IN THE HIGH COURT OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT NZEGA

DC CRIMINAL APPEAL NO. 202 OF 2008

(Appeal from the decision of the District Court of Nzega in Original Criminal Case No. 102 of 2007).

DOTTO NGALLA NGELANIJA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

25th November & 2nd December, 2014

JUDGMENT

MWAMBEGELE, J.:

The appellant Dotto Ngalla Ngelanija was charged before the District Court of Nzega with the offence of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged that on 07.05.2007 at about 1700hrs he did have unlawful sexual intercourse with a certain Halima Hamisi; a girl aged 6 years of age. Upon satisfaction that the case was proved beyond any reasonable doubt, the trial court convicted the appellant and sentenced him to life imprisonment. Dissatisfied with the conviction and sentence, the appellant has appealed to this court on a memorandum of appeal with five grounds of complaint. However, the

central complaint is that the case was not proved to the required standard as the PF3 was wrongly admitted in evidence.

The appellant appeared in person and unrepresented on 25.11.2014 when the appeal was argued before me. The appellant thus fended for himself. Mr. Nestory Paschal, learned State Attorney, appeared for and on behalf of the respondent Republic. The appellant, a lay old man aged 77 years and who has a hard hearing, did not have any useful material to add to his memorandum of appeal he earlier filed; he opted to rely on them as his submissions on appeal.

Mr. Paschal, learned State Attorney supported the appellant's appeal. He was of the view that, in the light of evidence adduced at the trial, the case was not proved to the required standard; that is, beyond reasonable doubts. The learned State Attorney submitted that penetration was not proved. He also submitted that the trial magistrate used the testimony of PW3 and the PF3 to convict the appellant but that the PF3 was improperly admitted in evidence, for it was admitted contrary to section 240 (3) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002. For that ailment, the learned State Attorney submitted, the PF3 must be expunged from the record. After expunging the PF3 there will be no evidence of rape, he submitted.

Mr. Paschal, learned State Attorney also submitted that the provisions of section 231 of the CPA were not compliance with and that these provisions are mandatory; the omission is therefore incurably defective, he submitted.

He also submitted that the charge sheet was framed in very general terms; it mentions section 130 and 131 of the Penal Code without mentioning the proper subsections in the said sections. He finally concluded that they think generally that the evidence against the appellant was not sufficient to ground a conviction, that is why they opted to support the appellant's appeal.

In rape cases, as in the present one, the best evidence is that of the victim herself [see: ***Godi Kasenegala Vs R***, Criminal Appeal No. 10 of 2008, ***Khamis Samwel Vs R***, Criminal Appeal No. 320 of 2010, and ***Burundi s/o Deo Vs R***, Criminal Appeal No. 33 of 2010 which refers to several other cases as well such as ***Seleman Mkumba Vs R***, Criminal Appeal No. 94 of 1999, ***Saidi Ally Mkong'oto Vs R***, Criminal Appeal No. 133 of 2009 and ***Hakizimana Sylvester Vs R***, Criminal Appeal No. 181 of 2007 (all unreported decisions of the Court of Appeal)]. In the instant case, the victim did not testify. When she was called to testify on 13.07.2007, the court learnt that she could not even tell her name. She was to testify as PW2. Her parents told the court that though she looked better on that day, she was a mentally challenged kid. She was therefore found incapable of testifying and disqualified accordingly. In the present case therefore, the case lacks the advantage of the best evidence of the victim.

Let me start with the complaint by the appellant respecting the admission of the PF3 into evidence. As rightly pointed out by the appellant, the PF3 was wrongly admitted in evidence. The record has it that the PF3 was tendered on 13.07.2007 and the appellant is recorded as having no objection to its being tendered. However, the record is silent as to whether the appellant was told of his right to have the person who filled the document to be made

available for cross-examination. This was a fatal omission. The provisions of section 240 (3) of the CPA put a mandatory duty on the court to inform the accused person of his right to require the medical practitioner who made the medical report, in the instant case the PF3, to be summoned for examination or cross-examination if he so wishes. Let the subsection speak for itself; it provides:

> "When a report referred to in this section is received in evidence the court may, if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross examination the person who made the report; **and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provision of this subsection.**"
> [Emphasis is added].

Compliance with the said provision is mandatory. The mandatory nature of the subsection can be discerned from the use of the term "shall" in it. It is elementary principle of statutory interpretation that once the term "shall" is used in a provision, it implies that the function must be performed. This is the tenor and import of the provisions of subsection (2) of section 53 of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002 (henceforth "the Interpretation Act"). The subsection reads:

> "Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

In the instant case, the procedure of admitting the PF3 in evidence was flouted. The appellant was not informed of his right to require the person who made the PF3 to be summoned for examination or cross-examination if he so wished. In the light of the Interpretation Act, it was imperative upon the trial court to inform the appellant of this right. That was not done and therefore the PF3 tendered is worth expunging from evidence. I find fortification in this stance in a number of unreported Court of Appeal decisions. These are ***Alfeo Valentino Vs R,*** Criminal Appeal No. 92 of 2006, ***Arabi Abdu Hassan Vs R*** Criminal Appeal No 187 of 2005, ***Burundi s/o Deo Vs R***, Criminal Appeal No. 33 of 2010, ***Parasidi Michael Makulla Vs R***, Criminal Appeal No. 27 of 2008, ***Arabi Abdu Hassan Vs R***, Criminal Appeal No 187 of 2005, ***Shabani Ally Vs R***, Criminal Appeal No. 50 of 2001, ***Prosper Mnjoera Kisa Vs R***, Criminal Appeal No. 73 of 2003 and ***Meston Mtulinga Vs R,*** Criminal Appeal No. 426 of 2006 and ***Harrison Mwakibinga Vs R***, Criminal Appeal No. 196 of 2009 to mention but a few.

In ***Alfeo Valentino,***[1] for instance, the Court of Appeal, speaking through Rutakangwa, J.A, provided the following pertinent guidance:

> "We think that the law on this issue was stated with sufficient lucidity by this Court in the cases of **Kashana Buyoka** v **R,** Criminal Appeal No. 176

> of 2004, **Sultan s/o Mohamed** v **R,** Criminal Appeal No. 176 of 2003, **Rahim Mohamed** v **R,** Criminal Appeal No. 234 of 2004, (all unreported) among many others. The Court has consistently held that once the medical report, as the PF3, is received in evidence, it becomes imperative on the trial court to inform the accused of his right of cross-examination. This Court held in these cases that **if such a report is received in evidence without complying with the mandatory provisions of section 240 (3), such a report must not be acted upon.**"
> [Emphasis mine].

The foregoing aptly summarizes the position of the law and what course to take in situations when the provisions section 240 (3) of the CPA are overlooked. On the basis of these binding authorities of the highest court of our land, the PF3 tendered and received in evidence in disregard of the provisions section 240 (3) of the CPA is hereby expunged from the record.

For the avoidance of doubt, the same is the position in respect of a sister provision of section 291 (3) of the CPA respecting trials in the High Court – see ***Dawido Qumunga Vs R*** [1993] TLR 120] and ***Elias Mtati @ Ibichi Vs R*** Criminal Appeal No. 65 of 2014 an unreported decision of the Court of Appeal which judgment was handed down on 14.08.2014.

Now comes the aspect of penetration. It is elementary criminal law that penetration is one of the essential elements of the offence of rape. In addressing this aspect the trial court stated at what is supposed to be page of the typewritten judgment as follows:

> "... it is quite clear that **the accused's penis never penetrated into the victim's vagina**. Currently, the position of the law is very clear, that penetration is not a number, when proving rape. **The fact that the accused used his penis to ejaculate in the sexual organs of the victim is a necessary proof of rape**. It is therefore found that the accused had carnal knowledge of the victim ..."
> [My emphasis].

Reading in context the foregoing paragraph, I have understood the trial court, when making reference to "penetration is not a number when proving rape", to mean penetration, however slight, was sufficient to constitute sexual intercourse envisaged in the commission of the offence of rape. However, with due respect to the trial magistrate, I am not ready to sail with him on the conclusion that "the fact that the accused used his penis to ejaculate in the sexual organs of the victim is a necessary proof of rape". Rape is proved when, *inter alia*, penetration, however slight, is proved. The trial court erred in concluding that rape was committed while evidence respecting penetration was wanting. The fact that the court was of the view that there was no penetration, however slight, was enough to acquit the appellant of the

offence of rape. On this point I feel pressed to echo what was stated in the ***Godi Kasenegala*** case (supra):

> "Under the Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of eighteen without her consent. Two, having sexual intercourse with a girl of eighteen years and below with or without her consent (statutory rape). **In either case, one essential ingredient of the offence must be proved beyond reasonable doubt. This is the essential element of Penetration ie the penetration, even to the slightest degree, of the penis into the vagina**: ***Masomi Kibusi V Republic***, Criminal Appeal No. 75 of 2005 (unreported)".
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> [Except for the case, the bold is supplied].

In the case at hand, having scanned the evidence of witnesses dispassionately, I have not been able to glean a scintilla of evidence to suggest penetration. If anything, the witnesses are positive that there was no penetration at all. Lucia Thomas PW3, who allegedly caught the appellant and victim *in flagrante delicto*, is recorded to have told the court as follows:

> "... there was no rupture of hymen. I believe she was not sexed in her vagina but perhaps he was

just brushing his penis on the walls of the victim's vagina which could not cause damage to her."

In the light of this testimony, it is crystal clear that the element of penetration was not proved. What the evidence has, is that the appellant brushed his penis on the poor girl's vagina and ejaculated on it. This was not rape, for to prove the offence of rape, as already alluded to above, penetration, however slight, ought to have been proved. This was not the case in the present instance.

In the light of the foregoing discussion, I am satisfied that the appellant's acts were not sufficiently established to justify a finding that he indeed raped the victim. As already stated, the evidence falls short of proof of the offence of rape as envisaged by criminal law. Having so found, I am satisfied, however, that there is sufficient evidence on record to prove a minor and cognate offence of sexual harassment contrary to section 138D (1) of the Penal Code.

In the upshot, I allow the appeal to that extent. I quash the conviction of the appellant for rape and set aside the sentence of life imprisonment imposed on him. In terms of section 138D (4) of the Penal Code, I substitute therewith a conviction for sexual harassment contrary to section 138D (1) of the Penal Code. I take note that the offence of sexual harassment I have substituted the conviction of the appellant with carries a maximum penalty of five years on conviction. Thus if the appellant was to be sentenced to such a maximum penalty, and under the provisions of section 49 of the Prisons Act, Cap. 58 of the Revised Edition, 2002 which provides for one-third remission of sentences to convicted criminal prisoners upon industry and good conduct, he would

have finished his jail term in 2011; about three years ago. In the premises, all said and done, I sentence the appellant Dotto Ngalla Ngelanija to such a prison term as would result into his immediate release from custody unless he is otherwise lawfully held for some other lawful cause.

DATED at NZEGA this 2nd day of December, 2014.

J. C. M. MWAMBEGELE
JUDGE