**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: KIMARO, J.A., MUGASHA, J.A., And MZIRAY, J.A.)**

**CRIMINAL APPEAL NO. 243 OF 2015**

**SHUKURU TUNUGU ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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

**(Rwakibarila, J.)**

**dated the 4th day of July, 2011**
**in**
**DC. Criminal Appeal No. 11 of 2011**

**.....**

## JUDGMENT OF THE COURT

11th & 14th April, 2016

**MZIRAY, J. A.:**

The appellant, Shukuru Tunugu was charged with and convicted of rape c/s 130 (2)(a) and section 131 of the Penal Code, Cap 16, Vol. 1 of Tanzania Laws, as amended by section 5 and 7 of the Sexual Offences, Special Provisions Act No. 4/1998. He was alleged to have carnal knowledge of Juliana Tung'ombe who was 70 years old on 9th day of October, 2005. He was sentenced to serve thirty (30) years term in jail. His appeal to the High Court was dismissed. The High Court upheld the lower court's decision and in addition enhanced the sentence by adding twelve

(12) strokes of the cane and compensation of Tshs. 2,000,000/= to the victim of the offence. Still aggrieved, he preferred this second appeal.

Briefly stated the facts of the case were as follows; that on 9/10/2005 Juliana Tung'ombe (PW1) together with her daughter Eugenia Philipo (PW2) were together at PW2's hut situated at Katumba refugee settlement residence. While there, around 08.00 pm the appellant visited them. On his arrival, he asked PW1 if he could escort her somewhere to collect her money Tsh. 300/=. Upon hearing this, PW2 intervened and asked the appellant why is he taking her mother at night and who will bring her back? The appellant responded quickly promising to bring her back. When PW2 got assured of the safety of her mother, the appellant and PW1 moved away to collect the money. But after several paces, the appellant got hold of PW1's neck and threatened to stab her with a knife in event she raised an alarm. He managed to drag PW1 down, he undressed her and penetrated his penis into her vagina while grabbing her by the neck. By coincidence PW3 passed nearby. He heard someone screaming and he walked to that direction. He found the appellant *infragrante delicto* ravishing PW1. With that intervention the appellant stood up and took to his heels. He ran after him, and luckily he apprehended him holding a

knife. The appellant denied to have committed any offence. PW1 was taken to hospital after obtaining a PF3 from Katumba Police Station.

In his defence, the appellant denied to have committed the offence. He simply narrated as to how he was arrested on 17/10/2005 by militia people in connection with the alleged offence. The appellant's memorandum of appeal raised seven (7) grounds which nevertheless boil down to four grounds. **One,** that the two courts below erred to find that the appellant was properly identified; **two,** that the trial court received the PF3 without compliance with the law; **three**, the trial court erred in giving judgment relying on the contradicting evidence of PW4 and PW2, and Lastly that the prosecution did not prove the case against him beyond reasonable doubt.

At the hearing of the appeal the appellant appeared in person fending for himself while Ms. Catherine Gwaltu, learned Senior State Attorney was for the respondent Republic. The appellant however opted for the respondent Republic to begin, alluding to respond thereafter. We allowed the learned Senior State Attorney to start.

The learned Senior State Attorney supported the conviction and the sentence imposed. Arguing on the issue of identification, the learned Senior State Attorney pointed out that the appellant was identified by all

the prosecution witnesses. It was stated by PW1 and PW2 that the appellant visited them prior to the incident. They talked before moving away with PW1, the victim and that there was a moonlight on that particular day which enabled them to identify the appellant. The learned Senior State Attorney went on to submit that the evidence of PW1 and PW2 alone was sufficient to support that the appellant was properly identified. But if need be, it was corroborated by PW3 who found the appellant *infragrante delicto* having sexual intercourse with PW1.

Arguing the 2nd ground of appeal, the learned Senior State Attorney readily conceded that, the admission of PF3 contravened the provision of section 240 (3) of the CPA. The appellant was not informed of his right to call and cross examine the doctor who examined the victim, PW1. Under the circumstance the learned Senior State Attorney prayed this Court to expunge the PF3 evidence from the record. However, the learned State Attorney stated that even without this exhibit (PF3) the remaining evidence is sufficient to prove rape. She said the best evidence in rape case comes from the victim. She referred this Court to the case of **Niyonzimana Augustine v. Republic Criminal Appeal No. 483 of 2015** (unreported).

As to 3rd ground of appeal, the learned Senior State Attorney pointed out that the contradictions in the evidence of PW1 and PW2 are minor and does not go to the root of the matter. The same will not vitiate the prosecution case. The learned Senior State Attorney made reference to the case of **Shabani Mpunzu @ Elia Mpunzu v. R, Criminal Appeal No 12 of 2002** [unreported].

On the fourth and last ground, the learned Senior State Attorney submitted that the case against the appellant was proved beyond reasonable doubt and that there is no evidence on record to the effect that the appellant was convicted because he jumped bail.

On his part, the appellant insisted and stressed that the evidence on record was not watertight for positive identification. On the contradictions of evidence adduced by PW1 and PW2, the appellant argued that the courts below did not resolve them properly.

In determining the appeal we will start tackling the second ground of appeal. It was submitted and readily conceded by the learned Senior State Attorney that there was a fault by the trial court in admitting the PF3 as exhibit. She submitted and correctly on our view, that section 240 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002 was not complied with. Citing

the case of **Niyonzimana Augustine** (supra) the learned Senior State Attorney stated that it was mandatory for the doctor who examined the victim to be summoned for cross examination by the appellant. In this case the appellant was not given such an opportunity. Since there was non compliance with S. 240 (3) of the CPA then, the evidence on the PF3 from which was wrongly admitted and relied upon by the trial court and supported by the first appellate court can not remain on record. It is accordingly expunged from the record.

With regard to the first ground of Appeal, as correctly submitted by the learned State Attorney, the appellant was properly identified by the prosecution witnesses. It was testified that prior to the incident, the appellant who was well known to the two witnesses visited PW2's hut and found PW1 there. They talked before the appellant moving away with PW1. With this evidence and the fact that at the material time there was moonlight, the question of mistaken identity can not arise.

As for the ground of appeal on the contradiction in the evidence of PW1 and PW2, before we embark on examining this ground, we feel it necessary to highlight certain principles on this subject. We must start by reiterating what was said in **Mohamed Said Matula v. Republic [1995]** TLR 3 that;

*"Where the testimony by witness contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible, else the Court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

It is therefore true that the existence of contradictions and inconsistencies in the evidence of a witness is a basis for a finding of lack of credibility, but the discrepancies must be sufficiently serious and must concern matters that are relevant to the issue being adjudicated, to warrant an adverse finding. As this Court said in **Said Ally Saif V. R. Criminal Appeal No. 249 of 2008** (unreported)

*"It is not every discrepancy in prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory that the prosecution case will be dismantled."*

Minor contradictions and inconsistencies on trivial matters which do not affect the case of the prosecution should not be made a ground on which the evidence can be rejected on its entirety.

Now in the instant matter do the contradictions pointed out by the appellant really go to the root of the matter? We think not. PW1 and PW2 narrated how the appellant visited them and asked PW1 to follow him to collect her money. PW1 obliged and on their way the appellant raped PW1. Whether the money was for tobacco or liquor that can not vitiate the case.

That said and on the basis of the evidence that remained on record, it goes without saying that the prosecution proved the case against the appellant beyond reasonable doubt and since there is no evidence on record that the appellant was convicted because he jumped bail as alleged then; the complaint to that effect must fail. For all the above reasons, their appeal can not succeed. It is dismissed in its entirety.

DATED at MBEYA this 13th day of April, 2016.

N.P. KIMARO
**JUSTICE OF APPEAL**

S.E.A. MUGASHA
**JUSTICE OF APPEAL**

R.E. MZIRAY
**JUSTICE OF APPEAL**

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

E. Y. Mkwizu
**DEPUTY REGISTRAR**
**COURT OF APPEAL**