

TANZANIA / JUDGMENT

19800512 TZHC Tanga

COURT
TZHCDECIDED
12 May 1980

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA (District Registry) AT TANGA APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 17 OF 1977 From the decision of the District Court of Korogwe at
Korogwe in Criminal Case No. 80 of 1977, ... Before: T.M.I. Ngitami, Esq., R.M. i: let count:
Abduction of a girl under 16 years of age c/s 134 of the Penal Code. 2nd count (Alternative to 3rd.
count) Defilement of a girl under 16 years of age c/s 136 of the Penal Code, 3rd count (Alternative
to 2nd. count)

JUDGEMENT

Sieya, 3:- The appellant appeared in the District Court at Korogwe to answer to a charge containing three counts of Abduction of a girl under sixteen years of age contrary to Section 134, Defilement of a girl under sixteen years of age contrary to Section 136 and Rape contrary to Sections 130 and 131., These are offences under the Penal Code. Counts two and three, namely those of defilement and rape, respectively, were in the alternative. The learned Resident Magistrate who tried the case, however, inadvertently I suppose, treated the counts as if all of them were in the alternative. The end result was that he made a finding, entered conviction and passed sentence on only one count, namely count two of defilement, although he appears to have been satisfied that the offence in count one was proved as well he, nevertheless, refrained from making a specific finding and entering a conviction thereon. Consequently, no sentence was passed on that count one either. This was wrong. The learned Resident Magistrate ought not to have refrained from making a finding on count one. The question that naturally arises is what should now be done about this error in count one. I must admit the matter caused me some little anxiety. At first I was minded to remit the record back to the District Court, Korogwe, with directions to convict and pass appropriate sentence on count one. On second thought I do not consider it prudent and I am just to do so. This is so because this Court has reliably been informed that the appellant who, incidentally, was sentenced to three years imprisonment and ten strokes of Corporal punishment has now just completed his prison term. The maximum term of imprisonment for an offence under section 134 of the Penal Code such as the one charged in count one is two years imprisonment. In the circumstances, even if the learned Resident Magistrate convicted the appellant and sentenced him in count one the substantive term to be served by the appellant would not have exceeded the three years imprisonment to which he was sentenced. In short, no miscarriage of justice, therefore, has been occasioned by the error and, as the learned State Attorney, Mr O Mwale, quite correctly in my view pointed out, the error is

curable. Now, getting down to the facts of the case, evidence was given at the trial by the complainant, a girl aged thirteen years, who gave evidence on oath after the learned trial Magistrate was satisfied that she was of sufficient intelligence to understand the nature of the proceedings and to appreciate the piety of an oath,, to the effect that on 15/3/77, early in the morning, her "sister", one Mwanaiaha d/o Oman (Pw2) asked her to accompany her to a place called Mayuyu where they were to pick up some vegetables. It is in evidence which was not contradicted to the effect that the father of Mwanaisha (pW2) and the father of the complainant, one)'raticis Bakani (Pw3) were such intimate friends that their child,rn re,zard,ed each other as from the same father. Unsuspectinga- s the complainant accompanied her "sister", Mwanaisha. On the way they met the appellant who is her "brother—in—law", husband of Mwana- isha who then joined them. However before they reached Mayuyu the appellant announced that they were then off, on their way, to Magoma. which, incidentally, was his and Mwanaisha's matrimonial home, and that the complainant was, from then onwards, Mwanaisha's co—wife. To the complainant's surprise she noticed that Mwanaisha kept quiet.. Nevertheless she herself stated that she was not going to Magoma. On hearing this the appellant slapped, her twice and began to lead her to Magoma with a stick in his hand. Thereafter he told her to lie down. She:was not willing to do so whereupon the appellant with the assistance of his wife, Mwanaisha, lifted her up and lay her down. He pulled her gown up whereupon she became naked as she did not wear any underpant. He forced his male organ into her vagina and had carnal knowledge of her in the full view of Mwanaisha, That was her first time to know a man. She felt severe pain in her private parts. •.. 4 ... 3 ... 4 . She cried, out but no help was forthcoming. After the appellant had satisfied his lust she noticed that she was bleeding profusely from her private parts. Thereafter she could not even walk on her own. The appellant then carried her on his shoulder. However, instead of proceeding to Magoma as originally announced by the appellant the three of them proceeded to Kwaboha at the house of his, ia, appellant's, grandmother, one Mahiza Said.i (PW4). According to the complainant on their arrival at Kwaboba the appellant told PW4 that he had married her, i.e. complainant. PW4 then examined her private parts and saw the blood.. She then asked the appellant why he had "spoilt" her, i.o, complainant. He replied. and I quote from the record of proceedings, "Mimi kitu cha kuiba sitaki kukiohelewosha," PW4 then bathed her with very warm water and massaged her genital organ. She also told her not to sleep with the appellant any more. The complainant remained there for five days; She was sharing a room with PW4. Thereafter she, on her own, pro- ceeded to her own grandmother, i.e. mother of her father Francis (PW3), at Bumbu].i where she stayed for another five days. All that time Francis (pW3) was kept in the dark as to the whereabouts of his little daughter. Eventually ho, i.e. PW3, went and fetched her. He took her to the Police Station where the matter was reported. The Police sent her to the hospital with a PF3 which was tendered and admitted in evidence at the trial. This, among other things, shows that the hymen was not intact. PW2, Manaisha Qnari, testified to the effect that the complai- nant who is her "younger sieter" was also her co-wife because she was married to her husband., the appellant. The marriage took place after the complainant had stayed with appellant in conoubinago for sometime. This witness recalled that on 15/3/77 she left Keronge village for Magoina village with the appellant. The complainant also accompanied them after she had deceived her father that she was going to fetch some vegetables, Nothing happened on the way.

The three of them stayed together for five days. Thereafter the complainant absconded. On the application by the Prosecution this witness, Mwanaisha, was treated, as a hostile witness. When she was cross-examined on her statement to the Police she claimed that she signed the same after the Police had threatened, to send her to dog and snake houses. Rven' tually she said and I quote from the record of proceedings:- "Frankly speaking my husband (accused) did have sexual intercourse with Maria (PW),) but not in the bush. The aot took place at home and I saw it with my own eyes." 4 The father of the complainant, Francis Bakari (PW3) testified that on 15/3/77 at about 6.00 a.m, the complainant asked him for permission to go and pick up some vegetables. He permitted her to go and she left in the company of Mwanaisha (PW2). She, however, did not return. He tried to look for her but all in vain. After about ten days he met the appellant and Mwanaisha. When he asked them about the complainant both of them expressed ignorance about her whereabouts. Eventually, on the eleventh day since her dis- appearance from home he traced her at Bumbuli at the house of his mother. Thereafter, acting on information given to him by her he took her to the Police station at Korogwe. PW4, Mahiza Saidi, testified that on the material day the appellant accompanied by his wife and the complainant arrived at her house at about 5.00 p.m. On their arrival the appellant announced that he had brought his new wife to her. She looked at the comp- lainant and noticed that her clothes were stained with blood. There- after she examined the complainant's private parts and noticed that her hymen had recently been ruptured.. She then gave her a hot bath and told her not to sleep with appellant again. She kept the complai- nant in her house for five days. On the sixth day the complainant absoonded and she did not know where she had gone. The defence of the appellant at the trial was that of a mere denial. This did not impress the learned. trial Magistrate who, on the other hand, found that the evidence of the complainant to the effect that had had sexual intercourse with her was corroborated by that of Mwanaisha (Pw2) and Mahiza Said.i (PW4). In his petition of appeal the appellant raises two substantive points, namely that the leatnod trial Magistrate erred in acting upon the evidence of PW2 who is his own legal wife and also in believing the oornplainat story as it sounds inconceivable that he could have engaged himself in an act of sexual intercourse in the full view and presence of his own wife. On the first point, assuming as I do that I understand what appellant's complaint is all about all he needs to be told, and I am doing so now, is that f or the purposes of the offenoes with which he, appellant, was charged PW2 as his spouse was a competent and compellable witness for the prosecution. I note from the record of proceedings in the lower Court that even then the learned. trial Magistrate took pains to explain to Mwanaisha (PW2) that she was not compelled to give eviddnoe against the appellant as her husband. This was not only undesirable but also wrong. The attention of the learned. trial Magistrate is drawn to the proviso to sub section (i) of section .1.15•1• 5 •• 130 of the Evidence Act, .1967 the relevant portion of which reads- "Pvid.ed that the wife or husband shall be a oompetent and compellable witness for the prosecution in the following oases only:-

- (a) in any case where the person charged is charged with an offence under Chapter XV of the Penal Code" Chapter XV of the Penal Code covers offences against morality and it comprises Sections 130 to 162, inclusive. On the other hand I readily agree that the learned trial Magistrate erred in acting upon the evidence of Mwanaisha (PW2), not because of the

reason advanced by the appellant in his petition of appeal but for a different reason. To begin with on the evidence of the complainant whom the trial Magistrate found to be a true and honest witness Mwanaieha was clearly an accomplice in the sexual assault that was unleashed on the complainant. ShG actively and physically assisted the appellant to lay her, i.e. complainant, down. If that was all that had to be said about Mwanaisha then I would have gone on to say that her evidence would, as a matter of practice, need, corroboration. It could not, as the learned. trial Magistrate erroneously did, be used as corroborative evidence. Evidence which needs corroboration cannot itself corroborate. However, that was not all that could be said about Mwanaisha (PW2). It will be recalled, that this witness, Mwanaisha, was treated as a hostile witness at the trial. The effect of treating a witness hostile is to make his/her evidence completely worthless. In the instant case the learned. trial Magistrate did, not only act, inter alia, on the evidence of Mwanaisha (PW2) but he did so without reservations. I do not hesitate, therefore, to hold that in so doing the learned. Magistrate erred in law. He ought to have disregarded the evidence of Mwanaisha (PW2). The question that now arises is what effect does this mis-direction on this aspect of the case have on the conviction for defilement of a girl under sixteen years of age? This brings me to the second point in the petition of appeal and mentioned hereinabove. As aforesaid the learned, trial Magistrate found the complainant to be a true and honest, witness. He had the great advantage of seeing and hearing her in the witness box. In my part I cannot say that in accepting the complainant's story the learned. Magistrate erred. Admittedly, this being a sexual offence corroboration is required as a matter of practice. I hasten to say that on the issue of sexual intercourse with the appellant the complainant's evidence is corroborated in material particular by the independent and credible evidence of the appellant's own grandmother, Mahiza Saidi (PW4). Critical though the appellant pretends to be of some of the witnesses nowhere in his petition of appeal does he make any mention let alone criticism of the evidence of PW4. The fact remains, therefore, that the appellant did have carnal knowledge of the complainant, a girl aged thirteen years. In short even if the evidence of Mwanaisha were struck off the record the conviction would still stand and the same is sound in law. There is, thus, no merit in the appeal against conviction which is hereby upheld. Now I turn to sentence. In sentencing the appellant to three years imprisonment plus ten strokes of Corporal punishment the trial Magistrate had this to say and I quote:- "The accused is a first offender. He is a young man of about 22 years. The offence of which the accused is convicted is serious. On top of it it was committed in a brutal way. I see no valid reason why the Court should be lenient on the accused for what he has done," With respect, I agree. The appellant is a sadist. Indeed, there is not even a single factor which speaks well of him in the case, This was a heinous crime committed on an innocent and defenceless little girl. Virile as the cock and the he-goat are said to be I myself have never seen or even heard of the former "chasing" chicks or the latter servicing its young she-goats. People of the appellants mentality are a menace to society, and the longer they are kept away the better for well being of our little girls. Without beating about the bush had this appeal been brought before me before the expiry of the appellants prison term I would, happily have doubled the sentence. However, since the term of imprisonment

has expired I propose to leave the sentence undisturbed. Nevertheless, the appellant will still have to receive his strokes of Corporal punishment. In the final result this appeal fails and it is dismissed in its entirety. The sentence of three years imprisonment plus ten strokes of corporal punishment is hereby confirmed. Delivered in open Court at Tanga this 12th day of May, 1980.

11,

(H. E. D. -Sisya) JUDGE

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE [https://media.tanzlii.org/media/judgment/351431/
source_file/33e2f3c21d81207a/19800512_TZHC_Tanga.pdf](https://media.tanzlii.org/media/judgment/351431/source_file/33e2f3c21d81207a/19800512_TZHC_Tanga.pdf)

CASE PAGE [https://chat.esheria.ai/case-law/tanzania/appellant-name-not-specified-v-republic-
abductionofminor-tzhc-1980](https://chat.esheria.ai/case-law/tanzania/appellant-name-not-specified-v-republic-abductionofminor-tzhc-1980)

Prepared on 14 October 2026 · Esheria