IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 67 OF 2013

DOMINICK S/O KASUNZU.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Wambali, J.)

dated the 7th day of December, 2009
in
DC. Criminal Appeal No. 54 of 2007

JUDGMENT OF THE COURT

19th & 23rd September, 2013

MBAROUK, J.A.:

In the Resident Magistrate's Court of Tabora at Tabora, the appellant was charged and convicted of the offence of rape contrary to section 130 and 131 of the Penal Code as amended by sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to thirty (30) years imprisonment. He was aggrieved by the conviction and

sentence and appealed to the High Court where his appeal was dismissed. Still aggrieved, he appealed to this Court and preferred three grounds of appeal, namely: -

> *(1) That, the charge against the appellant was not proved beyond reasonable as there was no corroborative evidence of the prosecutrix.*
>
> *(2) That, there was no material evidence to prove penetration after the evidence of the PF3 was expunged.*
>
> *(3) That, the evidence of PW1, PW2 and PW3 needed corroboration which was not found on record.*

We have found it useful to give a brief account of the case which was before the trial court before discussing the points raised in the memorandum of appeal. The facts were that, on 25-6-2005 at around 18:00 hrs; one Nshoma Marco

(PW1), a woman aged 60 years was selling cooked rice at a place where traditional "ngoma" festival was conducted. Having finished her business, she decided to go back home. On her way, she passed at Imalanguru village. While passing through a place where there was a forest, PW1 saw the appellant who fell her down, layed on top of her and penetrated his penis into her vagina. PW1 shouted for help. People who answered the alarm found the appellant on top of PW1 making love. They managed to pull the appellant out, but PW1 failed to stand up as she did not have power to do so. Those people took PW1 and the appellant to the Village Executive Officer (VEO) of Mwanapoli. Thereafter, the appellant was sent to the Police Station at Tabora where PW1 was given a PF3.

The record shows that, the people who rescued PW1 were Ramadhan Salum (PW2) and Majengo Taunas (PW3). Both testified that, while they were coming from traditional "ngoma" festival, at Mwanapoli village, they heard an alarm

and decided to light a torch to see what was going on. They then discovered that there were two people, a male and a woman. A woman layed on the ground, whereas a man was on top of the woman making love. When that man noticed the presence of PW2 and PW3, he was furious. He took a stick to scare them away and managed to escape, but PW2 and PW3 ran after him and arrested him and sent him together with PW1 to VEO.

In his defence, the appellant denied to have committed the offence charged against him. He said, he remembered on 25-6-2005 at about 21:30 hrs, he was on his way home from Itobela. He was a little bit drunk singing "sukuma" songs until he reached Mwanapoli village. While he was at the center of Mwanapoli, he was invaded and thereafter arrested for having raped a woman. He said, he was sent to VEO and thereafter at the police station where initiatives were taken to charge him before the court.

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas Ms. Jane Mandago, learned State Attorney represented the respondent/Republic. The appellant opted not elaborate to his grounds of appeal, instead, he gave a chance to the learned State Attorney to reply to his grounds of appeal and he opted to react later after her.

From the outset, Ms Jane Mandago indicated not to support the appeal. In her reply to the grounds of appeal, the learned State Attorney opted to combined the 1st and 2nd grounds of appeal. She submitted that the record is very clear how the evidence of PW1, PW2 and PW3 proved the offence of rape against the appellant. She said, PW1 clearly testified how the appellant fell her down, layed on top of her and penetrated his penis into her vagina. The learned State Attorney urged us to find that the issue of penetration was proved from the testimony of PW1. Ms. Jane Mandago further submitted that even the issue of consent was proved. She said, the record shows that PW1 was forced to fall down "kupingwa ngwara" by

the appellant and then PW1 shouted for assistance and that is why PW2 and PW3 went to rescue her.

The learned State Attorney further submitted that as far as the courts below were satisfied that PW1 as a victim was telling nothing but the truth, and as far as the best evidence comes from the victim of rape, she urged us to find that the issue of penetration and consent had been proved beyond reasonable doubt. In support of her argument, she referred us to the decision of this Court in **Selemani Makumba v. The Republic**, Criminal Appeal No. 94 of 1999 (unreported). She added that, even if evidence of PF3 was expunged, but the remaining evidence of PW1 sufficiently proved penetration and there was no consent. Hence, she said the 1st and 2nd grounds of appeal in their totality lacked merit.

On our part, we fully agree with the learned State Attorney that even if the PF3 was expunged, there was enough evidence from PW1 herself to prove that penetration and

consent were established beyond reasonable doubt. The record is very clear how PW1 met the appellant and fell her down, layed on top of her and inserted his penis into her vagina. We think, that evidence from PW1 is sufficient enough to prove that penetration was established. Both courts below found PW1 truthful on that point of penetration, hence we have no reason to fault them. Even the issue of consent was proved. This is because, the record shows how PW1 was made to fall down by force and thereafter shouted for help to be rescued. We are of the view that, had there been consent, PW1 could not have been felled down by force by the appellant and she could not have raised an alarm to be rescued. PW2 and PW3 responded to the alarm raised by PW1. Their response of the alarm made by PW1 further corroborated the aspect that there was no consent in that act of rape. After all, as pointed out in the case of **Selemani Makumba** *(supra)*: -

> *"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, there was penetration'.

All in all, we are of the considered opinion that the ingredients of the offence of rape were proved beyond reasonable doubt that it was no other person other than the appellant who committed that offence of rape to PW1. For that reason, we find the 1st and 2nd grounds of appeal devoid of merit.

As to the third ground of appeal, the learned State Attorney submitted that there was no need of corroboration of the evidence of PW1, PW2 and PW3 as their evidence sufficiently proved the offence against the appellant. She urged us to find that the evidence from the Village Executive Officer of Mwanapoli could not have added any value to the credence of the evidence from PW1, PW2 and PW3. This is because, she said, what was important, was to prove that, the offence of rape was committed by the appellant and as the

record shows, there was sufficient evidence to prove that it was the appellant and no other person as the one who committed the offence of rape against PW1. After all, she said, Section 143 of the **Evidence Act** Cap. 6 R.E. 2002 states that no particular number of witnesses shall in any case be required for the proof of any fact. Finally, the learned State Attorney urged us to find that the appeal generally is devoid of merit and should be dismissed.

On our part, we think, the learned State Attorney was right when she said that there was no need of corroboration in this case. This is because, the evidence from the Village Chairman of Mwanapoli could not have added anything from the already existing strong evidence of PW1 (victim) who as per the decision of this Court in the case of **Selemani Makumba** *(supra)* as a victim of rape she was in a better position to prove the offence of rape. In addition to that, as pointed out by the learned State Attorney that, according to section 143 of the **Evidence Act** no particular number of witnesses shall be

required for the purpose of proving any fact. We are of the view that the evidence of PW1, PW2 and PW3 sufficiently proved that it was the appellant and no other person as the one who committed the offence of rape to PW1.

In the final analysis, and for reasons stated above, we find this appeal devoid of merit. Hence, we accordingly dismiss it.

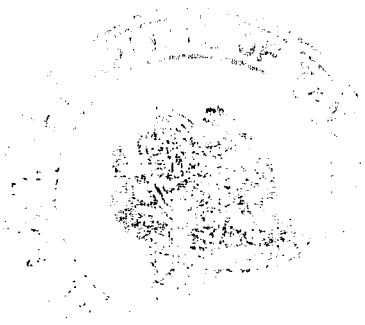
DATED at TABORA this 23rd day of September, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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



Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL