IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 99 OF 2010

ALLY HUSSEIN KATUA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Teemba, J.)

dated the 16th day of April, 2010
in
Criminal Appeal No. 85 of 2005

J U D G M E N T

30 March & 8 April 2011

MANDIA, J.A.:

The appellant ALLY HUSSEIN KATUA appeared before the District Court of Muheza at Muheza to answer a charge sheet containing one count of Rape c/s 130 (a) and 131 (1) of the Penal Code, Chapter 16 of the Laws as amended by the Sexual Offences Special Provisions Act Number 4 of 1998. After a trial in which the prosecution fielded five witnesses and the defence fielded four

witnesses the trial District Court found the appellant NOT GUILTY and acquitted him.

The Director of Public prosecutions was dissatisfied with the finding of the trial court and preferred an appeal to the High Court of Tanzania at Tanga. The memorandum of appeal which the Director of Public Prosecutions filed had two grounds, namely:-

> *"1. The Magistrate erred in law and fact in holding that the prosecution evidence on the issue of identification from one witness (PW1 alone) was not sufficient to find the accused guilty of rape.*
>
> *2. The trial Magistrate erred in law and fact in holding that the prosecution side failed to substantiate their case beyond reasonable doubt."*

After due hearing of the appeal in the High Court, the first appellate Judge found that the trial court had misdirected itself when it based its finding of acquittal on the issue of identification since the appellant and all the witnesses who testified are village mates and

relatives. I am of the view that the learned first appellant judge was right in coming to this conclusion which led to her allowing the first ground of appeal.

In the second ground of appeal the appellant in the High Court had raised the question of burden of proof i.e. proof beyond reasonable doubt. The judgment of the appellate high Court however made a finding that the judgment of the trial District Court did not amount to a judgment under the provisions of Section 312 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002. The appellate High Court made this comment:-

> *"The learned State Attorney criticized the judgment of the trial court, and I agree with him entirely, that it offends Section 312 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002. The law requires the trial court, in writing its judgment, to single out points of determination, evaluate evidence and make findings of facts and the decision thereon and to assign reasons for any decision. The trial District Magistrate did not follow the*

verdict by citing a reported case without making analysis."

Despite this finding, the appellate High Court went on to assess the evidence on record and found it as a fact that the complainant was a truthful and credible witness. Basing itself on Section 127 (7) of the Evidence Act as amended by the Sexual Offences Special Provisions Act, 1998 the appellate High Court set aside the decision of the trial District Court, found the appellant guilty and convicted him. This led to the present appeal.

At the hearing of this appeal the appellant appeared in person, unrepresented, while the respondent/Republic was represented by Mr. Faraja Nchimbi, learned State Attorney.

The appellant raised two points in his appeal. The first one is that the charge he was faced with in the trial court was defective in that it did not indicate lack of consent in the charge of rape facing him, and the second ground of complaint is that the appellate High

Court did not direct its mind to the credibility of the complainant: that she was mentally ill and confused at the time of commission of the alleged offence.

In arguing the appeal Mr. Faraja Nchimbi, learned advocate put forth the point that since the age of the victim was seventeen years, consent or the lack of it was immaterial in a charge of rape for an under-age girl as provided for in Section 130 (2) (e) of the Penal Code. As for credibility the learned advocate argued that since the learned appellate High Court judge had found the complainant to be a credible witness capable of giving minute details of the events leading to the allegations of rape, the finding that the complainant was a truthful and credible witness was proper which makes the conviction properly founded.

To appreciate the issues, it may be opportune to recapitulate on the evidence.

PW2 Mwantumu Juma is a grandmother living at Kidutani Village, Mlingano Kibaoni in Muheza District. She lives in the same house with PW1 Rehema Athumani who is her granddaughter. The

appellant also lives at Kidutani Village and his house, according to PW2 Mwantumu Juma, is situated 250 paces from the house of Mwantumu. The appellant is the son of PW2 Mwantumu Juma's brother, and is therefore an uncle to PW1 Rehema Athumani. PW2 Mwantumu Juma also testified that the appellant is a traditional healer at their village.

In the trial court PW2 Mwantumu Juma testified that on 20/1/2004 the complainant PW1 Rehema Athumani complained that her head was confused. When PW1 Rehema Athumani got "seriously sick" according to Mwantumu she (Mwantumu) went over to the appellant and reported Rehema's sickness to the latter. The appellant went over to Mwantumu's house and "treated Rehema." On the following day 21/1/2004 PW2 Mwantumu Juma took Rehema Athumani to the appellant's house. Accompanying them was Rehema Athumani's younger brother Mhidini. Mwantumu Juma (PW2) had carried with her things to be used in the treatment as advised by the appellant. These were one rotten egg, three coconuts and a red hen. Mwantumu Juma and her grandchildren arrived at the appellant's house at 8 p.m. Before the treatment the

appellant implored PW2 Mwantumu Juma, who was his aunt, to bless him for the treatment and the blessing was accordingly made using "KATA YA MAJI". After the blessing that the appellant treated PW1 Rehema Athumani at a waste heap (Jalala). After the treatment in the presence of PW2 Mwantumu Juma the appellant slaughtered a hen and then left with Rehema alone. When they came back she Mwantumu Juma paid Shs. 500/= and they left for their home. On the way home Rehema shouted "as usual and cried out". This made PW2 Mwantumu to back to the appellant to report the recurrence of the sickness. The appellant went over to Mwantumu Juma's house where Rehema was and treated her again. After the appellant left, PW1 Rehema Athumani told her grandmother that she cried out because her uncle had raped her. PW2 Mwantumu reported the rape allegation to PW3 Habiba Kuziwa the village ten cell leader.

As the evidence of PW2 Mwantumu Juma shows, she did not witness the alleged rape. The incidence of rape is narrated in minute detail by the complainant, PW1 Rehema Athumani. She testified that on 21/1/2004 at about 8 p.m. she went to the house of his uncle, the appellant, for traditional healing because the appellant is a traditional

doctor. With them was his younger brother Shomari Majidi. There is a minor discrepancy here. While PW2 Mwantumu Juma gives the name of the younger brother who kept them company as Mhidini, PW1 Rehema Athumani gives the name as Shomari Majidi. The boy did not testify, so it is not known whether or not Mhidini is the same person who also goes by the name of Shomari Majidi. All in all PW1 Rehema Athumani testified that when they went over to the appellant's house for treatment, the appellant's wife **Amina Hamisi** was there in attendance. Rehema Athumani went on to say that the initial treatment took place at a waste dump. There the appellant made her sit on an instrument used for grating coconuts while the appellant, holding a hen and calabash (tunguli) mumbled words while swinging the hen over her head. The two then went to a distance fifteen paces away where appellant made her (PW1) undress and he passed over a calabash (tunguli) over her in round motions. PW1 then dressed up at the instruction of the appellant and was made by the appellant to throw away bad eggs they carried. The two went home where the appellant slaughtered the red hen used in the treatment. The appellant then left with PW1 alone, leaving PW2 Mwantumu Juma back. They went to a distance 15 paces away

where she (PW1) undressed at the instruction of the appellant and was made to lie down face up. The appellant, according to Rehema, also undressed, lay on top of Rehema and inserted his penis into Rehema's vagina. Rehema testified that she thought the sex act was part of "tambiko" as the appellant told her what he was doing was "kutambika". All the same she told the appellant she was feeling pain. The appellant then told Rehema to accompany him home. Rehema said she saw white solution in her vagina and went home. The appellant told her to keep quiet about the sex act because talking about it would spoil the medicine. They went to the appellant's house where they met the grandmother PW2 Mwantumu Juma and his brother, from there they went back home. On the way back home she (Rehema) told her grandmother that the appellant had raped her. On the following day she took a bath. When her father Eliakim Athuman came, she does not mention the exact date, she narrated the rape ordeal and her father reported the matter to the Police. Before the report a meeting of elders was called and the appellant denied committing the rape. PW1 Rehema Athumani tendered a PF3 issued to her as exhibit P1. The PF3 is shown to

have been issued on 27/1/2004 and was filled in by the medical officer after examination on 30/1/2004.

PW4 Eliakimu Athumani, Rehema's father, testified that he received news of the rape four days after it happened and he reported to the Police.

Another witness fielded by the prosecution is PW5 Margareth Simkoko, a teacher with Mlingano Secondary School since 2003 and also matron for the school. She testified that on 21/1/2004 at about 11 a.m. in the morning PW1 Rehema Athumani, a student newly transferred from Lanzoni Secondary School, reported to her that she had been raped by her uncle.

At the closure of the case for the defence the appellant defended himself on affirmation. He admitted the fact that he is a traditional healer living in the same village as the complainant. He also confirmed that the complainant is his sister's daughter. The appellant also confirms that he treated the complainant whose "disease" was "shouting and causing disturbance." After the

treatment at the house of Mwantumu Juma PW2 the appellant testified that he had to repeat the treatment on the following day. As to the treatment the record shows the appellant at page 20 of the record, saying this:-

> *"It was thereafter I proceeded with the available and the others also were available. I took then the patient to a "**JALALA**" of my house. I was assisted by Mwantumu Juma (PW2) and my wife turned to be a spectator to what I was making (doing). I gave a small chair to the patient so that she could be seated. In the alternative handed over the TUNGULI to Mwantumu (PW2). I did proceed with the treatment and was the juncture the patient started shouting. The patient fell down and I did read the KORAN and the patient became alright. I*

proceeded with the medicine and then took a hen...."

The appellants wife, DW2 Mariamu Hamisi also testified for the defence and gave evidence on how the treatment at the waste dump went she denied that a rape took place. Another defence witness is DW3 Juma Hassani Katua who is an elder brother of the appellant. He attended a family meeting chaired by another elder brother DW4 Hussein Hassan Katua in which the rape allegation were discussed and found not to be true. When the complainant's father came he reported the matter to the police.

No police officer appeared in the trial court to testify, which is rather surprising, taking into account the gravity of the charge. On 4/10/2004, **nine months** after the alleged commission of the offence the appellant first appeared in court to answer the charge laid against him.

Arguing in support of the conviction, Mr. Faraja Nchimbi, learned advocate, submitted that by giving a detailed account of the

events revealing the rape PW1 Rehema Athumani shows that she was a sane and credible witness. Mr. Nchimbi also argued that the fact that the appellant corroborates the facts as given prosecution witnesses particularly PW1 Rehema Athumani and PW2 Mwantumu Juma except the allegation of rape shows that the prosecution witnesses are telling the truth. The learned State Attorney urged this Court to take the anomalies regarding the medical report as minor and of no impact on the prosecution case.

On his part the appellant argued that the fact that at 11 a.m. on the morning of 21/1/2004 PW1 Rehema Athumani told PW5 Margaret Simkoko that she had been raped by her uncle makes the story of rape unlikely, because according to the charge sheet the incident happened at 8 p.m. on 21/1/2004. This means Rehema Athumani described the event **nine hours** before it happened.

The first ground of appeal raised by the appellant is on the property of the charge sheet. The section of the law quoted in the charge sheet as creating the offence is Section 130 (a) of the Penal Code, and the penalty provision quoted is section 131 (1) of the

Penal Code. The particulars of the charge show clearly the offence and a brief summary of the allegation the appellant faced in the trial court. May be to be more elegant the prosecution should have cited the section creating the offence as section 130 (1) (e) of the Penal Code because the victim was aged below eighteen, but this defect is minor and curable under section 388 of the Penal Code. Anyway the appellant was not embarrassed in his defence so the complaint about the charge being defective has no substance and is hereby dismissed.

In his second ground of complaint the appellant faults the High Court for not appreciating the state of mind of the complainant PW1 Rehema Athumani - that she was of an unstable mind- before taking her to be a credible and truthful witness. Mr. Faraja Nchimbi, learned advocate, argued that the High Court, at page 58 line 9 to 22 and at page 59 line 1to 16 of the record found the witness coherent in sequence of events so she was rational, and anyway her evidence is corroborated by PW2 in every material aspect. I will come to this aspect later, if there is need to do so. I will first deal with a specific finding of the appellate High Court which appears at the bottom of page 54 of the record to the top of page 53 and goes thus:-

"The second ground of appeal is that the trial District Magistrate erred in law and fact in holding that the prosecution side failed to substantiate its case beyond reasonable doubt. The learned State Attorney criticized the judgment of the trial court ***and I agree with him entirely****, that it offends section 312 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002. The law requires the trial court in writing its judgment, to single out points of determination, evaluate evidence and make findings of fact and the decision thereon and to assign reasons for any decision. The trial District Magistrate did not follow the requirements of s. 312 above and instead he summarized the evidence and made his verdict by citing a reported case without making analysis.*

The above quote, to put it plainly, means there was no judgment before the High Court worth considering. What is odd is that despite this finding that there was no judgment before the appellate High Court, the same court went to consider the evidence as adduced in the trial court and proceeded to quash the judgment of the trial court which entered an acquittal against the appellant. The appellate High Court then took over the role of the trial District Court, entered a conviction and passed sentence against the appellant. A similar situation arose in **R v PHILLETOUS MAILO** (1958) EA 11, and it was held, *inter alia* that:-

> *" While s.169 of the Criminal Procedure Code requires every judgment to contain the point or points for determination, the decision thereon and the reasons for the decision, a magistrate is not required in the case of an acquittal to deal with every point which would have to be decided when a judgment acquitting the accused fails to deal at all with one of the main*

is a substantial error of law. Appeal allowed. Case remitted for re-trial before another magistrate."

The quotation of the judgment of the High Court on appeal quoted above as it appears at pages 54 and 55 of the record in effect shows the High Court as having no basis for proceeding further. Yet in the same vein the High Court found that there was an acquittal which was fit for reversal, and after the reversal the High Court took it upon itself to assess the evidence adduced in the trial court, enter a conviction and sentence. In view of the defects if found the best option open to the High Court was to quash the order of acquittal and remit the case for re-trial before another magistrate. I would therefore allow the appeal, quash the conviction and set aside sentence passed by the High Court and remit the case for re-trial before another magistrate of competent jurisdiction.

In view of this finding I would not make any comment on the second ground of complaint touching on credibility of witnesses, burden of proof, elements of the offence etc. This would best be done after the retrial and appeal, if any.

DATED at TANGA this 7th day of April, 2011.

W.S. MANDIA
JUSTICE OF APPEAL

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

(E.Y. Mkwizu)
DEPUTY REGISTRAR