

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: MBAROUK, J.A., MMILLA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 144 OF 2012

ROBERT NYENGELA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania at Iringa)**

(Kihio, J.)

dated the 13th day of April, 2012

in

Criminal Appeal No. 38 of 2011

.....

JUDGMENT OF THE COURT

11th & 14th August, 2015

MBAROUK, J.A.:

In the District Court of Iringa at Iringa the appellant was charged with the offence of rape contrary to sections 130 (1)(2)(e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002. He was convicted and sentenced to thirty (30) years imprisonment with twenty four (24) strokes of the cane and also ordered to pay compensation of shs. 100,000/= to the complainant for the injuries she sustained. Aggrieved by the conviction and sentence, the appellant unsuccessfully appealed to the High

Court (Kihio, J.) at Iringa. Undaunted, he has now preferred this appeal.

In this appeal, the appellant appeared in person unrepresented, whereas, the respondent/Republic was represented by Ms. Lilian Ngilangwa, learned Senior State Attorney.

The appellant lodged a memorandum of appeal containing nine grounds of a complainant, but we are of the view that they can conveniently boil down to two major grounds, namely:-

- (1) That, the case was not proved beyond reasonable doubt.*
- (2) That, the appellant's defence was not considered.*

Before embarking to discuss the ground of appeal, we have found it prudent to briefly state the facts of the case as established in the evidence at the trial court. On 2-1-2010 at around 19:00 hours at Mangawe village within Rural District and Region of Iringa, Pendo Gwivaha (PW.4) was in her room having a rest and Deogratias Sengele (PW.2) was on his

evening walk. It was alleged that the appellant and another youngman came at PW.2's house and called Lulu s/o Sengele (PW.1) who was by then lighting fire in their kitchen for the purpose of preparing dinner. Thereafter, the appellant asked PW.1 to accompany him to his residence. PW.1 resisted but she was threatened by the appellant that he would stab her (PW.1) with a knife if she would not accompany him. PW.1 was forced to comply with the order of the appellant and followed him to his house. When PW.1 entered the appellant's room, the youngman who was with the appellant remained outside the house. Thereafter, the appellant locked the room and ordered PW.1 to lie on the bed but she refused. He thereafter, threw her on the bed by force, undressed her skirt and underwear and stopped her from shouting for help by blocking her (PW.1's) mouth using his hands and penetrated his penis into her female sexual organ. After the appellant had satisfied his sexual desire, he opened the door and ordered PW.1 to go home. When PW.1 reached home, she narrated the whole story to her father (PW.2) and the people who traced her when she

was found missing at home. PW.1 was then taken to Isman Health Centre for treatment. On 3.1.2010, at about 3.30 p.m. the appellant was arrested by Erasma Mwenda (PW.5) (a militiaman) by the order of a village chairman.

In his defence, the appellant denied to have raped PW.1. He stated that on 2.1.2010 at about 19:30 hours he was in the streets with his colleagues. He further testified that when he was playing football, the security committee chairman called him and thereafter "mgambo" militiaman arrested him.

At the hearing of the appeal, the appellant opted to allow the learned Senior State Attorney to respond to his grounds of appeal first and prayed to give his reply thereafter, understandably so being a layperson.

On her part, Ms. Lilian Ngilangwa responded by submitting that, she does not support the appeal. She then directed her submission to the above stated grounds of appeal. In her response to the 1st ground of appeal, the learned Senior State Attorney submitted that, in order to prove the offence of

rape under section 130 (1) and (2)(e) of the Penal Code, three ingredients of the offence have to be proved, namely:-

(1) Penetration.

(2) Consent.

*(3) Whether, it was the appellant and no one else
as the one who committed that offence of rape.*

Trying to relate the three ingredients with the evidence on record, the learned Senior State Attorney submitted that, **firstly**, the issue of penetration was proved. In substantiating her argument, she contended that the evidence adduced by PW1 (the victim) clearly proved as shown at page 7 of the record of appeal, when she testified that the appellant penetrated his penis into her female sexual organ and felt pain and blood came out from her vagina. The learned Senior State Attorney further submitted that, those words from PW.1 were corroborated by PW.2 (her father) at page 22 when he said he saw his daughter walking in an abnormal movement and her skirt had some blood stains. There after PW.2 ordered Jane Gwivaha (PW.3) and Pendo Gwivaha (PW.4) to check the private parts of PW.1 as she was walking abnormally. The

learned Senior State Attorney added that as shown at page 28 of the record when PW.3 checked PW1's private parts, she observed that PW.1 had sexual intercourse with a man and her underwear had blood stains.

Ms. Lilian Ngilangwa, then urged us to find that the evidence adduced by PW.1 was corroborated by that of PW.2 and PW.3 which clearly proved penetration. She added that, even if the evidence found in a PF.3 form was expunged by the first appellate court, but the remaining above stated evidence of PW.1 herself as a victim and that of PW.2 and PW.3 was sufficient to prove the ingredient of penetration in the offence of rape charged against the appellant. In support of her argument that the true evidence of rape has to come from the victim, Ms. Lilian cited to us the decision of this Court in the case of **Selemani Makumba v. Republic** [2006] TLR 379.

Secondly, as on the ingredient of consent, the learned Senior State Attorney submitted that, as PW.1 was under eighteen years of age, according to section 130 (2)(e) of the Penal Code hence consent was not necessary to be proved. She

added that according to the birth certificate tendered and admitted as exhibit P3 PW.1's age at the time when the offence of rape was committed was fourteen and half years.

Thirdly, as to whether the appellant was the one who committed the offence, the learned Senior State Attorney submitted that PW.1 knew the appellant before the incident as her village mate. Also, she said, as shown at page 14 of the record of appeal, PW.1 identified the appellant by face as there was light at the time when the appellant approached her at the kitchen of their house. She added that, PW.1 testified that, even when she was in the appellant's room there was light. Apart from that, the learned Senior State Attorney further submitted that, PW.1 named the appellant to PW.2 (her father), PW.3 and PW.4 (her mother) at the earliest possible time. Ms. Lilian said, all that proves that it was the appellant and no other person who committed the offence.

Ms. Lilian then urged us to find that, the case against the appellant was proved beyond reasonable doubt as per her

analysis of the ingredients of the offence of rape made above in relation to the evidence on record.

As for the 2nd ground of appeal to the effect that the appellant's defence was not considered, the learned Senior State Attorney submitted that, both the trial court and the first appellate court considered his defence in their judgments. She added that, looking at the record of appeal, the appellant's defence relied mainly on a general denial, but in essence his defence was considered.

After her response to the grounds of appeal, the learned Senior State Attorney urged us to find the appeal devoid of merit, hence it should be dismissed.

In his re-joinder submission, the appellant had nothing useful to say, he merely repeated what he has already stated in his grounds of appeal.

On our part, we fully agree with the learned Senior State Attorney that this appeal is devoid of merit. As for the 1st ground of appeal, we are of the considered opinion that, the

case against the appellant was proved beyond reasonable doubt. This is because, all the ingredients of the offence of rape were sufficiently proved.

We have found it useful at this juncture to remind ourselves on what constitutes the offence of rape under Section 130 (1)(2)(e) of the Penal Code, to which it states as follows:

"Section 130- (1) It is an offence of a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under the circumstances falling under any of the following descriptions:

(a).....

(b).....

(c).....

(d).....

*(e) with or without her consent when
she is under eighteen years of age,
unless the woman is his wife who
is fifteen or more years of age and
is not separated from the man."*

Looking at the above cited provision, it is clear that the ingredients of the offence of rape which need to be proved in relation to this case are mainly three, namely:-

- (1) Whether a male person has had sexual intercourse with a girl or a woman.*
- (2) Whether there was consent or not.*
- (3) Whether it was the appellant as the one who committed the offence of rape.*

As to the ingredient of penetration, we fully agree with the learned Senior State Attorney that the evidence by PW.1 (the victim), PW.2 and PW.3 has sufficiently proved the issue of penetration. As the record shows, PW.1 testified as to how the appellant inserted his penis into her female sexual organ. It is now settled that true evidence of rape has to come from the victim. See **Selemani Makumba v. Republic**, [2006] TLR 379, at 384, where this Court stated 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.”

(Emphasis added).

In the instant case, PW.1 as the victim of the offence of rape has established the element of penetration. In addition to that PW.2 and PW.3 corroborated her evidence that the appellant had a sexual intercourse with her.

As regards the issue of consent, we again agree with the learned Senior State Attorney that according to Section 130(2)(e) of the Penal Code as PW.1 was under the age of eighteen years hence consent is irrelevant to be proved. Also see decision of this Court in the case of **Selemani Makumba** (supra).

As on the issue as to who committed the offence, we are of the considered opinion that the evidence adduced by PW.1- the victim has sufficiently proved beyond reasonable doubt that it was the appellant and no other person who committed the offence of rape to her. As the record shows, PW.1 testified that

she knew the appellant before the incident occurred. She also testified that when the appellant approached her at the kitchen of their house there was light and even when they were at the appellant's room there was light too which enabled her to identify him. In addition to that, PW.1 named the appellant to PW.2, PW.3 and PW.4 at the earliest possible time. Hence, the combination of all those factors have led us to have no flicker of doubt that it was the appellant and no other person who committed the offence of rape to PW.1.

With regard to the 2nd ground of appeal that the appellant's defence was not considered, we agree with the learned Senior State Attorney that both courts below considered his defence in their judgments. We also agree with Ms. Lilian that the appellant's defence constituted mere general denial that he did not commit the offence, hence both courts below cannot be faulted as they did consider his defence.

In the event and for the foregoing reasons, we do not find any basis for which to fault the findings of the two courts

below on all substantive matters considered herein above. The appeal is patently wanting in merit. We accordingly dismiss it in its entirety.

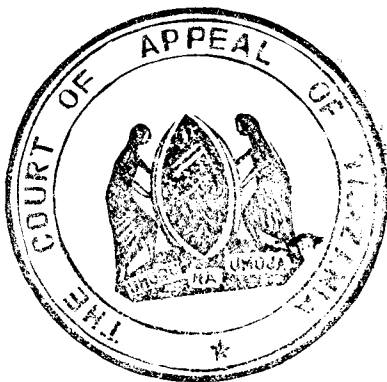
DATED at IRINGA this 13th day of August, 2015.


M.S. MBAROUK
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL