IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And ORIYO, J.A.

CRIMINAL APPEAL NO. 108 OF 2009

PETRO ANDREA..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Sambo, J.)

Dated the 26th day of November, 2008
in
Criminal Appeal No. 54 of 2006

JUDGMENT OF THE COURT

25th & 28th November, 2011

LUANDA, J.A.:

The above named appellant was charged in the District Court of Monduli at Monduli with the offence of rape contrary to sections 130 (1) (2) (b) and 131 (1) of the Penal Code, Cap. 16. He was convicted as charged and sentenced to thirty (30) years imprisonment.

Aggrieved, he unsuccessfully appealed to the High Court of Tanzania. Still dissatisfied, hence this second appeal.

Briefly the prosecution case is that on 31/10/2001 around 9:00 a.m. Nondomon w/o Lekeny (PW1) in company with four others, inter alia, Naitoyi Ndeyeni (PW2) and Nditanyani Sukuma (PW3) left their village on foot and went to Mtowambu to grind maize, a distance of about 5 kilometres. On completion they started returning home. PW1 was behind whereas her colleagues were ahead.

At a certain place where there is a house, by then it was in the evening, the appellant followed PW1 and ordered her to stop. PW1 did not heed to the order. The appellant, according to PW1, got hold of her and pulled her near a tree, fell her down, raised her clothes and raped her. PW1 said she did not wear or put on underwear. PW1 raised an alarm whereby PW2 and PW3 who were ahead returned back to see what was wrong. PW2 and PW3 saw the appellant pressing PW1 down. They went closer; they saw the appellant raping PW1. They rushed to the house to seek assistance; there was nobody. They returned to the place where

raping was taking place. The appellant had already quenched his thirst so to speak. The matter was reported to Maasai elders then to police the following day where she was given PF3 and went to hospital. The PF3 was tendered by D/Constable Linus (PW4) as exhibit P1. PW4 also drew a sketch plan exhibit P2. The appellant was arrested and eventually charged.

After the close of the prosecution case, the appellant was informed of his rights of giving evidence and calling of witnesses. The appellant elected to remain silent. The trial court, as observed earlier on, convicted and sentenced him accordingly. His appeal to the High Court was dismissed.

The appellant has raised four grounds of appeal in his memorandum of appeal. These are, we reproduce:-

1. That, the trial Magistrate and the appellate Judge erred in law and fact after believing that the appellant was properly and correctly identified at the scene of crime by the PW1, PW2 and PW3.
2. That, the learned trial magistrate and the appellate Judge erred in law and facts when they failed to asses carefully the credibility of the prosecution witnesses.

3. That, the learned trial magistrate and the appellate Judge erred in law and facts contravened the provisions of section 240 (3) of the CPA. 1985. When accepted the PF3 tendered before the court as an exhibit.
4. That, the prosecution failed to prove its case beyond reasonable doubts as required by the law since the charge sheet itself is defective. As it was prepared at the police station Monduli on 07/04/2001 while it is alleged that the incident occurred on 31st October, 2001.

In this appeal the appellant appeared in person. The respondent Republic was represented by Ms. Javelin Rugaihuruza, learned State Attorney. Ms. Rugaihuruza did not resist the appeal.

Submitting in support of the appeal Ms. Rugaihuruza said the prosecution witnesses, who were at the scene of crime, did not say the time the offence was committed; they said in the evening. The charge sheet, she went on to say, shows that it was around 7:00 p.m. As that time is night time there was a need on the part of witnesses to say how they

identified the appellant. The evidence on the record is dead silent on this aspect. So, it is doubtful whether really they saw the appellant. Further, the evidence of PW1 lacked one of the ingredients of rape; penetration.

As regards to non compliance with section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the Act) in respect of PF3 Exhibit P1 Ms. Rugaihuruza conceded that much and prayed that the same be expunged. She thus prayed that the appeal of the appellant be allowed.

We wish to begin with non-compliance with section 240 (3) of the Act in respect of Exhibit P1-PF3. D/C Linus (PW4) was the one who tendered the Exhibit P1-PF3 of PW1. At page 13 of the record, PW4 prayed to produce PF3 as exhibit. This is what he said and how it was accepted. We reproduce:-

> *"I request to produce it in court. Accepted as exhibit P1."*

It is clear from the above extract that, in the first place, the appellant was not given opportunity to say something in relation to its admissibility before it was tendered. We think that was not proper. We are of the settled mind that whenever a document is intended to be introduced in court as evidence, it should first be cleared for admission, including hearing of the adverse party.

But that was not the end of the story. The trial court did not explain to the appellant of his rights, as per dictates of section 240 (3) of the Act, of calling the medical witness. Time and again this Court, has emphasized the need on the part of the trial court to explain to the accused his rights of calling a medical officer who made a report. Failure to call the medical officer is a fundamental irregularity which will result such report to be expunged from the record (see **Kashana Buyoka v. R.,** Criminal Appeal No. 176 of 2004 (unreported); **Nyambaya Kamuoga v. R.,** Criminal Appeal No. 90 of 2003 (unreported)).

We entirely agree with Ms. Rugaihuruza. This ground has merit. PF3 exhibit P1 is hereby expunged from the record.

We now turn to grounds 1 and 2 together. Assuming that the witnesses identified the appellant while "raping" PW1; was rape really committed?

One of the ingredients of the offence of rape is penetration of the male organ into the female organ. Was there any evidence of penetration?

PW1, the victim of rape, merely gave a bare statement that the appellant raped her. In her evidence in chief, she said:-

> *"I was not dressed with an underwear. He then raped me by force."*

PW2 and PW3 did not advance PW1 story any further. Like PW1, they also said the appellant raped PW1, PW2 said:-

> *"That man was raping her."*

And PW3, who gave hearsay evidence, stated:-

> *"We were told by PW1 that he (sic) was raped."*

In **Mathayo Ngalya @ Shabani V R** Criminal Appeal No. 170 of 2006, (unreported) the Court observed:-

> *"The essence of the offence of rape is penetration of the male organ into the Vagina. Sub-section (a) of section 130 (4) of the Penai Code Cap. 16 as amended by the Sexual Offence (Special Provisions) Act, 1998 provides:- for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary for the offence. For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the Court to ensure that the witness gives the relevant evidence which proves the offence."*

In **Ex B. 9690 SGT Daniel Mshambala v. R.,** Criminal Appeal No. 183 2004 (unreported) the Court also underscored the importance of the need to lead evidence of penetration of a male organ into the female organ.

In that case the victim of the alleged rape merely said the appellant forced her to lay on the ground, he took her underwear and raped her. The Court said:-

> *"We think, if at all PW1 was raped, she ought to have gone further to explain whether or not the appellant inserted his penis into her vagina, whether or not the penetration, was slight etc."*

In the instant case, the witnesses did not state that the appellant's penis penetrated into the vagina of PW1. What is on the record is bare assertion that she was raped. That is not enough. The offence of rape was not proved. We agree with Ms. Rugaihuruza.

In fine, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant to be released from prison forthwith unless he is held in connection with another matter.

Order accordingly

DATED at **ARUSHA** this 28th day of November, 2011.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

Z. A. Maruma
DEPUTY REGISTRAR