

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MJASIRI, J.A., KAIJAGE, J.A., And MUSSA, J.A.)**

**CRIMINAL APPEAL NO. 265 OF 2013**

**IBRAHIM SIMBA .....APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

(Appeal from the decision of the High Court of Tanzania  
at Dar es Salaam)

**(Hon. Msuya, J.)**

Dated 22<sup>nd</sup> day of May, 2013

In

**HC. CRIMINAL APPEAL NO. 9 OF 2013**

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**JUDGMENT OF THE COURT**

6<sup>th</sup> Nov. 2015 & 10<sup>th</sup> February, 2016

**MUSSA, J.A.:**

In the District Court of Bagamoyo, the appellant was arraigned for rape, contrary to sections 130(2) (b) and 131(1) of the Penal Code, Chapter 16 of the Laws. The particulars were that on the 29<sup>th</sup> December 2010, at Kiwangwa Village, within Bagamoyo District, the appellant did have carnal knowledge of one Fatuma Chande without her consent.

The appellant denied the charge, whereupon the prosecution lined up four witnesses and a Police Form No. 3 (exhibit P1) in support thereof. For his part, the appellant refuted the accusation upon affirmed testimony and did not wish to call any witness. At the height of the trial proceedings, the appellant was found guilty, convicted and sentenced to a term of thirty (30) years imprisonment. He was dissatisfied but, on his first appeal, the High Court (Msuya J.) found no cause to vary the trial court's verdict and the appeal was, accordingly, dismissed in its entirety. Still aggrieved, the appellant presently seeks to impugn the decision of the first appellate court upon a memorandum which is comprised of six points of grievance. For an easy appreciation of the issues of contention in this appeal, it is necessary to briefly explore the factual background giving rise to the arrest, arraignment and the ultimate conviction of the appellant.

As hinted upon, the prosecution accusation was to the effect that on the alleged date and place the appellant had carnal knowledge of the referred lady without her consent. During the trial, the alleged victim (Fatuma Chande), who happened to be an elderly lady aged 70, was ushered into the witness box as the first prosecution witness (PW1). According to her, on the fateful day, around 5:00 p.m. or so, she was collecting

cashewnuts at her farm. Soon after completing the exercise, PW1 felt symptoms of diarrhoea and decided to go to a nearest shrub so as to empty the waste matter from her bowels. As she walked towards the destination the lady noticed that the appellant who had a machete in hand was closely following her. PW1 greeted him but the appellant did not reply and, instead, he threatened her with the machete and cautioned her to observe silence. In response, PW1 started to run but, no sooner, she stumbled over a hole and fell down. As to what transpired next we think it is best if we let the witness pick the tale in her own words:-

*"I took the panga and threw it away but he had a knife in his pocket thus he squeezed my neck telling me that he will kill me. I only wore under pants as I already undressed my clothes for attending the call of nature and getting bath. The accused undressed my underwear and inserted his penis into my vagina and raped me by force but he did not ejaculate as he was prevented by people who were coming talking. I told him that they were my children coming, I told my sons to come and help me. Then he came and arrested the accused and asked him why he is raping me he remained silence".*

The witness added a detail to the effect that she duly cautioned her ravisher that she had symptoms of diarrhoea but the appellant ignored her, hence, in the course of the encounter, she uncontrollably discharged the excreta which daubed over her body as well as the appellant's pair of trousers. Further down at the foot of her testimony, PW1 gave more details in the course of examination by the trial court:-

*"It is true the accused person penetrated into my vagina but he did not ejaculate. I knew that he did not ejaculate as my vagina remained dry and he himself said "sijakojoa". The person who came to help me is one Mnyamwezi. The penis entered it half (sic) as I tried to prevent him. I felt so much pain as it was without my consent".*

Some more evidence on the encounter came from Sai Iswalala (Pw2) who, incidentally, held himself to be the person who came to the lady's rescue at the scene. The witness told the trial court that as he walked past the scene he heard sounds of dismal squeaks and groans from a person who was seemingly in pain. He approached the scene to satisfy his curiosity and as to what he saw at the scene we will also allow him to pick the tale in his own words:-

*"I found the old woman by the name Bint Chande together with the accused having sexual intercourse by force. The woman was forced that is why "alikuwa anakoroma". The accused saw me by his one eye (sic) and stood up. Thus I decided to go behind by reverse. Then the woman said "nabakwa". She was crying. I told her to be calm so that I can call the accused who tries to run away. As I threatened to beat him he stopped. Then I interrogated all of them what happened. The woman told me that he was at the farm cultivating then the accused did beat her by a foot she fall down then he threatened her by knife and panga. Then raped her. The accused told me that the woman consented to it as he gave her Tshs 2,000/=. The woman denied to have consented and to have received any money from the accused. The woman had faeces on her cloth and the accused trouser had faeces (uharisho)".*

According to the witness, from the scene, they all walked to where the victim's children and other villagers were gathered. At the gathering, the appellant made an about turn and completely denied involvement in any

sexual encounter with the old lady. The appellant was then referred to the police, whereas the victim was attended by Dr. Kusema Job (PW3) at Bagamoyo District Hospital. Thus, against the foregoing backdrop, the appellant was formally arraigned and so much for the prosecution version which was unveiled during the trial.

In his reply, the appellant was relatively brief. He introduced himself as a peasant resident of Turiani, Morogoro Region. In his affirmed testimony, he did not quite dispute being at Kiwangwa Village on the fateful day where he went to seek casual employment on a farm belonging to a certain Mzee Kifyagi. More particularly, the appellant also admitted seeing PW1 at the scene on that fateful day and specifically requested her to show him the location of Mzee Kifyagi's farm. To his surprise, the old lady responded by running clear of him and, soon after, PW1 started wailing about and seeking for help. Within a while, a group of young men emerged at the scene and physically descended upon him. After a thorough beating, the appellant was then referred to the police where he was implicated for raping the old lady. In a nutshell, he completely disassociated himself from the prosecution accusation.

As hinted upon, both courts below were more impressed by the version told by the prosecution witnesses and, accordingly, the appellant's defence was rejected. With six points of grievance, the appellant's memorandum of appeal is lengthy but, for purposes of clarity, we think it is necessary to reproduce the grounds of appeal in full:-

- "1. *That the learned Appellate Judge erred in law and fact for non – directions in regards to inconsistencies/self-contradiction in the evidence of PW1 subsequent to sustain conviction and sentence, notably the witness in her evidence in chief alleged that was raped to the extent of faeces going out itself, but when cross – examined by the court upon what happened exactly she averred that the appellant only entered a hold of his penis as she hurried to prevent him. These unsolved inconcistencies strongly mutilated the witness credibility.*
2. *That the learned Appellate Judge further erred in law and fact for non-directing his mind to re-assess the veracity of PW1 who proved herself a liar by telling court that she was rescued by her sons in the first instance, but when*

*responding to questions from the court she averred that she was rescued by the person called Mnyamwezi, these open – lies rendered her evidence highly suspect.*

- 3. That the learned Appellate Judge further more erred in law and fact to sustain convictions and sentence based on the incredible evidence of PW2 who claimed to have rescued the victim (PW1) subsequent to arrest the appellant, contrary to PW1 in her testimony in which she named different people, but not him (PW2), the thing which watered down his evidence and rendered it too incredible to sustain conviction.*
- 4. That the learned Appellate Judge erred in law and in fact to sustain conviction and sentence on the appellant based on the un-corroborated evidence of PW1 whereas the non –tendering of other material exhibits like under – pants of the victim, panga and knife allegedly retrieved from the scene of crime strongly affected the inference of proving the prosecution case.*
- 5. That the learned Appellate Judge erred in law and fact when sustained conviction and sentence without drawing an adverse inference against the prosecution for failure to cause the*

*village chair-man and word Executive Officer to testify on material fact alleged in the case, since its alleged that the crime was first, reported to their respective Officer the omission rendered the whole prosecution evidence highly suspect.*

6. *That the learned Appellate Judge erred in law and fact to sustain conviction and sentence based on the incredible evidence of PW3 and exh. P1 without noting that the witness (PW3) did not identify exh. P1 as to verify its contents and his signature the failure lessened the credibility of the witness”.*

Before us, the appellant who was fending for himself, unrepresented, fully adopted the memorandum of appeal. He, however, deferred its elaboration to a later stage, after the submission of the Republic. As it were, the respondent Republic, had the services of two learned Senior State Attorneys, namely, Ms Chaya Mlaki who was being assisted by Ms. Dorothy Massawe. Ms. Mlaki, who argued the appeal, fully supported the conviction and the sentence imposed on the appellant. In her submission, the learned Senior State Attorney contended that the evidence of the victim overwhelmingly implicated the appellant and, furthermore, her implication

was fully corroborated by the testimonies of PW2 and PW3. In rejoinder, the appellant reiterated the points raised in the memorandum of appeal.

For our part, we have dispassionately considered the rival arguments of the parties. To begin with, it is noteworthy that the first three grounds of appeal address the issue of contradictions or inconsistencies that are allegedly intrinsic in the testimonies of PW1 and PW2. The contradictions in point relate to a portion of PW1's testimony where she stated that she told her sons to come and help her. Admittedly, this portion of her evidence does not augur well with the other claim by the witness that she was rescued by PW2. Furthermore, the portion of the evidence also contradicted PW2 who said during cross – examination.

*"...we were only three at the scene after the incidence"*

Incidentally, the learned first appellate court was well aware of the witnesses contradictions including the two versions which are seemingly inherent in the testimony of PW1. After due consideration, the Judge

expressed the view that the *"inconsistencies and the contradictions do not go to the roots of the matter"*.

We would entirely subscribe to this conclusion. With respect, the witness was testifying on a fast moving occurrence in which she was involved and what was vital was the general flow of the information derived from her testimony. Granted that she gave two conflicting versions with respect to her rescues, but the inconsistency does not affect her central story to the effect that she was raped by the appellant (see, for instance the case of **Mukani Wankyo vs The Republic** [1990] TLR 40). To this end, we find the first three grounds of appeal to be bereft of merit.

On the fourth and fifth grounds of appeal, the appellant deplores the first appellate court for sustaining the conviction despite, respectively, the non-tendering of material exhibits and the calling into testimony the village authorities to whom the occurrence was reported. The appellant had reference to PW1's underwear, the machete and the knife as well as the village chairman and the Ward Executive Officer who were not called to testimony. A short answer to the appellant's grievance is that, in order to prove a fact in issue, the prosecution is not obliged to avail a superfluity of

witnesses or exhibits. The proposition is fortified by section 143 of the Evidence Act which stipulates:-

*"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."*

This Court reiterated the proposition in **Yohannes MSIGWA vs The Republic** [1990] TLR 148 in the course of addressing a corresponding grievance. Thus, the fourth and fifth grounds are equally without a semblance of merit.

In ground No. 6, the appellant has a point in his complaint that, throughout his testimony, PW3 was not shown the PF3 (exhibit P1) so as to identify and confirm that the document was authored by him. To say the least, that would suffice to discount and expunge the PF3 from the record. Nonetheless, we are satisfied that even in the absence of the PF3, the oral testimony of PW3 stands. His evidence was to the effect that upon examination, he noted that PW1 had genital wounds and bruises.

When all is said and done, we are of the settled opinion that conviction and sentence meted against the appellant cannot be assailed and, accordingly we dismiss the appeal in its entirety.

DATED at DAR ES SALAAM this 4<sup>th</sup> day of February, 2016.

S. MJASIRI  
**JUSTICE OF APPEAL**

S. S. KAIJAGE  
**JUSTICE OF APPEAL**

K. M. MUSSA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original

  
P.W. Bampikya  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**