IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RAMADHANI, C.J, KIMARO, J.A., And MANDIA, J.A.:)

CRIMINAL APPEAL NO. 181 OF 2007

HAKIZIMANA SYRIVERSTER..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Bukoba)

(Sambo, J.)

dated the 31ST day of May, 2006
in
Criminal Appeal No. 41 of 2006

JUDGMENT OF THE COURT

11th October & 18th October, 2010

MANDIA, J.A.:

The appellant appeared before the District Court of Muleba on a charge of Rape c/s 130(1) and 131(1) of the Penal Code as amended by the Sexual Offences Special Provisions Act, Number 4 of 1998. He was found guilty, convicted and sentenced to life imprisonment. He preferred an appeal to the High Court of Tanzania at Bukoba. His appeal was dismissed in its entirety. He has preferred a second appeal to this Court.

Evidence which led to the appellant's conviction and subsequent sentencing tended to show that on 13/10/2002 PW2, Nduwimana Apolonia, a refugee from Burundi then living at Lukole A refugee camp in Ngara District, sent her grand daughter PW1 Hatungimana Lucine, with whom she was living, to the appellant's shop situated in the same neighborhood within Lukole A camp to buy kerosene. According to PW2 Nduwimana Apolonia, her grand daughter delayed in returning home which made her worry so she decided to follow her. She met her daughter coming out of the appellant's house while crying. On asking her why she was crying, the girl told her the appellant had raped her. She examined the girl's private parts and found her discharging some mucoid substance. She raised the alarm which led to the arrest of the appellant by PW3 Nyandwi Deodone, amongst other people. The appellant and the victim were taken to the Police Post situated within the refugee camp where the girl was issued with a PF3 with which she was refered to hospital for treatment.

The victim of the alleged rape is PW1 Hatungimana Lucine. After conducting a thorough *voire dire* examination, the trial District Court took her testimony on oath. We use the word "thorough" advisedly. We are of

the opinion that the examination conducted by the trial court covered every aspect of *voire dire* examination as required under Section 127(2) of the Evidence Act, Chapter 6 R.E. 2002 of the Laws. At the end of the *voire dire* examination, the trial magistrate took the evidence of PW1 on oath. In her testimony, PW1 Hatungimana Lucine identified the appellant as a person who used to live in the same building, called "blende", with her but in a separate apartment. She said the appellant was a petty trader selling, among other things, kerosene. Hatungimana Lucine narrated the events on the day she was sent by her grandmother PW2 Nduwimana Apolonia to go and buy kerosene at the appellant's shop. She testified that instead of selling kerosene to her, the appellant seized her arm, dragged her into his house, stripped her naked and had carnal knowledge of her. She said the appellant covered her mouth with his palm while raping her. After a while the appellant left her free and she went out crying. Outside she met her grandmother and narrated her ordeal to her. The grandmother raised the alarm which led to the arrest of the appellant and report to the Police. She tendered the PF3 issued to her which was admitted and marked Exhibit P1.

In his defence, the appellant acknowledged his arrest but denies the allegation of rape. As we said earlier, the first appeal filed by the appellant was dismissed in its entirely, largely on the ground of credibility of witnesses. The record of appeal in the High Court shows that the first ground of appeal in the High Court was based on the improprieties on the PF3 as pointed out by the appellant. This ground was not addressed at all by the High Court in its judgment.

In this appeal the appellant has filed a memorandum of appeal. The memorandum filed is a do-it-yourself job which essentially raises two grounds, namely:-

1. That the contents of the PF3 were of doubtful reliability and the Court did not summon the doctor who perform the medical examination to prove the contents of the PF3.

2. That the whole case for the prosecution depended on circumstantial evidence where

there was material discrepancy between different witnesses.

3. That the trial was conducted by Biyereza DM and the judgment was written by Komba DM which was illegal.

As remarked earlier, the appellant appeared in person. The respondent/Republic was represented by Mr. Edgar Luoga, learned Senior State Attorney.

At the start of the hearing of this appeal, the appellant appraised us of the fact that the case was tried to finality in the Court of first instance but the proceedings were quashed on appeal for failure by the trial court to observe some requirements of procedural law. The High Court ordered trial to commence *de novo* in the same trial court. The appellant prayed to this court that the record of proceedings which was vacated by the High Court be called up for inspection by this court so that the evidence given by the witnesses in the two records be compared for veracity.

We will start with the application made by the appellant to have the record of vacated proceedings be called up by this court for comparison. In this we observe that the High Court, as a first appellate court, acted under Section 29(b) of the Magistrates' Court Act, Chapter 11 R.E. 2002 of the laws which reads thus:-

> *"29(a).....*
>
> *(b) to quash any proceedings (including proceedings which terminated in a decision or order of a district court substituting an acquittal for a conviction, not being a decision or order confirming an acquittal by a primary court) and where it is considered desirable, order the case to be heard de novo either before the Court of first instance or some other primary court or district court having jurisdiction:*
>
> *Provided that where proceedings are quashed and an order for rehearing is made as aforesaid-*
>
> *(i) the provisions of paragraph (b) of subsection*
>
> *(1) of section 49 and of subsection (2) of that section shall be applicable to such rehearing as if the case had been transferred, and*
>
> *(ii) no plea of res judicata or autrefois acquit or autrefois convict shall be entertained in respect of any decision or order in the proceedings so quashed;*
>
> *(c).....*

In view of section 29(b) of the Magistrates' Courts Act, proceedings that are quashed are a nullity and that is why under Section 29(b)(ii) no plea of *res judicata* or *autrefois acquit* or *autrefois convict* can be raised as regards them. As such no order of recall can be made regarding them. The prayer by the appellant is therefore rejected.

The appellant also raised a querry about the PF3 issued to PW1 Hatungimana Lucine when he said he was not afforded an opportunity of examining the medical officer who made the report. It is true when the PF3 was put in evidence the appellant did not object. The record however shows clearly that the trial court did not inform the appellant of his right to have the medical officer who filled in the report summoned for examination as to the contents therein. This court has consistently held that failure by a trial court in informing an accused person of his right under s. 240(3) of the Criminal Procedure Act to have a person who makes a medical report called renders the medical report valueless. We have said so much ni **Japhari Juma V R**, Criminal Appeal No 104 of 2006 (unreported), **Jackson Mlonga V R**, Criminal Appeal No. 200 of 2007 (unreported) and

Wilbard Kimangano V R, Criminal Appeal No 235 of 2007 (unreported). We therefore discount the PF3 put in evidence as Exhibit P1.

Having discounted the PF we are left with the evidence of the prosecutrix herself, PW1, Hatungimana Lucine, her grandmother PW2 Nduwimana Apolonia and PW3 Nyandwi Deodene. We start with the evidence of PW3 Nyandwi Deodene. His role was merely to go to the appellant's house and apprehend him so he had nothing to do with proof of the offence. We are therefore left with the prosecutrix and her grandmother. Before we go into the substance of the evidence we should point out that this is a second appeal, and in a second appeal the court is supposed to deal with questions of law only. In **Ludovide Sebastian V Republic**, Criminal Appeal No 318 of 2007 (unreported) we said this:-

> *"On a second appeal we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If both courts completely misapprehend the substance, nature and quality of the evidence, resulting in an unfair conviction, this Court must, in the interests of justice, interfere".*

Can it be said the two courts below dealt with the findings of fact and law exhaustively so that we cannot interfere? Both the trial court and the High Court on appeal found it as a fact that the prosecutrix PW1 was a credible witness and that her evidence was corroborated by that of her grandmother PW2 Nduwimana Apolonia. The record however shows that both courts did not address themselves on a very necessary ingredient of the offence the appellant was charged with, to wit, penetration. The only reference to penetration by the victim is at page 20 of the record where the victim says:-

> *".....seized me by my arm dragged me into the house where he stripped me nacked (sic) and had my carnal knowledge. The accused person at all material time he was having my carnal knowledge was covering my mouth with his palm ".*

On the part of the grandmother, PW2 Nduwimana Apolonia, the only evidence which suggested something wrong with the victims private parts is at page 25 of the record where she says:-

> *".....I observed in Hatungimana's private parts and detected some discharge of mucoid substance therein ".*

An essential ingredient of the offence of rape is as laid in Section 130(4)(a) of the Penal Code which states thus:-

> *"(4) For the purposes of proving the offence of rape-*
>
> *(a)penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence.*

This Court has amplified the requirement of penetration and laid down guidelines to assist in proof of the offence in the case of **Mathayo Ngalya @ Shabani V Republic**, Criminal Appeal No 170 of 2006 (unreported), when it said:-

> *"For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence".*

Other cases which have put emphasis on proof of penetration are:-

*(1) **Alfeo Valentino V Republic**, Criminal Appeal No 92 of 2006*

*(2) **Charles Kayoka V Republic**, Criminal Appeal No 325 of 2007*

*(3) **Ally Mlawa VR**, Criminal Appeal No 77 of 2007 (unreported)*

Both the trial court and the High Court did not address themselves on this fundamental requirement which must be proved in cases of rape. Failure of the victim to say what exactly happened is necessarily fatal. As this court held in **Selemani Makumba V Republic**, Criminal Appeal No: 94 of 1999 (unreported):-

> *"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of any other women where consent is irrelevant that there was penetration".*

Both the evidence of the victim and that of her grandmother did not prove penetration, and since we have discounted the PF3 put in evidence, it remains that an essential element of the offence remained unproved both at the level of the trial court and during the appeal in the High Court. Failure to apprehend this important aspect of the law regarding sexual

offences entitles this court to intervene and correct this situation which I in fact led to miscarriage of justice.

Lastly, the appellant raised the point that two District Magistrates wrote the judgment. We have checked the record. From the time the charge was read over to the accused person, now the appellant, and he entered his plea to the date on 22/3/2006 when the trial court made an order that judgment will be delivered on 3/4/2006 the trial magistrate was one G.G. Biyereza, District Magistrate. Then at page 43 of the record the coram shows that the magistrate who wrote the judgment is one D.D. Komba, District Magistrate. At the end of the judgment on 5/4/2006 when the trial court found the appellant guilty and convicted him, the magistrate who signed the judgment and dated it is G.G. Biyereza, District Magistrate, who continued, on the same day, to sentence the appellant. The record is therefore not clear who wrote the judgment between D.D. Komba and G.G. Biregeya who are both District Magistrates, and whether one took over from the other in terms of Section 214(1) of the Criminal Procedure Act.

We would have been minded to exercise our revisional jurisdict under Section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of tl Laws R.E. 2002 as amended by Act Number 17 of 1993 as regards the breach of the provisions of Section 214(1) of the Criminal Procedure Act, but in view of our findings as regards the medical report PF3 and the fact that the offence was not proved at all, we are constrained to agree with the learned State Attorney who did not support the conviction and sentence, that there was no evidence to sustain a conviction. Accordingly we quash the conviction and set aside the sentence. The appellant should be released from custody unless he is held on some other lawful cause.

DATED at MWANZA this 18th day of October, 2010.

A. S. L. RAMADHANI

CHIEF JUSTICE

N. P. KIMARO

JUSTICE OF APPEAL

W. S. MANDIA

JUSTICE OF APPEAL

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

P. W. Bampikya

SENIOR DEPUTY REGISTRAR