape had not been established. The learned Senior State Attorney made reference to **Mbwana Hassan vs Republic** –*supra* in support of his contention. He urged us in the circumstances to find instead that the appellant had committed an offence under section 138C of the Penal Code. The said section states:

Section 138C (1) Any person who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument or any orifice or part of the body of another person, being an act which does not amount to rape under section 130, commits the offence of grave sexual abuse if he does so in circumstances falling under any of the following descriptions, that is to say–

(a) without the consent of the other person;

(b)

(c)

(2) Any person who–

(a) commits grave sexual abuse is liable, on conviction to imprisonment for a term of not

less than fifteen years and not exceeding thirty years, with corporal punishment, and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person;

(b) commits grave sexual abuse on any person under fifteen years of age, is liable on conviction to imprisonment for a term of not less than twenty years and not exceeding thirty years, and shall also be ordered to pay compensation of an amount determined by the court to any person in respect of whom the offence was committed for injuries caused to that person.

Having given due consideration to all the circumstances of this case we have come to the settled view that there is only one main issue for consideration in this case and it is whether the appellant committed rape or grave sexual abuse against the child Zita d/o Ablahi. Evidence which was found to be impeccable at the trial established that the victim suffered serious injuries on her private parts while in the hands of the appellant. The victim was a child of only three years and she did not testify in court. It was established through evidence that the appellant was at his house

throughout in between the time that the mother (PW1) left the victim with him and the time she found the child injured in her vagina. The possibility that someone else could have harmed the child was properly ruled out as the appellant himself admitted to PW1 that nobody went to his house. The question now is; were the injuries that the infant suffered a result of rape or just grave sexual assault.

PW2 gave evidence to the effect that having seen the infant bleeding he asked the appellant what had happened. At first the appellant only trembled but when he was asked again later he said he was victimized by malaria and had done the act without any intention but for malaria.

Responding to questions put to him through cross examination by the appellant PW2 is recorded as answering that the appellant's wife was crying and she even said:

'Wewe Baba Musa umerudia tena kitendo hiki, juzi tu ndio matatizo haya yamekutoka na umerudia tena, si ungeniambia kama ulikuwa na shida.'

According to the witness the appellant's wife was blaming the appellant for repeating something that had put him in trouble shortly before and was telling him that if he was in need he should have told her.

The record shows that the appellant gave a cautioned statement in which he admitted to have defiled his neighbor's child. He blamed the devil for what happened. His cautioned statement matched what he stated to PW2. The cautioned statement was admitted without any objection from the appellant. He did not even put any questions to PW5 who tendered the statement in court. He did not repudiate nor retract his statement. The cautioned statement was properly admitted and we see no reason to fault the findings of the courts below. His own cautioned statement coupled with what he said to PW2 and the fact that no one else went to his homestead during the time that the child was there sufficiently established that no one else but the appellant raped the child.

In the event we find no merit in this appeal and we accordingly dismiss it.

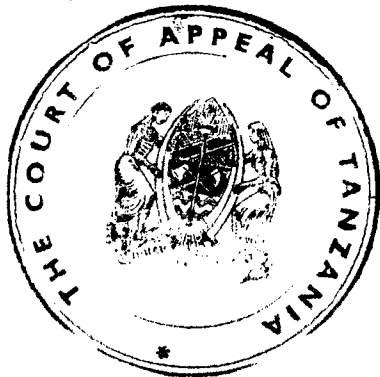
DATED at **ARUSHA** this 20th Day of February 2012

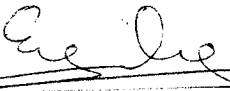
E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
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