IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 412 OF 2007

MZEE THOBIAS MOHAMED
MOHAMED KAYOKA .... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Oriyo, J.)

dated the 24th day of August, 2007
in
HC. Criminal Appeal No. 91 of 2005

JUDGMENT OF THE COURT

29th May & 25th June 2009

MANDIA,J.A:

The two appellants appeared in the District Court of Kilombero District at Ifakara where each one of them separately answered a charge sheet containing one count of Rape "contrary to sections 130 (2) (b) and 131 (A) (1) (2) of the Penal Code as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998". The particulars of the offence for each of the two appellants allege that on the 10th day of December, 1998, at about 9 a.m. at Sululu Village

each one of the two appellants separately had carnal knowledge of one MBILAZI d/o MAFIGWA without her consent. The appellants were found guilty and convicted of rape and each sentenced to thirty years imprisonment and twelve strokes of the cane. Both were aggrieved by the convictions and sentences and preferred a joint appeal to the High Court of Tanzania. The High Court dismissed the appeal against conviction and substituted the conviction of Rape with that of Gang Rape and sentenced the appellants to life imprisonment each. Aggrieved by both the dismissal of their appeal and the substitution of the convictions, the appellants have preferred this appeal. Mr. Frederick Manyanda, learned State Attorney, argued the appeal on behalf of the respondent Republic, and Mr. Dominic Kashumbugu,learned advocate, appeared and argued the appeal on behalf of the appellants.

The memorandum of appeal lodged in this Court has three grounds of appeal, namely:

1. The High Court erred in law and in fact in dismissing the appeal in its entirety when there was no enough evidence to support the charge as no corroborating evidence existed.

2. The High Court erred in law in convicting the appellants of Gang Rape when they had not been charged of the same but charged with a lesser offence of rape.
3. The High Court erred in law in holding that the duplex charges did not prejudice or embarrass the appellants in their defence and no failure of justice was caused, thereby substituting a conviction of Gang Rape and without calling the appellants to offer any mitigating factors against the sentence.

The facts as established in the trial District Court, and affirmed on appeal in the High Court, show that on 10/12/1998 at about 9 a.m. PW1 MBILAZI d/o MAFIGWA, a cattle herder's wife living at Sululu Village in Kilombero District, was returning home from a round of selling milk to fellow villagers. Her journey home took her to a secluded area with thick bush around where she met two youths wearing short pants. One of the youths, who PW1 identified as the first appellant, grabbed her by the neck and pulled her off the road into a nearby thicket. Another youth, identified by PW1 as the second appellant, followed behind. PW1 testified that she was

dragged for thirty paces into the thicket where the youths felled her, pulled her clothes and the first appellant started raping her. PW1 was emphatic that the first appellant entered his male organ into her female organ and went on up to the point of ejaculation. PW1 went on to say that when he was through, the first appellant rose and the second appellant took his turn at raping her. When the two had finished they told her to stay at the scene while they moved away. PW1 then slowly walked towards the road where she met Dorah who helped her go to report to the Village Chairman. PW1 told the trial court that she could not cry out during the rape because the first appellant squeezed her neck to prevent her from crying out.

The village Chairman to whom PW1 reported the alleged rape was PW2 Mohamed Kilimbwa. He testified that he detailed a village militiaman PW3 Kanston Mkandawile to follow up on the alleged rapists who were described to him by the colours of their skin. One was described as tall, and the second as not tall and grey in colour. PW3 apprehended the appellants whom he recognized as fellow villagers and took them to the Village Chairman where the complainant PW1 identified them as the alleged rapists. The time

which PW3 Kanston Mkandawile gave when he apprehended the appellants is about 10 a.m. which is about one hour after the alleged rape. The evidence of the militiaman PW3 shows that after the appellants were identified by the complainant, they were taken to the Police Station, but he did not mention which Police Station. The evidence of the complaint, however, shows that herself and the appellants were taken to Mang'ula Police Station where she was given a PF3 for examination in hospital. It was the witness who tendered the PF3 in Court as Exhibit P1.

In their defence, given under oath and affirmation respectively, the first and second appellants testified that on 10/12/1998 they were at Sululu Village where their shamba is situated. They worked in their shamba from 7 a.m. in the morning to 9.30 a.m. when they finished the work of burning grass they had cleared in their shamba. When they left the shamba and were walking home they met one Masai woman and one Mang'ati women. The second appellant talked with the Masai woman asking for buns (maandazi) and when the Masai woman told them buns were finished they went on their way.

They arrived home and later they left home to go and purchase sugar when they were arrested on the way and accused of raping the Mang'ati woman. They were taken to Mang'ula Police Station from where the Mang'ati woman was taken to hospital. They were then locked up and on the following Monday they were taken to Court.

As we have noted earlier, there are three grounds of appeal which we will discuss together because they are interlinked. The first ground raises the issue of identification, while the second and third grounds raise the issue on whether it was proper for the first appellate court to substitute a conviction for gang rape in the place of the conviction for rape entered by the trial Court. We have taken note that the charge as framed in the trial Court listed both the offence of rape and gang rape in the statement of the offence, but when it came to the particulars of the offence, these showed the offence of rape only, i.e. having carnal knowledge without consent. We have also taken note that the charge sheet, which was the basis of the trial, combined the two appellants in the same charge sheet but each of the two appellants faced a single respective count of rape. There was no joint charge which means the prosecution had

the duty of proving each of two respective counts for each of the appellants. The record of trial shows that the trial court found each of the two appellants guilty of rape and sentenced each to thirty years imprisonment. The offence of rape attracts a sentence of thirty years imprisonment, while Gang Rape attracts a sentence of life imprisonment. We also note that the Criminal Procedure Act, Chapter 20 R.E. 2002 of the Laws, provides for alternative verdicts in sections 300 to 307. The principle of law laid down in the above quoted sections is that substitution of a conviction can only be done where the offence substituted is minor and cognate to the offence with which the offender was previously charged, and not the reverse. In the present case, a more serious offence of gang rape was substituted for a less serious offence of rape. This was not correct. It was for these reasons that Mr. Manyanda urged us to allow the second and third grounds of appeal.

In ***OUMA V R*** (1969) EA 398, the erstwhile Court of Appeal for Eastern Africa made the following observation:-

> "Furthermore, apart from certain express provisions which are not relevant, the High Court only has power under s.179 of the Criminal Procedure Code to substitute a conviction for a minor offence which is of a cognate nature; here the purported substitution was for a more serious offence".

The above quoted authority falls in line with the Provisions of sections 300 to 307 of the Criminal Procedure Act, particularly section 304 which provides for alternative verdicts in charges of rape and kindred offences. Gang rape is not a kindred offence of rape so the purported substitution went against section 304 of the Criminal Procedure Act. We, therefore, allow ground number two and three of the memorandum of appeal. Accordingly, we set aside the order of the learned first appellate judge purporting to substitute the conviction of rape entered in the trial court with that of Gang Rape. The effect of this is that the conviction entered by the trial District Court is restored.

We now come to the first ground on whether there was sufficient evidence to support the conviction for rape entered by the trial Court. Mr. Manyanda was of the firm view that the evidence in support of the change of ordinary rape was overwhelmingly watertight. He invites us to rely on the truthful evidence of PW1.

We will start with the second appellant. The only evidence for which the second appellant was convicted and sentenced appears at page 11 of the record, and it reads thus:-

> "After 1st accused have (sic) ejaculated he got out and 2nd accused came to rape me as well".

There is no evidence on record to describe what the second appellant did to justify the conclusion that he committed rape. It is trite law that to prove rape evidence must be led to show penetration, however slight. The evidence of the victim as quoted above cannot, therefore, be the basis of a conviction as regards the second appellant in this case. If we discount the evidence of the

complainant, could the trial court rely on the PF3 tendered as Exhibit P1? A cursory glance at the PF3 shows that whoever filled it left the body of the PF3 blank where he was to give particulars of the wound. He/she only filled in the place reserved for "remarks" where he inserted the word "rapped". We guess the writer meant to write the word "raped". Even if he meant this, what he wrote was his opinion and not his clinical observations as an expert. We also note that the expert was not called to testify in the trial Court, and the trial court did not inform the appellants of their right to have the medical expert called as a witness. This default went against the provisions of section 240 (3) of the Criminal Procedure Act. This Court has held that failure to comply with the provisions of section 240 (3) of the Criminal Procedure Act leads to the result of having the PF3 being discounted – see ***DAUDI SHILLA V R*** Criminal Appeal No. 117 of 2007 (Dodoma registry – unreported) and ***ELIAS, KITEMA V R*** Criminal Appeal No. 171 of 2006 (Dodoma registry - unreported). We accordingly discount the PF3 tendered in evidence as Exhibit P1. After finding the evidence of the complainant wanting as far as the second appellant is concerned, and after discounting the PF3, we are of the opinion that there is no evidence whatsoever to link the

second appellant with the charge he faced. Accordingly, we quash the conviction entered and set aside the sentence of thirty years imprisonment passed on the second appellant. He should be released from custody forthwith, unless he is held on some other lawful cause.

Coming to the first appellant, the record shows that MBILAZI d/o MAFIGWA described how the first appellant pulled off her clothes, threw her to the ground and entered his male organ into her female organ and went on with the act up to the point of ejaculation. This Court has held in ***SELEMANI MKUMBA V R*** Criminal Appeal No. 94 of 1999 (unreported), and also in ***MKUMBO HAMISI V R*** Criminal Appeal No. 24 of 2007 (unreported) that the evidence of the victim herself is the best evidence in a charge of rape. The graphic account of the complainant MBILAZI d/o MAFIGWA, which was accepted by the trial court and the first appellate court, leaves no doubt that the first appellant was properly identified as the person who violated her on the morning of 10/12/1999. We support the findings of fact as held by the trial court and the first appellate court

on the conviction of the first appellant. We accordingly dismiss the first ground of appeal.

The charge sheet filed in the trial court gave the age of the first appellant as nineteen years. At the end of the trial, when the trial Senior District Magistrate was adjourning the case pending delivery of judgment, he made the following order as it appears at page 21 of the record:-

> "Order. Judgment on 31/8/99 accused further remanded in custody. 1st accused to be sent to hospital to get opinion regarding his age.
>
> Sgd S.Mmbaga – SDM
>
> 25/8/99".

On 1/9/99 both accused persons reported the fact that the first accused person, who is the first appellant now, had been examined as to age. The prosecution tendered a PF3 on the medical

examination as to age. The trial court admitted the PF3 and made the following remark:-

> "Court. PF3 has received (sic) in court and marked exhibit. It showed that the accused is between 18-20 years".

The remark as recorded shows that the trial court made an observation on what appeared on the PF3, but did not itself make a finding on the age of the first appellant. Section 16 of the Children and Young Persons Act, Chapter 13 R.E. 2002 of the Laws reads thus:-

> "16. – (1) Where a person whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child or young person, the court shall make due inquiry as to the age of that person and make a finding thereon, and for that

purpose shall take such evidence at the hearing of the case (which may include medical evidence) as is pertinent and may receive such proof of birth (whether of a documentary nature or otherwise) as appears to the court to be worthy of belief, according to its value, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated by the court and the age found by the court to be the age of the person so brought before it shall, for the purposes of this Act be deemed to be the true age of that person.

(2) A certificate purporting to be signed by a medical practitioner registered or licensed under the provision of the Medical Practitioners and Dentists Act as to the age of a child or young person shall be evidence thereof and shall be receivable by a court

without proof of signature unless the court otherwise orders".

If the trial court entertained doubt on the first appellant's age as indicated in the record, it was incumbent upon the trial magistrate to make a finding on age as is required under section 16 (1) of the Children and Young Persons Act. The section allowed the court to take in medical evidence or such other proof of birth as appears to be worthy of belief in order to make the finding as to age. It is this age found by the court which is deemed to be the true age of that person. By accepting the estimate of the medical practitioner and not itself making any finding, the trial court left the first appellant's age hanging in the air. He could be anywhere between eighteen and twenty years. In this doubtful situation, the benefit of such doubt should go to the first appellant. The first appellant should therefore have been sentenced as a young person under section 131 (2) of the Penal Code. As no proof of previous conviction had been put forth by the prosecution, the relevant sentencing provision is section 131 (2) (a) of the Penal Code. The sentence of imprisonment for thirty years imposed on the first appellant is set aside.

Under Section 131 (2) (a) the first appellant should be sentenced to corporal punishment. We, however, have taken note that he has already served nine years of the term of imprisonment imposed upon him by the trial court. In these circumstances we do not feel inclined to impose the sentence of corporal punishment. We, therefore, impose a sentence that will result in the immediate release of the first appellant from jail, unless he is held on some other lawful cause. It is so ordered.

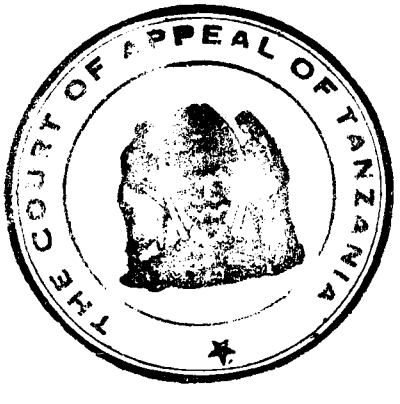
DATED at DAR ES SALAAM this 17th day of June, 2009.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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



J.S. MGETTA
DEPUTY REGISTRAR