

TANZANIA / JUDGMENT

20100817 TZHC Mbeya

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TZHCDECIDED
17 August 2010

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fN THE HIGH COURT OF TANZANIA AT MI3EYA 1)C. CRiMINAL A1PEAL NO.2 OF 2010
(Originating from the District Court of Mbarali at Rujewa Original Criminal case No.192/2009) 1-
IARUNA S/O SAILENT.....APPE1J.ANI1 VERSUS THE REPUBLI C.....R1
SPONT)]N

JUDGEMENT

10.8.10 & 17.8.2010 LUKELELWA, J. The appellant Haruna Sallent (15) was on 14th1 August 2009 sentenced by Mbarali District Court at Rujewa, Mbeya region on a charge of Rape Contrary to sections 130 and 131 of the Penal Code of the laws [RE.2002]. The appellant was aggrieved by the sentence of thirty years imprisonment with twelve strokes and compensation of Shs.500,000/= to the victim imposed on him, and has preferred an appeal into this Court. It was alleged in the Particulars of offence that, "H aruna sb 4111 day of August, 2009 at about Salient charged on or about .1 10.00 hours at Uhambule village within the Mbarali 1)istrict and Mbeya Region did have carnal knowledge of one Irene D/o Peter a girl aged 5 years. The charge was read over and explained to the accused person who was asked to plea; where the accused person replied "It is true" A plea of guilty was entered by the Court. Then facts were adduced as follows:-

FACTS:

- That the accused particulars are as per charge sheet.
- That the accused is charged of one offence of rape as stated in the charge sheet.
- That on 11/08/2009 the guardian of Irene Peter (victim). Enerisa Karasia after she returned from Mbeya, the \ictim told her guardian that, she was sick in private part.
- The victim explained that on 04/08/2009 at 10.00 hours, while she was back from the Nursery School, she met with 1-laruna Sallent, the accused the area has some trees. The accused person forced the victim undressed her underpants and raped by force.
- The guardian reported the incident at Igurusi Police station, and Police D.973 SGT Thaday opened the charge. 7

- That the victim was given PF.3 for Hospital treatment and examination. The Doctor proved that the victim was injured and there was penetration in the vagina of the victim. The PF 3 was tendered in Court without objection of the appellant and marked exhibit "P1 " After adducing the above facts, the learned trial Resident Magistrate asked the police prosecutor whether the appellant had a previous record. This was followed by Mitigations adduced by the appellant. There after the learned proceeded to sentence the appellant. The learned trial Resident Magistrate did not ask the appellant whether he admitted the facts adduced by the police Prosecutor. The learned trial Resident Magistrate did not make a finding that the adduced facts proved all the ingredients of the offence of Rape contrary to sections 130 and 131 of the Penal Code which the appellant stood charged. The learned trial Resident Magistrate did not make a finding whether he was satisfied that the appellant was guilty of the offence charged. The learned trial Resident Magistrate proceeded to sentence the appellant without Convicting him. 3 Indeed the procedure adopted by the learned trial Resident Magistrate was strange and very much flawed. Section 360 (1) of the Criminal Procedure Act [CAP 20 R1.2002] Provides that "No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate Court except as to the extent or legality, of the sentence." In Laurence Mpinga v. Republic 11983] TLR 166 this Court held that "(1) An appeal against Conviction based on an unequivocal plea of guilty generally cannot be sustained, although an appeal against sentence may stand: (ii) an accused person who has been convicted by any Court of an offence " on his own plea of guilty" may, appeal against the conviction to a higher Court on any of the following grounds:
1. that, even taking into consideration the admitted facts, his plea was imperfect ambiguous or unfinished and, for that reason, the lower Court erred in law in treating it as a plea of guilty; or that he pleaded guilty as a result of mistake or misapprehension, that the charge laid at his door disclosed no offence known to law, and that in view of the admitted facts he could not in law have convicted of the offence charged.' As pointed earlier, there was a lot of irregularities in the procedure adopted by the learned trial Resident Magistrate rendering the "plea of guilty" entered by the trial Court subject to an appeal. The failure by the learned trial Resident Magistrate to ask the appellant whether he admitted the facts adduced by the police Prosecutor, and his subsequent failure to convict the appellant before sentencing him contravened the provisions of section 228 of the Criminal Procedure Act. Had the learned trial Resident Magistrate taken trouble to read the endorsement on the PF3, exhibit "P1" tendered in his court, he would have found the words "I-lowever there is no evidence of penetration sexual intercourse endorsed thereon by the examining Medical officer of Chimala Mission Hospital. in that circumstances, in the absence of penetration, the offence of Rape could not be sustained as it is provided under section 130 (4) of the Penal Code that, "For the purposes of defining the offence of rape (a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence, and (b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent." in Bulimijja Mapenibe Vs Republic 1988] TLR 174, it was held that,:

In any case in which a Conviction is likely 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. The words "It is true" when used by an accused person may not necessarily amount to a plea of guilty, particularly where the offence is a technical one". 6 Having so adwiibrated, 1. hereby quash the proceedings of the lower District Court and set aside the sentence and Orders imposed on the appellant by Mbaraji District Court. I would have ordered a retrial, as the offence which the appellant stood charged attracted a sentence of Life imprisonment, as the alleged \ictim of Rape was aged five years; as per section 1 31(3) of the Penal Code. 1-lowever the essential ingredient of the offence of Rape namel y "penetration" was not established. I therefore order the immediate release of the appellant 'from prison unless held therein on other lawful grounds. Appeal allowed. Order accordingly. N A- "l I' r S.13 Lu a Judge - 17/8/2010. 7

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