

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**(CORAM: KILEO, J.A., ORIYO, J.A., JUMA, J.A.)**

**CRIMINAL APPEAL NO. 595 OF 2015**

**ISSA SAID ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of**

**Tanzania at Dodoma)**

**(B.M.A, Sahel, J.)**

**dated the 28<sup>th</sup> day of October, 2015**

**in**

**Criminal Appeal No. 22 of 2015**

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**JUDGMENT OF THE COURT**

25<sup>th</sup> & 27<sup>th</sup> April, 2016

**KILEO JA:**

The appellant, Issa Said was charged with and convicted of the offence of rape contrary to section 130 (1) and 131 of the Penal Code Cap 16 R. E. 2002. The District Court of Kondoa which held the trial sentenced him to serve thirty years imprisonment. His first appeal before the High Court was unsuccessful hence this second appeal which is against both conviction and sentence.

It was alleged that on 5<sup>th</sup> September, 2011 around 13:00 hours at Tungufu Village within the District of Kondoa in Dodoma Region, the appellant did have carnal knowledge with one Pascarina d/o Augustino a girl of 18 years without her consent.

The brief facts of the case as they were revealed at the trial were to the effect that on the day of the incident at around 13.00 hrs., PW1, the victim of the crime, was walking home from Kondoa town. On the way, the appellant appeared, grabbed her neck threw her to the ground and started to undress her; then undressed himself and began to rape her. PW2 appeared at the scene wanting to help PW1 but he was threatened by the appellant with a panga. PW2, fearing for his life ran away while the appellant continued raping PW1. After he got satisfied with the act, the appellant fled the scene. According to PW3, on the material date while she was at home PW1 and one Said Cheusi (who did not testify) went to her and informed her that PW1 was raped by the appellant. PW1 was thereafter taken to Kondoa District Hospital where she was examined by PW4. According to the PF3 which PW4 tendered in court as exhibit P1 there were multiple bruises on the vulva and vaginal walls as well as sperms in the victim's vagina.

The appellant denied involvement in the crime and in his defence claimed that he was nowhere near the scene of crime at the time when it was alleged to have been committed.

The appellant listed four grounds of appeal in his memorandum, however, his major complaint centered on insufficiency of evidence to sustain the conviction.

At the hearing of the appeal the appellant appeared in person and was unrepresented. The Republic was represented by Mr. Morice Sarara, learned State Attorney. When we called upon the appellant to address us on his grounds he opted that the respondent Republic submits first.

Mr. Morice Sarara for the respondent Republic, at first supported conviction and sentence but upon reflection he changed his stance and conceded that the evidence on record did not suffice for the establishment, beyond reasonable doubt, of the charge against the appellant.

The main issue in this appeal is whether the case for the prosecution case was established to the standard required by law which is beyond reasonable doubt. The circumstances of the case, in our considered view, are such that credibility of the witnesses was a crucial matter for determination.

We are mindful of this Court's decisions where it has been stressed that assessment of credibility of witnesses is the domain of the trial court. This is the general rule. That a second appellate court in our jurisdiction should generally confine itself to matters of law is borne out of the provisions of section 6 (7) (a) of the Appellate Jurisdiction Appellate Jurisdiction Act, Cap 141, R. E. 2002 which provides:

**“(7) Either party–**

**(a) to proceedings under Part X of the Criminal Procedure Act may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact;”**

However, where there has been a misapprehension of the evidence or failure to take material point or circumstance into account an appellate court may interfere with the finding of facts. See for example: **Issa Said Kumbukeni**, [2006] T.L.R. 227, **DPP v. Jaffari Mfaume Kawawa**[1981]T.L.R.149, **Benjamin Nziku v Republic**, Criminal Appeal No. 151 of 2010 (unreported), **Eriot Ezekiel Diombe v. Republic**, Criminal Appeal No. 248 of 2013 (unreported). In Ali **Abdallah Rajab v Saada Abdallah Rajab and others** [1994 TLR 132] (CA) the Court held:

- (i) *Where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion;*
- (ii) *Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record.*

Also in Criminal Appeal no. 88 of 2011, **Samwel Daud and Mwita Mitiro**

**v. Republic** (unreported) we stated as follows:

*"This Court has established through case law that in a second appeal, such as this one, we can interfere with the findings of fact by the courts below if we are satisfied that the findings of fact were based on a disregard of an established principle of practice, misapprehension of evidence, omission to consider available evidence, a misapprehension of applicable law and/or misdirections or non-directions on the evidence."*

We have given the matter due consideration and in our opinion, the circumstances of this case justify our interference with the findings of fact of the two courts below. We are convinced that the two courts below did not properly evaluate the evidence which was tendered at the trial. The rape was alleged to have been committed at 13.00 hrs. in broad daylight.

PW1 claimed that as she was on the road going home she met with the appellant who grabbed and undressed her, as well as removing his trouser and proceeded to rape her to his satisfaction. It was like the rape was committed in public. The question to ask is: Is it conceivable that someone in their right senses would just grab someone and rape her in the middle of the road in broad daylight? That is not all, according to PW2 he witnessed the victim being raped but after he was threatened by the appellant he decided to '*run away to home*' and later someone told him that a certain girl had been raped. Again, one wonders how someone who had just witnessed a serious crime being committed in his sight would just go home as if nothing had happened without immediately raising an alarm or at least reporting to authorities. PW3 to whom the incident was reported claimed that PW1 told her that she had been raped by a one eyed man. PW1 herself however did not describe her assailant in her testimony in court.

It is our considered view that the scenario above should have alerted both courts below to treat the testimonies of the witnesses with great caution. It may be possible that what swayed the prosecution to link the appellant with the crime is because he was considered to be not of good

character in the village as claimed by PW3. Be it as it may, we are satisfied that the lower courts failed to properly analyze the evidence tabled by the prosecution. If they had, we have no doubt that they would have given the benefit of doubt to the appellant.

In the result we find merit in the appeal by Issa Said. We accordingly allow it. Conviction entered is quashed and sentence imposed is set aside. The appellant is to be released from custody forthwith unless he is therein held for some lawful cause.

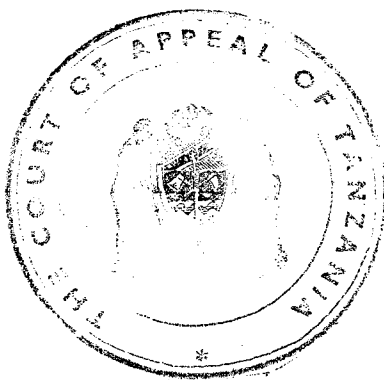
**DATED at DODOMA** this 26<sup>th</sup> Day of April 2016.

E. A. KILEO  
**JUSTICE OF APPEAL**

K. K. ORIYO  
**JUSTICE OF APPEAL**

I. H. JUMA  
**JUSTICE OF APPEAL**

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



  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**