IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 186 OF 2012

MUSSA S/O LULANDALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa)

(Mkuye, J.)

dated the 9th day of July, 2012
in
DC. Criminal Appeal No. 20 of 2011

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JUDGMENT OF THE COURT

4th & 7th December, 2012

MJASIRI, J. A.:

In the District Court of Iringa, the appellant, Mussa Lulandala was charged with two counts. On the first count he was jointly charged with Mwapu Mfikwa for conspiracy to commit the offence of rape contrary to section 384 of the Penal Code, Cap 16 R.E. He was also charged with the offence of rape contrary to section 130 (2) (e) of the Penal Code on the

second count, while Mwapu Mfikwa was charged of committing an unnatural offence contrary to section 154 of the Penal Code Cap 16. Mwapu Mfikwa was acquitted by the High Court on both counts. The appellant was sentenced to three years imprisonment on the first count and 30 years imprisonment on the second count. The sentences were to run concurrently. The appellant's appeal to the High Court was unsuccessful, hence this appeal.

The circumstances which led to the conviction of the appellant were as follows. The appellant was alleged to have been the boyfriend of PW1, Jane Alex a form II, 16 years old student of Highlands Secondary School. It was the prosecution's case that she was abducted and raped by the appellant and Mwapu Mfikwa for a period of 78 days. The appellant and Mfikwa were arrested following the complaint made to the police by PW3 who was PW1's grandmother. The house where the appellant and Mfikwa lived was raided by the police at 0.00 hours at midnight. PW2, a police officer was accompanied by PW3. PW1 was found hiding in the bathroom while the appellant was found sleeping in his room. The appellant and PW1 were taken to the police station. PW1 was later medically examined

and was found to have been raped and sexually abused. A medical doctor testified in court to that effect and a PF.3 report was admitted in court as Exhibit P. 2. The police in conducting the search did not involve other occupants in the house nor the ten cell leader or ward secretary. The police only searched the appellant's room. They found him sleeping, and found a lady's underwear and wrapper in the appellant's room. However, PW1 was found hiding in the bathroom. This led to the arrest of Mfikwa and the appellant.

At the hearing of the appeal the appellant was represented by Mr. Alfred Kingwe learned advocate while the respondent Republic had the services of Mr. Maurice Mwamwenda, learned Senior State Attorney.

Mr. Kingwe presented two grounds of complaint in his memorandum of appeal, which are reproduced as under:

1. *That the learned Honourable Judge misdirected herself by not taking into consideration that the prosecution evidence was tainted with many doubts.*

2. *That the learned Honourable Judge misdirected herself by arriving on her decision by using the weakness of the defence evidence.*

In relation to ground No. 1, Mr. Kingwe argued that the house in question had about ten different tenants, None of the tenants were questioned by PW2 nor brought to court as witnesses. The search was conducted at 0.00 hours without involving the ten cell leader or the ward secretary. The only room which was searched was that of the appellant. There was no move to wake up the other tenants. The underwear and wrapper (khanga) alleged to have been found in the appellant's room were not tendered in court as exhibits. PW3 claimed that they belonged to her granddaughter. PW1 was found in the bathroom and not in the appellant's room. According to Mr. Kingwe the whole episode was staged and dramatised, and was nothing but mere fiction. He submitted that it made no sense at all for PW1 to be hiding in the bathroom, at the time she did. How did she know that PW2 and PW3 would be coming for her.

He further stated that even though the appellant admitted that PW1 was his girlfriend, it was not established that he abducted her, confined her

and raped her. The High Court Judge had applied double standards for the appellant and Mfikwa. If she concluded that there was no sufficient evidence to convict Mfikwa, the same finding should have applied to the appellant.

Mr. Kingwe also stated that it was rather strange that PW1, a Form II student would have let herself to be confined for 78 days in a house full of people and not attempting to raise an alarm. The whole incident was exaggerated, and PW1 was never in the premises.

On ground No. 2 Mr. Kingwe submitted that the conviction of the appellant was based on the weakness of the defence.

Mr. Mwamwenda on his part, did not support the conviction. He submitted that the procedure leading to the arrest of the appellant was not lawful. The raid took place at 0.00 hours, without any search warrant or search permit and without involving the ten cell leader, ward secretary or even the tenants in the house in question. He also submitted that it took a

long time for PW1 and PW3 to report the unlawful confinement and /or rape.

Mr. Kingwe also brought to the attention of the court the double standard applied by the High Court Judge in upholding a conviction of the appellant but in acquitting Mfikwa, using the same material evidence. The PF.3 report implicated Mfikwa rather than the appellant. He concluded that the two courts below arrived at wrong conclusions.

After reviewing the evidence on record and the submissions made by counsel, we are of the considered view that the pivotal issue is whether or not the complainant PW1 was raped and whether or not it was the appellant who committed the rape.

In taking into account the PF.3 report (Exhibit P.2) and the doctor's testimony (PW4) that PW1 was raped and sodomized the offence of rape was established. However, the only evidence linking the appellant with the offence of rape is that of PW1. As provided under section 143 of the Evidence Act Cap 6, R.E. 2002 no particular number of witness is required for the proof of any fact. What is important is the witness's credibility.

See **Yohanis Msiqwa v R** (1990) TLR 148 (CA). In view of the conduct of PW1, her evidence is totally unreliable. Given the dramatic raid conducted by the police, (PW2) and PW3 at the appellant's house contrary to proper procedures, failure to involve the cell leader, ward secretary and the other tenants leaves a lot of questions unanswered.

Rape is a serious crime and the offence attracts 30 years to life imprisonment. The burden of proof is always on the prosecution to prove the case against the accused person beyond reasonable doubt. See **Woolmington v Director of Public Prosecution** (1935) AC 462 and **Mohamed Said Matula v R** (1995) TLR 3.

This matter has given us a lot of anxiety. We are compelled to agree with counsel that the circumstances leading to the raid and arrest of the appellant are most unusual. It is trite law that under section 127 (7) of the Evidence Act, in a fit case a conviction for rape can be validly sustained even on uncorroborated evidence of a child of tender years as a single witness where the court is satisfied that she is telling nothing but the truth. (See **Omary Kijuu v R,** Criminal Appeal No. 39 of 2005 CAT (unreported). With respect, the testimony of PW1 was not enough to ground a

conviction. The principle has always been that facts from which an inference of guilt is drawn must be proved beyond reasonable doubt. See **Ally Bakari and Another v R**, 1992 TLR 10. In the instant case no such proof is forthcoming.

In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison forthwith unless he is lawfully held therein.

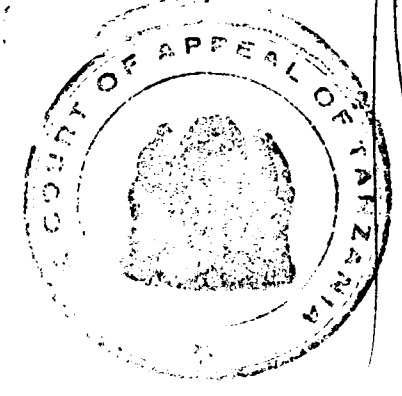
DATED at IRINGA this 5th day of December, 2012.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL