IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA. J.A.)

CRIMINAL APPEAL NO. 332 OF 2015

BABU IDD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Arusha

(Moshi, J.)

Dated the 27th day of January, 2015
in
Criminal Appeal No. 83 of 2014

.....

JUDGMENT OF THE COURT

18th & 23rd February, 2016

MUSSA, J.A.:

In the Resident Magistrate's Court of Arusha, the appellant was arraigned for two counts, namely, rape and an unnatural offence contrary to, respectively, section 130 (1) (2) (e) and 154 (1) (a) of the Penal Code, Chapter 16 of the Revised Laws. He denied the charge but, at the conclusion of the trial, the appellant was found guilty and convicted for both counts. Upon conviction, he was sentenced to life imprisonment on

each count, but the respective sentences were ordered to run concurrently. Dissatisfied, he preferred an appeal to the High Court which was, however dismissed in its entirety (Moshi, J.). Still aggrieved, the appellant presently seeks to impugn the decision of the first appellate court through a memorandum which is comprised of five (5) points of complaint.

During the trial, the case for the prosecution from its two witnesses was to the effect that on the 6th September 2013, at Ngusero area, within Arusha City, the appellant forcefully engaged a certain Martha James, a five years old child, in both formal and anal sex. The alleged victim who was featured as prosecution witness No. 2 (PW2) was remarkably brief in her testimony and the relevant portion of what she testified may be recited in full:-

> *"...the accused did bad things (Kinyuma) to me. He called me where I was playing, I was alone. He said he wanted to send me at shop. He took me to a house lived by bachelours. He told me to undress my underpants. He said to me to lay on bed. He then undressed his trouser, underpants and shirt.*

> ***He then did bad act to me I felt pains from my back.*** *I didn't alarm since he threatened to kill me. The accused fellow bachelours were not present. I wore my clothes and went home.* [Emphasis supplied.]

The extract is undermined by several grammatical mishaps but, we should suppose, the catch phrase comes out clearly and it is that the appellant did "*a bad act*" from which the alleged victim felt pains on her back. As to what exactly was that bad act and which particular part of her back was affected, the girl did not elaborate. There was some more prosecution evidence from the mother of the victim, namely, Happiness James (PW1) who was just as brief. She told the trial court that, on the fateful day, her daughter arrived back home a little late from a playing spree. She was limping and, what was more, the girl was discharging faeces from her anus uncontrollably. Upon being asked as to what happened, Martha informed her mother that she stumbled and fell whilst in a toilet. Strangely, PW1 found no immediate cause for alarm but, she was later concerned upon noticing that the uncontrolled excrement continued for four days in a row. The mother took her daughter to hospital where the

latter is said to have revealed that she was actually raped and sodomised by the appellant. The appellant was then formally arraigned and that concludes the prosecution version which was unfolded during the trial.

In reply, the appellant was even more brief. On the fateful day, he said, whilst he was at his home, he was abruptly surrounded by an unruly crowd of people who were wailing about and calling him a thief. The uncontrollable mob apprehended and took him to a police station onwards to court where he was implicated upon the accusation giving rise to the present appeal. Thus, although he did not clearly express so, the appellant completely disassociated himself from the prosecution accusation. But, as we have already intimated, the trial court, as well as the first appellate court were not, in the least, persuaded by the appellant's defence and the two courts below, respectively, convicted him and sustained the conviction to the extent we have indicated.

At the hearing before us, the appellant who was fending for himself, unrepresented, fully adopted his memorandum of appeal. He, however, deferred its elaboration to a later stage, if need be, after the submission of the respondent Republic. As it were, the latter had the services of two Law

Officers, namely, Mr. Augustine Kombe, learned Senior State Attorney and Ms. Alice Mtenga, learned State Attorney.

Initially, Ms. Mtenga who argued the appeal braced herself to resist it but, after a brief dialogue, she made an about turn and declined to support the conviction and sentence which were meted out against the appellant. In her refined submission, the learned State Attorney contended that the adduced evidence fell short of proving an essential element of both rape and the unnatural offence, namely, penetration. That being so, she concluded, it cannot be said that the prosecution established its case beyond all reasonable doubt. Having heard Ms. Mtenga submitting in support of his appeal, the appellant refrained from making any rejoinder.

Upon our careful consideration, we agreed that Ms. Mtenga could not have been more right. In this regard and, as hinted upon, the alleged victim simply claimed that the appellant did *"a bad act"* without further elaboration. What is obviously amiss from this bare claim is the act of *"penetration"* which is a necessary ingredient for both rape and sodomy. Simply put, *"penetration"* means the act whereby the male sexual organ enters the female sexual organ and, such entrance, however slight, is

sufficient to constitute the sexual intercourse necessary to the offence. Of recent, in Criminal Appeal No. 103 of 2012 – **Hassani Bakari @ Mamajicho V The Republic** (unreported), the Court made the following observation:-

> *"...It is therefore common knowledge that when people speak of sexual intercourse they mean the penetration of the penis of a male into the vagina of a female. It is now and then read in court records that trial courts just make reference to such words as sexual intercourse or male/female organs or simply to have sex, and the like. Whenever such words are used or a witness in open Court simply refers to such words, in our considered view, they are or should be taken to mean the penis penetrating the vagina..."*

Indeed, that is the current stance of the Court but, for sure, it cannot be extended to situations, such as the present, where the alleged victim does not make reference to sexual intercourse, male/female organ and the

like, but simply refers to "*a bad act.*" Such reference cannot be said to be evidence constituting penetration and for that reason alone, it is our settled view that the conviction cannot be upheld.

In the result, we allow this appeal, quash the conviction and set aside the sentence which was meted out against the appellant. He is to be released from prison custody forthwith unless if he is held there for some other lawful cause. Order accordingly.

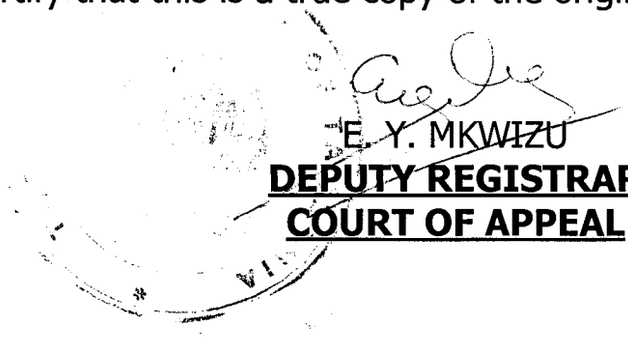
DATED at **ARUSHA** this 22nd day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL