- CONSEQUENCES OF LACK OF MEDICAL EVIDENCE ON A CHARGE OF RAPE.

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: KILEO, J.A., MJASIRI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 348 OF 2008

LAZARO KALONGA ....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Songea)

(Uzia, J.)

dated the 3rd day of November, 2008
in
Criminal Appeal No. 22 of 2008

JUDGMENT OF THE COURT

3rd & 7th December, 2012

KILEO, J.A.:

The District Court of Mbinga sentenced the appellant to thirty years imprisonment after having convicted him of the offence of rape contrary to sections 130 and 131 of the Penal Code, Cap 16 R. E. 2002. The appellant was also ordered to pay compensation of 500,000 Tshs. to the victim. His appeal at the High Court was unsuccessful hence this second appeal.

The case for the prosecution was based on the testimony of a sole witness, the complainant Fausta Komba. According to this witness, on 30th July 2006 at 9:00 am while on her daily routine as a seller of vegetables the

appellant having obtained vegetables from her asked her to go with him to his house where he would pay for the vegetables. When she arrived at his house the appellant instead of paying her he pulled her inside and raped her. She tried to raise an alarm but the appellant threatened to harm her with a panga and knife. The complainant reported the incident to the village chairman and thereafter to the police.

The appellant did not dispute to have had sexual intercourse with the victim. His defence was that there was consent.

The decision of the High Court is impugned on two major grounds:

1) Reliance on the testimony of the complainant alone while there was mentioned another witness who could have reinforced the case for the prosecution.
2) Failure to comply with the provisions of section 240 (3) of the Criminal Procedure Act (CPA).

At the hearing of the appeal the appellant appeared in person unrepresented. He had nothing much to say in support of his grounds of appeal apart from asking the Court to adopt the same.

The respondent Republic which was represented by Mr. Maurice Selemani Mwamwenda, learned Senior State Attorney did not oppose the appeal. Mr. Mwamwenda conceded that failure to comply with section 240 (3) of the CPA rendered the PF3 that was tendered in court to be of no evidentiary value. The learned Senior State Attorney also admitted that the failure by the prosecution to call the village leader to whom the incident was first reported further weakened the case for the prosecution.

The ground on the non- compliance with section 240 (3) of the CPA need not detain us. This Court has stated on a number of occasions that failure to comply with section 240 (3) of the CPA renders the medical report to be of no evidentiary value. See for example, **Mbwana Hassan v. Republic -** Criminal Appeal No. 98 of 2009, **Abdallah Elias v. Republic** – Criminal Appeal No. 115 of 2009, **Kirundila Bangilana v. Republic** – Criminal Appeal No. 313 of 2007 and **Richard Bukori v. Republic** – Criminal Appeal No. 25 of 2011 (all unreported)

In the present case the PF 3 of the victim was admitted without explaining to the appellant that he had a right as per law to have the doctor who prepared the report to appear in court for cross examination. Subsection 3 of section 240 of the CPA provides:

"(3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."

The High Court ought to have discarded the PF 3 in the circumstances of this case. We, in the circumstances discard it in line with the cases cited above.

We are mindful of the fact that lack of medical evidence does not necessarily, in every case, mean that rape is not established where all other evidence point to the fact that it was committed (See for example **Prosper Mjoera Kisa v. Republic** – Criminal Appeal No. 73 of 2003 and **Salu Sosoma v. Republic** – Criminal Appeal No. 31 of 2006 (both unreported).

The question to ask ourselves in this case is whether there was sufficient evidence to establish the charge of rape against the appellant. Lack of consent in a rape case where the victim is an adult is an essential

ingredient which has to be proven by the prosecution without leaving a shadow of doubt. The appellant having admitted to have had sexual intercourse with the complainant, the question that remains to be considered is whether lack of consent was established on the standard required in a case of this nature. On the question of consent it was the evidence of the complainant as against that of the appellant. The appellant claimed that initially the complainant had agreed to the sexual intercourse but subsequently she turned against him after she had failed to get what she wanted. It is a pity that the prosecution did not probe the appellant to know what he meant when he said that the complainant did not get what she wanted. All the same, there are other aspects of the case which, if they had been given sufficient scrutiny, would have resulted in a different conclusion in so far as the guilt of the appellant was concerned.

To begin with, the incident occurred on 30th July, 2006 and yet it was not until 8th of August, 2006 that the appellant was arrested. There is no explanation why it had to take over a week for the appellant to be arrested if he had committed such a horrendous crime. Secondly, the complainant stated that she first reported the incident to the village chairman, yet this chairman who was an important witness in our view, was not called in

evidence. While the prosecution has discretion to call any witness whom they please for establishing their case, however where they refrain from calling a witness who would advance their case an adverse inference may be drawn. In **Azizi Abdalah v. Republic** (1991) TLR 71 (CA it was held:

> *"i).....*
>
> *ii).....*
>
> *iii) the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

We are satisfied that this is a proper case where an adverse inference to the prosecution ought to have been drawn.

In the end we find the appeal by Lazaro Kalonga to have been filed with good cause. We accordingly allow it. His conviction is consequently quashed. The sentence imposed is set aside as well as the order for compensation. He is to be released from custody forthwith unless he is there held for some other lawful cause.

It is ordered accordingly.

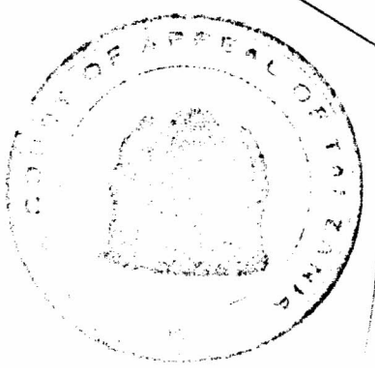
DATED at **IRINGA** this 4TH day of December 2012.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
CORT OF APPEAL