

TANZANIA / JUDGMENT

20101007 TZHC Mtwara

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IN THE COURT OF APPEAL OF TANZANIA ATMTWARA (CORAM: MBAROUK, J.A, BWANA, J.A. AND MASSATI, J.A.) CRIMINAL APPEAL NO. 22 OF 2007 ALI MOHAMEDI MATINGO APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the judgment of the RM's Court (Extended Jurisdiction) at Mtwara) (Kinemela (SRM - Ext.J.)) dated the 28th day of December, 2006 in Criminal Sessions Case No. 9 of 2006 JUDGMENT OF THE COURT 6 & 8 OCTOBER, 2010 BWANA, J.A.: convicted of Rape contrary to sections 130 and 131 of the Penal Code as amended by Section 5 (2) of the Sexual Offences (Special Provisions) Act No. 4 of 1998 (SOSPA). He was sentenced by the trial, District Court of Lindi to serve a prison term of thirty (30) years. 1 ,,,,- 'i He was also ordered to compensate his victim the sum of Tshs.100,000/= after serving the sentence. We pose here at the outset and question the logic of that order. Is it really reasonable objectively, to pay compensation of that sum after serving a prison term of 30 years? The objectivity of such an order leaves much to be desired. Be that as it may, it was the prosecution case that on the 20th day of March, 2005 at about 23.00 hrs at Kiwalala Village within Lindi District, the appellant had carnal knowledge of Mwanahamisi Swalehe, a girl aged 14 years then. The prosecution called 4 witnesses. The appellant called one defence witness, one Hassani Manchamba (DW2), the village chairman. Aggrieved by the decision of the trial court, the appellant appealed to -the High Court and-hEf-~fj5pe-arw-as heard --fry--the Se-riTor Resident Magistrate with Extended Jurisdiction. His appeal was unsuccessful, hence this second appeal. 2 'i In his Memorandum of Appeal to this Court, the appellant "" raised five main grounds of appeal. They were followed by eight other additional grounds. In essence, his appeal hinges on the following points:-

- Identification - whether he was properly identified at the scene of crime.
- Credibility of the evidence of PW1 and PW3 - that it was "fabricated"
- Trial Magistrate did not consider his defence case.
- The PF3 was tendered as an exhibit without complying with the relevant provisions of section 240 of the Criminal Procedure Act (the CPA). In addition to the above main grounds of appeal, the Court did conducted in accordance with the provisions of the law, particularly section 127 (2) of the Tanzania Evidence Act (The TEA), bearing in mind the age of the victim. The respondent Republic did not support 3 the conviction by the trial court and the findings of the first appellate court. The background to this appeal may be briefly stated as

follows. Two girls, Mwanahamisi Swalehe PW1 and Hadija Mohamed:, PW2 were seen by Ally Abdallah, PW3, seated outside their house, in the company of the appellant. PW3 rebuked PW1 for sharing a chair with the appellant. Immediately thereafter PW2 left for her home. Likewise did PW3 leave the area, leaving behind the appellant and PW1 alone. It was PW1's evidence then that she took her chair inside the house. The appellant followed her and demanded to have sexual intercourse with her lest he strangled her. PW1 was afraid so she gave in. While still in the act, PW3 returned. Upon realizing the presence of PW3, the victim PW1, escaped through the back of a neighbouring house. It was alleged by PW3 that when he entered the house, he found the appellant naked. He called a neighbour, PW4. Together they apprehended the appellant and took him to the 4th, residence of the village chairman for further steps. Likewise PW1 was interrogated by the said village chairman, DW2. She denied to have been raped by the appellant. She said he had gone there to borrow a pen. PW1 is said to have been taken for a medical examination the following day. The report, PF3, showed that PW1 had injuries externally, on the vaginal "as". But that PF3 shows that it was prepared on 21/3/2003! That is two years before this incident. It cannot, in our judgment, be correct. We will revert to this issue shortly. As stated above, the respondent Republic does not controvert the appeal. In our considered opinion however, there is need to examine three basic issues as they appear on the record. These are:-

- The Voire Dire principle, as applied by the trial court.
- The PF3 tendered in support of the prosecution case
- The credibility of the prosecution evidence. 5 Going by the case record, it is evidence that a voire dire was not conducted in accordance with standard practice. The trial court simply stated:- "Court: Voire dire principle complied with. PW1: I know the meaning of affirmation. Defence one tells lies he is committing sin. Court: PW1 knows the meaning of affirmation she is hereby affirmed. " With due respect, what the trial court recorded was not legally satisfactory. It is not in dispute that PW1 was 14 years old when the alleged incident took place. She was therefore, a child of tender years, in terms of the provisions of section 127 (5) of the TEA. That being the case, then a voire dire, properly conducted and recorded in 6 j. 1 The said voire dire must comply with the provisions of section 127 (2) of the TEA. The purpose is to help the trial court establish three basic factors, namely:-
 - Whether the child is possessed of sufficient intelligence to justify the reception of his or her evidence.
 - Whether the child understands the duty of speaking the truth.
 - Whether the child understands the nature of an oath or affirmation. The procedure to be followed when recording a voire dire emanates from the wording of Section 127 (2) of the TEA. (See also: Jonas Raphael vs Republic, Criminal Appeal No. 42 of 2003; Saasita Mwanamaganga vs Republic, Criminal Appeal No. 65 of 2005; (both unreported); Kisiriri Mwita vs Republic, (1981) TLR 218; Dllallir Ally vs Republic (1989) TCK 27. There is no flicker of doubt in our minds that the

trial magistrate failed to comply with those requirements, of the law by 7 I ' not recording in writing whether PW1 was possessed of sufficient intelligence to give evidence on oath/ affirmation; whether she understood the duty to tell the truth and above all, whether she knew the meaning of oath. What the trial magistrate wrote down is not, in our respectful opinion, a proper voire dire examination. The consequences of not recording a proper voire dire or not at all, has serious consequences. In a recent decision of this Court it was held that "failing in this test is therefore fatal" to the case. (See: Sunday Juma vs Republic, Criminal Appeal No. 406 of 2007 (unreported)). However, a longer chain of authorities set in the past by this Court show that such irregularity brings such evidence to the level of unsworn evidence of a child which requires corroboration. (See Remigious Hyera v Republic Criminal Appeal No. 167 of 2005 (unreported); Kibangeny Arap Kolil v R, (1959) EA 92; Saasita -Mwanamaganga -15upra); -H~rffian .Henjewe v R, Criminal Appeal No. 164 of 2005 (unreported); Deemay Daat v R, Criminal Appeal No. 80 of 1994 (unreported); Baziri Herman v R, Criminal Appeal No. 209 of 2005 (unreported)). 8 The corroboration needed, would, where necessary, come from either the victim's evidence or the medical examination conducted subsequent to the rape. We now consider these two issues together. The PF3 is said to have been prepared on the 21 st day of March, 2003. That in itself is a fatal error since the alleged offence took place on 20 th day of March, 2005. That is not all. The trial court record does not show that the provisions of Section 240 (3) of the CPA were complied with. Nothing suggests that the appellant was informed of his basic rights in so far as the administration of criminal justice is concerned. That section provides:- '\$. 240 (1). In any criminal trial before a subordinate court, any document purporting --- to oe a~'"report signeaoy~a medical witness upon any purely medical or surgical matter shall be receivable in evidence.

(2) 9

(3) When a report referred to in this section is received in evidence the court may if it thinks fit and shall if so requested by the accused or his advocate/ summon and examine or make available for cross- examination the person who made the report and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection "(Emphasis added). The appellant herein was not accorded that right. Therefore for the two foregoing reasons, the PF3 tendered in court should be expunged. Mr. Manjoti, learned counsel for the respondent Republic tne COurf lo~ao~-so. . --. asked... We do agree with him and oraer accordingly. With the PF3 expunged, we are left with the evidence of PW1 herself which cannot be used to corroborate itself. Further, that evidence is challenged by the appellant as not being credible. Mr. Manjoti agrees. Likewise, we do. Dw2 -stated in his testimony that when interrogating PW1, she denied to have been raped by the appellant. Further, failure on the part of PW3 to state in his evidence as to whether he found the two having sexual intercourse or not, his evidence is unreliable when it comes to proving the offence with which the appellant was charged and convicted of. The trial court ought to have realized the deficiency and interpreted it in favour of the accused. It is a cardinal principle of law that

doubts are resolved in favour of the accused person, however slight they may be. which empowers courts to convict an accused person in the absence of corroboration. We are nevertheless, hesitant to uphold such a conviction in the instant case as the deficiencies shown hereinabove, go to the root of the case. In conclusion, we allow the appeal, quash the conviction and set aside the prison sentence of thirty years imposed by the trial court and upheld by the first appellate court. We do order that unless the appellant is otherwise lawfully held, he be set free forthwith. Since the order for compensation has no legs to stand on, we allow the appeal against it. DATED at M1WARA this 7th day of October, 2010 M.S. MBAROUK JUSTICE OF APPEAL S.J. BWANA JUSTICE OF APPEAL S.A. MASSATI JUSTICE OF APPEAL DE C 12

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