

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: MUNUO, J.A, LUANDA, J.A And MJASIRI, J.A)

CRIMINAL APPEAL NO. 337 OF 2008

ISMAIL MNYAWAMI APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Iringa)**

(Jundu, J)

Dated the 13th day of October, 2008

In

(DC) Criminal Appeal No. 11 of 2008

JUDGEMENT OF THE COURT

16 & 21 JUNE, 2011

LUANDA, J.A:

On 23/6/2004 the appellant ISMAIL MNYAWAMI was convicted by the District Court of Iringa sitting at Iringa for raping a baby girl of 3 years of age and sentenced to life imprisonment . He was aggrieved by that finding. He unsuccessfully appealed to the High Court, hence this second appeal.

The facts which led to his conviction were that on 12/5/2003 around 4.00 p.m. while Sarah d/o Mtenga (PW I) was at her shamba near her homestead , she heard her daughter crying. She rushed back home to see what all the fuss was about . On arrival she saw the appellant on top of Brightness raping her. PWI ran to her neighbour one Zavelia d/o Maginga (PW 2) and informed her about the incident. Indeed, the two went to the place and saw the appellant in the act of raping the girl. When he was asked as to what he was doing, the appellant who was naked stood up, collected his supporting walking stick and wanted to beat PW2. The appellant could not do that as he was overpowered. Then the two raised an alarm and people responded.

Among the people who responded was Emiliana d/o Nyawami (PW3) who also said she was the mother of Brightness, the victim of rape. The appellant was arrested and the baby was examined there and then. The baby's vagina was swollen and it contained spermatozoa. The baby was later sent to a dispensary and attended by Frank s/o Shirima (PW5) a Rural Medical Aid, who, through his report which was tendered in Court

as Exht A opined that the baby was raped. The appellant was sent to police and eventually charged.

The appellant elected to remain silent after he was informed of his rights.

On the basis of the above evidence, both lower courts were satisfied that the appellant committed the offence of rape to the baby. The appellant was dissatisfied, exercising his rights, he has come to this Court on a second appeal.

In this appeal, the appellant was unrepresented and so he fended for himself; whereas the respondent Republic was represented by Mr. Josephat Mkizungo, learned State Attorney and Ms Andikalo Msabila, learned Senior State Attorney. Mr. Josephat supported the concurrent findings of facts of the lower courts and the sentence imposed.

The appellant has raised nine grounds of appeal in his memorandum of appeal. However, out of the nine grounds raised some are irrelevant or

immaterial to the case the appellant was charged with. For instance, he wanted to know among PW1 and PW3, who was the real mother of the victim of rape. That was not material to the case. The crucial issue in this appeal is whether the evidence adduced by the prosecution was strong enough to ground a conviction for the offence of rape.

Mr. Josephat Mkizungo submitted that the evidence of PW1 and PW2 who were eye witnesses alone is enough to ground a conviction. These two witnesses saw the appellant in the act of raping the baby girl of 3 years who could not testify. They then raised an alarm. People responded. And when the baby was examined her vagina was found to have been swollen and it contained spermatozoa. The appellant was the one who raped the baby girl, he charged.

This is the second appeal. Normally this Court will not interfere with the concurrent findings of fact by the courts below unless it is shown there are misdirections or non – directions. So the crucial question is whether or not there is a basis for us to interfere with the concurrent findings of fact by the courts below.

The evidence of PW1 and PW2 is loud and clear ; they saw the appellant raping the baby. In actual fact, as correctly submitted by Mr. Josephat, that the evidence of these two witnesses was enough to ground a conviction in absence of the evidence of the victim of rape. We are alive of the fact that ordinarily the best evidence of rape comes from the victim of rape. But at times, as in this case, where the victim of rape is unable to testify, evidence of eye witnesses suffices.

In view of the foregoing, we find, like the courts below, that the evidence in the prosecution case was strong that the appellant was the one who raped the baby. The conviction was inevitable.

Apart from the evidence, the appellant complained that the order of Mrema , J of taking additional evidence was not complied with. But he did not say whether the non compliance had occasioned any injustice. Be that as it may, it is true Mrema, J ordered for the taking of additional evidence. The record shows that efforts were made to trace the witnesses but to no avail. Hence, the disposal of the appeal.

We dismiss the appeal in its entirety .

Order accordingly.

DATED at **IRINGA** this 20th day of June, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



A handwritten signature in black ink, appearing to read "J.S. MGETTA".

J.S. MGETTA
**DEPUTY REGISTRAR
COURT OF APPEAL**