IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 344 OF 2008

SAIDI HEMEDI MAKAPILI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Rweyemamu, J.)

dated the 1st day of August, 2008
in
Criminal Appeal No. 34 of 2008

JUDGMENT OF THE COURT

27 & 30 September 2011

MBAROUK, J.A.:

This is a second appeal. The appellant was convicted by the District Court of Kilwa at Masoko of the offence of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 of the laws as amended by sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. He was

sentenced to thirty (30) years imprisonment. He believed the conviction and sentence were unjustified, hence appealed to the High Court. His appeal at the High Court was dismissed in its entirety. Dissatisfied, he has lodged this appeal.

Being a second appeal, it is now settled law that the Court is always cautious in reversing concurrent findings of fact made by two courts below. See: **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (1981) TLR 149 at page 153 this Court stated as follows:-

> "The next important point for consideration and decision in this case is whether it is proper for this Court to evaluate the evidence afresh and come to its own conclusions on matters of facts. This is a second appeal brought under the provisions of S. 5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies only where there are no misdirection or non-directions on the evidence a court is entitled to look the relevant evidence and make its own findings of fact."

In the determination of this appeal, therefore, we shall be guided by that established principle.

In the instant appeal, the appellant preferred five grounds of appeal in his memorandum of appeal, but they can be argued on a point as to whether the prosecution proved their case beyond reasonable doubt or not.

Before examining in detail the grounds of appeal, we think, it is helpful to give a brief account of what led to the appellant's conviction. On 10/10/2000 at 6.00 p.m., PW1, Aziza Amri Ngunga testified to the effect that she left home to fetch water and wash some of her clothes in the company of her two children. When PW1 arrived at a river, she met the appellant and greeted him as they were neighbours. PW1 then said that the appellant took his drawers and left, but returned shortly thereafter. The appellant then approached PW1 and told her that "mama Mwanaisha nakutaka". PW1 carried her water container, but the appellant kicked it, held her neck, while she screamed for help, her two daughters looked on

without any assistance. The appellant proceeded to tear PW1's underwear, put his penis into her vagina and ejaculated once. PW1 knew the appellant very well, as he was her neighbour who lived with his grandmother. After the appellant had left, PW1 rushed to report the matter to PW2, Omari Mwichande Iddi who was a ten cell leader of Mtilila village. With the help of other villagers, PW2 went to find the appellant and managed to find him hiding in the bush bare-chested. He was arrested and PW2 issued a letter for the appellant to be sent to VEO's office and later to police station.

On the other hand, PW3, Andrew Mkuluwa a Clinical Officer of Njinjo Health Center examined PW1 and found minor swelling and semen in her vagina and that she complained pain in her neck.

In his defence, the appellant categorically denied the charge and said that he was arrested in the bush while he was cutting trees without being told the reason. After all, he claimed not to be sexually active.

When the appeal was called on for hearing, the appellant appeared in person and was unrepresented. The respondent Republic was represented by Mr. Ismail Manjoti, learned State Attorney assisted by Mr. Prudens Rweyongeza, learned Senior State Attorney. The appellant had no additional ground of appeal. He adopted his grounds of appeal listed in his memorandum of appeal and had nothing to say in elaboration thereof.

On his part, Mr. Manjoti vehemently resisted the appeal. From the outset, he did not support the appeal. He directed his submission to a general question as to whether the prosecution proved their case beyond reasonable doubt. He then submitted that, the prosecution depended upon four witnesses and a PF3, Exhibit P2 to prove their case.

Mr. Manjoti, said PW1 correctly identified the appellant as he was her neighbour who knew him before. He submitted that the incident happened in a broad day light and due to the proximity she identified him correctly

The learned State Attorney further submitted that PW1 testified in length on how the appellant managed to rape her. Thereafter, PW3, the Doctor who examined PW1 gave his evidence to prove that PW1 was raped. He also tendered the PF3 and the appellant did not cross examine him.

Furthermore, Mr. Manjoti said, PW2 and PW4 testified as to how they managed to arrest the appellant after hiding himself in the bush. He also said that the appellant confessed to PW2 and PW4 that he committed the offence. He added that, it is now settled that such confession leads to an inference that the appellant committed the offence. To support his submission, he cited to us the case of **Ally Mohamed Mkupa v. Republic,** Criminal Appeal No. 2 of 2008 (unreported).

In addition to that, the learned State Attorney, we think correctly submitted that the appellant failed to cross examine some important prosecution witnesses, hence led the evidence of those witnesses to remain unchallenged. In support of his argument, he cited to us the

decision of this Court in **Goodluck Kyando v. Republic,** Criminal Appeal No. 118 of 2003 (unreported).

On our side, we are of the opinion that there is no doubt as Mr. Manjoti submitted, that the appellant was correctly identified by PW1. This is so for the reason that the appellant was not a stranger to PW1, she knew him before as they were neighbours. Also the incident happened in a broad day light, hence for a person known to PW1 before, there is no doubt, she identified him correctly. After all, PW1 and the appellant talked to each other before the incident and the proximity during the act enabled PW1 to correctly identify the appellant.

In addition to that PW1 testified as to how the appellant raped her, she said the appellant's penis was inserted into her vagina and he ejaculated once. That evidence alone is enough to prove the element of penetration as the law requires. However, the evidence of PW3, the Clinical Officer further established that penetration. Also the PF3 tendered as Exhibit P2 proved the element of penetration.

We think, that evidence alone has established that the prosecution proved their case beyond reasonable doubt. However, as pointed out by Mr. Manjoti, when the appellant confessed before PW2 and PW4, that means an inference can be drawn to the effect that the appellant committed the offence. After all, no use of force was claimed. That means the appellant confessed freely and voluntarily. See: **Ally Mohamed Mkupa** *(supra).*

As pointed earlier, in the instant case which is the second appeal, we have seen no misdirections or non directions from the concurrent decisions of the two lower courts. In the event, and for the reasons stated herein above, we see no reason to fault their decisions. In the circumstances, we hereby dismiss the appeal in its entirety.

DATED at MTWARA this 27th day of September, 2011.

E.N. MUNUO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

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

(M.A. Malewo)
DEPUTY REGISTRAR