IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 121 OF 2013

MOKESHI S/O MLOWE .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Songea)

(Kaganda, J.)

dated the 13th day of September, 2006

in

Criminal Appeal No. 27 of 2002

JUDGEMENT OF THE COURT

2nd July & 5th August, 2013

MJASIRI, J.A.:

In the District Court of Songea District the appellant Mokeshi Mlowe was charged and convicted of the offence of rape contrary to sections 130 and 131 of the Penal Code, Cap 16 [R.E.2002]. He was sentenced to thirty (30) years imprisonment. He unsuccessfully appealed to the High Court. In addition to the sentence of 30 years imprisonment the High Court ordered that he suffer twelve strokes and pay compensation of shs. 300,000/= to the victim. Still aggrieved he filed his appeal to this Court.

The background to this case is as follows. It was alleged by the prosecution that on the 27th day of December 2000 at about 18.40 hours at Mnazini Village within Songea District the appellant raped one Baina Amidu (PW2). It was alleged by PW2 that while returning home from the farm she came across the appellant who was riding a bicycle. The appellant allegedly offered her a lift. She refused his offer and proceeded walking home. The appellant is said to have stopped and pretended to repair his bicycle and he suddenly accosted her from behind and grabbed her by the shoulders and pushed her into the forest where he raped her. In the course of the struggle, PW2 bit her assailant's arm in order to free herself. The assailant bit her left ear pushed her down and raped her. She was helpless as he held her by the neck with one hand. He then left on his bicycle. She called out for help and one person who was on a bicycle, Mohamed Mkumba came. Then two other people arrived. She did not know them. She only knew Mkumba. However, he could not take her home as he was going to the farm. He requested the other two people who were present to escort her home. She returned to the scene to collect her trousers and underwear, but could not find them. She reported the incident to the police. The appellant was subsequently arrested in connection with the

rape. The appellant denied committing the offence and raised the defence of alibi.

The case for the prosecution was based on the evidence of a single witness (PW2). The three witnesses who came to the scene including Mohamed Mumba did not testify.

The appellant appeared in person and was unrepresented at the hearing and the respondent Republic had the services of Mr. Maurice Mwamwenda learned Senior State Attorney.

The appellant lodged in court a nine (9) point memorandum of appeal. However the major point of contention centres around the following two grounds.

1. *The High Court Judge erred in fact and law in relying on the evidence of PW2.*
2. *The conviction of the appellant was against the weight of the evidence on record.*

The appellant being unrepresented did not have much to say in support of his appeal. His request to the Court was to adopt his memorandum of appeal as part of his submissions.

Mr. Mwamwenda on his part did not support the conviction of the appellant. Mr. Mwamwenda centred his arguments on ground. No. 9 that the charge against the appellant was not proved beyond reasonable doubt. He submitted that the crucial issue is the identification of the appellant and the credibility of PW2. He stated that PW2 testified that he did not know the appellant at all. It was therefore not known what PW2 reported to the police and how the appellant was arrested. He submitted that the fact that two people were arrested for the offence, it was not clearly known who was the culprit. The incident occurred on December 27, 2000 but the appellant was arrested on January 7, 2001.

In relation to the non-comphance of section 240 (3) of the Criminal Procedure Act, Mr. Mwamwenda conceded that the PF.3 (Exhibit D) had no evidentiary value. The appellant was not advised of his right to have a doctor appear in court for cross–examination. This issue needs not detain us. This Court has stated on a number of occasions that failure to comply with section 240 (3) of the Criminal Procedure Act rendes the medical report to be of no evidentiary value. See **Richard Bukori v Republic,** Criminal Appeal No. 25 of 2011; **Abdullah Elias v Republic,** Criminal Appeal No 11 of 1009; **Mbwana Hasssan v Republic,** Criminal Appeal No. 98 of 2009 and **Kirundila**

Bangilana v Republic, Criminal Appeal No. 313 of 2007. The PF. 3 report should therefore be expunged from the record.

However lack of medical evidence does not mean that rape has not been established, if there is other evidence establishing the fact that rape was committed. See for example the cases of **Prosper Mjoera v Republic,** Criminal Appeal No. 73 of 2003 and **Salu Sosoma v Republic,** Criminal Appeal No. 31 of 2006 CAT (both unreported).

The main issues for consideration in this appeal are as follows:-

1. *Whether or not PW2 was raped.*
2. *Whether or not it was the appellant who committed the rape.*

The law is clear that there is no particular number of witnesses required for proof of any fact. Section 143 of the Tanzania Evidence Act Cap 6, [R. E. 2002] provides as under.

> *"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required proof of any act".*

In **Anil Phukan v State of Assam** 1993 AIR 1462 it was held as under:-

> *"A conviction can be based on the testimony of a single- eyewitness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing a conviction on his testimony alone."*

In a criminal case the burden of proof is on the prosecution to prove the case against the accused person beyond reasonable doubt. The burden never shifts (Section 3 (2) (a) of the Evidence Act (supra)).

This is a second appeal. The principle to be followed in dealing with the finding of facts and conclusion reached by the lower Courts is clearly set out in various decisions of this court and the Court of Appeal for East Africa. In **Hassan bin Said v. R** (1942) 9 EACA 62 it was held that the Court of Appeal is precluded from questioning the finding of fact of the trial Court, provided there was evidence to support those findings. See **Peter v Sunday Post,** (1958) EA 424 and **Salum Mhando v R** (1993) TLR 170.

The first issue need not detain us. PW2's evidence has clearly established that she was raped, the medical evidence not withstanding, since Exhibit D has been expunged from the record.

While we have no problem in reaching a conclusion that the evidence on record support the allegation of rape, we are not satisfied that the prosecution has established on the standard required under the law that it was the appellant who committed the offence.

The second issue is not so straightforward. Is there sufficient evidence to establish that it was the appellant who committed the rape? According to PW2 the appellant was unknown to her. One other person was jointly charged with the offence of rape and was later discharged by the District Court. If the appellant was positively identified by PW2, how did the police arrest one other person for the same offence?

It is not evident on record what description PW2 gave to the police and how the appellant was arrested. Mohamed Mkumba and two other unnamed persons were not called to testify. It appears the arrest of the suspects was done by trial and error which does not augur well with the principles of justice.

In relation to the failure by the prosecution to call the people who assisted the victim after the incident, we would like to state as follows:-

While the prosecution has discretion to call any witness they desire to establish their case (Section 143 supra) where they refrain from calling a witness who would advance their case an adverse inference may be drawn. In **Azizi Abdallah v Republic** 1991 TLR 71 (CAT) it was held thus:-

> "i .....
> ii.....
> *iii. The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.*

The appellant raised the defence of alibi. Neither the trial Court nor the High Court considered this defence. The High Court disregarded the defence of alibi because no notice was given by the appellant during trial in accordance to the requirements under section 194 of the Criminal Procedure Act. That was a fatal irregularity. See **Charles Samson v Republic,** Criminal Appeal No. 92 of 2006 and **Alfeo Valentino v**

Republic, Criminal Appeal No. 92 of 2006 CAT (both unreported) and **Maiko Charles v Republic,** Criminal Appeal No. 20 of 2008 CAT (unreported). The defence of alibi raised by the appellant should have been considered, although given without prior notice as per section (194 (6) of the Criminal Procedure Act, 1985.

In **Rashid Seba v Republic,** Criminal Appeal No. 95 of 2005 CAT (unreported) it was stated thus:-

> *"When considering the proper import of section 194 (4), (5) and (6) of the Criminal Procedure Act, 1985 this Court has said:-*
>
> *.... on a proper construction of the provisions of this section ... the court is not exempt from the requirement to take into account the defence of alibi, where such a defence has not been disclosed by an accused person before the prosecution close its case. What is this section means is that where such a disclosure is not made, the court, through taking cognizance of the defence "may in its discretion", accord no weight of any kind to the defence."*

In **Charles Samson v Republic,** Criminal Appeal No. 29 of 1990 CAT (unreported), this Court has succinctly stated that failure to consider a defence of *alibi,* is a fatal error. See **Alfeo Valentino v Republic,** Criminal Appeal No. 92 of 2006 CAT (unreported).

We are therefore under the circumstances hesitant to uphold the conviction of the appellant based on PW2's testimony. Even though the trial court in its judgment found PW2 credible. No basis for such conclusion was laid down. We are fully aware that there is no formula to apply when it comes to consideration of the credibility of a single witness. However the trial court is supposed to weigh evidence, consider its merits and demerits and having done so, decide whether or not it is trustworthy. The trial court failed to do so.

A conviction based on the evidence of a single witness can only be done when the court is satisfied that the witness is telling the truth. See **Hassan Juma Kanenyera v Republic** 1992 TLR 100 CAT.

In the instant appeal we are of the considered view that it is necessary to examine other circumstances or otherwise, supporting PW2's assertion in respect of the identity of the appellant.

For the foregoing reasons, we accordingly allow the appeal, quash the conviction and set aside the mandatory 30 years imprisonment, twelve strokes and the order for compensation. The appellant is to be released forthwith from prison unless he is otherwise lawfully held. It is so ordered.

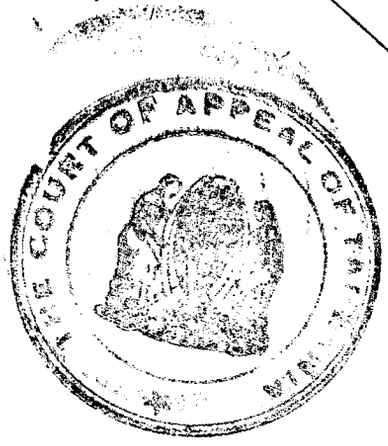
DATED at **IRINGA** this 5th day August, 2013

E. M. K. RUTAKANGWA
JIUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL