

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MSOFFE, J.A., MBAROUK, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 182 OF 201~~0~~²

FRANK S/O WILSONAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Tabora)**

(Kaduri,J.)

**dated the 22nd day of February, 2010
in
Criminal Appeal No. 57 of 2008**

JUDGMENT OF THE COURT

30 & 31 October, 2012

MBAROUK, J.A.:

Before the Resident magistrate's court at Tabora, the appellant was facing a charge of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 as amended by se 5 and 8 of the Sexual Offences Special Provisions Act No. 4 of 1998. R.E. 2002. The particulars of the charge read as follows:-

*" That **Frank s/o Wilson** charge that on 25th day of January, 2007 at about 10.00 hrs at Burudani Guest Ipuli area within Municipality District and Region of Tabora did have carnal knowledge with one ASHURA D/O MUSSA @ KISANGA aged 17 yrs."*

The trial court found the appellant guilty, hence convicted and sentenced him. The trial court found the appellant guilty, hence convicted and sentenced him to thirty (30) years imprisonment. The appeal of the appellant to the High Court (Kaduri, J.) was dismissed. This is a second appeal to which, the appellant seeks to challenge the decision of the High Court.

Five grounds of appeal were preferred by the appellant in his memorandum of appeal. However, we think that the centre of his complaint is that the case against him was not proved beyond reasonable doubt.

In this appeal, the appellant just as it appeared in the courts below fended for himself, whereas the respondent Republic, was

represented by Mr. Hashim Ngole assisted by Ms. Pendo Emphraim Makondo, learned Senior State Attorneys.

At the hearing, the appellant had nothing to elaborate apart from what he had stated in his grounds of appeal.

On her part, Ms. Pendo supported the appeal for the main reason that the evidence adduced at the trial court failed to prove the case against the appellant beyond reasonable doubt.

She submitted that the particulars of offence found in the charge sheet shows that, the offence of rape was committed on 25- 1- 2007 at about 10.00 at Burudani Guest House. However the learned Senior State Attorney pointed out that at page 9 of the record shows that PW1, the mother of the victim discovered on 24 -1-2007 that PW4 (the victim) was pregnant. Further contradiction concerning the date of pregnancy was found at page 10 of the record where PW1 stated that she was told by PW4 that she was pregnant by September, 2006.

The learned Senior State Attorney urged us to find that there was no rape committed the appellant on 25-1-2007 as shown in the charge sheet. In support of her argument, she cited to us the decision of this Court in the case of **Anania Turian v. Republic**, Criminal Appeal No. 195 of 2009 (unreported).

Apart from that discrepancy in the prosecutions evidence, Ms. Pendo added by submitting that PW1 at page 9 of the record that she was told by PW4 (the victim) that one Frank or Omari was the one responsible for her pregnancy. However, Ms. Pendo submitted that at page 1, the record shows that in a hospital card of PW4 (the victim) the name of Frank Adolf was written therein instead of Frank Wilson as a correct name of the appellant.

Another fundamental discrepancy pointed out by the learned Senior State Attorney is that PW4 who was the alleged victim testified to the effect that she did not know the appellant and said that she just saw him in court on that day.

as to the specific date of the commission of the offence. In the decision of this court in the case of **Anania Turian** (supra) stated as follows:-

" The charge against the appellant was that he had raped PW2 Zela at about 19:00 hrs, on 24th August, 2001. As we have sufficiently demonstrated, no evidence was given by the prosecution to prove this. Indeed none of the four prosecution witnesses alluded to this date in their evidence.....

...In our considered opinion, it was wrong for the two courts below to find the appellant guilty as charged and proceed to convict him."

Offence as found in the charge sheet was emphasized, where it was stated that:-

" when specific date of the commission of the offence is mentioned in the charge sheet, the

defence case is prepared and built on the basis of that specific date."

In the instant case, there is variance of dates as to when the offence of rape was committed. We are of the opinion that, that creates doubt as to when exactly the offence of rape was committed on PW4.

Another doubt is that of the uncertainty on the name of the appellant. As pointed out earlier, the record shows that PW1 testified that she was told by PW4 (the victim) that the name of a person who impregnated her was Frank or Omari. That means she was not certain as to who exactly impregnated her. Also the record shows that in the Hospital Maternity Card, there was a name of Frank Adolf, whereas the name of the appellant is Frank Wilson not Frank Adolf.

Apart from that, the record clearly shows the PW4 (the victim) herself testified that:-

" I don't know the accused I just see him right now"

If the victim herself testified that she did not know the appellant, she just had seen in Court, then it is difficult to say with certainty that it is the appellant who committed the offence of rape against PW4 (the victim). This is bearing in mind that the best evidence in the case of rape is that of the victim herself. See the decision of this Court in the case of **Selemani Makumba v. The Republic** Criminal Appeal No. 94 of 1999 and **Ibambi Sain @ Mwazembe v. The Republic**, Criminal Appeal No. 142 of 2012 (both unreported) to name a few.

All in all, we are of the considered opinion that the above mentioned are serious doubts which ought to be resolved in favour of the appellant. The two courts below failed to consider the existence of those doubts. We are increasingly of the view that had she too courts below considered those doubts they would have reached to different conclusion in their decisions.

In the light of the foregoing reasons, we hereby allow the appeal, quash the conviction and set aside the sentence. The

appellant is to be released from prison forthwith unless he is held in connection with a lawful cause.

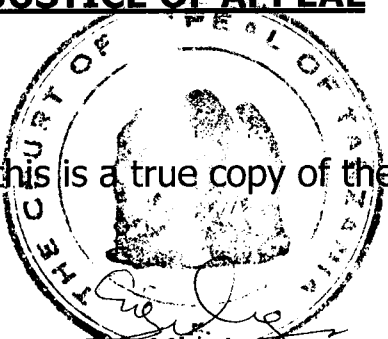
DATED at TABORA this 30th day of October, 2012.

J.H.MSOFFE
JUSTICE OF APPEAL

M.S.MBAROUK
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

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



E.T. Mkwizu
E.T. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL