

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

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 540 OF 2015

MISAGO NDENDAKUMANA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Khaday, J.)

**dated the 31st August, 2015
in
Criminal Appeal No. 49 of 2014**

JUDGMENT OF THE COURT

8th & 11th February, 2016

KILEO, J.A.:

The appellant Misago Ndendakumana was charged with and convicted of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code in the District Court of Ngara at Ngara. He was sentenced to life imprisonment. He lost his appeal to the High Court and has come to the Court on a second appeal.

His memorandum of appeal consists of the following two grounds:-

- 1. That the Hon appellate judge erred as penetration was not well determined /established by the prosecution side.*
- 2. That, the Hon trial (sic!) judge erred by acting on the appellant's presence at the scene of crime.*

The appellant appeared before us in person and fended for himself while the respondent Republic was represented by Mr. Hashim Ngole, learned Principal State Attorney.

The facts leading to appellant's conviction are simple and straight forward. They show that on the day of the incident the victim of the crime, Kudra Nuru who testified as PW1 and who was then aged about nine years was sent by her aunt to the house of their neighbor, one Bakunda to ask for a brand of fire. At the house she found the appellant who took her inside and instead of giving her the brand of fire he raped her. The testimony of PW1 was corroborated by that of PW2, the victim's aunt who claimed to have found the appellant on top of her niece after she had gone to Bakunda's house in search of the child whom she was informed was in that house. PW6 was one of the women who examined the victim and found her bleeding from her vagina. PW2, PW3, PW4, PW5 (a ten cell leader) and PW6 all testified to the effect that when the appellant was

confronted he admitted to have raped the child and claimed that it was "by accident".

The appellant's defence at the trial was a general denial of culpability.

At the hearing of the appeal the appellant who submitted after the learned Principal State Attorney's submission (by his own choice), did not have much to say save to argue that conviction ought not to have been sustained as there was no medical evidence tendered in the trial court to prove that there was penetration which is an essential element in a case of rape.

On the other hand, Mr. Ngole urged us to dismiss the appeal as there was sufficient evidence which connected the appellant to the commission of the crime. Referring to our decision in **Selemani Makuba v. R**, Criminal Appeal No. 94 of 1999 (unreported), the learned Principal State Attorney argued that even in the absence of the PF3 there was ample evidence from the victim herself and other prosecution witnesses which established that there was penetration. He therefore asked us to dismiss the first ground of appeal as it had no merit.

As for the second ground of appeal Mr. Ngole argued that the fact of the appellant's presence at the scene of crime was not denied by the appellant who said in his defence that he was living in Bakunda's house. Such admission furthered the case for the prosecution, the learned Principal State Attorney argued. Bakunda's house is the place in which the crime is said to have been committed.

This matter need not detain us. The appellant in his first ground of appeal has complained that penetration was not proved and therefore he ought not to have been convicted. He bases his complaint on the absence of the medical report showing that there was penetration. It is true that there was no PF3 tendered in court at the time of the trial. Going by the record it appears that the appellant was first charged and convicted in a case which was later set aside by High Court and a *de novo* trial ordered. The PF3 was tendered in the first case and efforts to trace it for purposes of the *de novo* trial were not successful. The question before us is whether the absence of the PF3 in the circumstances of this case defeated the case for the prosecution. In the **Selemani Makumba** case referred to by the learned Principal State Attorney the Court stated:

"A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is unconsented sex, even if bruises are observed in the female sexual organ. 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".

In the case at hand (which concerns statutory rape), the evidence of penetration was overwhelming, notwithstanding the absence of the PF3. The victim explained very clearly how the appellant inserted his male organ into her vagina causing her pain. She was examined by some women including PW6 who found her bleeding from her vagina.

We agree with the learned Principal State Attorney, and we are settled in our minds that penetration was sufficiently established. The first ground of appeal completely lacks any merit and we accordingly dismiss it.

As for the second ground concerning the appellant's presence at the scene of crime, he himself testified to the effect that he was staying in Bakunda's house. There was sufficient evidence that the crime was committed in Bakunda's house and that it was the appellant who

committed it. Furthermore, there was evidence from five prosecution witnesses who testified to the effect that when the appellant was accosted he admitted to have raped the child but said it was "by accident" (bahati mbaya), whatever he meant. Of course accidental raping is unheard of in our criminal justice system.

The above having been said and done, we can come to no other conclusion but that the appeal has been filed with no sufficient cause for complaint. In the end we dismiss it.

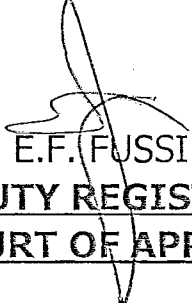
Dated at Bukoba this 09th day of February 2016.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL