

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.59 OF 2013

ORIGINATING FROM THE DECISION OF THE
DISTRICT COURT OF RUFJI AT UTETE IN
CRIMINAL CASE NO. 36 OF 2011.

FAKI SAIDI MTANDA.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order 8/4/2014
Date of Ruling 13/5/2014

A. Shangwa. J.

This is an appeal against conviction and sentence of 30 years term of imprisonment imposed on the Appellant **Faki Saidi Mtanda** by the District Court of Rufiji at Utete in Criminal Case NO. 36 of 2011 after finding him guilty of the offence of rape C/S 130 of the Penal Code Cap 16 R.R. 2002.

The particulars of the offence with which he was charged and found guilty are that on 24th day of April, 2011 at about 2.00 hours at Mgomboloni Mparange area within Rufiji District, Coast Region, he did have carnal knowledge of one Mwajuma Ally Rwambo aged 68 years without her consent. By then, the Appellant was 48 years old.

Having been dissatisfied with his conviction, he decided to appeal to this Court on five technical grounds which are as follows:-

- 1. That the trial Magistrate erred in law and fact for his failure to prepare a Memorandum of matters agreed for his signature and the public prosecutor's signature as per S. 192 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002.*

2. *That the trial Magistrate erred in law and fact by taking into consideration the incredible visual identification of P.W.1 (the victim) against him as it was dark in the night.*
3. *That the trial Magistrate erred in law and fact by convicting him of the offence charged on insufficient evidence as P.W.1 did not describe as to how the rape was committed.*
4. *That the trial Magistrate erred in law and fact by taking into consideration the contradictory evidence of P.W1 and P.W2 on how he was identified at the scene of Crime.*

*5. That the trial Magistrate erred in law
and fact by admitting in evidence exhibit
PA(RF3) tendered by P.W.3 Dr. Malinda
without having been asked as to
whether or not he objects to it,*

During the hearing of his appeal, the Appellant said that he had nothing to add to his grounds of appeal. The learned State Attorney, **Ms. Clara** supported the conviction imposed by the trial Court on the Appellant with respect to the offence charged. The following are her contentions in reply to the Appellant's grounds of appeal.

On the 1st and 5th grounds of appeal, Ms. Clara contended respectively that the trial Magistrate's failure to prepare the Memorandum of matters in dispute and cause it to be signed by him and the prosecutor and the trial

Magistrate's failure for not giving opportunity to say yes or no in admitting exhibit PA (PF3) did not cause any miscarriage of justice. I agree with her that such failure on the part of the trial Magistrate did not occasion any miscarriage of justice. This failure was not fatal to the proceedings and was not prejudicial to the Appellant's case. This is because in practice, the purpose of preparing the Memorandum of Appeal is simply to accelerate the trial of the accused by ascertaining matters which are not in dispute between him and the prosecution. The purpose of asking the accused as to whether or not he objects to the tendering in evidence of any exhibit by the prosecution is simply to avoid the admission of an exhibit which is not admissible in evidence or which is not relevant all depending on the charge.

On the 2nd ground of appeal, Ms. Clara contended that the Appellant was properly identified by P.W.1 (Complainant) because both of them used to know each other very well before the date of incident and that although the incident took place during the night when it was dark, he left the Scene of Crime at about 6.30 a.m or 7.30 a.m which means that P.W 1 did identify him properly before he left the Scene of Crime.

I also agree with Ms. Clara that as the Appellant and P.W.1 used to know each other before the date of incident, and as he left the Scene of Crime early in the morning when it was no longer dark, his argument that he was not properly identified by P.W.1 because the incident took place during the dark night is unfounded.

On the 3rd ground of appeal, Ms. Clara contended that although P.W.1 does not explain how she was raped, her testimony and P.W.3's testimony supports the fact that the Appellant raped her. I have read the testimony of P.W.1. She told the trial Court that he was raped by the Appellant who entered into her house at 2.00 hours and demanded to have sex with her, and that he grabbed her throat and made her fall down, and that after falling down, he lied over her and penetrated into her vaginal carnal and that after doing so, he said that he could not leave her house until he commits sex with her for the second time which he did. That after doing so, he left her house at about 6.30 a.m or 7.30 a.m.

I have also read the testimony of P.W.3 Dr. Malinda. This witness told the trial Court that on 24th April, 2011, he was at Ikwiriri Health Centre and that he received one old woman who was taken there by her relative. This old woman