IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 76 OF 2011

PETER KOSIANGA KIWE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal From the Judgment of the High Court of Tanzania)

At Moshi)

(Mmilla, J.)

Dated the 9th day of July, 2004
in
Criminal Appeal No. 92 of 2003

.....

JUDGMENT OF THE COURT

11 June &.....

MUSSA, J.A:

In the District Court of Rombo, at Mkuu, the appellant was arraigned and convicted for rape, contrary to section 130 (1) (2) (e) and 131 of the Penal Code, Chapter 16 of the laws. The particulars on the charge sheet alleged that on the 14th December, 2002 at Mamswera Chini Village, Rombo District, the appellant had carnal knowledge of a certain Salome

Michael who was then aged 15 years. Upon conviction, the appellant was sentenced to a term of thirty (30) years imprisonment. His appeal to the High Court was dismissed, (Mmilla, J; as he then was), hence this second appeal. We think it is instructive, in the first instance, to briefly narrate the factual setting giving rise to the arrest, arraignment and the subsequent conviction of the appellant.

In support of its accusation, the prosecution featured four witnesses inclusive the alleged victim, namely, Salome Maiko (PW1). At all the material times, PW1 used to reside at Ushiri Village and was a form one Pupil at Mkuu Secondary School. On the fateful day, around 2.00p.m, PW1 left her grandmother's residence at Mengwe Village and was walking towards home. On the way, she was confronted by the appellant who was taking care of a herd of cattle that was grazing. As to what transpired next, it is best if we extract her telling during the trial:-

> *Accused held me by my throat. He fell me down. He tore my underwear and underskirt. I raised an alarm but accused managed to rape me.*

In response to her alarm,, a woman in the name of Catarina Jerome, (PW2), momentarily attended the scene. According to PW2, she *"saw the*

accused raping the girl" but, upon seeing her, the appellant pickedup his pair of trousers and ran away. In the immediate aftermath, another woman called Cortensia John (PW3), caught glimpse of the appellant as he was fleeing from the scene of the occurrence. Incidentally, the appellant left the herd of cattle unattended. The victim who was bleeding profusely from the encounter, was assisted by PW2 and PW3 back to her grandmother onwards to the police where she was issued with a PF 3. PW1 was allegedly attended at Huruma Hospital and the outcome of the medical examination was comprised in the PF 3 which she adduced into evidence (exhibit P1). Somehow, the appellant was apprehended and subsequently arraigned.

In reply, the appellant was fairly brief in his complete disassociation from the prosecution accusation. He did not quite deny that, on the fateful day around 3.00pm, he was taking care of a herd of cattle that was grazing at Mengwe Chini Village. Whilst there, the appellant was accosted by a band of armed bandits who threatened him, whereupon he abandoned the herd of cattle and ran away intent upon reporting the occurrence to the cattle owner. A little while later, the cattle owner, namely, Peter Leiya (DW 2), was informed by a certain Mzee Laurent that the appellant had raped a girl following which he abandoned the herd of cattle and ran away.DW2

then went to the graze field where he traced his livestock, minus 5 cows and 4 goats which were missing . A good deal later the missing animals were traced in the Republic of Kenya. As regards the rape accusation, in his defence, the appellant resolutely refuted the prosecution version.

In convicting the appellant, the trial court unreservedly accepted the testimonial account of the prosecution witnesses as well as the PF 3. The appellant's defence was considered but rejected. The first appellate court found no cause to fault the material findings of the trial court and, accordingly, the conviction and sentence were upheld. As hinted upon, the appellant presently seeks to impugn the decisions of the two courts below upon a memorandum that may be crystallized under three headings:-

1. *That the PF 3 was improperly adduced into evidence in the face of non-compliance with the provisions of section 240 (3) of the CPA;*
2. *That PW1, PW2 and PW3 were not credible witnesses and;*
3. *That the prosecution did not adduce any evidence of description of the appellant.*

Before us, the unrepresented appellant fully adopted the memorandum of appeal and promised to give a response, if necessary, after the submission of the learned State Attorney. For his part, Mr. Oscar Ngole, learned State Attorney for the Republic, declined to support the conviction and sentence. To begin with, Mr. Ngole shared the appellant's sentiment that the PF 3 was improperly adduced into evidence in contravention of the provisions of section 240 (3) of the Criminal Procedure Act. As it were, the document was adduced into evidence without affording the appellant an apportunity to express whether or not he would have wished the medical officer summoned for examination. Upon numerous occasions, this court has reiterated the mandatory attribute of this requirement. In this regard, we need only refer to the unreported Criminal Appeal No. 25 of 2010-**Kanisilo Lutenganija;** in which the PF 3 was expunged for non-compliance with the requirement. Likewise, we take the option and, accordingly, expunge exhibit P1 from the record of the evidence.

Addressing the remainder evidence implicating the appellant, the learned State Attorney contended that in view of the fact that PW1 simply advanced a generalized accusation that she was raped, the crucial ingredient of penetration was not proved. To fortify his contention, Mr.

Ngole referred us to two unreported decisions of this Court-viz- Criminal Appeal No.39 of 2008- **Said Mfaume V R;** and Criminal Appeal No. 312 of 2007- **Goodlove Azael@ Mbise V.R.** We entirely subscribe to the submission of the learned State Attorney. Penetration is, so to speak, the essence of the offence of rape and, thus, in the absence of clear evidence of penetration, the offence cannot be safely said to have been established. Indeed, the requirement was underscored by this Court with succinctness in the unreported Criminal Appeal No. 170 of 2006 **Mathayo Ngalaya @ Shabani V R**:-

> *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 relevance evidence which proves the offence.*

As was reiterated in both the referred cases of **Said Mfaume** and **Goodlove Azael**, it is not enough for the prosecutrix to blandly state that she was raped; rather, there must be proof of sexual intercourse evidenced by penetration of the penis into the vagina, however slight.

As clearly demonstrated, no such evidence was forthcoming in the matter presently before us and, to say the least, the crucial ingredient of penetration was not proved. That alone would suffice to dispose of the accusation of rape in the appellant's favor. That being so, the conviction and sentence for rape are, respectively, quashed and set aside.

Undaunted, Mr. Ngole finally submitted that despite the shortfall, had the trial court properly directed itself on the authority of section 304 of the CPA; it would have handed the appellant an alternative conviction of sexual assault, contrary to section 135 (1) of the Penal Code. Again, we entirely subscribe to the submission and, in the exercise of our powers of revision under section 4 (2) of the Appellate Jurisdiction Act we, accordingly, step into the shoes of the trial court to substitute an alternative conviction for the offence of indecent assault, contrary to section 135 (1) of the Penal Code. Nonetheless, it is noteworthy that the offence attracts a maximum sentence of five years imprisonment or a fine not exceeding three hundred thousands shillings or both the fine and term of imprisonment. The appellant, we further note, has been in prison custody ever since his conviction on the 30th April, 2003. Given the duration of his prison custody, we need not prescribe any punishment for the alternative verdict.

Accordingly, the appellant is to be released from prison custody forthwith, unless if he is detained for some other lawful cause.

DATED at **ARUSHA** this 17th day of June, 2013.

K.K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
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