IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 110 OF 2012

(CORAM: OTHMAN, C.J., MBAROUK, J.A., And BWANA, J.A.)

ATHUMANI RASHIDI ..... APPELLANT
VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Mipawa, J.)

dated the 28th day of April, 2010

in

Criminal Appeal No. 2 of 2007

JUDGMENT OF THE COURT

11th & 25th June, 2012

OTHMAN, C.J.:

The appellant, Athumani Rashidi was charged with and convicted by the Masasi District Court of the offence of rape c/s 130 (1) (2) (a) of the Penal Code, Cap. 16 as amended by the Sexual Offences Special Provisions Act, No 4 of 1998. It sentenced him to thirty years imprisonment. Aggrieved, he appealed to the High Court (Mipawa, J), which on

28/04/2010 dismissed his appeal. He has now preferred this second appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic which resisted the appeal was represented by Mr. Peter Ndjike, learned Senior State Attorney.

In summary, the appeal arises this way. The prosecution case narrated by PW1 (Sophia d/o Hemed), aged 25 years was that, on 30/12/2006 at about 02:00 a.m. while at her house asleep without wearing an underwear, she was awaken by a person having sexual intercourse with her without her consent. Her husband was away. She recognized the appellant from Mapili Vilalge, whom she knew him before, with the aid of a small kerosene lamp, which was lit. She raised an alarm. PW2 (Akwilina Peter), PW1's co- wife responded to PW1's cry. She met PW1 naked and the appellant whom she also knew, dressed in a "*shuka*" inside the house. PW3 (Kazumari Athumani), a neighbour also rushed to the scene of crime. He arrested the appellant, a co-villager whom he knew, inside the house as he tried to flee.

The appellant, denied involvement. He claimed that he was arrested at his house.

The main grievances in the appellant's memorandum of appeal are the following. **First,** that the trial court and the High Court erred in relying on PW1's PF3 Form (Exhibit P1) which had no indication of any spermatozoa having been seen. He questioned why he was not medically examined. The prosecution, he said, had not proved sexual intercourse beyond reasonable doubt. **Second,** that it was unsafe for the courts below to rely on PW1's evidence, which contained inconsistencies and contradictions, without corroboration. PW2 and PW3's evidence was purely hearsay and incapable of corroborating the evidence of PW1. **Thirdly**, that he was denied the opportunity to call his witness.

Elaborating on the complaints, the appellant submitted that the evidence of PW3 was insufficient to serve as corroboration. There was also no direct evidence that he was caught red-handed committing rape. Being a lay person, he implored the Court to take into account the grievances in his memorandum of appeal.

For the respondent Republic, Mr. Ndjike, for different reasons readily conceded that there were shortcomings in the admission of PW1's PF3 Form (Exhibit P.1) by the trial court. The appellant was not accorded his right to require the medical doctor who examined PW1 to be summoned by the court for cross-examination, contrary to section 240 (3) of the

Criminal Procedure Act, Cap 20 R. E. 2002. This irregularity was detected by the High Court which did not rely on it. That PW1's evidence was sufficient to prove penetration. The High Court correctly found that there was ample and overwhelming evidence to show that the appellant had committed rape.

On the credibility of the evidence of PW1, PW2 and PW3, Mr. Ndjike submitted that the trial court had properly assessed their evidence and found it credible. It did not contain any contradictions. The evidence of PW1 was sufficiently corroborated by PW2 and PW3.

Finally, Mr. Ndjike submitted that the appellant had opted to defend himself without calling any witness. At this stage, it was too late to complain. He invited the Court to dismiss the appeal.

Attending next to the memorandum of appeal and considering the submissions made before us, one of the key issues raised is whether or not sexual intercourse was proved beyond reasonable doubt.

Section 130 (1) (2) (a) by which appellant had been charged with rape, provide:-

> "130 (1) **It is an offence for a male person to rape** a girl or **a woman**.

(2) **A male person commits the offence of rape if he has sexual intercourse with** a girl or **a woman under circumstances failing under any of the following description**:

(a) **not being his wife**, or being his wife who is separated from him **without her consenting to it at the time of sexual intercourse**.

Furthermore, section 130 (4) (a) of the Penal Code reads:

(4) **for the purposes of proving the offence of rape-**

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence" (Emphasis added).

The record is plainly clear that the medical examination report (Exhibit P1) tendered by PW1 was not objected by the appellant. That notwithstanding, in terms of section 240 (3) of the Criminal Procedure Act, the mandatory requirement that the appellant must be informed of his

right to have the medical officer from Newala Hospital who examined PW1 summoned for cross- examination was not complied with. With this serious irregularity committed by trial court, the medical examination report (Exhibit P1) ought to be expunged from the record, as we hereby proceed to do. (See, **Alfeo Valentino v. Republic, Criminal Appeal No. 92 of 2006**; **John Godfrey Baby v. Republic, Criminal Appeal No. 114 of 2008; John Juma v. Republic, Criminal Appeal No. 104 of 2006** (all CAT, unreported).

The question that remains is whether there was sufficient evidence from PW1 to prove that sexual intercourse between the appellant and PW1 had taken place.

As prescribed in section 130 (4) (a) of the Penal Code, penetration however slight is sufficient to constitute sexual intercourse. In examination-in-chief, PW1 repeated twice that the appellant had un consented "sexual intercourse" with her.

Going by the **Concise Oxford English Dictionary**, (2004 Ed.) "sexual intercourse" refers to:

> *"sexual conduct between individuals involving **penetration**, especially the insertion of a man's erect penis into a women's vagina." (Emphasis added)*

Encyclopedia Britannica (2012 Ed.) defines the word "sexual intercourse" to mean:

> *"Sexual intercourse also called coitus or copulation consists of a reproductive act in which the male reproductive organ* ***enters*** *the female reproductive tract". (Emphasis added)*

Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing and Allied Health, 7th Ed (2003) defines it thus:

> *"Coitus, any physical contact between two individuals involving* ***stimulation of the genital organs*** *of at least one."* (See also, **The Dorland's Medical Dictionary of Health for Consumers (2007 Ed).** *(Emphasis added)*

Segen's Medical Dictionary (2012 Ed) gives the same expression this meaning:

> *"The act in which the external male reproductive organ-penis-* ***enters*** *the external/ accessible female reproductive tract-vagina". (Emphasis added)*

Having given this matter proper reflection, we are of the considered view that the High Court, after discounting PW1's medical examination report (Exhibit P1) was entitled to find that there was ample evidence that PW1 had been raped without her consent and by the appellant. She gave cogent and consistent evidence that the appellant whom she knew before the event and had affirmatively identified, had sexual intercourse with her without her consent.

Much as PW1 twice employed the statutory language i.e. "sexual intercourse", her narration of the episode read as a whole and the words used by in their ordinary meaning and context must have made reference to the occurrence of penetration between the appellant and her. Going by the record of proceedings at the trial court, we entertain no doubt that the parties and the trial court fully understood PW1's explanation to refer to penile- genital penetration as the principal sexual activity that took place between her and the appellant that night. Each case must of course be decided on its own set of facts and attending circumstances. Accordingly, we find no merit in the appellant's complaint.

The appellant's second complaint was that the evidence of PW2 and PW3 was hearsay and could not have been relied upon by the trial court and the High Court to corroborate the evidence of PW1. True, PW2 and PW3 did not catch the appellant red-handed committing any sexual intercourse. However, their evidence was not hearsay. It was direct evidence.

Section 62 (1) (a) of the Evidence Act provides:-

> *"62 (1) Oral evidence must, in all cases whatever, be direct; that is to say-*
> *(a)if it refers to a fact which could be seen, it must be the evidence of a witness who says*

he saw it".

Moreover, it is trite law that evidence is not corroborative unless it connects or tend to connect the appellant with the commission of the offence (See: **Azizi Abdallah V R,** [1991] TLR 71; **R. V. Beck** (1982) 1 ALL E. R. 807; **R. V. Baskerville** (1916) 2 K. B. 658).

PW2 saw the appellant inside the house. PW3 arrested him inside that very house attempting to run away. Both said he wore a "*shuka*". The appellant's conduct and uninvited presence inside PW1 and PW2's house at about 2 am, while their husband was away, irresistibly could not have had an innocent explanation. The evidence of PW2 and PW3 could thus validly be used to corroborate the evidence of PW1. There is therefore, no basis to fault the courts below for relying on the evidence of PW2 and PW3 to corroborate that of PW1.

The appellant's third complaint is that he was denied the right to call his witness in defence. On this, the record speaks for itself. When the Defence case come up for hearing on 11/10/2006 this is what the appellant told the trial court:

> *"I ask the court to proceed with any my defence without my witness as he nowhere to be found."*

Prior to that, the hearing of the case was adjourned at least five times between 31/7/2006 and 11/10/2006 to allow the appellant's intended witness to come forward and testify. On the whole, we are not persuaded that the appellant was denied the opportunity or right to call his witness in defence. With respect, there is no substance in this ground of complaint.

For all the above reasons, we find no basis to disturb the concurrent findings of fact by the courts below. We are satisfied that the appellant's conviction was proved beyond reasonable doubt. Accordingly, we find no merit in this appeal, which we hereby dismiss.

DATED at **MTWARA** this day of 22nd June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

MBUYA R. M.
DEPUTY REGISTRAR