IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 282 OF 2010

JUMANNE SHABAN MRONDO.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Sambo, J.)

dated the 5th day of August, 2010
in
Criminal Appeal No. 64 of 2007

JUDGMENT OF THE COURT

19th September & 25th October, 2012

MASSATI, J.A.:

Before the District Court of Arusha, the appellant was convicted of the offence of rape. He was sentenced to 30 years imprisonment. His appeal to the High Court was dismissed, hence this, his second appeal.

At the trial court, it was alleged that on the 25th day of May, 2005, at 20:00 hours at Olmatejoo area, Arusha, he did have carnal knowledge of one Amina d/o Halifa, a girl of 14.

The prosecution evidence was to the effect that PW3, SAKINA HALIFA, a petty vegetable vendor, was living with her younger sister, AMINA HALIFA (PW1). On 25/5/2005 PW3 went to her place of business at Kilombero market leaving PW1 at home. She came back at about 8:00 p.m. PW1 told her that the appellant had raped her. She reported the matter to the police who issued a PF3 (Exh. P1) and led to the arrest of the appellant. PW1, herself told the trial court that the appellant had sexual intercourse with her. PW2 confirmed that she was at the residence of PW1 when the appellant came and entered into the house. By peeping through the crevices in the house, she and other children were able to see the appellant lying on top of PW1.

On the other hand, the appellant told the court on oath that he did not rape the girl, but admitted that on that day he was seen entering the house and even asked for forgiveness to PW3 so that the matter could be settled out of court.

The issue before the trial court was whether the appellant raped PW1. On the basis of the testimony of PW1 and PW2 who were found as

truthfull witnesses, the court answered it in the affirmative, hence the conviction.

At the hearing of the appeal, the appellant appeared in person, and adopted his memorandum of appeal which was comprised of four grounds. The grounds were that; **first,** the charge was defective; **second,** that section 240 (3) of the Criminal Procedure Act (the CPA) was violated; **third,** that the contents of section 130 (4) (a) of the Penal Code were not met and **lastly,** that section 210 (3) of the CPA was contravened. As a layman, he did not have much to say by way of elaboration of his somewhat intricate, legally padded grounds of appeal, except to repeat that he did not commit the offence.

Ms Elizabeth Swai, learned State Attorney represented the respondent/Republic. She declined to support the conviction on the major grounds that, **firstly,** the evidence of PW1 was received contrary to section 127 (2) of the Evidence Act, and so should be discarded; citing **GODI KASENEGALA vs R** Criminal Appeal No. 10 of 2008 (unreported). **Secondly,** PW2's evidence was neither here nor there, and that of PW3' was mere hearsay. **Thirdly,** the PF3 (Exh P1) was received contrary to

section 240 (3) of the CPA. So, even if PW1's testimony was to be treated as unsworn, there was no evidence to corroborate it, she argued. Lastly, the learned counsel submitted that for the offence of rape to be proved, there must be evidence of penetration, and there was none in this case. So she urged us to allow the appeal.

In his first ground of appeal, the appellant has alleged that the charge sheet was defective. Unfortunately both the appellant and the learned State Attorney did not advert to it. We have looked at the charge sheet. We do not see any defect on the face of it, and we cannot guess what the appellant had in mind. We therefore dismiss this ground.

On the second ground, we agree with the appellant and the respondent that the PF3 (Exh P1) was received without informing the appellant of his right to call the doctor who prepared it for cross examination. We take the law as settled that non compliance with section 240 (3) of the CPA disables a court from acting upon such medical evidence (See **ALFRED VALENTINO vs R** Criminal Appeal No. 92 of 2006 (unreported). But it is also equally settled law that even without such

medical evidence, a sexual offence may be proved by some other evidence (See **ISSA HAMIS LIKALAMILA vs R** Criminal Appeal No. 125 of 2005, **MESTON MTULINGA vs R** Criminal Appeal No. 426 of 2006 (both unreported). So, we allow the second ground of appeal subject to the fact that such non compliance may not necessarily be fatal to a conviction if there is some other evidence to support it.

The third ground of appeal relates to the contravention of section 130 (4) (a) at the Penal Code. The section provides:-

> *"130 (4) (a) penetration however slight is sufficient to constitute sexual intercourse necessary to the offence."*

Although the appellant himself did not say anything about this particular ground, Ms Swai actually elaborately submitted that there was no concrete evidence of penetration in this case to establish the offence of rape. She quoted words from the victim such as *"alinifanya matusi"* or *"he put his dudu inside my vagina"* or *"he used a piece of cloth to wipe off his*

penis and wipe my secret parts as well" as inconclusive. It is true that in many of its decisions, this Court has insisted that to prove penetration, it is not enough to use general statements such as that so and so "raped me". The complainant ought to be more specific (See **EX-B. 9690 SGT DANIEL MSHAMBALA vs R** Criminal Appeal No. 183 of 2004, **MOHAMED JUMA & TWO OTHERS vs R** Criminal Appeal No. 29 of 2009 (both unreported). But there have been cases where this Court has inferred penetration by circumstantial evidence (See **LUKAS MAKINGA @ MADUHU vs R** Criminal Appeal No. 269 of 2009 (unreported)), where this Court was satisfied that penetration was proved where although the victim was too young to testify, the appellant was found right in the act, blood was oozing out of the child victim's vagina, and the appellant had confessed and asked for forgiveness. But more recently, in **HASSAN BAKARI @ MAMAJICHO vs R** Criminal Appeal No. 103 of 2012 (at Mtwara) this Court said:-

> *"It is common knowledge that when people speak of sexual intercourse they mean the penetration of the penis of a male into the vagina of a female. It*

is now and then read in court records that trial courts just make reference to such words as sexual intercourse or male/female organs or simply to have sex and the like. Whenever such words are used or a witness in open court simply refers to such words.....they are or should be taken to mean the penis penetrating the vagina. There are circumstances, and they are not few that witnesses or even the court would avoid using such direct words as penis or vagina and the like for obvious reasons including but not restricted to that person's cultural background, upbringing, religion, feelings, the audience listening, the age of the person and the like. These restrictions are understandable. Given the circumstances of each case, our considered view is that so long as the court, the adverse party, and/or any intended audience grasps the meaning of what is meant then it is sufficient to

mean or understand it to be penetration of the vagina by the penis.....

.....Our cultural backgrounds and upbringing need to be observed and respected in matters of this kind."

In the present case, PW1 is on record to have said "*Alinifanya matusi*" which the trial court understood to mean he had sexual intercourse with her. PW1 also said "*He put his dudu inside my vagina,*" and then "*he used a piece of cloth to wipe off his penis and wipe my secret parts as well.*" The appellant went on to ask for forgiveness from the victim's sister, PW3. All these words and the appellant's conduct are, in our view, sufficient to prove penetration. So we do not find any merit in the appellant's complaint and the respondent's misapprehension. We therefore dismiss this ground.

The last ground of appeal is that section 210 (3) of the CPA has been contravened. That section provides:-

(210) "(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

Unfortunately, neither the appellant nor the respondent did address us on this issue; but as it is a point of law, we will examine it.

We have examined the proceedings. The typed proceedings do not reflect that the provision was complied with. So, it is true that section 210 (3) of the CPA was violated. But, in every procedural irregularity the question is whether, it has occasioned a miscarriage of justice (See **MICHAEL LUHIYE vs R** (1994) TLR. 181, **KOBELO MWAHA vs R** Criminal Appeal No. 173 of 2008 (unreported).

In this case neither the appellant nor any witness has come forward and complained that her or his evidence was mis-recorded, to the prejudice

of the appellant. In RICHARD MEBOLOKINI vs R (2000) TLR 90, Rutakangwa, J. (as he then was) was faced with a similar complaint. The learned judge observed that when the authenticity of the record is in issue, non compliance with section 210 may prove fatal. We respectfully agree with that observation. But in the present case the authenticity of the record is not in issue, at least, the appellant has not so complained. In the circumstances of this case, we think that non-compliance with section 210 (3) of the CPA is curable under section 388 of the CPA. So, we also dismiss this ground of appeal.

The next question, which was necessitated by the respondent not supporting the conviction is whether, on the evidence on record, the conviction of the appellant can be sustained?

Ms. Swai's main argument was that the evidence of PW1 was taken unlawfully and so even if it was to be treated as unsworn, it required corroboration, which was lacking. Secondly, that penetration was not proved.

We have already found above that, on the facts, there was sufficient evidence of penetration. So that should not detain us. On the evidence of PW1, it is true that on the face of it, the trial court found that the witness had sufficient intelligence and understood the duty of speaking the truth. The trial court, however did not make and record a finding that she understood the nature of an oath but proceeded to take her evidence on oath. Certainly that was wrong. In terms of section 127 (2) of the Evidence Act, if the trial court was only satisfied with the witness's sufficiency in intelligence and knowledge of telling the truth, her evidence should have been taken without oath or affirmation. This distinguishes it from the case of **GODI KASENEGALA vs R** *(supra)* where there was no finding as to the witness's intelligence at all. In the present case, PW1 had sufficient intelligence and understood the nature of telling the truth. So the justice of this case demands that her evidence be reduced to that of an unsworn witness.

There is no doubt that there is a large body of case law that, as a matter of practice and prudence, the evidence of an unsworn witness required corroboration, generally, but in particular, in all sexual offences (See **R vs LEONARD BIN NGIMBWA** (1943)) 10 EACA. 113, **CHARLES**

DEO vs R (1987) TLR 134, and SHOZI ANDREW vs R (1987) TLR 68. But it was not and it has never been a requirement of statutory law Courts now can by statute convict on uncorroborated evidence of any victim of sexual offence if, in terms of section 127 (7) of the Evidence Act, the trial court believes that the victim of the offence is telling nothing but the truth. (See **ONESIPHORY MASERU vs R**, Criminal Appeal No. 334 of 2009, and **HAMIS ANGOLA vs R**, Criminal Appeal No. 442 of 2007 (both unreported).

In the present case, the trial court found both PW1 and PW2 as truthful witnesses, and their evidence coherent and credible. The appellant and the learned State Attorney, have not faulted this finding in this appeal. As this is a second appeal, and we are mandated to interfere in concurrent findings of facts of lower courts only in cases where there are misdirections, non directions or misapprehension of the evidence, we find no justification to interfere in the findings of the two courts below in the present case. So we have no reason to disturb the conviction of the appellant.

Before we pen off, we wish to make a few remarks about the judgment of the first appellate court. Although it is labeled as a judgment, to us, it is more of an order of a summary rejection of the appeal because according to the learned judge, as:-

> *"the appellant submitted on quite different matters and the state attorney followed the trend..... The consequences of what the appellant did in his submission is that, he has dropped all his grounds of appeal and hence technically withdrawing his entire appeal before this honourable court..... In the result, and for the stated reasons, I find that this appeal lacks merits and therefore do dismiss it in its entirety".*

What has perplexed us, is, if the appellant was deemed to have withdrawn/abandoned his appeal because he did not submit on its merits then why was the appeal dismissed for lack of merits? If, on the other

hand he had considered the appeal on merit, why didn't the learned judge give his reasons for the judgment on the basis of the grounds of appeal?

We have reached that conclusion, because although PART X of the CPA, does not contain a provision similar to section 312 which applies to trials under the CPA, or Rule 31 Order XXXIX of the Civil Procedure (Code Cap 33 – R.E. 2002) (the CPC) which applies to judgments in civil appeals under the CPC, nevertheless section 367 (1) of the CPA, clearly anticipates that after hearing a criminal appeal, the judge is expected to prepare a "judgment or order". Unlike the CPC, the term judgment" is not defined in the CPA, but we think it must mean:-

> *".....the reasoning of the judge which leads him to his decision".*

Osborn's Concise Law Dictionary (Seventh Ed by Rober Bird) or

> *".....the expression of the opinion of the court arrived at after a due consideration of the evidence and all the arguments* ***RAMAUTAR THAKUTA vs STATE OF BIHAR*** *AIR (1957, Pat 33 (DB)*

So, in our considered opinion, under Part X of the CPA, a judgment is a reasoned decision of the court in the determination of the rights and liabilities of the parties. This view, will also be consistent with what is anticipated under section 312 of the CPA; although such a judgment need not be in the exact form as that of a trial court. The legislature may wish to see if the CPA could be amended to fill in this gap.

It follows therefore that if the first appellate court thought that the appeal had no merit, it ought to have gone into the grounds of appeal and given its reasons for rejecting them. If, it was sure that the appellant had withdrawn his appeal, it ought to have ordered the appeal marked withdrawn or summarily reject it. Instead, the learned judge went into error by undertaking to write "a judgment" when he in fact, he wanted to give an order, or intended to write a judgment but did not give his reasons. That was wrong. We accordingly revise and quash that part of the High Court judgment finding that the appellant was deemed to have withdrawn his appeal.

The defective judgment of the High Court, however, does not invalidate the appellant's conviction, as there is sufficient material on the record to enable this Court to consider and determine the appeal. The appeal therefore stands dismissed in its entirety.

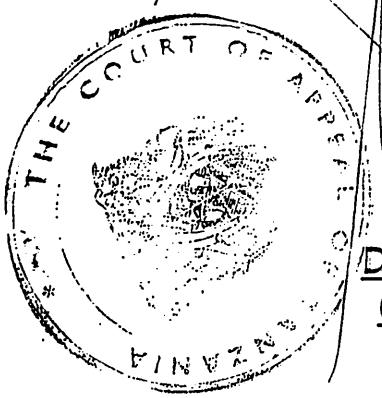
DATED at ARUSHA this 12th day of October, 2012.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
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