

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

(CORAM: NSEKELA, J.A., LUANDA, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 155 OF 2011

MICHAEL HERMAN TARMO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Arusha)

(Mmilla, J.)

dated the 17th day of August, 2009

in

Criminal Appeal No. 127 of 2007

JUDGMENT OF THE COURT

7 & 17 May, 2012

LUANDA, J.A.:

On 16/1/2002 around 6.00 pm Adelina Paulo (PW2) a girl of 7 years of age was dispatched by her mother to go to a nearby shop presumably to buy some commodities.

On the way she met the appellant, a familiar face, who grabbed her, dragged her off the road removed her underpants and raped her. She felt

pain, she raised an alarm. Anna Petro @ Mama Chacha (PW4) who was going to her garden responded to the alarm raised and went to the place. On arrival she saw the appellant on top of PW2. She too raised an alarm whereby Vitalis Paulo (PW3) responded. PW3 also found the appellant on top of PW2. The appellant was arrested by these two (PW3 and PW4) there and then and eventually the appellant was sent to police; whereas PW2 was sent to Health Centre where she was attended by Eliremisa Pallangyo (PW1) a Medical Assistant.

The evidence of PW1 was that she checked PW2's vagina and saw whitish matter, bruises, no hymen, it was wide, blood was coming out and lastly PW2 was infected with gonorrhoea. She tendered her report as Exhibit P1.

Having marshalled the above evidence, the prosecution charged the appellant with rape contrary to Section 130 and 131 of the Penal Code, Cap. 16 R.E. 2002.

The appellant on the other hand denied to have raped PW2. He said on the day he is said to have raped PW2, he was at the homestead of Paulo, the father of PW2. He was arrested for no apparent reason, sent to police and eventually charged.

The trial District Court of Babati at Babati was satisfied that the prosecution had proved its case to the standard required. It accordingly convicted and sentenced him to life imprisonment and 12 strokes of the cane. Aggrieved, he unsuccessfully appealed to the High Court of Tanzania, Arusha Registry, hence this second appeal.

In this appeal, the appellant appeared in person and so he fended for himself. The appellant filed his written submission elaborating his grounds of appeal. The respondent/Republic was represented by Ms. Javelin Rugaihuruzza, learned Senior State Attorney. Ms. Rugaihuruzza resisted the appeal.

In total the appellant has raised five grounds; four were raised in the main memorandum of appeal whereas the fifth one was an added ground.

The five grounds can be paraphrased as follows: -

- 1. The lower courts erred in convicting the appellant basing on the evidence of PW3 and PW4 without warning.*
- 2. The trial court erred in accepting the evidence of PW4 Anna Petro contrary to Section 289 of the Criminal Procedure Act, Cap. 20.*
- 3. The lower courts were wrong in making a finding that the offence was committed and reported to the police while no police officer was summoned to testify to that effect.*
- 4. Both lower courts erred in making a finding that PW2 was raped as no torn underpants were produced in Court.*

5. The judgment of the trial Court did not comply with Section 312(2) of the CPA.

The above grounds of appeal can be conveniently be categorized into two groups, namely those involving evidence which are grounds numbers 1, 3 and 4; and those concerning procedure which are grounds 2 and 5. We will therefore discuss the grounds of appeal on those lines and dispose the appeal.

Submitting as to evidence, as a whole Ms. Rugaihuza said the evidence on the prosecution is strong to ground convict. She said PW2 explained how she was grabbed and dragged off the road and raped. And PW3 and PW4 saw the appellant in the act of raping PW2.

As to tendering of torn underpants, Ms. Rugaihuza said that that was not necessary. Likewise the summoning of a police officer who received the report of rape.

Turning to those grounds concerning procedure, Ms Rugaihuza said Section 289 of the CPA does not apply in the subordinate courts; it is applicable in the High Court.

As regards to non-compliance with Section 312(2) of the CPA, Ms. Rugaihuza said the trial court complied with that section. She referred us to pages 14 and 16 of the record where the judgment shows the offence, section and law involved and sentence passed. She urged us to dismiss the appeal.

We will start with those grounds involving procedure. Section 289 of the CPA falls under Part VIII of the Act – PROCEDURE IN TRIALS BEFORE THE HIGH COURT. And Section 289 of the Act deals with a witness whose statement or substance of evidence was not read at the time of the conduct of committal proceedings in subordinate Courts, for an offence triable in the High Court, his evidence can be received if a reasonable notice in writing is given to the accused or his advocate. The section also provides what should contain in such notice and empowers the High Court

to determine what is reasonable. The section as rightly stated by Ms. Rugaihuza does not apply to subordinate Courts.

We now move to discuss, Section 312(2) of the Act. The section reads:

312(2) In the case of conviction the judgment shall specify the offence of which, and the Section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

Again we agree with Ms. Rugaihuza that the trial court complied with that section. Pages 14 and 16 are very clear. They show the offence, section and sentence imposed. The judgment shows the offence is rape; the sections are 130 and 131 of the Penal Code and the sentence of life imprisonment with 12 strokes of the cane. These two grounds have no merits.

As regards the evidence as a whole, the evidence is strong. PW2 explained how and where she was grabbed, dragged off the road and raped by the appellant. PW3 and PW4 who saw the appellant having sex with PW2 in **flagrante delicto**. And PW2 stated very clearly that as to what the appellant had done to her. She said at page 8 of the record thus:

"She (sic) undressed my underpant. He undressed his clothes and inserted his penis into my vagina."

And when she was cross-examination she stuck to her guns, she said:

"You inserted your penis into my vagina. You are not a stranger to me."

What we want to show is that the essential ingredient of rape, namely penetration of a male organ into a female organ was established by clear evidence of PW2 which was corroborated by PW3 and PW4 who saw the penis of the appellant erected after he was removed from PW2 and PF3 (Exhibit P1). (See **NYAMBUYA KAMUOGA v R** Criminal Appeal No. 90 of 2003 CAT (unreported)). We entirely agree with Ms. Rugaihuruzza that the appeal has no merit.

For the aforesated reason we dismiss the appeal in its entirety.

It is so ordered.

DATED at **ARUSHA** this 15th day of May, 2012.

H. R. NSEKELA
JUSTICE OF APPEAL

B. M. LUANDA
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