IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, C. J., MROSO, J. A. And KAJI, J. A.)

CRIMINAL APPEAL 172 OF 2005

BAKARI HAMISI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Rutakangwa, J.)

Dated the 3rd day of August, 2005
in
High Court Criminal Appeal No. 3 of 2004.

JUDGMENT OF THE COURT

24 October, & 30 November, 2007

KAJI, J, A.:

In the District Court of Babati in Criminal Case No. 226 of 2002, the appellant, Bakari Hamisi, was charged with and convicted of the offence of rape contrary to sections 130 (2) and 131 of the Penal Code, Cap.16, as amended by the Sexual offences Special Provisions Act No. 4 of 1998. He was sentenced to thirty (30) years imprisonment, and was ordered to pay the victim of the rape Hafsa d/o Mwinyi Hamisi (PW2) shs. 100,000= as compensation. He was aggrieved. On first appeal his

appeal was dismissed for want of merit. Still protesting his innocence he lodged this appeal.

The facts of the case as reflected in the record may briefly be stated as follows:-

On 30/8/2002, at about 1 pm, Hafsa d/o Mwinyi Hamisi (PW2) was on her way to Singe Secondary School. When she arrived at a certain area in Nangara village, she met the appellant armed with some stones. The appellant asked her of her name to which she did not reply. He ordered her to undress her underwear but she refused to do so. Suddenly the appellant grabbed her, dragged her into a bush and raped her. While still at the scene, PW2's younger sister, Hamini Mwinyi Hamisi (PW4) and one Ramadhani Issa, who could not be available for evidence, arrived. The appellant ran away just when they approached. The matter was reported to the police at Babati who issued PW2 with a PF 3. PW2 was medically examined by a medical officer of Babati Government Hospital one Fuatael Sossiya (PW3). However, it is not clear what he observed. He filled his observation in columns 1, 3, 4, and 5 of the PF 3 as follows:- (1) Raped case.

(3) Genital area. (4) Dangerous harm. (5) Sexual intercourse. He concluded with a remark "dangerous harm". The appellant was arrested and charged as already indicated.

In his defence the appellant denied the allegation of rape and raised a defence of alibi that at the material time he was at another area in Nangara village loading and carrying bricks in a lorry to Babati Town.

He called Bakari Issa (DW2) and Seleman Shabani (DW3) who supported him that they were with him on the job from 9.00 Am till 3.00 Pm. The trial Magistrate was not impressed. He convicted him and sentenced him as above.

In his petition of appeal in this Court the appellant preferred four (4) grounds and later added two (2) making a total of six (6) grounds. However at the hearing he abandoned grounds Nos. 1 and 4 and proceeded with the remaining 4 grounds which may conveniently be paraphrased as follows:-

One, that the prosecution did not prove his guilt beyond all reasonable doubt.

Two, that the PF 3 did not show that PW2 was raped.

Three, that PW2 and PW4 were from the same family, and that their evidence ought to have been accorded less weight.

He did not wish to elaborate on them.

He preferred the learned state Attorney to respond to those grounds and thereafter he would give his rejoinder. Responding to these grounds Mr. Henry Kitambwa, learned State Attorney, who advocated for the respondent Republic, submitted that the prosecution proved the guilt of the appellant sufficiently through the evidence of PW2, the victim of the rape, PW3 who medically examined her and formed an opinion that there was sexual intercourse, and PW4 who saw the appellant running away from the scene. The learned State Attorney pointed out that the mere fact that PW2 and PW4 were from the same family did not water down their evidence as long as they told the truth. In his view they told the truth.

In a short but strongly argued rejoinder the appellant complained that the doctor, PW3, was allowed to tender a school exercise book in which he had recorded differently from what is in the PF3, and that he tendered it on a different day and not on the day when he tendered the PF3. He held the view that the observations in the exercise book were

cooked up to implicate him. The appellant challenged his identification by PW4 on the ground that PW4 did not say how far she was when she alleged she saw him running away from the scene. He held the view that the case was a frame up by PW2 who previously had accused him of house breaking and stealing in Babati Criminal Case No. 91 of 2003. He said he was convicted by the trial court but was acquitted on appeal.

On our part, we have carefully considered whether, on the evidence on record, it was sufficiently proved that PW2 was raped, and if so, whether it was sufficiently proved that it was the appellant who raped her.

According to the prosecution, the evidence which proved that PW2 was raped was that of PW2, PW3, the PF3 Exhibit P. 1. and the school exercise book Exhibit P5. We have carefully considered the contents of the PF 3 exhibit P. 1. As indicated earlier on, PW3 had simply recorded "raped case, genital area, dangerous harm, sexual intercourse". We ask ourselves; were these particulars/observation sufficient to enable PW3 to form an opinion that Pw2 had been raped? In our view they were not, and it is not clear to us what made PW3 form an opinion that there was sexual intercourse. We note from the record that the exercise book

was tendered and admitted as exhibit P5. It contains some particulars which could corroborate the act of rape. For example, one particular indicates that some sperms were found, presumably in PW2's private parts (vagina). The appellant complained that this exhibit was probably fabricated to implicate him.

The learned trial magistrate discarded the evidence pertaining to this exhibit, but held the view that the PF3 proved conclusively that PW2 was raped. Why he held so is worth to reproduce the relevant part of the judgment which reads:-

> *"As I have pointed out that I will discuss the legality of the document in the course of my judgment, now it is my turn to discuss the same PW3 who is the medical officer conducted the examination to find out whether or not the complainant was raped, filled the PF 3 he was supplied by the police, and inserted the words as "Genital area" as area affected and "Dangerous harmful" on the nature of the injury, and "Sexual intercourse" on what kind of weapon used. I think the report was enough to lead any learned person to reach a conclusion that the victim was*

raped and therefore, there was no any need to produce any other document concerning the same thing. The PF 3 supplied to him was enough to be used to furnish all the important reports of the medical Examination. I therefore declare the so- called Exhibit P5 not legal and it cannot be acted upon by this court in reaching the conclusion that the victim (PW2) was raped by the accused, but it is the PF 3 which is relied upon though not well furnished with all the reports of medical examination."

Admittedly, we cannot claim to have understood well the learned magistrate. But we think that, after holding the view that the particulars in the PF 3 were enough to lead any learned person to reach a conclusion that the victim was raped, he held the view that there was no need to produce any other document concerning the same thing. That would appear to be the reason why he held the PF 3 to have corroborated the evidence of PW 2 that she was raped, and why he discarded the evidence pertaining to exhibit PF 5. We have already

expressed our view why we think the particulars in the PF 3 were not enough to lead to the conclusion that PW 2 was raped.

Unlike the trial magistrate who relied on the PF 3 exhibit P. 1 and held the same to have corroborated the evidence of PW 2 that she was raped, and discarded the evidence pertaining to exhibit P 5, the learned judge on first appeal appears to have said nothing on the PF 3 but held exhibit P5 to have corroborated the evidence of PW 2 that she was raped.

We say so in view of his observation in his judgment where he remarked:-

> *"When examined shortly later by PW3 Dr. Sossiya she was not only found disheveled, as Ms Sarakikya neatly put it, but also bleeding and spermatozoa were found in her vagina..... the presence of spermatozoa strengthened her claim that she had been raped."*

With great respect to the learned judge, we don't think exhibit P 5 is all that worth. We say so for the following reasons:-

First, exhibit P 5 is a school exercise book. There was a PF 3 which is normally used by doctors in matters of this nature to fill in their observation in examining the victim. We ask ourselves: why did the doctor (PW 3) fail/omit to fill the PF 3 exhibit P 1 with those observations and instead elected to record them in a school exercise book? A school exercise book is not normally used by doctors to express their observations in matters of this nature. Where a doctor departs from this procedure, as in the instant case, we would expect to know the reason why he decided to do so. In the instant case no reason/ explanation was given.

Second, PW 3 tendered the PF 3 exhibit P 1 on 7/3/2003. He tendered the school exercise book exhibit P 5 on 25/8/2003, after a period of over five (5) months. We ask ourselves:- why did it take so long? There was no explanation given. This strengthens the appellant's complaint that it was probably concocted to implicate him, especially having in mind the appellant's allegation of bad blood between him and PW 2. As indicated above, the trial magistrate discarded the evidence pertaining to this exhibit. In view of what we have stated above, we think he was right.

Having expressed our view on the shortfalls in exhibit P 1 and exhibit P 5, we ask ourselves: what is the position of the oral evidence of the maker (PW 3)? In our view those shortfalls rendered the oral evidence of PW 3 of very little evidential value, if any. After disregarding the evidence pertaining to exhibits P 1 and P 5 and that of PW 3, there is not other evidence which corroborated the act of rape of PW2. We are mindful of subsection (7) of Section 127 of the Evidence Act, which was introduced by the Sexual offences Special Provisions Act, 1998, which allows a conviction to be founded on uncorroborated evidence of the victim of the rape if the court believes, for the reasons to be recorded, that the victim witness is telling nothing but the truth. In the instant case, the learned trial magistrate did not state specifically whether PW 2 was truthful and the reason for so saying. The doubt is to be resolved in favour of the appellant.

Having held the view that the prosecution did not prove beyond all reasonable doubt that PW 2 was raped, our second question of whether it was the appellant who raped her becomes superfluous. However we may remark in passing that, PW 4's assertion that she saw the appellant running away from the scene and identified him to be Bakari Hamisi, is not free from doubt. We say so because PW 4 did not say how far she

was from the suspect when she saw him running, and how she saw and identified him to be the appellant, in view of PW 2's assertion that it was in a bush. We think it was dangerous to hold that PW 4 properly identified the appellant and that her evidence supported the evidence of PW 2 that it was the appellant who raped her as held by the two courts below.

Lastly, there is one point which we think we should address, although not raised as a ground of appeal and was not brought to the attention of the judge on first appeal. It refers to change of magistrates. According to the record, the prosecution evidence was recorded by H. H. M. Tuwa (DM). The defence evidence and the judgment were recorded by M. H. M. Seenene (DM). There is nothing in the record suggesting that section 214 of the Criminal Procedure Act was explained to the appellant or that the appellant elected that Seenene could proceed from where Tuwa had ended. This was an error. However there is nothing suggesting that the appellant was prejudiced. The fact that he did not raise it as a ground of appeal suggests that, even if section 214 would have been explained to him, he would have preferred Seenene to proceed from where Tuwa had ended.

According to all that we have stated above, we are of the firm view that, had the learned judge on first appeal taken the approach we have taken, he would have held the view that the prosecution had not established the guilt of the appellant beyond all reasonable doubt, and would have allowed the appeal.

In the event, and for the reasons stated above, we allow the appeal, quash the conviction and set aside the sentence and the compensation order. The appellant is to be released from prison forthwith unless lawfully held.

DATED at DAR ES SALAAM this 8th day of November, 2007.

A. S. L. RAMADHANI
CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR

Delivered under my hand and Court Seal in Open Court /Chambers at ..... this..... day of .....

.....
DEPUTY REGISTRAR