IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 286 OF 2015

YUSTINIAN MULOKOZI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Matogolo, J.)

dated the 17th May, 2015
in
Criminal Appeal No. 7 of 2015

JUDGMENT OF THE COURT

12th & 16th February, 2016 &

KILEO, J.A.:

The appellant Yustinian s/o Mulokozi was charged with, and convicted of rape contrary to section 130 (2) (e) and 131 (1) of the Penal Code, Cap 16 R. E 2002 in the Resident Magistrate's Court of Bukoba at Bukoba. He was sentenced to thirty years imprisonment and eight strokes of the cane. His appeal to the High Court was unsuccessful hence this second appeal.

In his memorandum of appeal the appellant listed four grounds of appeal of which in essence he was challenging the linkage of the doctor's evidence to the commission of the crime and the quality of the rest of the evidence which formed the basis of his conviction.

The appellant appeared in person at the hearing of his appeal while the respondent Republic was represented by Mr. Hashim Ngole, learned Principal State Attorney.

The facts of the case are simple and straight forward.

On the day of the incident, the victim who testified as PW1 was sent by her mother to their pastor's home. This was around 16.00 hours. She did not find the pastor at home so she decided to go back home. On her way back she decided to fetch some firewood. While in the process of fetching the firewood the appellant who was well known to her appeared. At first the appellant asked her what she was doing but no sooner than she had answered did the appellant kick her down holding her by the neck and covering her mouth and eyes. He removed her underwear and raped her. Somehow she managed to raise an alarm which prompted PW2 and PW3 to go towards the place from which the alarm had been raised. As they did

so they saw the appellant running away from the scene. PW1 told them that she had been raped by the appellant. She was clad only in a blouse and underwear and one of the women had to find a wrapper for her. She was seen bleeding in her mouth and nose as well as her private parts.

The matter was reported to the police and thereafter PW1 was taken to Kaibanja Dispensary where she was attended by PW5 Adelina Buberwa, a Medical Officer. According to the witness upon her examination she found bruises on the victim's private parts. She tendered in court as exhibit P1 the PF3 that she filled in. At the trial court the appellant disassociated himself with the commission of the crime and raised the defence of alibi which was however rejected by the trial court.

When the appellant was called upon to address us on his grounds of appeal he opted to have the learned Principal State Attorney address us first.

Submitting on the first and second grounds of appeal both of which were challenging the medical report, the learned Principal State Attorney maintained that even if the PF3 was to be put aside there was sufficient evidence which established the prosecution case without leaving any

reasonable doubt. The learned Principal State Attorney referred us to decisions of the Court in **Tatizo Juma v. Republic**, Criminal Appeal No 10 of 2013 and **Abdallah Mohamed v. Republic**, Criminal Appeal no. 2009 (both unreported) where the Court held that the best evidence to prove the offence of rape is that of the victim herself.

As for the quality of the evidence that was tendered at the trial, Mr. Ngole submitted that it was not hearsay nor was the evidence only of a single witness but that there was sufficient evidence to sustain the conviction.

In response to the learned Principal State Attorney's submission the appellant argued that since the doctor did not find any sperms or blood and the rape was not witnessed he ought not to have been convicted.

The matter need not detain us. The issue before us is whether it was established that PW1 was raped and whether it was the appellant who raped her.

We are satisfied that the evidence adduced at the trial overwhelmingly established that PW1 was raped by the appellant. Not only was there the evidence of PW1 herself who explained clearly how she was

assailed by the appellant but there was also the evidence of PW2 and PW3 who saw the appellant running away from the scene of the rape. The crime was committed in broad daylight. Their testimonies could not be said to be hearsay because they went to the scene in response to the alarm that was raised by the victim. The appellant was known to them prior to the incident. The witnesses were found to be credible and we are settled in our minds that there was no misapprehension of the evidence to warrant this Court to interfere with the finding of credibility by the courts below. Further, the fact that there were no sperms or blood noted in the victim's private parts does not in itself mean that the victim was not raped. The learned first appellate judge quite properly explained the position with regard to the proof of penetration in rape cases and we take the liberty to reproduce what he said. His statement appears at page 38 of the record where he said:

> *"...and for purposes of proving rape, it is not necessary that the rapist must ejaculate and sperms must be observed in the victim's vagina. What matters is penetration. The same suffice to prove rape whatever slight it is. This is clearly provided of under s. 130 (4) of the Penal Code Cap 16 R. E. 2002"*

The provision that the learned judge made reference to states:

"Section 130 (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;"

Looking at the evidence of the victim it is obvious that she underwent a very traumatic experience. Not only was she subjected to grave sexual assault and sustained injuries on her private parts and other parts of her body but she also explained how, involuntarily, she passed out faeces in the ordeal.

All in all, having given the matter the consideration that it deserves, we cannot, but agree with the learned first appellate judge that the evidence at the trial was watertight and led to the irresistible conclusion that it was the appellant and nobody else who raped PW1. The findings of the High Court in sustaining the conviction entered by the trial court cannot be faulted.

In the end we find the appeal by Yustinian Mulokozi to be lacking in merit and for this reason we dismiss it.

DATED at **BUKOBA** this 15th 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