

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

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

**CRIMINAL APPEAL NO. 75 OF 2009**

**SONDA S/O DEUS @ MAYOMBI.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**  
**(Appeal from the decision of the High Court of Tanzania**  
**at Tabora)**

**(Kaduri, J.)**

**dated the 9<sup>th</sup> day of February, 2009**

**in**

**DC. Criminal Appeal No. 73 of 2007**

.....

**JUDGMENT OF THE COURT**

13 & 17 September, 2013

**MBAROUK, J.A.:**

The appellant, Sonda Deus @ Mayombi, was charged with the offence of rape contrary to sections 130 (1) (2) (a) and 131 (1) of the Penal Code, Cap.16 Vol. 1 of the Laws as amended by Sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. The District Court of Igunga at Igunga convicted and sentenced him to thirty (30) years imprisonment with twelve

(12) strokes of the cane. He was aggrieved by the conviction and sentence, he then appealed to the High Court. His appeal before the High Court (Kaduri, J.) was dismissed in its entirety, hence preferred this appeal.

Briefly stated, the facts leading to the conviction of the appellant at the trial court were as follow. That, on 10-2-1999 at around 5:45 a.m Nyasole d/o Maige (PW1) was sleeping in a kitchen which had no door, while her husband left for "shamba". When PW1's husband left for "shamba", he left Masamba Machibya (PW4) a child sleeping outside. While PW1 was sleeping, she felt someone pressing her to the ground. She then pushed away the bed sheet and saw the appellant who ordered her to keep quiet or else he will stab her with a knife. PW1 struggled to free herself from the appellant while shouting. Thereafter, when PW4 saw his mother struggling with the appellant he went to call their neighbours. While the struggle continued, both the appellant and PW1 were naked. The appellant managed to fell PW1 down and penetrated his penis into her vagina while grabbing her by the neck. PW 1 was then

sent into the house by the appellant and ordered her not to get out. Later, PW1 heard people shouting as if they were chasing someone, and the appellant was thereafter arrested. PW1 was taken to hospital after obtaining a PF3 (Exhibit P1) from the Police Post.

In his defence, the appellant denied to have committed the offence. He simply submitted as to how he was arrested at the house of Mihayo and asked for an identity card which he had none. He said, he was then beaten, after being suspected to be a thief and then taken to a house where he was told a woman was raped. He also claimed not to have been examined by a doctor.

Initially, the appellant filed a memorandum of appeal containing four grounds of appeal, but we think, they can be condensed to two main grounds, namely:-

(1).That, the prosecution failed to prove their case beyond reasonable doubt.

(2).That, the requirement under section 240(3) of the Criminal Procedure Act (CPA) was not complied with.

At the hearing, the appellant appeared in person unrepresented, whereas Mr. Jackson Bulashi, learned Principal State Attorney represented the respondent/Republic.

Being the appellant, the Court offered him a chance to argue his appeal, but he opted to give a chance to the learned Principal State Attorney to reply to his grounds of appeal, thereafter he will respond.

On his part, Mr. Bulashi strongly argued against the appeal. He submitted that PW1 clearly testified the incident on how the appellant rape her. Both, the trial court and the first appellant court reached a concurrent finding that the appellant had sexual intercourse with PW1 without her consent. In support of his argument he cited to us the decision of this Court in the case of **Selemani Makumba v. The Republic**, Criminal Appeal No. 94

of 1999 and **Ngusa s/o Shija v. The Republic**, Criminal Appeal No. 303 of 2010 (both unreported).

The learned State Attorney further submitted that Magembe Shilali (PW2) and Lugesha Lilo (PW3) testified as to how the appellant was arrested at Mihayo's house after being chased by the people. The learned Principal State Attorney added that, PW3 saw the appellant naked holding a blanket running away to Mihayo's house and they surrounded the house. He was then ordered to come out and thereafter arrested. For that reason, Mr. Bulashi urged us to find that the first ground of appeal to have no merit.

As to the second ground of appeal, the learned Principal State Attorney submitted that he agrees with the appellant that the requirement of Section 240 (3) of the CPA was not complied with. He said, this is for the reason that, the PF3 (Exhibit P1) was tendered by PW1 who was not the author of the said document. For that reason, he urged us to find that the second ground of appeal to have merit and expunge the said Exhibit P1.

All in all, the learned Principal State Attorney submitted that, even if Exhibit P1 is to be expunged, the remaining evidence adduced by PW1, PW2 and PW3 is sufficient enough to prove the offence against the appellant beyond reasonable doubt. He therefore, urged us to dismiss the appeal for lack of merit.

We are of the considered opinion that this is a straight forward case. The record is very much clear on how the incident of rape occurred. PW1 clearly testified on how she was raped by the appellant while her husband was at "Shamba". PW1 denied to have been a lover of the appellant, which meant there was no consent. This Court in the case of **Selemani Makumba**. (supra) state as follows:-

*"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."*

In the instant case, as pointed out earlier, both, the trial District Court and the first appellate court reached a concurrent finding of fact that the appellant had sexual intercourse with PW1 without her consent. It is a settled principle that being a second appellate court, we should not interfere with factual findings unless there are glaring errors on the face of the record, such as errors in calculations or misdirection or non-directions on the evidence. See the decisions of this Court in the case of **DPP vs. Jaffar Mfaume Kawawa** (1981) TLR 149, **Issa Mgara @ Shuka vs. Republic**, Criminal Appeal No. 37 of 2005 and **Paschal Christopher vs. DPP**, Criminal Appeal No. 106 of 2006 (both unreported).

In the instant case, we have seen no misdirections or non-directions to make us to interfere with those current findings of the lower courts. For that reason, we find the evidence of PW1 being the victim of the offence to be a credible witness.

In addition to that, we have found that the evidence of PW2 and that of PW3 corroborated the evidence of PW1. As the

record shows, PW2 being a neighbour of PW1 testified as to how he was awoken by PW4 and thereafter chased the appellant who ran for hiding in Mihayo's house. In the company of other people, they surrounded Mihayo's house and managed to apprehend the appellant while covering himself with a blanket. On the other hand, PW3 also testified on how he saw the appellant naked holding a blanket while running away. As among those who chased the appellant, PW3, said they surrounded Mihayo's house where the appellant ran into it and thereafter apprehended him.

We are of the opinion that, the chain of events from where the appellant was at PW1's house and committed the offence of rape to the place where he was apprehended at the Mihayo's house was not broken. That led to water tight evidence against the appellant. For that reason, we find that the prosecution proved their case against the appellant beyond reasonable doubt. We have reached to that conclusion even without the assistance of PF3 (Exhibit P1). We too just like the learned Principal State Attorney agree that the mandatory



requirements of section 240 (3) of the Evidence Act have not been complied with.

All said and done, we find this appeal to have no merit. We are satisfied that the prosecution established the guilt of the appellant beyond all reasonable doubt. We find no merit in this appeal we therefore accordingly dismiss the appeal.

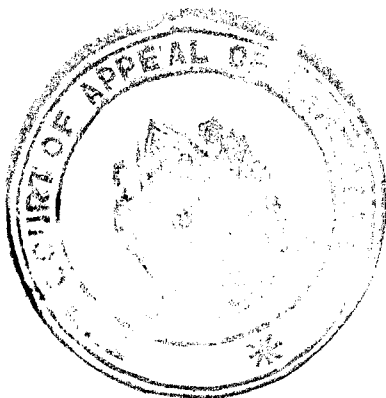
DATED at TABORA this 16<sup>th</sup> day of September, 2013.


M. S. MBAROUK  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

B. M. K. MMILLA  
**JUSTICE OF APPEAL**

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



  
Z. A. Maruma  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**