IN THE HIGH COURT OF TANZANIA
AT BUKOBA
APPELLATE JURISDICTION

HIGH COURT CRIM. APP. NO. 38 OF 2006
(Arising from Karagwe District Court Crim. Case No. 103 of 2002 - before Komba D.D. Esq. DM).

DAMIAN RUHELE ... ... APPELLANT
Versus
REPUBLIC ... ... RESPONDENT
13/07 & 19/11/07

JUDGMENT

Lyimo, J.

The Appellant Damian s/o Ruhele was charged before the Karagwe District Court in Criminal Case No. 103 of 2002 with the Offence of Attempted Rape, contrary to Section 132 (1) as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998.

The particulars of the Offence stated that the appellant on 23rd April 2002, at about 12.00 hrs. at Bisheshe Village, Karagwe District, Kagera Region, did attempt to rape one MARIANTHONIA d/o OBED without her consent. He was convicted and sentenced to serve thirty (30) years imprisonment. He is now appealing against the conviction and sentence.

The appellant who was unrepresented, filed five (5) grounds of appeal contesting his innocence. He has complained inter alia, that the evidence by Pw1 the complainant should not be believed. That, the husband of Pw1 should have been summoned to give evidence. Further, that the trial magistrate erred to convict him on the uncorroborated evidence of Pw1. The appellant also complained that the prosecution had not proved its case to the required standard.

Mr. Kameya, the learned State Attorney who appeared for the Respondent, strongly resisted the appeal and prayed for its dismissal for lack of merits. I will revert to his submissions later in the course of this judgment.

The facts of the case could be stated very briefly as follows:-

The Complainant Maria Tonia d/o Obed –Pw1 - a resident of Rwamgondo and knew the appellant as a resident of Kaku Village. Pw1 testified that on 23/03/2002 at noon, she was working in her shamba. Another villager, one Deogratias Mibamoko was also working in his shamba. She informed the court that while she was working in her shamba, the appellant appeared and greeted her. He said to her "Pole na kazi shemeji", to which she retorted why call me "shemeji?" According to Pw1, the appellant then went close to her and uttered the following words:-

"Leo utanipa tu kuma yako."

Thereafter, the appellant is reported to have grabbed her and threw her down. Pw1 struggled to get up but the appellant forced her down and undressed her. At the same time the appellant undressed. Pw1 went on to state that the appellant laid on her and she raised the alarm, whereby one Deogratias Mibanguko came to rescue her. When the appellant noticed Mibanguko coming, he rose and took off uttering the following words:-

"Chukua lakini utakapokufa kitaoza".

Pw1 went to report to her husband on what had befallen her and the matter was subsequently reported to the Police. Pw1 was issued with a PF3 for Medical Examination, and the medical report was tendered as Exh. P1. Further, Pw1 tendered in court underwear and an underskirt, which were collectively marked as Exh. P2. The Court observed that the exhibits were torn.

Deogratias gave evidence as Pw2. He is known to both the appellant and the complainant. The Complainant Pw1 is his neighbour. He was working in his shamba which is near to that of Pw1 and this is what he had to say:-

> "*Ön 23/03/2002, around 12.00 I was working into my shamba. The shamba is close to the church. While working into my shamba I head shouts from a nearby shamba. I went to the place the shouts came. I met the accused to be necked (sic) and Pw1 was also necked (sic). I saw the accused raping Pw1. I saw it with my eyes. I was surprised to see him (the accused) doing that act.I recall Pw1 under wear and skirt was torn when undressing her. As I saw that act, I also shouted for help because I am disabled person. The accused heard my shouts; he woke up and ran away...*' (End of quote).

After the court had recorded the evidence of the two prosecution witnesses, the prosecution closed its case and the appellant was put to his defense.

In his short defense, the appellant denied to have attempted the rape of Pw1. He informed the court that sometime on 11/03/2002 at around 17.30 hrs.; he was on his errands when he passed by the house of Pw1. That Pw2 was sitting outside and upon Pw2 seeing him, he called out for the husband of Pw1 telling him to come out and see the person against whom he was going to testify against. That the husband of Pw1 came out wielding a spear which he threw at him and also a child of Pw1 came out throwing stones, but luckily he was not harmed. While running for safety, the appellant met with one Joabison Fideli, to whom he narrated the whole story. He denied to have gone to the shamba as testified to by Pw1 and Pw2.

The appellant called as his defense witness one Philemon Byabachwezi - Dw2. This witness informed the Court that on 11/03/2002 at around 21.00hrs. the appellant went to his house and informed him that the husband to Pw1 had wanted to strike him with a spear, and since that time they have been staying in the same homestead. That he heard about accused's attempted rape and he knows nothing about it. Under cross-examination, the witness stated that he had been staying withDw1 from 1989 and that Dw1 was his employee. He has two houses and Dw1 used to stay in his second house.

In its judgment, the trial court reviewed the evidence as given by all the witnesses. The trial court found the prosecution witnesses to be credible and after revisiting the elements of the offence of attempted rape, found the appellant guilty as charged and sentenced him accordingly.

As I haven indicated above, the appellant has challenged the decision of the trial magistrate on three main fronts. First, that as the prosecution had not summoned the husband of Pw1, then Pw1 should not be believed. That her evidence required corroboration and that the magistrate was wrong in holding the witnesses credible. This ground of appeal can be disposed off briefly.

In his defence, the appellant asserted that there were grudges between him and the husband of Pw1. He tried to show that as early as 11/03/2002 Pw2 was prepared to testify evidence against him and that is why he alleges that the omission to summon the husband of Pw1 was fatal. I will now revisit the submissions made by the state attorney in rebuttal to the assertions of the appellant.

The learned state attorney submitted, and it was in evidence, that both the prosecution witnesses and the complainant were residing almost in the same place. They were known to each other. The offence was committed in broad day light at 12.00 noon and in the absence of mistaken identity of the assailant; there is hardly room to doubt the

testimony of the two main witnesses. As correctly submitted by the learned state attorney, these witnesses were familiar and known to each other. The appellant did not challenge those facts, and as such we have no room to doubt their credibility. It is inconceivable how Pw2 on 11/03/2002 would have prepared to give evidence against the appellant for an offence which was to be committed on 24/03/2002.

The second leg of the complaint by the appellant was in respect to failure of the prosecution to summon the husband of Pw1. The learned state attorney submitted that in view of what was testified to by Pw1 and Pw2, such evidence by the husband would have been of little or no value, since it would have been hearsay evidence. I can not but agree. The non production of the husband of Pw1 as a witness did not occasion failure of justice. Pw1 complained to her husband, who later took the matter to the Police and which led to Pw1 being issued with Exhibit P1. In a way, Pw1 promptly reported the matter and this led to the arrest of the appellant. As it is, the complaint is rejected as it has no legs to stand on. I will now consider the other ground of appeal that the evidence of Pw1 and Pw2 was contradictory.

It will be recalled that Pw2 stated that when he was working in his shamba, he heard someone shouting for help. He went to the direction of the alarm and he saw the appellant raping Pw1. Both were naked. That Pw2 himself had to raise the alarm to call for help as he is a disabled person, walking with assistance of crutches. The appellant ran away while at the same time saying the words alluded to above.

Going by the evidence of Pw1 and Pw2, and taking into account the medical report exhibit P1. it is not difficult to observe that these two witnesses were not contradictory. Pw1 gave evidence on how she had to struggle with the appellant who wanted to rape her. Pw2 testified that he saw with his own eyes that the appellant was on top of the complainant, skirt and underwear torn. The learned state attorney spent time on elaborating on the provisions of Section 132 (2) (a) and (b), and submitted that Pw1 and Pw2 could not have contradicted themselves on what actually happened on the date of the incident. He pointed out that although Pw2 testified that he saw the appellant raping Pw1, technically the offence committed was attempted rape. As far as exhibit P1 shows, the complainant suffered pains on the neck. The report is silent of any other observations, and as she had been referred to the doctor on allegations of having been raped, it must be held that no other harm or injury was detected. Further, Pw2 witnessed the scuffle between the appellant and Pw1 and when the appellant noticed

that people were converging on to the scene, he ran away saying ***"chukua lakini utakapokufa kitaoza"*** which the trial magistrate ruled that they were spoken in desperation for not having fulfilled his mission. As it were, the trial court found and correctly so, that the two prosecution witnesses were credible. I have perused the record of the trial court, and I have not been able to fault the trial court on the question of the credibility of those witnesses. It is a trite principle of law and procedure that the trial court is one which is best suited to determine the credibility of a witness – see the case of

Augustino Kaganya &Others*, 1994 TLR 16 (C.A.)** and it is the rule that the trial court's finding on credibility of a witness is binding on an appellate court unless there are circumstances which call for the reassessment of their credibility - see the case of ***Omar Ahmed Vs. The Rep. (1983) TLR 52, (CA). In my considered view, there are no factors which warrant the interference by this Court on the finding of the credibility of Pw1 and Pw2. For the foregoing reasons, the appeal is dismissed in its entirety for lack of merits.

Order accordingly.

Lyimo J.

At Bukoba
19/11/07