IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 171 OF 2006

ELIAS KITEMA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Kaijage, J.)

dated the 27th day of March, 2006
in
Criminal Appeal No. 9 of 2004

JUDGMENT OF THE COURT

21st & 26th Nov, 2008

MBAROUK, J.A.:

In the District Court of Dodoma at Dodoma, the appellant Elias Kitema, was convicted of the offence of rape contrary to sections 130 1(2)(e) and 131(1) of the Penal Code, Cap.16 of the laws as amended by the Sexual Offences (Special Provisions) Act, No. 4 of 1998. He was sentenced to thirty years term of imprisonment. Aggrieved, the appellant appealed to the High Court at Dodoma (Kaijage, J.). He lost the appeal, hence this second appeal.

The appellant filed a memorandum of appeal containing six grounds of complaint. He appeared in person, while Mr. Prudence Rweyongeza, learned State Attorney, appeared for the respondent Republic at the hearing of the appeal.

The six grounds of appeal are narrowed down to three major complaints. **One,** that section 240(3) of the Criminal Procedure Act Cap.20 R.E. 2002 was not complied with. **Two**, PW1, PW2 and PW4 were family members, hence they all had similar interest, hence element of bias could not have been avoided. **Three**, that it was a cooked up case.

We think, it is helpful at this juncture to give a brief account of the facts giving rise to the case at the trial which led to the conviction of the appellant as charged. On 26.11.2002 at 2.00 p.m. PW1 Haksa John an eleven year old girl who was in STD 3 at Kizota Primary School was playing outside their house with her friend Tabu. The appellant arrived and ordered his daughter Tabu to leave. As PW1 wanted to leave also, the appellant pulled her into his room and put her on the bed, put off her clothes and inserted his penis into her

vagina. PW1 felt pains. The appellant covered her mouth and PW1 failed to shout. He then told her to go and wash the blood which was oozying from her vagina. PW5 Clotilda Maduwa saw PW1 leaving the room with bare chest wearing only a skirt. PW1 returned into the room of the appellant and got out carrying her blouse. PW1 went home but did not tell her grandmother (PW2 Julia Bozi) about the incident. However, her grandmother noticed PW1 walking with difficulty.

PW1 told PW2 how the appellant raped her. PW2 checked the private parts of PW1 and noted her vagina to have swollen and dirty. They went to a ten cell leader and later to hospital where she was medically examined by a doctor, and PF3 (exhibit P1) was issued.

In his defence, the appellant, a 78 years old male, naturally denied the charge claiming that the case against him was fabricated and framed up.

As stated earlier, this is a second appeal which originated from the District Court of Dodoma sitting at Dodoma. Being a second

appeal, the Court rarely interferes with concurrent findings of fact by the courts below. See **Director of Public Prosecution V. Jaffari Mfaume Kawawa** [1981] TLR 149 at page 153, the Court stated:-

> *"... This is 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 misdirections or non-directions on the evidence by the first appellate court. In cases where there are misdirections or non-directions on the evidence a court is entitled to look at the relevant evidence and make its own findings of fact."*

Looking at the evidence as a whole, we find no strong and compelling reasons to interfere with the concurrent and respective findings of fact by the courts below in this appeal.

At the hearing, the appellant had nothing to add apart from what he has stated in his memorandum of appeal. Understandably so because he is a layperson who is unrepresented.

Mr. Rweyongeza, learned State Attorney for the respondent Republic, firmly supported the conviction and sentence imposed upon the appellant. However, he was quick to respond to the appellant's ground of appeal that the courts below misdirected themselves by accepting the evidence of a PF3 (exhibit P1) without calling a doctor as the author who wrote that medical document. Mr. Rweyongeza without any hesitation responded that a trial court was under a duty to call a doctor to testify after having informed the court that he cannot read. The same was not read to him. Mr. Rweyongeza submitted that section 240(3) of the Criminal Procedure Act, Cap.20 R.E. 2002 was not complied with. He urged us to discount the PF3 (exhibit P1). We accept his reasoning and accordingly discount and expunge the evidence contained in the PF3 (exhibit P1).

However, even in the absence of the PF3, Mr. Rweyongeza urged there was enough evidence to convict the appellant. He

submitted that, PW1 clearly gave her evidence on how the appellant pulled her into his room and put her on bed, put off her clothes and inserted his penis into her vagina whereby she felt pains. Thereafter PW1 was ordered to go and wash herself, Mr. Rweyongeza said.

Additionally, Mr. Rweyongeza pointed out that the evidence of PW1 was corroborated by that of PW5 Clotlida Maduma who saw PW1 leaving the appellants' room with bare chest wearing only a skirt. He further contended that PW2 also corroborated PW1's evidence when she checked her private parts and noted her vagina swollen and being dirty. Furthermore, he submitted that PW2 went to report the incident of rape to PW3 Matei Pauli, the ten cell leader. He said, PW3 went to the appellant and interviewed him in the presence of PW1 and PW2. The appellant wanted to settle the matter amicably before PW3, a ten cell leader, where he wrote an admission note (exhibit P2) signed it and promised to incur medical expenses for PW1. Mr. Rweyongeza added that the appellant admitted that it was his signature which appeared on exhibit P2.

For that reason, Mr. Rweyongeza urged us to find the charge of rape to have been proved by the prosecution, notwithstanding the discounting of the PF3.

On our part, we, just like Mr. Rweyongeza are of the firm opinion that the charge of rape against the appellant was proved. We think, the evidence of PW1 clearly narrated how she was raped. We find her evidence truthful. Her evidence was corroborated by the evidence of PW2, PW3 and PW5 which is enough to prove the charge against the appellant.

Going through the record, PW1 herself testified in court that the appellant inserted his penis into her vagina whereby she felt pain. PW2, her grandmother, checked the private parts of PW1 and noted PW1's vagina to have swollen and being dirty. Furthermore, PW3 Matei Pauli, a ten cell leader testified that the appellant admitted that he had committed rape to PW1, he wrote an admission note (exhibit P2) and promised to incur medical expenses for PW1. Whereas PW5 testified that she saw PW1 leaving the appellants' room with bare

chest. We think the evidence was watertight in proving the charge against the appellant.

Among the grounds of the appellants' appeal is that PW1, PW2 and PW4 were family members, hence had similar interest. He prayed for such evidence of related witnesses be discredited. However on our part, we find no reason for discounting the evidence of the said related witnesses. Our decision find support in the case of **R. V. Lulakombe s/o Mikwalo and Kibugu s/o Kibege** [1936] 3 E.A.C.A. 43 at page 44, Sir Sidney Abraham, C.J. held that:-

> *"There is no rule of law or practice which permits the evidence of near relatives to be discounted because of their relationship to an accused person."*

However, even if we discount the evidence of those related witnesses we still have the support of the provisions of section 127(7) of the Evidence Act, 1967 as amended by section 22 of the Sexual Offences (Special Provisions) Act, No. 4 of 1998. The sub-section reads as follows:-

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offences the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case, may be the victim of sexual offence on its own merits,* ***notwithstanding that such evidence is not corroborated, proceed to convict*** *if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*
>
> *(Emphasis added).*

Both courts below were satisfied that PW1 was a truthful witness. On our part, we have found no reason to differ with them on this finding.

In the circumstances, we think the appellants' claim that PW1, PW2 and PW4's evidence ought to have been discredited is without merit.

In conclusion, we are of the considered opinion that the appeal is lacking in merit. We accordingly dismiss it in its entirety.

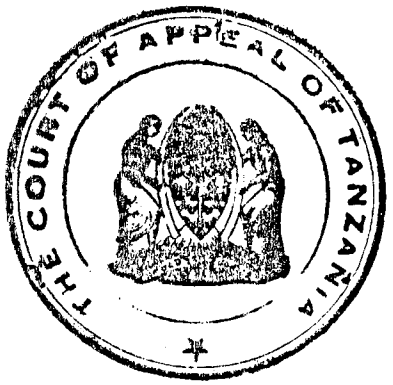
DATED at DODOMA this 25th day of November, 2008.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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



(S. S. MWANGESI)
SENIOR DEPUTY REGISTRAR