

**IN THE COURT OF APPEAL FOF TANZANIA
AT MWANZA**

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., AND ORIYO, J.A.)

CRIMINAL APPEAL NO. 21 OF 2010

DEFROMAS MISUNGWI @ BUMBUGU APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court
of Tanzania at Mwanza)**

(Sumari, J.)

**dated the 07th day of August, 2009
in
HC Criminal Appeal No. 94 of 2008**

JUDGMENT OF THE COURT

1st & 4th June, 2012

ORIYO, J.A.:

The appellant appeared before the District Court of Geita sitting at Geita on a charge of Rape, contrary to section 5 (1)(2) and 6 (1) of the Sexual Offences (Special Provisions) Act, (SOSPA), No. 4 of 1998. He was found guilty, convicted and sentenced to life imprisonment. He preferred an appeal to the High Court of Tanzania sitting at Mwanza. His appeal was dismissed in its entirety. He has preferred a second appeal to this Court.

The evidence which led to the appellant's conviction and subsequent sentencing came from three prosecution witnesses, namely Vumilia Lazaro, PW1 (the victim), Mariamu Yohana, PW2 and Lazaro Kishosha, PW3. The evidence on record show that PW1, a young girl of 16 years lived with her father, PW3, in Kasesa Village, Geita District. On 14.02.2003, the appellant, who was known to PW3, visited Kasesa Village and spent the night at the home of PW1 and PW3. On 15.02.2003, when the appellant was returning to his home in Katoro Village, Geita, PW3 asked him to take PW1 along to Katoro to see her aunt who was ill. The appellant agreed and left with PW1 to Katoro. It was alleged at the trial that on reaching Katoro, the appellant took PW1 to the house of PW2, Mariamu Yohana, a wife of his friend, to whom the appellant introduced PW1 as his wife. The introduction misled PW2 to prepare one room to be shared by PW1 and the appellant. It is alleged that despite PW1's protest to share a bedroom with the appellant, the latter forced her and raped her in the night. The matter was reported to the police and a PF3 was issued to PW1 for medical examination. Subsequently the appellant was arrested and charged.

The appellant, on his part, totally denied any responsibility in raping PW1, but he admitted knowing both PW3 and PW1. He attributed the charge as being part of a series of other incidents concocted against him for political reasons as he was the Chairman of TLP, Busanda. He alleged that this fact brought him in frequent conflicts with the government leaders in the area.

The appellant's memorandum of appeal listed nine grounds of appeal but for the purposes of the appeal we shall restrict our discussion to three complaints only. In ground **one** the complaint is against the law under which the appellant was charged. The charge-sheet which is dated 13th May, 2003 shows the following:-

"Offence, Section and Law

*Rape c/s 5(1)(2) and 6(1) of the Sexual Offences
Special Provisions Act, No. 4/1988." (sic)*

Actually the underlined law should read "No. 4/1998" and not '1988'. The provisions of Act 4 of 1998 have been incorporated into the revised edition of the Penal Code, Cap. 16, R.E. 2002. Section 5 of SOSPA has been incorporated into the Penal Code and it is now section 130 of the Penal Code. Therefore the charge sheet was not defective as such.

In ground 2 of appeal the complaint is on the contradictions in the testimonies of PW1 and PW2. Of significance to the appellant is on the time he spent in the house of PW2 raping PW1; whereas PW1 stated that the appellant spent only one night; PW2 testified that he spent three days raping PW1. It was argued by the appellant that such contradictions affect the credibility of witnesses and render the testimonies of PW1 and PW2 unreliable and the Court ought not to act on it unless it is corroborated by some other evidence.

The third complaint relates to the delay in reporting the alleged rape to the police. Going by the PF3 (Exhibit "P1"), the rape which was allegedly committed on 15/2/2003, was reported on 8/3/2003 and there

are no reasons given for the inordinate delay of three weeks. Yet, the appellant was arrested in May, 2003. Again we have found not a single reason given to justify this inordinate delay.

The case of the prosecution was, admittedly based on the credibility of PW1 and PW2.

The issue that arises now is whether the evidence of PW1 and PW2 can be relied upon. In the case of **Shabani Daudi v. R.**, Criminal Appeal No. 28 of 2000 (unreported), the Court stated the following:-

*"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: **One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the***

credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."

Responding to the appellant's complaints was Mr. Edwin Kakolaki, learned Mr. Kakolaki, Principal State Attorney, who appeared for the respondent Republic, had been patiently listening to the appellant as he unraveled the implausible prosecution evidence which had led to his incarceration since 2003. The learned Principal State Attorney did not support the conviction and the sentence meted out on the appellant, as the conviction was based on the prosecution's incredible evidence.

In the circumstances, we accept Mr. Kakolaki's stand that PW1 and PW2 gave incredible evidence. We are therefore left with no evidence from the prosecution upon which to sustain the appellant's conviction of rape. In the result, we agree with both the appellant and the learned State Attorney and accordingly quash the conviction and set aside the sentence. The appellant is to be released from custody unless he is held for some other lawful cause.

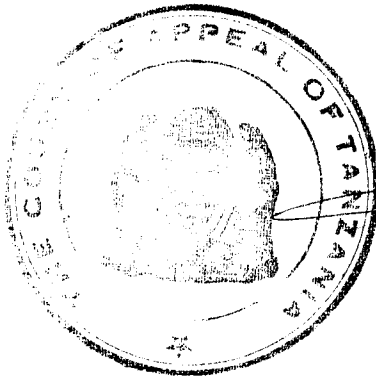
DATED at MWANZA this 3rd day of June, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR