IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 2 OF 2011

ALFANI RAMADHANI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Teemba, J.)

dated the 24th day of September, 20
in
Criminal Appeal No. 14 of 2010

JUDGMENT OF THE COURT

27th June, & 9th July, 2012

MANDIA, J. A.:

The appellant Alfan Ramadhani appeared in the District Court of Lushoto at Lushoto where he was tried for Rape Contrary to Sections 130 (2)(c) and 131 (2) (a) of the Penal Code as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998. He was found guilty, convicted and sentenced to thirty years imprisonment and also ordered to pay compensation amounting to sh. 300,000/= to the victim of the crime. Aggrieved by both the conviction and sentence as well as the order of compensation, the appellant preferred an appeal to the High Court. His appeal was dismissed summarily. Further aggrieved, he has filed this appeal.

It was established in the trial court that on 28th December, 2002 PW1 Zaina Omari, an elderly lady whose age is estimated to be between eight and ninety years, was asleep in her bedroom together with her grandchildren, one of whom was PW2 Yasin Suleman. A wick lamp was burning. Round about midnight the elderly grandmother heard a sound signifying that the door to her house was being tampled with. She woke up, went to check the door and found it intact. She resumed sleep. She again heard the noise but a check found nothing wrong. The third time she heard the noise, a person, who PW1 identified by the wick lamp as the appellant, entered the bedroom. The appellant allegedly went straight over to PW1, squeezed her onto the bed she was lying on, undressed her, raped her while at the same time threatening to cut her up with a "*sime*" he was carrying. Describing the act, PW1 has this to say:-

> *"....the accused with force pushed me to the bed and squeezed me at the bed, he undressed me and begin (sic) to rape me."*

PW1 cried out for help. Her cries were heard by her grandson Yasin Suleman who is aged fourteen years. PW2 Yasin Suleman testified under affirmation and told the trial court that the appellant entered their house and raped his grandmother, PW1. He yelled out for help by saying, "*Uwii, bibi anakufa, tumeingiliwa na jambazi.*" PW2 further went on to say that he went to hide inside the cupboard after the appellant threatened to cut him up with a sime he i.e. the appellant, was carrying.

The cries of help made by PW1 were picked up by her son PW4 Hashimu s/o Omari who testified that when he heard the cries for help coming from his mother's house he went there. As there was moonlight that day he met the appellant coming out of the door of his mother's house but he did not stop him. He went inside the house which was lit by a kerosene lamp. His mother told him the appellant had raped her. He reported the matter to the village authorities the same night and then took his mother to hospital. In the following day PW4 arranged for the appellant's arrest. PW4 tendered the appellant's cap he picked at the scene of the crime as Exhibit P4. One day later, on 29/4/2008 WP 2050 Corporal Monica (PW3) issued a PF3 to PW1 Zaina Omari, and she tendered in court the PF3 as Exhibit P1.

In his defence, the appellant claimed he did not know anything about the charges leveled against him. He said all he knew is that on 28/10/2002 he was arrested as he was going about his business, locked up and then charged with rape.

Despite his denial the appellant was convicted and sentenced as we indicated earlier on. On appeal to the High Court of Tanzania sitting at Tanga, the PF3 tendered in the trial court as Exhibit P1 was discounted on the ground that it offended the provision of section 240 (3) of the Criminal Procedure Act, Chapter 20 R.E. 2002 of the laws. The appellate High Court relied on **Kashana Buyoka v. R,** Criminal Appeal No. 176 of 2004

(unreported) when it expunged the PF3 from the record. We are of the opinion that the appellate High Court rightly acted so.

The appellate High Court also found it as a fact that the appellant was properly identified at the scene of the crime, as the conditions at the scene were favourable for positive identification, and in forming this opinion it relied on **Eva Salingo and Pascal Mgawe v R,** (1995) T.L.R. 220.

The appellant also raised, in the appellate High Court, a ground of appeal relating to the situation where members of the same family i.e. a grandmother, a son and a grand son testified against him. The appellate High Court dismissed this ground, relying on **Iddi Salimu v R,** Criminal Appeal No. 29 of 2009 (unreported). We are of the opinion that the first appellate court was justified in holding so.

Again, the appellate High court found it as a matter of fact, and held so, that penetration was proved. The court relied on the evidence of the victim PW1 Zaina Omari, PW2 Yasin Suleman and PW3 WP 2050 Corporal Monica. The court cited **Omari Kijuu v R,** Criminal Appeal No. 39 of 2005 that proof of penetration, however slight, clinches a case of rape.

The appellant has filed in this Court a memorandum of appeal containing three grounds, but the only substantive ground worth consideration by this Court is ground number three where the appellant

contends that penetration has not been proved to warrant a conviction for rape.

The respondent Republic, represented in this appeal by Mr. Joseph Sebastian Pande, learned Senior State Attorney assisted by Mr. Omari Kibwana, State Attorney, declined to support the conviction and sentence. It was the argument by the respondent Republic that identification and penetration, two essential elements in proof of the offence in this case, have not been established to the required standard of proof in criminal cases. We are in agreement with the reasoning by the learned Senior State Attorney. Before we go into the merits of the case, we must point out that the record of trial shows that the first appellate court relied on the evidence of PW1, PW2 and PW4. Of these, PW2 Yasin Suleman was aged fourteen years, so he was a child of tender years. His evidence was therefore covered by the strictures of Section 127 (2) of the Evidence Act which this Court has held that must be subjected to **voire dire** examination. The record shows that the evidence of PW2 Yasin Suleiman was recorded against the dictates of Section 127 (2) of the Evidence Act, Chapter 6 R.E 2002 of the Laws. The first appellate court therefore ought to have discounted the evidence of PW2 Yasin Suleman instead of relying on it. We discount the evidence of PW2 Yasin Suleiman.

As regards identification we agree with the learned Senior State Attorney that the incident happened at midnight. Though PW4 testified to the effect that he identified the appellant by moonlight, he did not

particularize how bright the moonlight was to allow for positive identification. PW4 did not also explain why if at all he identified the appellant coming out of the door of his mother's house, he stepped aside to let PW4 go scot free. Clearly this conduct is unexplainable if one takes into account that PW4's presence there was to help his mother who was crying out in distress. The doubtful situation on identification falls in line with **Waziri Amani v. R.** (1980)TLR 250, **Tabalo Seleli v.R,** Criminal appeal No. 301 of 2008 (unreported) and **Nhembu Ndalu v. R,** Criminal Appeal No. 308 of 2010 where this Court laid emphasis on the need to treat evidence of visual identification with circumspection, as it is the weakest and most unreliable of all evidence.

Coming to penetration, we agree with Mr. Joseph Sebastian Pande, learned Senior State Attorney, that this essential ingredient of the offence of rape was not proved at all. As we said in **Seleman Makumba v R,** Criminal Appeal No. 94 of 1999(unreported:-

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other women where consent is irrelevant that there was penetration."*

At page 70 of the record the first appellate court is on record as giving the following opinion:-

"As for the issue of penetration, the law is very clear. According to Section 130 (4)) (a) of the Penal Code, Cap. 16 as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998, penetration of the male organ into the female organ however slight, is sufficient to prove sexual intercourse. This is also supported by case law as evidence in the case of OMARI V R, Criminal Appeal No. 39 of 2005 (unreported).

In the present case, there is evidence from PW1 the victim, PW2 and PW3 that the victim was raped. PW2 was the eye witness. The witnesses' credibility was not challenged at the trial."

Evident above is the fact that the learned judge in the first appellate court correctly addressed herself to the law on penetration in rape cases. When it came to applying the law in this specific case the learned judge found proof of penetration in the evidence of PW1,PW2 an PW3. What did these witness tell the trial court? PW1, the victim, alleged that the appellant raped her without elaborating. PW2 was a child of tender years whose evidence the first appellant court should have discounted, and which evidence this Court has discounted. PW3 was a police officer who issued a PF3 a day after the alleged rape was committed. She put in evidence thePF3 but this was discounted after it was shown that it was received in evidence in violation of Section 240 (3) of the Criminal

Procedure Act, Chapter 20 R.E. 2002 of the laws. The evidence of PW1, PW2 and PW3 which was relied upon to prove penetration did not, therefore, meet the require standard of proof. We are inclined to agree with the learned Senior State Attorney that the standard we set in **Mathayo Ngalya @ Shabani v R,** Criminal Appeal No. 170 of 2006 (unreported) has not been met. To avoid any lingering doubt, in the above-quoted case we said this:-

> *"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penai Code Cap 16 as amended by the Sexual Offences (Special Provisions) Act 1998 provides:- "for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary for the offence." For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement and alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence."*

Republic, Criminal Appeal no. 244 of 2006 (unreported) and **Edward Nzabuga v Republic,** Criminal Appeal No. 195 of 2009 (unreported).

For the foregoing reasons we are inclined to allow the appeal. The conviction is quashed and the sentence and order for compensation are set aside. The appellant should be released from custody unless he is held on some other lawful cause.

DATED at **TANGA** this 6th day of July, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
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