

TANZANIA / JUDGMENT

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4 IN THE HIGH COURT OF TANZANIA AT TABORA. : APPELLATE JURISDICTION S

- HIGH COURT CRIMINAL APPEAL N0024 OF 1976 (Cf. Cr. Appeal No.25 of 1976 (Original Criminal Case No. 41 of 175 of the District Court of Kasulu District at Kasulu — before C. A. Lwelengera, D.M.) • '• ELISHA. JERAD a aaaa a aaa aa aaa aaaaa aaaa a a APPELLANT
- S (Original Accused) versus THEREPUBLIC • eoaOcoSooeoa000.00OcaoacOOOee.. RESPONDENT - (Original Prosecutor) charge; 1st count: Malicious damage to property c/s 326 of the Penal Code Cap.16 Vol.1 of the T/R. Laws. 4 2nd count: Personating Public Officer c/s 100 (a) of the Penal Code Cap.16 Vol.1 of the T/R/Laws. 3rd count: Rape c/s 130 & 131 of the Penal Code of the
- T/R/Laws. - J U D G M E N T. SISYA, J: The two appellants, ELISHA JERAD and RASHID RANADHANI, were jointly, charged in the District Court, Kasulu, on three counts of Malicious damage to property, Personating a public officer and Rape respectively. The appellant Elisha who, incidentally, appeared as the first accused at the trial and whom I shall, purely on grounds of convenience, continue throughout hereafter, to call first accused was convicted on the first and third counts, that is for Malicious damage to property and rape. The appellant Rashid whom I shall hereafter call the second accused. was convicted only on the rape count. The first accused was sentenced to twelve months imprisonment on count one and to four years imprisonment on count three with an order that the sentences should run consecutively. The second accused was also sentenced to four years imprisonment on the rape count. Both accused are now appealing and their appeals are consolidated.
- Evidence was given at the trial by the woman complainant, one Zakia Nachumi (P.W.I) to the effect that on the evening of 3/4/75 at about 9.00 p.m. She entered a pombe club, owned by one Kibaliza. Among the people whom she found in the said pomebe. club were the first and second accused.. She drank soc
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- 3 - The first accused then tore off the complainant's clothes before he perched himself in between her legs and he was intimate with her. After satisfying his lust the first accused got up and held the complainant's legs. The second accused then took his turn. He too had a full act of sexual intercourse with the complainant. Eventually he got up and suggested to the first accused that they release the complainant but he, i.e. first accused, insisted that they should take her to the Police Station.
- Later when they arrived at a road junction the two accused forced the complainant to take the road which led to the prison. They, i.e. the accused, told the complainant that she was under arrest. They went on past the prison and stopped further on a slope. While there, again, the first accused had sexual intercourse with her against her wish while second accused held her legs in position. Thereafter, as at first the second accused took his turn. Eventually the two accused released the complainant. The first accused, however, retained her piece of kitenge to which she had tied her room key. The first accused refused to return the same to her. She, however, had her other articles of clothing which first accused tore before assaulting her sexually on the first instance. These were a sweater, an underskirt, a piece of kitenge and a bra which were produced as exhibits and marked Exhs. A. B. C. and D respectively. As it was then past midnight she returned home. She could not, however, get into her own house. She, therefore, spent the night in some other person's house. On the following morning she went and reported the matter to the police. She described her assailants to the police. She was then sent to the hospital for examination with a PF.3(Exh.E). According to the PF.3 were, however, no marks of violence. The first accused in his defence admitted visiting Kibaliza's
- pombe club on the material evening in the company of the second accused. However, according to him after drinking beer he and second accused returned straight home at about 10.40 p.m. On 5/4/75 he was arrested by the police at a football field and he was subsequently charged. The second accused in his defence gave the same story as did the first accused. He was however arrested at his home on 7/4/75 and he was subsequently charged.
- The learned trial magistrate reviewed all the evidence adduced
- before him. He was satisfied that the tearing of the complainant's clothes was not to
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- 4 - He acquitted both accused on the second count of Personating a public officer because, according to the magistrate, the charge sheet did not specify the subsection of section 100 of the Penal Code under which they were charged. On the third count the learned trial magistrate warned himself of the dangers of convicting on uncorroborated evidence. In the complainant's sexual offences. He was, however, satisfied that although there was no corroboration on the evidence of penetration as testified by the complainant the latter's evidence on this aspect of the case could not be but true, 7 The accused's petition of appeal do not contain any new line of defence apart, of course, from their protestations of innocence. On count one, it is clear, on the evidence of the

complainant herself that the first accused tore her to articles of clothing in his zest to assault her sexually. With respect:-I, do not think that the learned trial magistrate was, therefore, right to hold that the tearing of articles of clothing by the first accused was an individual act motivated by sheer malice. There is not even a scintilla of evidence to support this finding. That being so then I think the decision in the case of LEO PGANGOMA V.R. (1967) H.C.D. 131

- is relevant to the decision on this count in Pigangoma's case the accused was convicted of assault causing actual bodily harm, common assault and malicious damage to property. In the course of the assault the accused tore the complainant's shirt, vest and broke his spectacles. On appeal it was held by this court (per Platt J) that where an assault takes place which causes damage to property worn by or in the possession of the complainant such damage is to be considered merely incidental to the assault, rather than a separate offence, unless there is evidence of wilful damage to the property as such. As I pointed out earlier there was no evidence that the tearing of the clothes was wilful as such, it is my considered opinion that the first accused tore the clothes in his over zeal to reach the complainant's naked body. For these reasons the conviction in count one cannot therefore stand, The appeal is quashed and the sentence imposed thereon is set aside.
- 5 - As for the rape count apart from the complainant herself there is the evidence of P.W.2 and P.W.3 both of whom testified to have seen the two accused dragging the complainant while alleging that she had taken their money and that they were taking her to the Police Station. Both accused, however, denied the allegations. According to them nothing of the sort as narrated by the complainant, P.W.2 and P.W.3 ever took place. The learned trial magistrate accepted the evidence of the complainant, P.W.2 and P.W.3 to be true and I have absolutely to state to say that he was wrong in so doing. In the circumstances it is not, to my mind, insignificant to note that if the accused's allegations that the complainant had taken their money and that, therefore, they were taking her to the Police station were true then one would have expected them to stick to their original version of the story. This is, however, not what they have done. As I pointed out earlier the two accused denied, at the trial, doing what P.W.1, P.W.2 and P.W.3 said they did. The evidence of P.W.2 and P.W.3, both of whom are Independent witnesses, in my mind, affords the basis for believing the complainant's story even to the extent that what happened to her took place without her consent. This view is also strengthened by Exhs. A. B. C. and D. All in all I am satisfied that the two accused were properly convicted in count three. Turning to sentence, though harsh I feel it was well earned. These two youngmen behaved like real savages towards a woman fit to be their own mother. The sentences of four years each will need confirmation by this court is thus accordingly confirmed. - In the final result, save to the extent indicated (allowing the appeal in count one) these appeals are otherwise dismissed. Delivered in Court at Tabora this 16th day of December, 1976 H. E. D. SISJ, JUDGE

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