IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO.10 OF 2013

TATIZO JUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Tabora)

(Songoro, J.)

Dated the 13th day of February, 2012

in

Criminal Appeal No. 64 of 2009

JUDGMENT OF THE COURT

30th April & 7th May, 2013

KIMARO, J.A.:

On 28th October, 2007, at around 4 P.M, at day light, Agripina Joseph, (PW1) a girl aged 16 years, a standard VI pupil at Kalage Primary School was walking home using a path in a forest. She had come from a '*shamba*' where her parents, Joseph Kashato (PW2) her father, and Severina Tungiro (PW2) her mother, sent her to take food to workers who were working on their shamba. On the way, at Nyarubande area, she met

Tatizo Juma, the appellant. PW1 the complainant in this case was carrying some seeds. The appellant took away the seeds she was carrying and ordered her to stop. She did not comply with the instructions given. She ran away but the appellant ran after her. He caught her, fell her down, tore her underpants, and had sexual intercourse with her. Giving details of what the appellant did, the complainant said he inserted his penis in her vagina and he ejaculated twice. At the time the appellant did so, he squeezed her neck hard. That prevented her from raising an alarm. There were no houses around the area as the incident took place in the forest. The complainant knew the appellant before. After the painful event was over, the appellant refused to hand to PW1 the seeds and remained behind with her underwear while the complainant rushed home to her parents and informed them of the ordeal. She mentioned the name of the appellant to her mother. The mother of the complainant corroborated the evidence of PW1 on the rape and the name of the person who raped her, that is the appellant. She said the complainant returned home crying. She also checked the complainant's private parts and saw sperms. PW3 also said the complainant was discharging blood in her vagina. The mother of the complainant accompanied her to the scene of crime where they collected

her underwear. According to PW3 the underwear was torn. The matter was then reported to the father of the complainant, Joseph Kashato (PW2) and then to the police where the complainant was issued a PF3. The complainant was examined at Muyama Dispensary and the doctor confirmed that the complainant was raped. The PF3 and the torn underwear of the complainant were admitted in evidence collectively as exhibit P1.

With the above evidence from the prosecution charges of rape contrary to section 5(3) of the Sexual Offences (Special Provision) Act No. 4 of 1998 were preferred against the appellant.

In his defence the appellant denied knowing the complainant. He raised a defence of alibi that he was not at the scene of crime as alleged by the complainant.

The trial Court believed the evidence of the prosecution. The trial magistrate disbelieved the defence of alibi raised by the appellant. He said he saw no reason why the complainant would fabricate evidence against him.

The appellant was convicted and sentenced to thirty years imprisonment, which conviction and sentence were sustained on first appeal by the High Court.

In this second appeal, the appellant raised three grounds of appeal. First, he was aggrieved by the conviction because there was no evidence of penetration. Second, he complained of non-compliance with section 240(3) of the Criminal Procedure Act, [CAP 20, and R.E.2002]. Last he was aggrieved because the evidence for the prosecution was only from family members.

At the hearing of the appeal, the appellant appeared in person. He was not defended. The respondent Republic was defended by Ms Jane Mwandago, learned State Attorney. The appellant felt safer to respond to the grounds of appeal after the learned State Attorney responded to the grounds of appeal.

The learned State Attorney supported the conviction but not the sentence. However, she noted an anomaly in the charge sheet which in her considered opinion would not vitiate the proceedings. In her considered opinion, it can be corrected by section 388 of the Criminal

Procedure Act because it did not cause any miscarriage of justice. She said the law under which the offence was preferred was not correct since the offence was committed in 2007 after the Penal Code had been amended to incorporate the amendments in the Sexual Offences (Special Provisions) Act. She said the appellant should have been charged under section 130 (1) and (2) (e) of the Penal Code. The appellant being a layperson was not in a position to respond to this observation.

With respect, we agree with the learned State Attorney that the right provision under which the offence fell had to be cited. The Learned Judge on first appeal noted this anomaly and corrected the error, but without pointing to the trial Court the mistake that was in the charge sheet. The judgement of the High Court at page 32 of the record of appeal reads:-

> *"The appellant, Tatizo Juma was charged before Kasulu District Court with the offence of rape contrary to sections 130(1) and (2) (e) of the Penal Code."*

As said by the learned State Attorney, section 388 of the Criminal Procedure Act, [Cap 20. R.E 2002] allowed the learned judge on first

appeal to do so. Failure to mention the right provision of the law under which the charge was preferred did not affect the particulars of the charge as the appellant understood them and pleaded to them. He also made his defence.

Responding to the first ground of appeal, that penetration was not proved, the learned State Attorney said Agripina Joseph, (PW1) the complainant, was very clear in her evidence that the appellant inserted his penis in her vagina. The appellant had nothing to say on this, apart from saying that he did not commit the offence.

The evidence of PW1 at page 6 of the record of appeal is clear on what the appellant did to her:-

> *"The accused chased me and arrested me. He fell me down. He tired my underwear I had put on and started to have intercourse with me. His penis entered into my vagina. The accused ejaculated twice. The accused squeezed hard my neck with his hands to enable me not raise an alarm."*

Section 130(4) (a) says that an essential ingredient of the offence of rape is penetration, however slight. The cases of **Mathayo Ngalya @ Shabani V R** Criminal Appeal No. 170 of 2006(unreported), **Bakari Rashid V R,** Criminal Appeal No.308 of 2010 (unreported), **Mahone Sele V R** Criminal Appeal No. 188 of 2008 (unreported) and **Hassani Amiri V R** Criminal Appeal No. 304 of 2010 (unreported) are among the authorities made by the Court on this aspect. The first ground of appeal has no merit as evidence of penetration is vivid in the proceedings.

The evidence is also clear that the incident of rape was reported immediately, to the complainant's parents and the complainant mentioned that it was the appellant who committed the rape. The learned judge on first appeal cannot be faulted for agreeing with the trial Court that the complainant was a credible witness. She knew the appellant before. See the case of **Swale Kalonga @ Swale & another V R** Criminal Appeal No. 46 of 2001 (unreported).

As for the second ground of appeal, the learned State Attorney said the first limb of it lacked substance. On this aspect the appellant lamented for not being medically examined in order to ascertain that he was the one who raped the victim. We do not think that this would help him. Evidence

of PF3 only assist in proving that the victim was raped. It does not prove who committed the rape.

The second limb is a complaint that the appellant's rights were infringed because the doctor who conducted the examination on the complainant was not called for cross-examination. The learned State Attorney conceded that this was a violation of section 240(3) of CAP 20. For this ground we need not waste our time. With respect, we agree with the learned State Attorney. The Court has said in several decisions that, where evidence of PF3 is intended to be used in evidence, section 240(3) of Cap 20 imposes a mandatory duty on the trial Court to inform an accused person of his right to have the doctor called for cross-examination. In this case that was not done. See the case of **Mahona Sele V R** (supra) where other cases are also cited. It was wrong for the learned judge on first appeal to hold that the obligation of the trial Court is discretionary. It is a mandatory requirement of the law made purposely to ensure that justice is done to both sides in the trial. The learned State Attorney requested the Court to disregard the evidence of PF3. We accordingly expunge it from the record.

The last ground is on evidence of family members. The learned State Attorney said the ground has no leg to stand on as the law does not forbid the courts from receiving evidence of family members. We agree with the learned State Attorney that what matters is the competence and credibility of the witness to testify on the facts in issue. Responding to a similar complaint raised by the appellant, the Court in **Esio Nyomolelo and two others V R** Criminal Appeal No. 49 of 1995(unreported) held that:-

> *"It is common knowledge that in any trial evidence is forthcoming from witnesses who directly or circumstantially witnessed the incident taking place...*
>
> *The fact that they are related to the deceased is in our view is irrelevant. They were witnesses of credence and were believed by the trial judge. We see no reason for casting doubt on their evidence."*

The same principle applies in the circumstances of this case. The complainant was raped. She reported the incident to her parents. Her

mother went to the scene of crime and she saw the torn underwear the complainant left behind after the rape incident. She inspected her private and saw blood and sperms. Where else should she have reported the incident? Apparently this ground was not raised in the first appeal Court but even if it was raised, the position of the law as we have indicated, is clear.

From the circumstances in which the offence was committed, we have no reason to fault the decision of the first appellate Court in sustaining the conviction because the evidence that was given sufficiently established the commission of the offence of rape against the appellant. In sustaining the conviction the learned judge on first appeal held:-

> *"Now turning to the instant appeal, I find that the trial court assessed the testimony of PW1 by taking into account the circumstances under which the offence was committed, ..."*

Moreover, in the case of **Salum Makumba V R** Criminal Appeal No. 94 of 1999 (unreported) the Court held that the best evidence to prove the offence of rape is the victim herself. In this case the complainant proved

that she was raped. So long as her credibility was not doubted, that sufficed to establish the offence. The appeal by the appellant on conviction has no merit. He was properly convicted.

Regarding the sentence that was imposed on her we agree with the learned State Attorney that it was unlawful. The charge sheet shows that at the time the appellant committed the offence, he was aged 18 years. Section 131(2) (a) of the Penal Code requires such offenders to be sentenced to corporal punishment only if they are first offenders. The record of appeal at page 20 shows that in mitigation, he told the trial Court that he was first offender.

The appellant was sentenced on 12th March, 2008. Today is 4th May, 2013. This means that the appellant has been in prison unlawfully for more than six years. For this reason, we fault the learned judge on appeal for sustaining the sentence of thirty years imposed on the appellant. We quash it and set it aside. We order his immediate release from prison unless he is held there for any other lawful purpose.

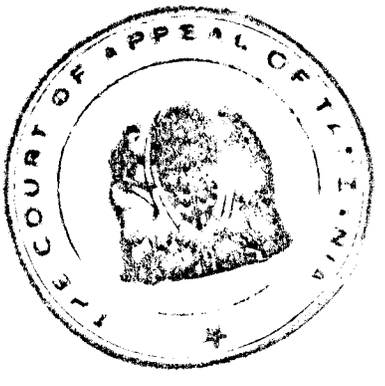
DATED at **TABORA** this 4th day of May, 2013.

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL