IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., BWANA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 124 OF 2007

MINANI EVARIST ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Sambo, J.)

dated the 29th day of March, 2007
in
Criminal Appeal No. 155 of 2005

JUDGMENT OF THE COURT

15 & 17 February 2012

MSOFFE, J.A.:

The District Court of Ngara (Biyereza, DM) convicted the appellant MINANI EVARIST of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, as amended, and sentenced him to the statutory term of thirty years imprisonment. On appeal, the High Court at Bukoba (Sambo, J.) upheld the conviction and sentence. Still aggrieved, the appellant has preferred this second appeal.

There are three grounds of appeal. But, as correctly pointed out by Mr. Seth Mkemwa, learned Senior State Attorney representing the respondent Republic, the key ground really is number three in which the cornerstone is the allegation that the case against the appellant was not proved beyond reasonable doubt. On this, we understood the appellant and Mr. Mkemwa for that matter to be saying that penetration, which is an essential element in a charge of this nature, was not established beyond reasonable doubt.

When arguing in support of the appeal Mr. Mkemwa took quite sometime in telling us that evidence of penetration was lacking in the case. In the process, he referred us to the relevant testimony of the victim PW2 Elikeye Anjelika on the point as reflected at page 18 of the record thus:-

> ..... Upon arrival at the tap I met with the accused person who seized me by my arm and dragged me into one of the classrooms where he stripped me half naked and had my carnal knowledge ..... The accused person before having my carnal knowledge stripped

> off himself half naked his long trousers. Although I felt the act of sexual intercourse to be painful I did not scream for help ...

In his view therefore, Mr. Mkemwa was positive that the above evidence did not establish penetration. To buttress his argument Mr. Mkemwa referred us to this Court's decision in **Hakizimana Syrivester v. Republic,** Criminal Appeal No. 181 of 2007 (unreported) in which the importance of leading evidence of penetration in the proof of a charge of rape was emphasized. In underscoring this point this Court in **Hakizimana** quoted the victim's evidence and in the end it opined that it did not establish penetration. This is what the victim had told the court as reflected at page 20 of the said record:-

> ... seized me by my arm dragged me into the house where he stripped me nacked (sic) and had my carnal knowledge. The accused person at all material time he was having my carnal knowledge was covering my mouth with his palm.

We wish to observe from the outset that we have listened to both the appellant and Mr. Mkemwa with keen interest. In the end, we are satisfied that the case against the appellant was proved beyond reasonable doubt.

It is true that an essential ingredient of the offence of rape is as laid out in Section 130 (4) (a) of the Penal Code which states:-

> (4) For the purposes of proving the offence of rape –
>
> (1) penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence.

As pointed out in **Hakizimana,** this Court has amplified the requirement of penetration and laid down guidelines to assist in proof of the offence of rape. Thus, the Court in **Hakizimana** cited the case of **Mathayo Ngalya @ Shabani v Republic,** Criminal Appeal No. 170 of 2006 (unreported) thus:-

> For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement 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 ..

In this sense, we are also aware that as this Court stated in **Selemani Makumba v Republic**, 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 woman where consent is irrelevant that there was penetration.

With the above guidelines in mind, we also wish to make one general statement. It is generally accepted that in determining cases a court has to look at the peculiar and particular facts of each case.

In other words, each case has to be decided on the basis of its own facts. This is important because the facts of one case may not necessarily be the same as the other.

In our considered view, the evidence of PW2 (supra) established that there was penetration. This is especially borne out by the evidence of PW2 that .... *and had my carnal knowledge .... Although I felt the act of sexual intercourse to be painful* .... It seems to us, *inter alia,* that PW1 could not have felt the act of sexual intercourse to be painful if the appellant had not inserted or penetrated his penis into her vagina.

As earlier stated, each case has to be decided on the basis of its own facts. The case of **Hakizimana** is distinguishable from this case in one major aspect. In **Hakizimana** the PF3 was discounted from the evidence. In this case, there was a PF3 tendered by a Doctor, i.e. PW3 Sabina M. John, an expert for that matter. It was tendered without objection by the appellant. So, since this expert appeared and testified there was no need for recourse to **Section**

240 (3) of the **Criminal Procedure Act** (CAP 20 R.E. 2002). PW3 examined PW2 almost immediately after the incident. In his evidence at page 21 of the record he stated:-

> .... I observed in the patient's genitals and found that she had a tear measuring 1 cm x 3 cm. The tear was still fresh and the hymen was no longer intact ..... To my observation the tear secured (sic) to have been inflicted by a blunt object ....

In a way, the above evidence of PW3 is consistent with that of PW2 regarding the rape in question.

There is also another important feature in the case which we have to mention here. In the evidence of PW1 Bigirimana Godfrey, which was not contradicted by anybody, when people assembled in answer to the alarm raised by him (PW1) PW2 identified, and actually named, the appellant as the person who raped her. In our view, the naming of the appellant by PW2 at that early opportunity was significant. We say so because as this Court stated, *inter alia,* in

Swale Kalonga and Another v Republic, Criminal Appeal No. 45 of 2001 (unreported) the ability of a witness to name a suspect at the earliest possible opportunity is an all important assurance of his reliability. On this, we think, PW2 was reliable in her assertion that the appellant raped her.

For the foregoing reasons, we are satisfied that the evidence taken as a whole shows that the prosecution case against the appellant was proved beyond reasonable doubt. Accordingly, we hereby dismiss the appeal.

DATED at MWANZA this 16th day of February, 2012.

J.H. MSOFFE
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(J.S. MGETTA)
DEPUTY REGISTRAR