

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

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

CRIMINAL APPEAL NO. 315 OF 2009

KALEBI ELISAMEHE.....APPELLANT

VERSUS

THE DPP..... RESPONDENT

**(Appeal from the Judgment of the High Court
of Tanzania at Arusha)**

(CHOCHA, J.)

**dated the 9th day of July, 2009
in
Criminal Appeal No. 3 of 2006**

JUDGMENT OF THE COURT

24th & 29th February, 2012

KILEO, J.A.:

The appellant, Kalebi Elisamehe was convicted of the offence of rape contrary to section 130 (1) (2) b and 131 (1) of the Penal Code by the District Court of Monduli in Criminal Case No.39 of 2003 and was sentenced to the mandatory term of 30 years imprisonment. His appeal to the High Court was unsuccessful hence this appeal.

The facts of the case are brief and straight forward.

On 11th day of June 2003 at around 17.00 hrs PW1 Veronica d/o Aminiel, a girl aged 12 years in the company of her colleague PW2 also aged about the same age went out in search of firewood. On the way they met the appellant a resident of the village where they resided and whom they knew very well. The appellant lured them to his residence promising that there they would get a lot of firewood. When they got there they indeed found a lot of firewood and they started cutting the same. While they were so doing the appellant started making advances towards them promising even that he would give them shs. 1000/- each, if they returned his 'love.'

Though the girls declined his advances he however managed to force down PW1 and raped her. In the meantime PW2 ran while crying to a neighboring house in search of rescue. She found PW3 at home to whom she narrated what was happening to PW1. As PW2 and PW3 left for the spot where PW2 had left her companion being raped they met with the appellant who was carrying a panga that he had taken from the children. On being asked by PW3 as to what he had done to the children he dropped the panga and ran away. PW3 and PW2 proceeded to the scene but before they reached there they

met the victim who was limping. PW1 told PW3 that the appellant had raped her. Upon examination PW3 found the victim bleeding from her private parts. PW3 also saw some sperms. The matter was reported to the police and the victim was taken to hospital for treatment.

On this second appeal the appellant has listed the following three complaints in his memorandum of appeal:

1. *That, the Trial Magistrate and the Appellant Judge both erred in law and in fact by convicting the Appellant with the alleged charge without detecting that, the prosecution side didn't prove their case beyond reasonable doubts as required by the law.*
2. *That, the trial Magistrate and the Appellant Judge both erred in law and in fact by failing to concentrate carefully about the truthfulness of the prosecution witnesses.*

3. *That, the trial magistrate and the Appellant Judge both erred in law and in fact by failing to discover that PW3 was the one who convinced PW1 and PW2 to frame this case , as PW3 had grudges with the appellant. Cases of this kind are very rampant within the society and therefore the learned trial Magistrate and the appellant judge ought to have taken the prosecution evidence at caution.*

When the appeal came up for hearing the appellant appeared in person and unrepresented while the respondent Republic was represented by Mr. Juma Ramadhani, learned Principal State Attorney. In addition to his grounds of appeal the appellant submitted orally before us maintaining that the case against him was a frame up as the police nor the victim's parents ever testified in court.

Supporting conviction, the learned Principal State Attorney submitted that there was sufficient evidence upon which the courts

below sustained the conviction. He argued that both the trial court and the High Court were satisfied as to the creditworthiness of the witnesses and this Court would have no justification in interfering with the findings of fact of the lower courts. In response to the appellant's complaint in relation to the PF3, the learned counsel for the state submitted that even if it were to be discarded for non-compliance with the dictates of section 240(3) of the Criminal Act there was other glaring evidence sufficient for a conviction. Mr. Juma made reference to **Godi Kasenegala v Republic**-Criminal Appeal No. 10 of 2008 (unreported) where it was stated:

"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors may give corroborative evidence"

Essentially this is a case which rests wholly on the credibility of witnesses. All things being equal, the credibility of a witness is always in the province of a trial court. We have no dearth of authorities on

this aspect. One such authority is **Omari Ahmed V Republic** (1983)

TLR 52 where this Court held:

'the trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility.'

The same principle was reiterated in **Ali Abdallah Rajab V Saada Abdallah Rajab And Others** (1994) TLR 132 where it was held:

(i) Where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion;

(ii) Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court

which merely reads the transcript of the record.'

On our part we see no reason to interfere with the finding of fact made by the courts below. The trial magistrate is the one who heard the witnesses and observed their demeanor as they testified. He found the witnesses to be reliable and we see no reason whatsoever to think that the circumstances were any other than those narrated by those witnesses. The first appellate judge also correctly observed that the testimonies of the prosecution were very consistent.

The appellant at the trial raised the defence of alibi. The trial magistrate properly addressed himself to this defence. He was mindful of the fact that there is no onus on an accused to prove his alibi. Having considered the defence of alibi he came to the conclusion that it did not raise any doubt in his mind with regard to the appellant's implication in the commission of the crime.

In the light of the above considerations we find that this appeal has been filed without sufficient cause for complaint. We accordingly dismiss it in its entirety.

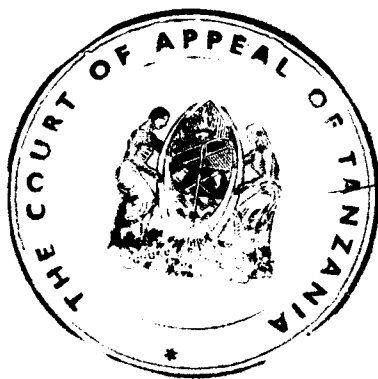
DATED at **ARUSHA** this 24th Day of February 2012.

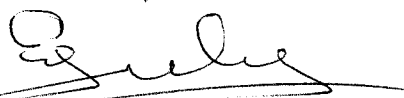
E. N. MUNUO
JUSTICE OF APPEAL

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