IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: OTHMAN, C.J., KIMARO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 245 OF 2010

FAUSTIN FRANCIS TARIMO.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Moshi)

(Mzuna, J.)

dated the 25th day of March, 2010
in
In DC Criminal Appeal No 84 of 2008

JUDGMENT OF THE COURT

25th September, & 1st October, 2012

OTHMAN, C.J.:

The appellant, Faustin Francis Tarimo was charged with and convicted of the offence of rape contrary to sections 130(1)(2)(c) and 131 of the Penal Code, Cap 16 R.E. 2002 as amended by the Sexual Offences (Special Provisions) Act, No 4 of 1998. He was convicted, sentenced to thirty years imprisonment and ordered to pay Tz Shs 200,000/= as compensation, by the District Court of Rombo on 5/2/2008. His appeal to the High Court (Mzuna, J) was dismissed on 25/3/2010. Aggrieved, he preferred this second appeal.

At the hearing of the appeal on 25/9/2012, the appellant appeared in person, unrepresented. The respondent Republic, which supported the appeal was represented by Ms. Javelin Rugaihuruza, learned Senior State Attorney.

The central facts of the case may be briefly stated. The prosecution case alleged that on 2/5/2007, while at the shamba, Furtunata John (PW1) a deaf and dumb woman, 80 years of age was raped by the appellant whom she knew. PW2 (Mary Amadeus) found the appellant on top of PW1. PW3 (Fausta Leoni), the ten cell leader who responded to an alarm, met the appellant running away. The medical evidence by DR W.T. N. Keijo (PW4) was that he had examined one Fortunata George Masawe on 3/5/2007 and found that sexual intercourse had taken place.

In his defence, on oath, the appellant denied involvement and claimed that he did not know PW1. He raised a belated *alibi* that he had been in Arusha from 30/04/2007 to 5/5/2007.

On the whole evidence, including the strength of the prosecution case, the trial court convicted the appellant. That decision was upheld by the High Court.

Ground 2 and 5 of the Appellant's grounds of appeal contained in his memorandum of appeal filed on 16/12/2011 are crucial to the determination of this appeal.

The complaint in ground 2 of the appeal is that the High Court erred in law and fact in relying on the evidence of PW1, a deaf and dumb witness in violation of section 128 of the Evidence Act, Cap 6 R.E. 2002. He submitted that PW1 was not properly sworn by the trial court and there was no evidence to show that the interpreter, one Bernard George Masawe had any skills in sign language.

On her part, Ms. Rugaihuruza too submitted that first, it was improper for the trial court to have sworn PW1 before the interpreter. By doing so, it is not known how she was sworn. Second, that it is also not known what expertise or skills in sign language the interpreter had.

In relation to the High Court's decision, Ms. Rugaihuruza submitted that in determining the issue, it only directed itself whether by the evidence of PW1 interpreted through an interpreter, the appellant was accorded a fair trial. It had failed to properly direct itself on the sign language skills possessed by the interpreter or his familiarity with it. Relying on **Sinu Lishinu V.R**, Criminal Appeal No 260 of 2009 (CAT)(unreported) she submitted that with the irregularities in the

reception of PW1's evidence, it should not have been relied upon by the High Court as it did, to support the appellant's conviction.

The record reveals that in dealing with the issue, the High Court reasoned and found:

> "The issue as I can understand is whether the appellant was given a fair trial? He, i.e. the interpreter was sworn before discharging his duty as required by law. The appellant asked questions exhaustively as can be seen in the record. The trial magistrate just like the appellant did not find any difficulty during the said interpretation by signs. This to my view is a clear indication that he was given a fair trial".
>
> …."although the record is silent if the interpreter was skilled in signs, he was sworn. Skills in interpreting the sign to my view does not necessarily be obtained in classes by being taught, but can also be obtained through experience. So, even a peasant can be experienced in signs".

The law is well settled that on second appeal an appellate court should not disturb concurrent findings of facts arrived at by the courts below unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice, a violation of some principle of law or practice or the findings were perverse or clearly wrong (See, **Amratlal D.M. t/a Zanzibar Silk Stores V. A. H. Jariwala t/a Zanzibar Hotel,** (1980) TLR 31).

The record of the hearing on 29/8/2007 reads:

> "**PW1**: Fortunata John, Female, Tanzania, 80 years Christian, swears and states:
>
> **PP**: The witness is Dumb/Deaf. There is an interpreter who is Bernard George Masawe of Keni, Peasant.
>
> I swear that I will properly interpret what the complainant is telling the court by signals and vice versa".

The trial Court then proceeded to record PW1's evidence as interpreted by the interpreter.

Section 128 of the Law of Evidence Act, provides:

"128(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, such as by writing or by signs; but such writing must be written, and the signs made in open court.

(2) Evidence given in accordance with section (1) shall be deemed to be oral evidence."

Section 128 of the Evidence Act applies to a dumb as well as to a dumb and deaf witness.

Having closely examined the record, we would agree with the appellant and Ms. Rugaihuruza that as PW1's evidence was taken in an erroneous manner, it could not have been safely relied upon by the lower courts. **First**, the intepreter was required to have been sworn by the court *before* he assisted PW1 to take her oath. As PW1's oath was administered before the interpreter was sworn, it is not know how she took her oath. **Second,** it is unclear from the record whether the interpreter was sworn by the court or the public prosecutor. It is trite that duty falls on the court and not the public prosecutor. **Third**, it is not known what expertise in sign language the interpreter possessed or how closely familiar he was with the sign language used by PW1. **Forth**, none of the signs made by PW1 were

recorded by the court. All this went foul to the procedures for the recording of the evidence of such witnesses under section 128(1) of the Evidence Act, well spelt out by the Court in **Sinu Lishinu's Case** (*supra*).

With respect to the High Court, the pertinent issue under section 128 of the Evidence Act was not the fairness of the trial, but of the court satisfying itself of the competence of the interpreter interms of his expertise in sign language or her close familiarly with PW1's sign language. As remarked by the High Court itself, the record is dead silent on that. All considered, there is no option but to completely discard PW1's evidence, in its entirety, including her torn underwear (Exhibit P.1). We find merit in this ground of appeal.

Ground 4 of the appeal is to the effect that the High Court erred in law and fact in failing to notice that the alleged victim named in the charge sheet was one **Fortunata d/o John** (i.e. PW1), while the PF3 Form (Exhibit P.2) concerned one **Fortunata d/o George Masawe**, two different persons. The appellant questioned whether he could safely have been convicted on the evidence based on the PF3 Form, which named a different person from the complainant in the charge sheet.

Ms Rugaihuruza submitted that with the discrepancy in the two names contained in the charge sheet and the PF3 Form (Exhibit P.2),

PW4's evidence was not conclusive as to who was raped. PW4 may not have been referring in the PF3 Form (Exhibit P.2) to the same complainant named in the charge sheet, i.e. P.W.1. She pointed out that the High Court had also failed to directed itself on this aspect of the evidence. That with the doubt raised in the evidence of PW4 and the PF3 (Exhibit P.2) the remaining evidence of PW2 and PW3 was insufficient to have conclusively established the prosecution case beyond reasonable doubt.

Having closely scrutinized the record, again we would agree with the appellant and Ms. Rugaihuruza that the discrepancy between the complainant of rape named in the charge sheet, i.e. **Fortunate d/o John** (PW1) and the person examined by PW4 and named in the PF3 Form (Exhibit P.2) i.e. **Fortunata d/o George Masawe** raises a significant doubt whether or not it refers to one and the same person. No clarification was sought by the Public Prosecutor or the Court, from PW1 or PW4 on that serious discrepancy that goes to the root of the matter. With respect, this short coming was undetected by both the District Court and the High Court, which relied on the PF3 Form (Exhibit P.2) as corroborating the testimony of PW1. It could not. Accordingly, we find merit in ground 4 of the appeal.

Given the significant gaps in the above evidence, we are of the settled view that it could not conclusively be held that the prosecution had proved its case beyond reasonable doubt. In these circumstances, it would be highly unsafe to allow the conviction to stand.

In the upshot and for the foregoing reasons, we are constrained to quash and set aside the decision of the High Court. The appellant is to be forthwith released from prison unless he is held on some other lawful cause. The appeal is hereby allowed. It is so ordered.

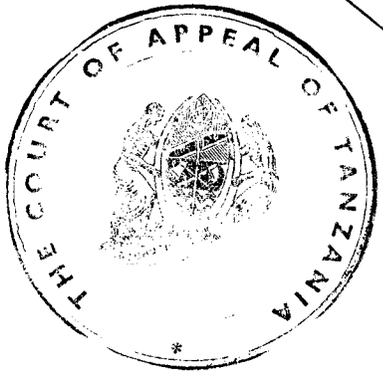
DATED at ARUSHA this 28th day of September, 2012.

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL