CRIMINAL APPEAL NO 7 of 2007 – Court of Appeal of Tanzania at Arusha. CORAM: KAJI, J.A, KILEO, J.A, AND KIMARO, J.A	Ally Mkombozi VS The Republic (Appeal from the judgement of the High Court of Tanzania at Arusha – Criminal Appeal No. 6 of 2004)	The essence of the offence of rape is penetration of the male organ into the vagina S.130 (4) of the Penal Code Cape.16 as amended by SOSPA 1998. Also in Daniel nguru and others VR (CAT) Criminal Appeal No. 178 of 2004) Mwanza (Unreported). In Omary Kijuu VS Republic CAT (Criminal Appeal No. 39 of 2005 (Dodoma) (unreported)

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KAJI, J.A., KILEO,J.A.,And KIMARO, J.A.)

CRIMINAL APPEAL NO 7 OF 2007

ALLY MKOMBOZI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Tanzania at Arusha)

(Rutakangwa,J)

dated this 14th day of July 2006
in
Criminal Appeal No. 6 of 2004
.....
JUDGMENT OF THE COURT

23rd & 25th April, 2008

KIMARO, J.A.:

The appellant, Ally Mkombozi was charged, convicted and sentenced to life imprisonment for raping Irene Adriano, a very small child of 3 years of age. His appeal to the High Court was dismissed in its entirety. Still aggrieved, the appellant is protesting his innocence before us.

The appellant has filed three grounds of appeal the effect of which amounts to saying that there was no sufficient evidence to base his conviction. He complained that in terms of the provisions of the Sexual Offences (Special Provisions) Act, 1998 the offence of rape was not committed. He also faulted the first appellate court for upholding his conviction while the trial magistrate failed to assess the credibility of PW2. Lastly, the appellant wondered why neighbours said to have visited the scene of crime were not summoned to testify for the prosecution.

At the hearing of the appeal the appellant appeared in person while Mr. Henry Kitambwa, learned State Attorney, appeared for the respondent Republic. The learned State Attorney supported the conviction and sentence.

Briefly, the evidence that led to the conviction of the appellant was that Pamela Joachim, (PW3) the mother of Irene, the victim of the offence, was on 16th October, 2002 at Mbauda market where she carried on a business of selling charcoal, since 8.45am. She left the

little girl at home. On the same day, at around 9.30 am Mary Masha,(PW2) a small scale business woman, and a tenant in the house of PW3 returned home from her business to take medicines as she was not feeling well. As she was in her room taking tablets, she heard a child crying bitterly; and someone was telling it to keep quiet. The child insisted to be left free. The witness went out to investigate what was happening.

PW2 described what she saw as follows:

> "I then saw the accused holding the said child over his thighs. It was the accused who was holding the child and the accused is normally known as Mgosi at Mbauda area. The trousers of the accused were half dressed. In other words, his trousers were open while the child was sitting on his thighs. I then asked the accused as to what he was doing with the child and he said "we are just playing together". I saw the penis of the accused. Actually the accused was sitting down on the floor and holding the child who was lying on

> his abdomen. The underwear of the child was on the floor."

Further testimony of PW2 was that as she lifted the child from the appellant a fight occurred between them, but neighbours responded positively to her alarm and the appellant was overpowered. He was arrested by the people who turned up at the scene of crime and was locked in a room of a tenant at the same house until when the police were informed and took him to the police station. PW2 is also recorded to have said:

> "I noticed a swollen part at the private part of the child. I also saw blood. She was bleeding from her private part."

PW3 was informed about the ordeal to which she promptly responded and returned home to see what had taken place. As she examined her little Irene, she saw her bleeding from a swollen part in her vagina. She also had bruises in her private parts. The incident was then reported to the police where W.P. 1845 Corporal Agnes (PW4) attended to the complaint. She also examined the little girl

and confirmed that she suffered the same injuries in her private parts as noted by PW2 and PW3. A PF3 form for the examination of Irene was issued, and PW3 took her to Mount Meru Hospital where she was examined by Dr. Hassan Kivuyo, (PW1). According to PW1, he was required to examine the little girl to establish whether she was raped. In his examination, PW1 found the little girl with a fresh swell within her vagina and was bleeding. His firm expert opinion was that the swell was caused by a blunt object, possibly by a penis in the course of penetration.

In his defence the appellant did not deny being in the premises of PW3 where the offence was committed but denied being the one who committed it. Accounting for his presence there, the appellant said he went to demand from PW2 payment for work he did for her, namely painting the house but had not been paid. The appellant admitted that himself and PW2 wrestled, and in that process PW2 struggled to pull down his pair of trousers so as to create an impression to the public that the appellant was trying to rape her. The trial magistrate disregarded the appellant's defence on the

ground that it was not raised at the time PW2 testified in court and so it was an afterthought. The appellant was attempting to avoid conviction but as stated before, he was convicted and sentenced to the statutory minimum penalty of life imprisonment as provided for under section 131(3) of the Penal Code.

During the hearing of the appeal the appellant attacked the prosecution evidence upon which his conviction was based, contending that it was not water tight as there was a discrepancy in time, and contradiction between the witnesses. He also wondered why the prosecution failed to summon as witnesses the neighbours who responded to the alarm raised by PW2; and their failure to tender as exhibit the little girl's underpants. In his opinion the offence of rape could not stand as there were no traces of spermatozoa found in the vagina of the complainant when she was medically examined. He prayed that the appeal be allowed.

On his part the learned State Attorney addressed two questions of which he came up with positive answers. First, was the question

whether the offence of rape was committed? The evidence of all the four prosecution witnesses, (PW1 to PW4), the learned State Attorney contended, proved that the offence of rape was committed. All of them said they examined the victim of the crime and found her with a swelling in her vagina and she was bleeding. The doctor (PW1) the learned State Attorney said, was specific that injuries were caused by a blunt object and possibly a penis.

We respectfully agree with the learned State Attorney that all the prosecution witnesses gave same evidence on the kind of injuries suffered by the victim of the crime. The doctor was also particular on what could have caused the injuries. He said it was a blunt object and possibly a penis. PW2 saw the appellant with his trousers half dressed, holding the little girl over his thighs. She also saw his penis. When PW2 asked the appellant what he was doing with the complainant his answer was that they were playing. The appellant's argument that the offence could not be committed because no traces of spermatozoa were found in the vagina of the victim is misconceived. The essence of the offence of rape is penetration of

the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penal Code Cap 16 as amended by the Sexual Offences (Special Provisions Act) 1998 provides that; "for the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence." In **Daniel Nguru & Others Vs Republic** CAT (Criminal Appeal No. 178 of 2004) (Mwanza) (Unreported) the Court remarked that penetration is not proved by presence of semen on the body of the prosecutrix or bruises on her vaginal region. In discussing what amounts to penetration, the Court in **Omary Kijuu Vs Republic** CAT Criminal Appeal No. 39 of 2005 (Dodoma) (Unreported) said;

> "Thus the doctor's observation coupled with PW2's evidence on how those bruises came there, that is, they were caused by a male organ, amounted to penetration and capable of proving the offence of rape..."

With the evidence which was before the trial court, the first appellate court was entitled to uphold the conviction by the trial court. We find no reason for disturbing this finding.

Second, was the question who committed the offence? The learned State Attorney was quick to point out that it was none other than the appellant. The evidence to prove this, argued the learned State Attorney was in the evidence of PW2 and the defence of the appellant himself. We also agree with the learned State Attorney on this aspect. PW2 was an eye witness to the commission of the offence. We quoted above; her portion of her evidence describing what she saw the appellant doing. In his defence the appellant admitted being at the scene of crime around the same time the offence was alleged to have been committed. He was arrested there. The defence which he gave accounting for his presence at the premises was, as correctly observed by the trial court and upheld by the first appellate court, an afterthought as this version of his defence never featured in evidence when he cross examined PW2. If

such a situation existed, it could not have escaped his mind during the cross examination of PW2.

On the complaint by the appellant on the discrepancy in time, we entirely agree with the learned State Attorney that it was minor and could not have affected the conviction of the appellant. The record does not support the appellant on his grievance that the prosecution evidence is contradictory. In fact it is the other way round. The evidence of the prosecution witnesses was very consistent at all stages. As for the omission by the prosecution to call witnesses from the neighborhood and omission to tender the underpants of the complainant, our observation is that what the prosecution was required to do was to prove their case on the standard required. They were at liberty to sort out which evidence they needed to establish their case. After all, it is not all evidence which comes out during investigation is relevant for proving the case for the prosecution. This grievance lacks substance.

In the event, we find the appeal lacking in merit and it is dismissed in its entirety.

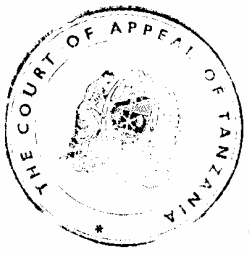
DATED at ARUSHA this 25th day of April 2008.

S. N. KAJI
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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



F. L. K. WAMBALI
SENIOR DEPUTY REGISTRAR