**IN THE HIGH COURT OF TANZANIA**

**AT MTWARA**

**CRIMINAL APPEAL NO. 7 OF 2013**

**ORIGINAL NEWALA DISTRICT COURT**

**CRIMINAL CASE NO. 102 OF 2009**

**HASSANI MAWAZO ..... APPELLANT**

**VERSUS**

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

# JUDGMENT

24th June, 2013 & 16th August, 2013.

## M. G. MZUNA, J.:

Hassani Mawazo is currently serving 30 years imprisonment upon his conviction for the offence of Rape contrary to section 130 (1) (2) (c) and 131 (1) of the Penal Code Cap 16 R.E. 2002. He is alleged to have sexual intercourse with one Fatuma d/o Khalfani (aged 50 years) without her consent the offence which is alleged to have been committed on 11th day of August, 2009 at or about 08.00 hours at Ngalu village within Newala District in Mtwara Region.

***The first issue*** is whether the appellant was properly identified?

It was the argument of the appellant that the victim never knew him before and that he only saw him in court. Mr. Makasi, the learned State Attorney who did not support this appeal, said that the record shows that the incident took place at 08:00 a.m. at broad day time whereby there was

sufficient light for accurate and unmistaken identification. Further that the appellant was known to her as he resides at the neighboring village. Above all he mentioned his name as Hassan.

According to the evidence on record, it was on 11/08/2009 at about 08:00 a.m. when Fatuma d/o Khalfani (PW1) (the victim of rape) was at her *shamba*. Suddenly, the appellant went close to her, grabbed her and put his hands on her mouth so that he could not raise alarm. He stripped off her clothes and waylaid her and fell her on the ground. He proceeded to insert his penis into her vagina, sexed her until he ejaculated. He then ran away. PW.1 reported the matter to her neighbours and her husband Athumani Rajabu (PW.2). The matter was then reported to the police where the PF.3 (Exhibit P.1) was issued.

The story from PW.2 was that on the material date when he was returning to his nome he met his wife (PW1) with other villagers and was informed by PW1 that she was raped by the appellant. They went to report the matter to the police station leading to the arrest of the accused person on 13/5/2009 at Malatu village and was then sent to Kitangari police station. That evidence was given support by the Doctor Yahaya Mdaka (PW.3) who examined the victim and found her with seamen into her vagina as can be seen in his report the PF.3 which was tendered as exhibit P1.

The appellant denied any involvement in the commission of the offence. He admits however to have been arrested at Malatu where he was born and that he went there for treatment. That he never knew the victim

prior to his arrest. He said that he was implicated in this case for no apparent reasons.

Now, coming to the first issue above, it is true as argued by the learned State Attorney, the victim knew the appellant before the incident as he was living at the nearby village. Further he mentioned his name to be Hassani and the appellant did not deny his name. Naming the suspect by his name not nick name is good evidence against him. That position was reiterated in the case of **Abdul Juma @ Jumanne vs. The DPP**, CAT, Criminal Appeal No. 310 of 2009, at page 9, Mbarouk, J.A (unreported). Similar position was said in the case of **Fadhili Gumbo @ Malota and Others vs R** (2006) TLR 50 which was cited by the Learned State Attorney.

The question is to whom did he mention the culprit? The available evidence shows that she mentioned him to PW.2 her husband. Suffice here to say that the trial magistrate had the opportunity to assess the demeanor of the witnesses and believed it to be true. This appeal court agrees with the learned State Attorney that the identification which was made at broad day light to the person well known was perfect and cannot be faulted. The closing of her mouth with the appellant's hands followed by the sexual intercourse at zero distance, all these acts were done at close range such that there can not be likelihood of mistaken identity. All these were done to the person who was not a stranger. Secondly, the time spent from when he approached her, grabbed her and put his hands on her mouth so as not to raise alarm followed by stripping off her clothes and then pushing her on the ground followed by inserting his penis into her vagina clearly shows

that the incident took some considerable time sufficient for a proper identification after sufficient time of observing him. So I'm satisfying that the appellant was properly identified by the victim. *The first issue* is therefore answered in the affirmative that the appellant was correctly identified as the one who committed this sinful act.

***The second issue*** is whether there was need to conduct the identification parade?

The appellant has alleged that, the prosecution failed to conduct the identification parade in order to prove that he was really identified as the one who committed this offence. The learned State attorney never responded to this point. However, identification parade can not be made to the person well known. That could have been a point worth any merit if the appellant was not known to PW.1 a fact which does not arise in this case. I am fortified to this finding by the Court of Appeal decision in the case of **Hassan Juma Kanenyera and Others Vs. R** (1992) TLR 100, 106 (CA) where it was amply stated that to conduct the identification parade for a person well known is "superfluous" citing with approval **Sarkar's Law of Evidence** 13th ed. p.99 as authority that "an identification parade is useless if the persons put on the parade to be identified are known to the person who is to make the identification." The second issue equally fails.

I now revert to ***the third issue*** as to whether the charge was proved to the required standard of proof? In order for a person to be convicted on rape offence, the evidence must show that there was 'penetration' however slight so as to 'constitute the sexual intercourse

necessary for the offence' as clearly stated under Section 130 (4) of the Penal Code Cap 16 R.E. 2002. Another important element is that the victim as in the present case, never consented to the sexual act. That position was amply stated by the Court of Appeal in the case of **Musa Mohamed vs. Republic,** Cr. Appeal No. 216 of 2005 (CAT) (unreported).

The evidence on record shows that, the victim was tripped off her clothes by the appellant, then the appellant pushed her on the ground and inserted his penis into her vagina. PW.1 said she never consented as the appellant was not her partner. Her evidence was corroborated with the PF. 3 (Exh. P.1) and the Doctor's evidence (PW3) who examined the victim and found sperms inside the victim's vagina. Of course the learned State Attorney expressed his concern that the said PF.3 never touched on the issue of penetration apart from saying that there was a possibility of rape "yawezekana tendo hili limefanyika". This anomaly notwithstanding is minor because the court can proceed to convict even without the PF.3 if believed the evidence of the complainant. The trial court believed it and the appellant never shown any prior existing grudge with PW.1 and PW.2 such that they could have framed this serious offence against him. The absence of the neighbours and or a policeman one D/Cpl. Abdallah who were mentioned as among the prosecution witnesses but were not summoned for unexplained reasons, can not be a ground to fault the prosecution case as the law is very clear under S. 143 of the Evidence Act Cap 6 R.E. 2002 that "no particular number of witnesses shall in any case be required for the proof of any fact." I also ruled out the possibility of the likelihood of 'relatives' team up' against him as nothing led me to such

conclusion. The prosecution evidence having conclusively proved penetration of a male organ to a female organ (vagina) without consent, all this evidence shows that rape was committed. So the third issue is answered in the affirmative and therefore the conviction was inevitable and well deserved.

***The fourth issue*** is whether this appeal should be allowed? For the above stated reasons, I am in total agreement with Mr. Makasi, the learned State Attorney that the conviction and sentence imposed against the appellant was proper. The appellant's appeal lacks merit and the same is hereby dismissed.

Lastly though in passing, I would like to say that, the evidence on record and the particulars of the charge did not support the charge of Rape c/s 130 (1) (2) (c) of the Penal Code Cap 16 R.E. 2002, instead it ought to have been preferred under Section 130 (2) (a) of the Penal code as there was no consent to the sexual act. So long as the appellant knew from the beginning the offence he was charged with, I find that he was not prejudiced in any way for such a defect. I find that the error is curable under section 388 (1) of CPA Cap 20 R.E. 2002. There is authority to that view by the Court of Appeal of Tanzania, in **Muksini Sabihi Sadiki vs. R.** Criminal Appeal No. 97 of 2013, (unreported) at pg 6 & 7.

Appeal dismissed.

**M. G. Mzuna,**

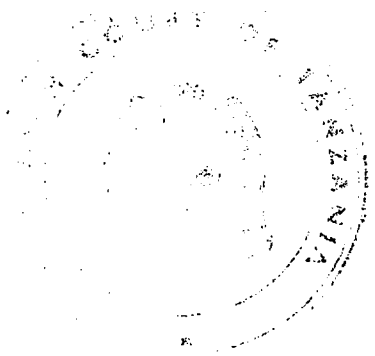
**JUDGE.**

**16/8/2013**

Appellant: Present

Respondent: Mr. Mkude S.A

**Court**: Judgment delivered this 16th day of August 2013 in the presence of the parties.



**M. G. Mzuna,**

**JUDGE.**

**16/8/2013**