IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 46 OF 2012

HASHIMU KHALID .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Mzuna, J.)

dated the 15th day of April, 2011
in
Criminal Appeal No. 7 of 2010

JUDGMENT OF THE COURT

18th & 20th June, 2013

MSOFFE, J. A.:

This appeal arises from the decision of the High Court (Mzuna, J.) upholding the conviction of the appellant for rape contrary to section 130(1) and (2)(e) of the Penal Code and the sentence of 30 years imprisonment meted by the District Court of Moshi (Massati, RM.). The courts below were satisfied that on 28/12/2008 at about 9.00 hours at Mabungo area, Moshi Rural, Kilimanjaro Region, the appellant did carnally

know PW1 Amina Shabani Mdee, aged 33 years at the material time, without her consent.

The appellant filed a memorandum of appeal containing four grounds. The main complaint however, in those grounds is that the conviction was not well grounded. In other words, the appellant is of the view that the prosecution case against him was not proved beyond reasonable doubt.

The prosecution evidence that led to the conviction and sentence was as follows. PW1 told the trial District Court that on the fateful day and time she was in her maize farm. The appellant came to her and raped her. She raised an alarm and one Mzee Hamisi came to her rescue in response to the said alarm. It is not clear from the evidence whether the said Mzee Hamisi was the same person as PW2 Sembua Nchewele. Anyhow, PW2 told the trial District Court that he arrived at the scene in response to the alarm whereupon, according to him , the appellant

> *.... was only unzipped his trouser, he was still with all of his clothes, while PW1 remained with only with Linda....*

The incident was reported to the police and eventually PW1 was referred to hospital. PW4 Dr. Justine Selengia examined her but did not observe any signs of rape because:-

> *...it is impossible from an adult and a mother like her to obtain bruises in her vagina since the place should be wide open...*

Before us, the appellant appeared in person and essentially repeated the contents of his memorandum of appeal. On the other hand, the respondent Republic had the services of Mr. Hangi Matekeleza Chang'a, learned State Attorney. At first, Mr. Chang'a sought to support the conviction. On reflection however, he changed his mind and argued in support of the appeal. With respect, we are in agreement with Mr. Chang'a that there is merit in the appeal.

In the case of **Selemani Makumba Vs. Republic,** (2006) TLR 379 this Court stated:-

> ***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.

(Emphasis is ours.)

Better still in **Mathayo Ngalya @ Shabani Vs. Republic,** Criminal Appeal No. 170 of 2006 (unreported) this Court stated:-

The essence of the offence of rape is penetration of the male organ into the vagina. Subsection (a) of section 130(4) of the Penal Code... provides:-

For the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence. ***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.***

(Emphasis is ours.)

Admittedly, in the instant case the prosecution case was to stand or fall on the evidence of PW1. This was the key witness in the whole case in that she alleged that she was the victim of the said rape. In this regard, her evidence ought to have shown exactly whether or not there was penetration. This is what she told the trial District Court:-

> *.....Meanwhile, I saw someone coming, it was accused person, when he was near me, he just invaded me and he started to undress my clothes. My clothes were in pieces, they were torn, especially my underpants and skin tight, then he put soil into my mouth to avoid me from screaming ... He did make love to me after he beat me.....*

Very briefly, in our considered view, by the above evidence PW1 was not forthcoming in showing exactly whether there was penetration within the dictates of the law. At best, she said the appellant made love with her. With respect, that was not enough because she could still have made love without necessarily there being any penetration. Her evidence ought to have been more forthright , comprehensive and conclusive on the issue of penetration so as to enable the court to make a meaningful decision on

the important issue of penetration. In the absence of such clear evidence it follows that, penetration, which is an essential ingredient in a charge of rape was not proved.

For the above single reason, the appeal has merit. We hereby allow it, quash the conviction and set aside the sentence. The appellant is to be released from prison unless lawfully held.

DATED at ARUSHA this 19th day of June, 2013.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

Malewo, M.A
DEPUTY REGISTRAR
COURT OF APPEAL