Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO. 24 OF 2007 – Court of Appeal of Tanzania at Dodoma. Coram: RUTAKANGWA J.A,KIMARO,J.A AND MBAROUK J.	**MKUMBO HAMISI VS THE REPUBLIC** – Appeal from the decision of the High Court of Tanzania at Dodoma– **Criminal Appeal No 73 of 2006** (Masanche, J)	Non-compliance with s.240(3) of CPA Nyambura Kamaoga Vs.Republic, Criminal Appeal No.9 of 2003 (unreported) Also Selemani Makumba Vs Republic, Criminal Appeal No.94 of 1999 (unreported)

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 24 OF 2007

MKUMBO HAMISI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Masanche, J.)

dated the 4th day of December, 2006
in
Criminal Appeal No. 73 of 2006

JUDGMENT OF THE COURT

2 & 4 December, 2008

MBAROUK, J.A.:

In Criminal Case No. 32 of 2006 in the District Court of Iramba at Kiomboi, the appellant Mkumbo Hamis was convicted of the offence of rape contrary to section 130 (1)(2)(e) and 131 (1) of the Penal Code as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998. He was sentenced to thirty years imprisonment and twelve strokes corporal punishment. Also he was ordered to pay 100,000/- compensation to PW1 for the harassment she got. He was aggrieved by the conviction and

sentence and appealed at the High Court. Masanche, J. dismissed his appeal. Still not satisfied, he has filed this second appeal.

The appellant has filed a lengthy eight grounds memorandum of appeal which can conveniently be reduced to seven grounds:

1. *That, the trial magistrate and the 1st appellate court grossly erred in law and facts after working upon the evidence of PW1 which does not suffice the court to rule out that PW1 was doing sexual intercourse with the appellant.*

2. *That, the trial magistrate and the 1st appellate court erred in allowing the prosecution not to summon a ten cell leader (Issa Kikasi) instead they called PW2.*

3. *That, the trial magistrate and the 1st appellate court grossly erred in law and facts after imposing severe sentence to the appellant while the conviction fell under the lesser offence of abduction and not rape.*

4. *That, the trial court and 1st appellate court grossly erred in law and facts for convicting the appellant without complying with the mandatory requirement provided under section 312 (2) of CPA, Cap.20 (R.E. 2002).*

5. *That, PF3 has not shown the evidence that penis penetrated into the vagina. Also a doctor was not called to testify at the trial court contrary to section 240 (3) of the C.P.A.*

6. *That, the trial court and 1st appellate court erred in law and facts after admitting and working upon the evidence of PW1 and PW2 without considering the failure to produce the sketch map to show where did the two persons met and had sexual intercourse.*

7. *That, the trial court and 1st appellate court seriously erred in law and facts without considering the appellant's defence at the trial.*

We have opted to give a brief account of the case which was before the trial court before we discuss the points raised in the memorandum of appeal. On 14.3.2000 at 1.00 p.m., PW1 Sarah d/o Daniel was tending cattle with PW2 Petro Amosi. PW1 went to the river to pick firewood. She saw the appellant walking towards her. PW1 left the river and went to her cattle. The appellant followed PW1 and told her 'leo ni leo'. PW1 asked the appellant why he was making that remark. The appellant replied that he has been seducing her but PW1 was refusing. The appellant then kicked PW1's legs using his feet and PW1 fell down. He lied on top of PW1 and tore her underpants, unzipped his trousers and took his penis and inserted into PW1's vagina and the penis penetrated. PW1 shouted and PW2 Petro Amosi who was tending his cattle 20 paces from PW1 heard the cries and saw what the appellant did to PW1. At the scene, PW2 found the appellant lying in between PW1's thighs. PW2 flogged the appellant on his back who then woke up and PW1 ran away. PW1 and PW2 drove their cattle home and went to report to the ten cell leader and later to the police post, where she was issued with PF3 and sent to the hospital. The PF3 tendered and admitted as Exhibit P1 showed that PW1 sustained bruises and mild

swelling on her private parts. Thereafter, the appellant was arrested and accordingly charged.

In this appeal, just like in the courts below, the appellant was unrepresented. The respondent Republic was represented by Ms. Neema Mwanda, learned State Attorney.

At the hearing the appellant had nothing to submit apart from what he stated in his memorandum of appeal understandably so because he was a lay person.

On her part, Ms. Mwanda, from the out set supported the conviction and sentence imposed upon by the trial court to the appellant. The learned State Attorney vehemently urged us to consider all the grounds as baseless with the exception of the 5th ground of appeal concerning the non compliance with section 240 (3) of the Criminal Procedure Act (CPA).

In her response to the first ground of appeal, Ms. Mwanda submitted that the record clearly shows that the appellant did the act of rape at day time. She said that, the appellant was clearly identified by PW1 and PW2. Both witnesses (PW1 and PW2) testified to the effect that they knew the appellant before, as they were living in the same village. Ms. Mwanda further submitted that the evidence of PW1 and PW2 was water-tight to enable the offence against the appellant to have been proved beyond reasonable doubt. As per the record, Ms. Mwanda added that, PW1 narrated the whole story when the appellant followed her, kicked and fell her down, lied on top of her and inserted his penis into her (PW1's) vagina. The learned State Attorney furthermore submitted that PW1 was found to be a truthful witness by the trial court. PW2 corroborated the evidence of PW1, she said. After being satisfied, the trial court accordingly found the appellant guilty as charged Ms. Mwanda added. Hence, she urged us to find the 1st ground of appeal baseless and without merit.

On our part, as urged by the learned State Attorney we find the 1st ground of appeal without merit. We have arrived to that conclusion after having a

considered opinion that, the act of rape happened during day time and there was no question of mistaken identity. Bearing in mind that, the two courts below have reached to the decision of convicting the appellant after the analysis of the facts, we find no justification for interfering with the concurrent findings of the two lower courts. We find no merit in the appellants' complaint as found in his 1st ground of appeal.

As to the 2nd ground of appeal, Ms. Mwanda agreed that, it was true that a ten cell leader (Issa Kikasi) was not called to testify at the trial court. However, we think, the learned State Attorney correctly submitted that not calling a ten cell leader to testify did not affect the prosecution case. This is because he was not an eye witness at the scene of the crime. She said the evidence of a ten cell leader would have had no value compared to that of PW1 and PW2 who actually witnessed the act of rape. Hence the prosecution side cannot be faulted she said.

On our part, we totally agree with the learned State Attorney that the prosecution side at the trial court cannot be faulted for not calling the ten cell

leader (Issa Kikasi). This is because, the evidence of PW1 and PW2 was sufficient to prove the offence against the appellant as charged. Hence we find the 2nd ground of appeal with no merit.

Without labouring ourselves to go to a thorough analysis of each ground, like ground number three, four, six and seven, we find them with no merit as urged by the learned State Attorney. This is because we have found them to have been fully complied with by the trial court. For example ground three, after the offence of rape has been proved we think, the sentence imposed was legal. As for ground four we are of the opinion that section 312(2) of the CPA has been fully complied with as shown in the record. As for ground six, we are of the opinion that there was no need for the production of a sketch map of the scene of the crime. Concerning ground seven, the records are clear that the trial Principal District Magistrate fully considered the appellant's defence in his judgment. Hence generally, we have find grounds No. 3, 4, 5, and 7 with no merit after having been fully complied with by the trial court.

The only ground which has remained is ground of appeal No. 5 concerning the non compliance with section 240(3) of the C.P.A. Ms Mwanda herself conceded that the act of not calling a doctor to testify on the PF3 which he wrote was contrary to section 240(3) of the C.P.A. She prayed for the evidence of PF3 to be discounted. To which we accordingly do so. She then referred us to the decision of this Court in **Nyambura Kamaoga V.R.,** Criminal Appeal No. 9 of 2003 (unreported).

After having discounted the evidence found in PF3 we have been left with evidence of PW1 and PW2. However, as we have already found, there is no justification for the interference of the concurrent findings of facts of the courts below. Hence we automatically find the evidence of PW1 and PW2 credible as found by the trial court and confirmed by the High Court. In addition to our findings, this Court elaborated further on this position in the case of **Selemani Makumba V. R.,** Criminal Appeal No. 94 of 1999 (unreported), where it was stated that:

> *"A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is non consented sex, even if bruises are observed in the female sexual organ.* ***True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman consent is irrelevant, that there was penetration."***
> *(Emphasis added).*

In the instant case, PW1 testified to the effect that the appellant inserted his penis into her vagina without her consent. That evidence of PW1 has been accepted by both lower courts that it has proved the offence of rape. Hence, we are of the opinion that, even if the evidence contained in PF3 has been discounted, the evidence of PW1 and PW2 suffices to prove the offence against the appellant.

For the foregoing reasons, after having found overwhelming evidence against the appellant, we have found no reason to fault the decisions of the

no reason to fault the decisions of the two courts below. We find no merit in this appeal. We accordingly dismiss the appeal in its entirety.

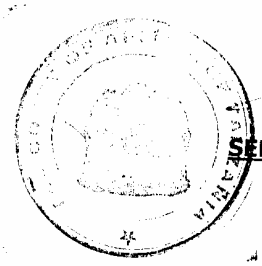
DATED at DODOMA this 3rd day of December, 2008.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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



(S. S. MWANGESI)
SENIOR DEPUTY REGISTRAR