

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

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

**CRIMINAL APPEAL NO. 383 OF 2015**

**SHIJA JUMA ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Decision of the High Court of Tanzania at Bukoba)**

**(Khaday, J.)**

**Dated the 29<sup>th</sup> day of October, 2014**

**in**

**Criminal Appeal No. 40 of 2012**

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**JUDGMENT OF THE COURT**

16<sup>th</sup> & 22<sup>nd</sup> February, 2016

**MJASIRI, J.A.:**

In the District Court of Chato District at Chato, the appellant, Shija Juma was charged with the offence of rape contrary to section 130(1)(2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002. He was convicted as charged and was sentenced to life imprisonment. Being aggrieved with the decision of the District Court, he appealed to the High Court. His appeal to the High Court was unsuccessful, hence his second appeal to this Court.

The background to this case is rather sad and pathetic. It was the prosecution's case that the appellant raped a three year old child. The little girl had accompanied his mother PW1 to the farm. While her mother was working in the farm and the little girl was eating yams, along came the appellant, who was PW1's neighbour. He volunteered to take the little girl home. The mother readily allowed her daughter to leave with the appellant. Nor sooner had they left she came back to the farm crying. She was holding her skirt and walking with difficulty, in short paces. She informed her mother that she has been raped by the appellant. PW1 shocked and in disbelief went straight to the appellant's house, but did not find him at home. She then went to Kibehe shopping centre where she found the accused's father, the accused and her husband. She narrated to them what transpired. When she examined her daughter she found sperms all over her legs. PW1 took her child to Kibehe dispensary where she was examined by a medical officer and was then referred to Chato Hospital for medical treatment and observation. She produced a PF 3 report in Court. She also reported the incident to the Village Executive Officer (VEO) who ordered the appellant's arrest. The appellant while being held under the custody of the VEO broke the lock and ran away but was eventually arrested by the victim's father. Appellant was granted bail,

but jumped bail in the course of the trial before the close of the prosecution case. He was therefore convicted and sentenced in absentia. In addition to the evidence of PW1, the victim's mother, Dr. Christopher Matola from Chato District Hospital testified in court. He confirmed that the child was raped. Upon examining the victim, he observed that there were swellings in her internal female organs caused by a blunt object. He tendered a PF3 report which was admitted as Exhibit P.A. The victim could not testify given her tender age. When she was put to the witness stand it was established that she neither knew the nature of an oath nor understood the duty of speaking the truth.

The appellant presented in Court a four – point memorandum of appeal. However the major grounds of complaint can be summarized as follows:-

- 1. The appellant was not accorded a right to be heard.*
- 2. The charge of rape was not proved in accordance to the standard required under the law.*

At the hearing of the appeal the appellant fended for himself and had no benefit of a legal counsel. The respondent Republic was represented by Mr. Athumani Matuma, learned Senior State Attorney. The appellant being unrepresented did not have much to say when called upon to present his submissions. He opted to let the learned Senior State Attorney to address the Court first.

Mr. Matuma supported the conviction of the appellant and the sentence. On the complaint that the appellant was denied the right to be heard, Mr. Matuma submitted that this ground has no basis. The appellant applied for bail and was granted bail accordingly. However, he abused this right and opted to jump bail, hence his absence in court during the trial was of his own making. Hearing of the case was adjourned for more than six (6) times compelling the prosecutor to request the court to proceed under section 226 (2) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). The application was duly granted by the trial court given the continuous absence of the appellant without any valid excuse. Mr. Matuma submitted further that after the appellant was arrested nearly two years after the *ex parte* judgment was delivered, he was promptly taken before the trial court in order to give him a chance to explain himself. He

however failed to provide any valid explanation in respect of his non – appearance in court. Mr. Matuma relied on the cases of **Marwa Mahendo v. Republic** (1998) TLR 249 and **Olongo Lemuna and Another v. Republic** (1994) TLR 54.

In relation to the offence of rape, Mr. Matuma submitted that the prosecution evidence against the appellant was overwhelming. PW1 clearly established in her testimony that her child (the victim) was raped. She narrated how the child came back crying informing her that the appellant had raped her. The child was walking with difficulty. When she examined her, she found sperms all over her legs. The evidence of PW5, the medical doctor also corroborated her evidence. PW1 gave her testimony before the appellant jumped bail. The appellant on cross examining PW1 did not deny that he left with the victim from the farm.

Mr. Matuma reiterated that PW1 and the rest of the prosecution witnesses were credible witnesses.

The appellant in reply did not have much to say. He simply stated that he opposed all the arguments raised by the learned Senior State Attorney.

We on our part, after carefully reviewing the record of appeal, the memorandum of appeal and submissions by the learned Senior State Attorney, are of the firm view that on the charge of rape, there is overwhelming evidence that the offence of rape was proved beyond reasonable doubt. The sequence of events as narrated by PW1, provided a clear and concise account of what had transpired. Her account is fully supported by the testimony of PW4, the medical doctor. We therefore have no basis of disturbing the concurrent findings of the facts of the two courts below. See **Dikson Elia Shapwata and Another V. Republic**, Criminal Appeal No. 92 of 2007 CAT (unreported). Both the trial court and the first appellate court reached a concurrent finding that the appellant had sexual intercourse with the victim. The two courts below reached that finding after believing the evidence of PW1 which was materially corroborated by PW4.

Section 130(4) (a) of the Penal Code Cap 16, R.E. 2002 provides as follows:-

*"(4) For the purposes of proving the offence of rape.*

*(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."*

In Criminal Appeal No. 170 of 2006, **Mathayo Ngalya @ Shabani v Republic** CAT (unreported) this Court stated as follows:-

*"The essence of the offence of rape is penetration. For the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence."*

It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. What is important is credibility and reliability of the evidence. See **Goodluck Kyando v. Republic** (2006) TLR 365 and **Yohanis Msigwa v. Republic** (1983) TLR 52.

The appellant's conduct left a lot to be desired. It is on record that he jumped bail for almost two years. He also escaped when being held by the VEO prior to being taken to the police. An adverse inference can be drawn against the appellant for running away.

On the right to be heard, we cannot emphasize this fundamental right of the accused person. It is a principle of natural justice and failure to accord an accused person such right renders all proceedings before the court a nullity.

However in the instant case the complaint raised by the appellant has no basis. The appellant jumped bail and did not appear in court for hearing before the close of the prosecution case. The case proceeded in his absence.

The issue for determination and adjudication is whether or not the conviction of the appellant was proper in the circumstances. Section 226(1) of the CPA provides as follows:-

*"If at the time or place to which the **hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present;** and if the complainant does not appear, the court may dismiss the charge and acquit*



*the accused with or without costs as the court thinks fit."*

[Emphasis provided].

Section 226(2) provides as under:-

*"If the court convicts the accused person in his absence, **it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and he had a probable defence on the merit.**"*

[Emphasis provided].

Section 226(2) therefore enables proceedings which were preceded with the conviction from the stage before the close of the prosecution case to be reopened if the court was satisfied that the accused's absence was justified.

The appellant was arrested nearly two years after the judgment was pronounced. He was taken before the trial court in line with the requirements under section 226(2) of the CPA in order to explain his absence. He failed to come up with any viable explanation for his absence. He was therefore not denied his fundamental right to be heard as claimed.

See - **Marwa Mahende v Republic** (1998) TLR 219 and **Olonyo Lemuna and Another v. Republic** (1994) TLR 54.

In view of what has been stated above, this ground has no basis.

In the result we find that the appeal has no merit. We hereby dismiss the appeal. Order accordingly.

**DATED** at **BUKOBA** this 19<sup>th</sup> 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**