

TANZANIA / JUDGMENT

20130528 TZHC Mbeya

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- , 4 IN THE HIGH COURT OF TANZANIA AT MBEYA DC. CRIMINAL APPEAL NO.20 OF 2010 (Originating from Kyela District Court Criminal Case No.21 of 2010) BEGEE ABRAHAM APPELLANT VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

24.05 2013 & 28.05.2013 CHOCHA, J. The appellant Begee Abraham was charged at Kyela District Court with rape c/s 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap 16 Revised Edition 2002]. It was stated in the particulars of the offence that on the 1st day of March 2010 at about 19.00 hrs at Kisosyo village the accused/appellant did have carnal knowledge of one Jenti d/o Matai a girl of 8 years of age. The court record shows that when the appellant had been submitted before the magistrate on the 4th March 2010, the following transpired:- "Charge read over to the accused person who pleads: - It is true I did rape the said girl aged 8 years. Signed- BEGEE Entered Plea Guilty/Li'. Signed. District Magistrate 4/3/2010 Thereafter the prosecutor adduced the facts which at the end, it is again on record thus:- 'Accused: I admit all facts as true. Signed: BEGEE" On the strength of this progress, the trial magistrate proceeded to convict and sentence the appellant by imposing a statutory life imprisonment sentence. On the 10th March 2010 the appellant lodged a notice of intention to appeal in fulfillment of the requirements of S. 361 (a) of the Criminal Procedure Act Cap 20. That was followed by a Memorandum of Appeal which was ameliorated on the 23rd March 2010 with the leave of this court. In his Memorandum of Appeal, the appellant had few grounds. In the 1st ground he said the elements of the offence were not clearly explained to him. In the 2nd the appellant explained to this court the impact and effect of communication breakdown between himself and the court considering also his being a layman. Here in court, with the assistance of Andrew Mwaipula who translated from Kinyakyusa to Kiswahili and vice versa, the appellant categorically denies that the charge and facts were at all read and explained to him. During his response, Mr. Stambuli - State Attorney working for the respondent, picked and capitalized on the communication breakdown related ground. It looks like he was settled that the appellant could not 2nd fr manage Kiswahili. In that vein, the respondent submitted that it could not be easy for the appellant to understand the nature of the charge involved. The respondent appreciated the appellant's proposed way forward contained in ground no.3 of the Memorandum of Appeal, namely, a retrial. The appellant says he is a layman but he is introducing very interesting legal points. For example in his previous Memorandum of Appeal,

he talks of the legal restriction whereby under section 360 (1) of the Criminal Procedure Act a person who has pleaded guilt and convicted is prohibited and no appeal shall be allowed except with regard to the legality of the sentence. The issue to address is whether the accused's plea was or not equivocal. An accused can be convicted on a plea of guilt if the court is certain that he (accused) accepted the fact constituting the ingredients of the offence to be correct. In the case of **BUHIMILA MAPEMBE V.R**

(1988) TLR 174 quoting the case of **YONASANI EGALU & ORS V. R** 9 EACA 65, it was stated:- "In any case in which a thn v/ct/on is ilklly to proceed on a plea of guilty.. it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every element of it unequivocally." This line has been accepted and adopted in a number of cases like **JOSEPH CHALEANI V.R** (1987) TLR 107, **MITINGE MIHAMBO V.R** (2001) TLR 348 to name only a few. 35(9 The constituents of the offence of rape under section 130 and 131 of the Penal Code nowadays unhappily combine constituents of the former offence of defilement, are broad. They must be carefully analysed before they are communicated to the accused. The accused says infact he was never called upon to plead anything. The accused's submission cannot be accepted. Both the trial court's record and the practice will not accommodate such an explanation. The appellant's assertion cannot be but a mere after thought. Such accusations if given room on appeal may create a bad precedent. This court has, for more than two years of its stay with the appellant, had communication difficulties. It was previously thought that the appellant was pretending not to know the language. Like the respondent, this court too, has finally acknowledged that indeed, the appellant can command only venacular language. The trial court's record does not show, given this situation, how was communication between the court and the appellant facilitated. It is not clear if the constituents of the offence of rape were clearly and competently communicated to the appellant for him to understand and admit as being true. As matters stand, I find the language must have been a serious barrier for smooth communication of the nature of the offence. Conviction would under the circumstances not stand without occasioning injustice. It is hereby quashed, and sentence is set aside. The appellant's proposed way forward which is echoed by the respondent is attractive. It is however worth taking note as it was in the cases of **MANJI FATEHALI yR** (1966) EA 343 and **NJENGA & AN V.R** 4* 0 .)

(2006) 1 EA 297 that an order for retrial would not be automatic. It would be made where the interest of justice so require. There are no readymade standards for the court to consider while making an order for retrial. Each case must depend on its merits. The appellant is charged with a very serious offence attracting an equally serious sentence to a proved offender, especially considering the purported age of the victim. Such a serious case with serious adverse consequences cannot be handled so superficially. Charges must be fully established beyond reasonable doubts. It is in that perspective that I am inclined to share both the appellant and respondent's proposed way forward. I order a retrial. The record is to be remitted to the Kyela District Court to have the matter tried de novo" before a

magistrate of a t1 competent jurisdiction. For smooth operation of a retrial, conviction is quashed and sentence is set aside. The appellant shall remain in prison as a remand prisoner pending his being transferred to Kyela for retrial. He shall be entitled to bail conditions as the trial court may determine. / .." I ,

- II (zI N.P.Z. Ciha I \ Rh Judge 24.05.2013 5) Date: 28.05.2013 Coram: N.P.Z. Chocha, J. Appellant: Present. Respondent: Mr. Rogers - State Attorney. R/A' Gaudensia 1/Ass. Anna. Interpreter: A. Mwaipula. Court: Judgment delivered as planned. Order: Right of Appeal Explained. N.P.Z. Chocha Judge 28.05.2013

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