

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

(CORAM: LUBUVA, J.A., MBAROUK, J.A., And OTHMAN, J.A.)

CRIMINAL APPEAL NO. 98 OF 2008

ABEL MWANAKATWE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mmilla, J.)

**dated the 5th day of June, 2006
in**

Criminal Appeal No. 68 of 2005

REASONS FOR THE COURT DECISION

8 & 8 July 2008

LUBUVA, J.A.:

On 8.7.2008, after hearing the appeal, we allowed the appeal, quashed the conviction and set aside the sentence. The appellant was ordered to be released forthwith unless otherwise lawfully held. We reserved our reasons which we are now set to give.

The facts leading to the case are simple. The complainant, Helena d/o Dominic (PW1), and the appellant, were residents of Lusaka Village within Sumbawanga District, Rukwa Region. They

were familiar to each as they belonged to the same religious sect, namely Assemblies of God. So, they prayed together and regularly visited each other. PW1, aged about 15 years old was a student at Luela Secondary School.

It was alleged by the prosecution that on 16.12.2003, at about 7.00 a.m., Agnetha Mlundi (PW2), the mother of PW1, entered the room of PW1 to see a 7 year old child who had visited her (PW2). To her surprise she found the appellant hiding at the corner of the room wearing PW1's clothes. Apparently, at that time, PW1 had gone to the toilet. Suspecting that foul play had taken place, she informed her husband, the Ward Executive Officer and other neighbours who came to the scene. The appellant was apprehended and taken to the police. He was charged with the offence of rape contrary to sections 130 (1) (2) (4) and 131 (1) of the Penal Code.

In the trial District Court at Sumbawanga, the case against the appellant was solely dependant upon the evidence of PW1, the complainant and her mother PW2. According to PW1, on the day of

the incident, at about 7.00 p.m. the appellant visited her at their house, they sat together at the sitting room. When she entered her room, the appellant followed her into the room where he raped her. She shouted for help following which her mother came.

On her part, PW2 testified that on the day of the incident, at about 8.00 a.m., she entered PW1's room when she met PW1 going to the toilet and found the appellant in the room wearing PW1's clothes. She said PW1 told her that the appellant had had sexual intercourse with her. She also stated that she did not examine the private parts of PW1.

The trial magistrate convicted the appellant in absentia as he had jumped bail. On the basis of the evidence of PW1 and PW2, the magistrate was of the view that the appellant had sexual intercourse with the consent of PW1. However, in view of the law under section 130 (2) of the Penal Code as amended by the Sexual Offences Special Provisions Act No. 4 of 1999, regarding a girl below 18 years of age, consent is immaterial. The appellant was convicted as

charged. He was sentenced to thirty years imprisonment. Dissatisfied, he appealed to the High Court. The High Court, (Mmilla, J.) apparently, dismissed the appeal and hence the appellant has come to this Court on second appeal.

Before us in this appeal, the appellant appeared in person and the respondent Republic, was represented by Mr. Mwenda, learned State Attorney. Mr. Mwenda did not support the conviction.

It will be observed that we have indicated that it was apparent that the appeal was dismissed in the High Court. In this regard we wish to make brief observation. From the judgment of the High Court, the record does not show whether the appeal was allowed or dismissed. For this reason, at the commencement of hearing the appeal, the Court invited Mr. Mwenda, learned State Attorney, to address this issue.

Mr. Mwenda at first, vacillated but upon reflection, while he conceded that the learned judge on second appeal did not indicate

whether the appeal was allowed or dismissed, he firmly maintained that failure to do so in this case was not a fatal irregularity. He said that from the general scheme of the judgment, it was apparent that the appeal was dismissed. Furthermore, he submitted that in any case the appellant was not prejudiced because he understood and accepted that the appeal had been dismissed. Consequently, he said the appellant lodged this appeal which he was prepared to conduct in terms of the grounds prepared. He therefore urged that the omission was inconsequential.

It is common ground that as a general principle, the judge or magistrate on appeal as happened in the instant case, should make a verdict in clear terms that the appeal is either allowed or dismissed. With such pronouncement, the party involved in the appeal would be certain as to the fate of the appeal. In that situation one would be able to decide to appeal or otherwise against the decision.

In this situation, it has seriously exercised our minds whether to remit the matter to the High Court with direction for the learned

judge to make the position clear. However, upon further reflection and as correctly stated by Mr. Mwenda, in view of the circumstances of this case, we do not think that it would be in the interest of justice to take that course of action. This is so, because first, it is a long time since the appellant was convicted. Secondly, and importantly, the appellant was not prejudiced as he understood the appeal to have been dismissed. That is why he is before us on this appeal. Thirdly, it would also take long time for the matter to be taken to the High Court before it is brought back to this Court again on appeal. So, we agreed with Mr. Mwenda that the matter proceeds to hearing. It is in the interest of justice to take this course of action.

With regard to the merit of the case, Mr. Mwenda declined to support the conviction. First, he said the case is entirely based on the evidence of PW1 and PW2 which is not free from difficulty. While PW2 the mother of PW1 said in her evidence that she went into the room of PW1 to see the child visitor, PW2 stated that PW1 went into her room in response to her shouting for help. This contradiction

raises doubt as to the credibility of their evidence, Mr. Mwenda stressed.

Second, Mr. Mwenda said the evidence available was not sufficient to prove the offence of rape. He further contended that the only evidence is the alleged word by PW1 to PW2 that she had been raped by the appellant. Not only did PW2 not examine PW1 in her private parts but there was no medical evidence to show that PW1 had sexual intercourse, the State Attorney observed.

Furthermore, Mr. Mwenda stated that it was inexplicable that the PF3 was not produced at the trial as PW1, according to PW2, had been taken to the hospital. Thirdly, Mr. Mwenda also submitted that although it was alleged that neighbours had come to the scene of the crime but strangely none of them was called to testify in court. All these, Mr. Mwenda submitted, raised doubt in the case, it is unsafe to sustain conviction based on such evidence. For these reasons, he did not support conviction.

It hardly needs to be over emphasized that it is trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt. In this case, as correctly submitted by Mr. Mwenda, learned State Attorney, the case against the appellant was entirely based on the evidence of PW1 and PW2. However, from the record, it is plainly clear that this evidence can hardly be relied on as a basis for convicting the appellant for the offence of rape.

First, PW1 and PW2 are conflicting in their evidence. While PW2 says in her evidence that she entered the room of PW1 on her own to see the visiting child, PW1 says PW2 entered the room following her shout for help. Second, if as stated by PW2 that neighbours including her husband went to the room where the appellant was found, why were these people not summoned to testify in court?

Third, with regard to the alleged rape, there is no other supporting evidence that PW1 had sexual intercourse. For instance,

apart from the allegation by PW1 that she had been raped, PW2 did not examine her private parts. Furthermore, according to PW2, PW1 was taken to the hospital, but again for unexplained reasons, no medical evidence including PF3 was available at the trial. Fourth, according to PW1, the incident took place at about 7.00 p.m. but PW2 stated that it was in the morning at about 8.00 a.m. when she found the appellant in PW1's room. This is widely conflicting. If the incident took place at a particular time and PW1 and PW2 were the only witnesses to the incident, it is curious that PW1 and PW2 differ in their evidence on such a material issue. This, we think raises grave doubt on the credibility of the evidence of PW1 and PW2.

In the circumstances, considering the evidence as a whole, we are in agreement with Mr. Mwenda, learned State Attorney, that it is highly doubtful that the offence of rape against the appellant was proved.

It is for these reasons that on 8.7.2008 we made the order for the appeal to be allowed, conviction quashed and the sentence to be set aside resulting in the immediate release of the appellant.

DATED at MBEYA this 14th day of July, 2008.

D.Z. LUBUVA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

M.C. OTHMAN
JUSTICE OF APPEAL

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



DEPUTY REGISTRAR