

TANZANIA / JUDGMENT

augustino mohamedi vs republic

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IN THE HIGH COURT OF TANZANIA AT TANGA CRIMINAL APPEAL NO.48 OF 2009 (Originating from District Court Korogwe, Cr.Case No.422/2000) AUGUSTINO MOHAMEDI.....APPELLANT VERSUS THE REPUBLIC..... RESPONDENT Date of last order: 7/12/2009 Date of Judgment: 5/3/2010

JUDGMENT

Mussa, J; In the District Court of Korogwe, the appellant was arraigned for rape, contrary to section 130(2)(e) and 131 of the penal code, chapter 16 of the laws. The particulars on the indictment alleged that on the 11th day of November, year undisclosed; at Kwamatuku village, Korogwe District, the appellant had carnal knowledge of one Evelyne Lukindo who, then, was aged 17. The appellant denied the accusation, whereupon, the prosecution featured five witnesses in support thereof. At the conclusion of the enquiry, a conviction was had, results of which the appellant was sentenced to thirty years imprisonment with corporal punishment of twelve strokes of the cane. He now appeals upon a petition comprised of six grounds of grievance of which he fully adopted at the hearing. The Republic was represented by Miss Naiman who declined to support the conviction. Ahead of this court's own consideration and determination of the appeal, I should reflect on the factual background. From the prosecution version, it was common ground that, Evelyne (PW.1), the alleged victim, was, at the material times, a form two student at Kabuku secondary school. On the 11th November 2000, around noon, she was just killing off time at the schools' hostel whilst in the company of Mwanahamisi Nyata (PW.2), a form three fellow student. As the two of them were thereabouts, the appellant emerged by and; immediately, required Evelyne to avail herself for a conversation outside the hostel. It seems, that school does not admit to tight rules there are in others and; I am afraid to say, quite unfortunately. To the appellants' request, Evelyne • was obligatory, more so, as he is some relative of hers, being son of her aunt or, rather, her cousin. The other girl, Mwanahamisi, simply greeted the appellant and left the twosome to converse privately. Hearing from Evelyne as to what transpired there, the appellant, pointedly, commanded her to avail back all what he previously bought the girl as gifts on the occurrence of her passing examinations. Evelyne would recall that the appellant previously bought her shoes, a watch and an assortment of clothes.

Those gifts, Evelyne attributed to a brotherly gesture but; the way she told and; apparently, on a prior occasion, the appellant demanded sex in return, to which the girl had turned down. Now that the appellant was demanding back the gifts; Evelyne had no option than to give them back and; walking back to collect the items at the hostel, she was in floods of tears. Having collected the demanded items, her friend, Mwanahamisi, walked her back to where the appellant was but; incidentally, more was in the offing. There, it was told, the appellant commanded Evelyne to take his company out of the school premises; or else, he would have her stabbed with knife. Evelyne said she obliged the command on account of the threat and; Mwanahamsi escorted them, all along, up to where they boarded commuter transport to take them away. But, moments before they had left, Evelyne gave a sum of* shs. 1,500/= to Mwanahamisi as transport fare, so as she goes to her father (Evelyne's) to keep him posted of what was on the ground. Having boarded the bus, the appellant and Evelyne traveled all the way to Korogwe, reaching there around 3.00pm or so. Nonetheless, the twosome kept by the bus stop up until night when the appellant, momentarily, left to fetch a room at a guest house thereabouts. Coming back, the appellant, allegedly, hurled the girl unto a guest room where he had her underpants teared apart and; next, he forcefully involved Evelyne into the sexual act. Going by her account, she did not dare yell or shout an alarm simply because the appellant was, throughout, threatening her. Speaking of the forceful penetration, Evelyne said that the appellant penetrated her upon tfiree separate stunts. Meanwhile, Mwanahamisi, just as well, traveled to Kwamatuku so as to meet Evelyne's father in obedience to her friend's wish. There, she met Mathias Saffi (PW.4), Evelyne's father, who happened to be a teacher at Kwamatuku secondary school. To him, Mwanahamisi told all what had befallen upon her friend and; indeed, the father went straight up reporting the incidence at Manundu police station, Korogwe. That was on the morrow of Evelyne's alleged abduction and; then, apparently coincidentally, Mathias came by his daughter whilst alone at Manundu bus stop. From her, Mathias got the detail about the alleged ravishing; in the wake of which a look around for the appellant was launched immediately. Soon after, the appellant was securely apprehended, someplace close to a church and; mission accomplished, the accusation there is to this matter was laid at his door. Some further prosecution evidence comprised in a PF.3 (exhibit P.2) was adduced by the alleged victim. But, as is the common, unbeatable practice below, there was non-compliance of the provisions of section 240(3) of the CPA on account of which I need not glean the contents of the document. With so much in support of the prosecution accusation, the appellant was upbeat in his denial of each and every allegation. True; he was at Kabuku around noon, on the fateful day, but; after all, he was then running a quite unrelated errand to do with purchasing tomatoes of which he, apparently, desired to sell at Korogwe. Upon being done and; the way it appears, whilst traveling back in a bus; the appellant came by Evelyne whom told him, sort of, she was on her way home for a week-end break. Between him and her, according to the appellant, that was about all; up until he was arrested on account of the accusation the day following their brief encounter. And so, in a nutshell, the entire accusation was fabricated on him. Nonetheless, the learned trial Magistrate did not view the matter the appellants' way; being, on the contrary, impressed by the version as told by the prosecution. More particularly, the presiding officer certified Evelyne as a witness of truth; as it was perceived unlikely for her to dare fabricate her own kinsfolk. Furthermore, it was so found, the fact that sexual intercourse

was without consent vividly manifested itself in the torn under wear. The appellants' defence was considered but dismissed as "kicks of a dying horse". In the upshot and; as hinted upon, a conviction was had. The petition is predicted upon a variety of points of grievances mainly to do with the unreliability of Evelyne and Mwanahamisi. Again, as hinted upon, Miss Naiman, for the Republic, declined to support the conviction on account that those two were privy to too dramatic a tale to be true and; as such, were unreliable witnesses. Quite frankly, I just as well find it hard to accept Evelyne's claim about being abducted given the fact that, at times, she had every opportunity to disentangle, that is, if at all she was abducted. Going by her own tale, the appellant traveled her in a bus from Kabuku to Korogwe in which, obviously, were other persons and; yet, she did not deem it opportune to publicly proclaim that she was in captivity. And; if I understood her well, there was a time, at Manundu bus stop, when the appellant left her to fetch up a guest room and; again, Evelyne did not grab the chance there was, to sneak away. To say the least, if at all, her version has some semblance of truth; chances are that Evelyne connived with the appellant unto the whole arrangement. Granted that the accusation at the appellants' door has more to do with age and; for that matter the same is constituted with or without the consent of the alleged victim. Yet, connivance is still a relevant factor when it comes to ascertaining the status to which a victim of a sexual offence is to be accorded. Where, asp-here, there is some evidence tending towards a connivance; the victim of a sexual offence is just as well an accomplice whose evidence ought to be approached cautiously. In the matter at hand, no one, apart from Evelyne, positively testified to the alleged incidence of sexual inter course at the guest house and; to me, hers is a lone voice, unreliable on account of connivance and the telling of an unlikely narrative. Unlike the presiding officer, I find myself reluctant to attach any weight to the under wear, allegedly, torn by the appellant in the course of the incident. That underwear was not an item retrieved at the scene of the crime, rather, it was throughout in possession of Evelyne, and; who knows if it was not torn much later; specifically, to accord fortification to her version. Quite apart, it is noteworthy, a lot was taken for granted in the proceedings below. The offence to which the appellant stood arraigned, as I said, has more to do with the age of the alleged victim of which must be proved beyond all reasonable doubt. In the matter under consideration, the age of the victim; was merely alleged on the indictment and repeated in Evelyne's particulars, that is, at her introduction as a witness. To this, I am bound by the pronouncements of the Court of Appeal comprised in Abdallah Iddi Mshangama Vs Republic - unreported - Criminal Appeal No.54 of 2007. It was held there that when age is constituted upon mere allegations of the sort; the prosecution cannot be said to have proved the detail beyond all' reasonable doubt. And, in this matter, I would say, the prosecution had every opportunity at its complete disposal, more so, as chances are that Mathias could have availed the date when his daughter was born. It was not felt opportune to involve him as such and; Evelyne's age was, indeed, a matter merely alleged. When all is said and done, the cumulative effect is to impeach the conviction of which is, accordingly, quashed. The accompanying sentence is, as well, set asid£ The appellant is to be released from custody forthwith; unless he be held there for some other lawful cause. It is so ordered. 5/03/2010 Coram; Mussa, J. Appellant: present Respondent: Miss Kato, state attorney. Judgment delivered in the presence of the parties.

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