IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., BWANA, J.A And MJASIRI J.A.)

CRIMINAL APPEAL NO. 313 OF 2007

KIRUNDILA BANGILANA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(An Appeal from the Decision of the High Court of Tanzania at Bukoba)

(Mussa, J.)

dated the 2nd day of July, 2007

in

Criminal Appeal No. 78 of 2006

....

JUDGEMENT OF THE COURT

22 & 23 February, 2012

BWANA, J.A.:

This is a second appeal. Initially the appellant was charged with and convicted of the offence of Rape contrary to section 130 (2) (a) of the Penal Code as amended by section 5 of the Sexual Offences Special Provisions Act No. 4 of 1998. The trial court, the District Court of Biharamulo at Biharamulo, sentenced him to the mandatory minimum sentence of thirty (30) years imprisonment. He was also to get six strokes of the cane.

His first appeal before the High Court of Tanzania at Bukoba was unsuccessful, hence this appeal. The appellant appeared in person before us while the respondent Republic was represented by Mr. Castuce Ndamugoba, learned State Attorney.

Briefly the facts are that on the 3rd day of January 2002 at about 1300 hrs, at Mtundu village within the District of Biharamulo, the appellant had carnal knowledge of Dorothy Ngaheselwa, a fifty eight (58) year old woman, without her consent. At Dorothy's house some local brew was being sold and the appellant had been there a day or so before. On the material day, he went there alone at first and asked Dorothy, the victim PW1, if he could be served with food. There was none so he left. He came back only to find PW1 having a nap in her bedroom apparently without her underpants on.

It is on record that suddenly the appellant squeezed himself between PW1's thighs and had his male organ penetrate the victim's vagina. PW1 initially thought it was her husband but upon realising that it was the appellant, she grabbed him, held his neck and raised an alarm. Two of her neighbours responded. Both Faida Mpandula, PW3, a neighbour and

Zakaria John, PW2, her son, rushed to the scene. Both PW2 and PW3 testified to the fact that upon approaching PW1's house, they saw the appellant emerge from PW1's house, on his heels and being chased by the said PW1. Eventually the appellant was apprehended. It is on record further that during the chase and after his apprehension, the appellant was found holding a red underpant, apparently belonging to PW1. The appellant's trousers was not "zipped" and so his male organ was just hanging about. He was taken to the police and his victim was later on taken to hospital. She was examined and a PF3 report prepared.

However, the said PF3 was improperly tendered in court, not in compliance with the requirements of section 240 (3) of the Criminal Procedure Act (the CPA). That irregularity formed part of the appellant's grounds of appeal. The learned State Attorney did concede before us, and rightly so in our view, that since the said PF3 was tendered in court not in conformity with the provisions of section 240 (3) of the CPA, it should be expunged from the record. We did so.

Having expunged the PF3 from the record, we are left with the need to consider the remaining evidence, whether or not it supports the

prosecution case to the required standard. Mr. Ndamugoba affirmatively submitted that there is sufficient evidence in support of a conviction. The appellant appeared to argue otherwise, claiming that the whole case is framed up because of a past family grudge.

We have considered the evidence in its totality and the following factors do emerge, strongly supporting the prosecution case.

First, PW1's assertion that the appellant did have carnal knowledge of her without her consent is not controverted on a reasonable doubt by the said appellant. PW1's claims are further supported by the evidence of both PW2 and PW3 to the effect that following the alarm raised by PW1, they rushed to her house only to meet the appellant running out of PW1's house, holding her red underpant and his trouser unzipped with his male organ protruding out.

Second, the said carnal knowledge lacked consent. According to PW1, upon realizing that the one who had made penetration of her female sexual organ was not her husband, she struggled with him at the same time calling for help. Such action by PW1 indeed convinces us to hold that the said sexual act lacked consent.

Rape is proved (in case of adults) when a male organ penetrates the victim's female organ without her consent. The evidence on record herein, clearly establishes beyond reasonable doubt that that is what happened in the case at hand. Accordingly, we are of the considered view that the appellant committed the offence with which he was charged with and eventually convicted of. The sentence meted on him was the minimum as prescribed by law. Therefore this appeal lacks merit. It is dismissed in its entirety.

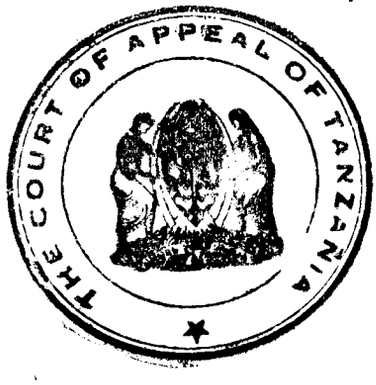
DATED at **MWANZA** this 22nd day of February 2012.

J. H. MSOFFE
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



J. S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL