LEGAL PRINCIPAL DISCUSSED

Citation	Parties	Legal Principles Discussed
IN THE COURT OF APPEAL OF TANZANIA. CRIMINAL APPEAL NO. 163 OF 2008. KILEO J.A, MASSATI J.A AND ORIYO J.A.	**ABDALLAH ZUMBI @ NILLA MSELA VS THE REPUBLIC** (Appeal from the Decision of the High Court of Tanzania at Dodoma, Masanche J.)	1. The prosecution case has to be proved beyond reasonable doubt. 2. It is of the court's duty to order compensation to a victim of rape and not to impose it on a victim of rape to sue separately for compensation in civil litigation.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 163 OF 2008

ABDALLAH ZUMBI @ NILLA MSELA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Masanche, J.)

dated the 6th day of June, 2007
in
Criminal Appeal No. 30 of 2006

JUDGMENT OF THE COURT

11 & 18 March 2010

ORIYO, J.A.:

The appellant, Abdallah Zumbi @ Nilla Msela, was charged with and convicted of rape contrary to Sections 130 (1) (2) and 131 (1) of the Penal Code, Cap 16, RE 2002. He was sentenced to 30 years imprisonment by the District Court of Manyoni District at Manyoni. He unsuccessfully appealed to the High Court at Dodoma. Still dissatisfied he preferred this second appeal.

Before we proceed further, we would like to give a brief account of the case which was before the trial court.

It was alleged that on 18 November 2004 at about 00.00 hours at London Village, within Manyoni District in Singida Region, the appellant unlawfully had sexual intercourse with one Mariam Hussein without her consent. The evidence adduced before the trial court was that Mariam, 20 years of age, who was PW1 at the trial, was engaged in the business of preparing food for sale, popularly known as "Mama Lishe" or "Mama Ntilie". PW1 and the appellant previously knew each other. PW1 testified that on the fateful day, the appellant visited her kiosk for food and drinks. Thereafter he approached her for sex but PW1 declined. Appellant's second attempt was also turned down. It appears that the appellant was not discouraged in his pursuit because he waylaid PW1 on her way from taking a bath. It is stated that the appellant grabbed PW1's hand and dragged her outside at knife point and fell her down near a road. The appellant proceeded to undress her and raped her in the presence of several other people who did not intervene. Instead, the crowd was

applauding the appellant. It was not until PW2, Mustapher Saidi @ Giriki, arrived at the scene and rescued PW1. The appellant then disappeared from the scene.

The appellant's defence was a mere denial and an **alibi** raised at the trial. He contended that he was framed up. The trial court believed the prosecution case and rejected that of the defence; hence the conviction.

The appellant's memorandum of appeal essentially had 4 grounds of appeal with several complaints which included –
One, that the prosecution case was not proved beyond reasonable doubt; two, that the prosecution evidence exhibited contradictions; three, that there was no evidence in support of the offence of rape; four, failure to summon essential witnesses; five that he was convicted on the basis of hearsay evidence and six, that his defence was not considered.

Before us, the appellant was unrepresented as was the case in the courts below. The respondent Republic was represented by Ms Neema Mwanda, Senior State Attorney. The appellant adopted his memorandum of appeal and did not add anything material save that he would make his submissions, if any, after the Republic's response to the grounds of appeal.

On her part, the learned State Attorney did not support the conviction of the appellant and she agreed with the appellant that the offence against him was not proved beyond reasonable doubt. In support of the Republic's stand, Ms Mwanda led us through the testimonies received at the trial. She drew our attention to several instances of contradictory and/or fanciful testimonies of the prosecution witnesses in particular those which vividly describe the scene of the incident.

We shall point out some of the testimonies which Ms Mwanda told us that it made her disbelieve that the offence of rape was committed in the circumstances. Examples of such pieces of

evidence came from PW1 who testified to have previously known the appellant but on cross examination by the appellant she changed and stated that she knew him from the date of the incident. Another piece of testimony by PW1 was that throughout the rape incident, the appellant held a knife in one hand while the other hand held PW1 and the appellant was seated on her thighs. Ms Mwanda told us that PW1' testimony is different from and contradicts that of PW2 who described the scene differently as he found it. PW2 evidence was that the appellant was seated on the ground with his legs spread out; while PW1 sat in between the accused legs with the appellant's right hand holding PW1's back. The learned State Attorney submitted that if PW2 testimony was taken as genuine description of the respective positions of PW1 and the appellant at the scene; it raises serious doubts in the prosecution evidence that the offence of rape was committed.

On the evidence of PF3 which was admitted by the trial court, it was stated that PW1 had minor bruises on the neck, right knee and leg. The learned State Attorney submitted that PF3 was therefore

not evidence of rape and could not at any rate be taken to have any corroborative value.

On our part we find no basis to differ with Ms Mwanda as the alleged contradictory and fanciful testimonies are supported by the record before us.

For example at page 9 of the record, PW1 describes the scene as follows:-

> "Accused undressed my skirt, blouse and my underwear before he undressed his jeans trousers half way and sat on my thighs. He did penetrate his penis into my vagina. I did not allow him. He completed the sexual act by emitting seeds."

At page 12, PW2 describes the scene using the following language:-

> "Accused was seated on the ground with his legs spread out. PW1 was seated in between

not evidence of rape and could not at any rate be taken to have any corroborative value.

On our part we find no basis to differ with Ms Mwanda as the alleged contradictory and fanciful testimonies are supported by the record before us.

For example at page 9 of the record, PW1 describes the scene as follows:-

> "Accused undressed my skirt, blouse and my underwear before he undressed his jeans trousers half way and sat on my thighs. He did penetrate his penis into my vagina. I did not allow him. He completed the sexual act by emitting seeds."

At page 12, PW2 describes the scene using the following language:-

> "Accused was seated on the ground with his legs spread out. PW1 was seated in between

> the accused legs with his right hand holding PW1's back. --- I separated the two. I found them sexing."

We think there is also evidence of bad blood between the appellant and PW2 and the residents of the area generally. PW2 said as follows on cross examination by the appellant at page 13:-

> "You're a threat at the Goldmines."

He gave a similar response on cross examination by the court

> "Accused is a common law breaker as he threatens at Kahama Mines several times. I am not happy with accused's act."

Unlike the learned first appellate Judge and the learned trial magistrate, we are satisfied that the evidence of lack of consent, for example, by the prosecution witnesses was very weak and did not prove the charge of rape against the appellant beyond reasonable doubt. Had the learned judge and the learned trial magistrate considered the weaknesses pointed out above in the prosecution

testimonies, we think they would have come to the inevitable finding that it was not safe to sustain a conviction in the circumstances.

In the light of the above, we are satisfied that the conviction and minimum statutory sentence imposed on the appellant warrant our interference. Accordingly we allow the appeal, quash the appellant's conviction for rape and set aside the sentence of 30 years imprisonment. The appellant is to be released immediately unless otherwise lawfully held.

We think our decision will be incomplete without a word on the trial court's order for compensation; which might have escaped the attention of the first appellate court. After pronouncing the sentence of imprisonment the learned trial magistrate issued the following order:-

> "**ORDER**
>
> PW1 to sue for compensation through civil litigation."

Having given the order some thought we are constrained to hold that the learned trial magistrate erred after convicting the appellant for rape without an order of compensation. This is contrary to the provisions of Section 131 (1) of the Penal Code, Cap 16, R.E. 2002 which states the following:-

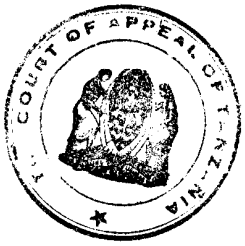
> "131 – (1) Any person who commits rape is, --- liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person" (Emphasis provided)

Therefore, it was wrong for the learned trial magistrate to shift the courts' duty under the above provision and impose it on a victim of rape to sue separately for compensation in civil litigation.

However, in view of the decision we have reached above, the error has been taken care of as well.

DATED at DODOMA this 17th day of March, 2010.

E.A. KILEO
JUSTICE OF APPEAL



S.A.L. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

(E.Y. MKWIZU)
DEPUTY REGISTRAR