IN THE COURT FO APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 153 OF 2011

BIGARA KIGURU .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlay, J.)

dated the 22nd day of May, 2011
in
Criminal Appeal Case No. 64 of 2000

JUDGMENT OF THE COURT

23rd May & 4th June, 2012

ORIYO, J.A.:

Bigata Kiguru was charged with and convicted of the offence of rape contrary to sections 130 (1) (2) (a), (b) and 131 (1) of the Penal Code as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. The charge sheet shows the particulars of the offence as:-

"That Bigata s/o Kiguru is charged on the 23rd day of June, 1999 at about 17.000 hours at Kumwuzuza

Village within Ngara District in Kagera region did have carnal knowledge of one Jane d/o Wisman without her consent."

The District Court of Ngara sitting at Ngara sentenced him to the mandatory minimum punishment of thirty (30) years imprisonment and ten (10) strokes of the cane. His appeal before the High Court sitting at Bukoba was unsuccessful, hence the second appeal to the Court.

At the hearing, the appellant appeared in person, he was unrepresented. The respondent Republic was represented by Mr. Aloyce Mbunito, learned State Attorney.

The brief facts on the incident which occurred on 23/06/1999 were as follows:-

PW1 and the appellant were village mates. They knew each other before the incident. It was about 5 p.m. on the day of the incident, when the appellant went to the home of PW1, Jane Wisman, the victim. At PW1's home, the appellant found her mother, brothers (including PW2 –

Nitanga Wisman) and some neighbours. The appellant was not a stranger to the family of PW1 either. After an exchange of greetings and some conversation, the appellant told PW1 that there was maize for sale at his place and asked for her assistance to weigh the maize. PW1 agreed after the appellant sought and secured her mother's permission. Then the two of them left PW1's home and walked over to the home of the appellant.

At the appellant's home, they worked on the maize available but found that it was insufficient for the intended purpose. It was the version of PW1 that while they were still processing the maize, the appellant held her hand and told her that he had married her. Then he took her to his sleeping room where he undressed PW1 and himself and he had sexual intercourse with her until the next morning when PW2, Nitanga Wisman, PW3 Yosam Binazi, a cell leader and some "sungusungu" vigilantes arrived at the appellant's home to enquire on the whereabouts of PW1. It was then that the appellant let PW1 leave with her people who took her to a police station where she was given a PF3 for medical examination.

On his part the appellant did not deny to have had sexual intercourse with PW1 on 23/06/1999 at his home. His defence was that he did not

rape PW1 but they had consensual sexual intercourse. He denied to have used threats and /or force in the process. The appellant stated that he loved PW1 for a long time and intended to marry her only that he was unable to pay the bride price and that is why PW1's family concocted the rape case against him.

Before the Court the appellant had three grounds of appeal which can be summarised as follows:-

(1) The first appellate judge is faulted for misdirection by relying only on part of the evidence to establish lack of consent;

(2) The first appellate judge is faulted for failure to assess the credibility of PW1, the only eye and material witness whose evidence was contradictory;

(3) The first appellate judge is blamed for failure to observe and draw adverse inferences to the prosecution case e.g. victim's delayed medical examination and inadequate medical report which did not disclose the nature and extent of injury.

For the appellant who is a layman and not conversant with legal issues, he did not elaborate further on the grounds of appeal. As for the respondent Republic, Mr. Mbunito, learned State Attorney supported the conviction and sentence meted on the appellant. Reacting to the first and second grounds of appeal, the learned State Attorney stated that both courts below believed the evidence of PW1 which was consistent and was corroborated by PW2 and PW3. It was his submission that the evidence of PW1 had no contradictions. Regarding the last ground of appeal, the learned State Attorney was of the view that it lacked merit because PF3 was promptly issued on the date following the incident and there was no delay. In support, Mr. Mbunito, referred to the decisions of the Court in:-

1. **Kabalagala Kadumbagula & Another vs. Republic,** Criminal Appeal Nos. 128 and 129 of 2007 **and**
2. **Leonard Jonathan vs. Republic,** Criminal Appeal No. 225 of 2007, (both unreported).

With our greatest respect to Mr. Mbunito, learned State Attorney, in as much as we appreciate the arguments in his submissions, we hesitate to go along with him as we shall shortly demonstrate why.

First, we shall deal with the two cases above. The learned State Attorney referred us to the two decisions of the Court in the cases of **Kabalagala and Leonard Jonathan** *(supra).* With due respect, these cases are distinguishable due to the outrageous, aggravated circumstances and the excessive use of force applied.

The incident took place on 23/6/1999 in the village of Kumwuzuza, in Ngara, where the parties resided. While PW1, who was 22 years old, lived with her mother and brothers, the appellant was 26 years of age and apparently lived not far from his own parents but had his own separate house nearby. We say so because according to PW1, the mother of the appellant brought them food she had cooked which they ate together. And in her testimony, PW1 stated that as they were going to the house of the appellant, they by-passed the house of the appellant's father, where PW1 at first stopped but the appellant invited her to proceed to the appellant's own house. PW1 accepted the invitation. PW1 testified that she cried

throughout the night she spent with the appellant as he raped her and threatened her with a knife. This may be scenario one.

The other scenario is the undisputed fact that the appellant went to the home of PW1 at 5 p.m. and in the presence of PW1's mother, brothers and others people after the appellant had sought permission from PW1's mother for PW1 to go to his place for the maize business. The permission was readily granted. Her brother, PW2 testified that he went to the house of the appellant at 5 a.m. to look for PW1, on the next day. PW2 was in the company of the cell leader (PW3) together with the chairman of the street where PW1 and her family resided. PW2 testified that PW1 was crying when she emerged from the appellant's house and told them how she was raped by the appellant. Thereafter, they took PW1 to the police where she was issued with PF3. The appellant was left behind at his house where he could have escaped had he wished to but did not.

Those are some of the salient, unchallenged facts in this case. Admittedly, the scenarios above have exercised our minds a lot because there are a number of basic issues which are left unanswered. For instance, it is difficult to comprehend that an ordinary man with an

intention to rape or to do harm to another person would collect the victim from her family after asking for and being granted permission to take her with him. We have failed to understand why the family of PW1 knowing where PW1 was, and suspicious of the appellant, did not go after her earlier, on the same day, 23/6/1999. Instead they left her to spend the night at the appellant's home.

PW1 alleged that she was placed in confinement by the appellant in his house, raped and she was being threatened by a knife. We have pointed out earlier the proximity of the dwelling places of the appellant and his parents. PW1, if her allegation is true, had opportunities to escape from her ravisher but she did not, e.g. when the mother of the appellant brought them food or when the appellant gave her water and indeed she took a bath. PW2, PW3 and the others including "sungusungu" vigilantes collected PW1 at 5 a.m. on the following day, but there is no evidence on record as to why they went with PW1 to the police and left the appellant, her ravisher at his residence instead of arresting him and taking him to the police.

We have pointed out only a few instances in the events of 23/6/1999 and 24/6/1999 which remain unexplained and which in our view create serious doubts in the prosecution case that the sexual intercourse was not consensual. The prosecution evidence is full of implausibilities as exemplified above. It is these implausibilities which make us unable to go along with Mr. Mbunito, learned State Attorney and the prosecution case generally, for that matter.

It is trite law that in a criminal case, the standard of proof has to be beyond all reasonable doubt. The implausibilities in the prosecution case coupled with the appellant's defence have created serious doubts on the guilt of the appellant. The benefits of those doubts ought to have been given to the appellant.

In the circumstances, we are constrained to allow the appeal. The conviction of Bigata Kiguru is hereby quashed and the sentence set aside. We order that he be released from custody forthwith unless otherwise lawfully held.

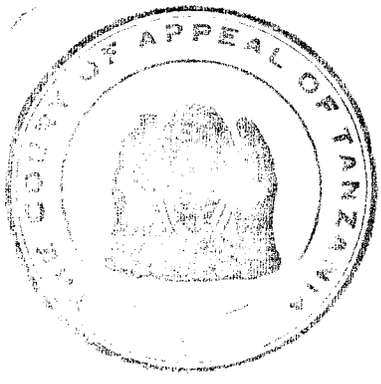
DATED at MWANZA this 4th day of June, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR