

TANZANIA / JUDGMENT

20180905 TZHC Dodoma

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IN THE HIGH COURT OF TANZANIA AT DODOMA (APPELLATE JURISDICTION) (DC) CRIMINAL
APPEAL NO. 26 OF 2018 (Original Criminal Case No. 42 of 2017 the District Court of Dodoma at
Dodoma) IBRAHIMU HOSEA TOWO.....APPELLANT VERSUS
THEREPUBLIC.....RESPONDENT

JUDGEMENT

11/7/2018 & 05/9/2018 A. MOHAMED, J. In Criminal Case No. 42 of 2017, Ibrahimu Juma Towo, the appellant was charged with and convicted of two counts of rape contrary to section 130 (1) (2) (a) and section 131 (1), and one count of an unnatural offence contrary to section 154 (1) (2) (a), all offences under the Penal code [Cap 16 RE 2002]. After a full trial, he was sentenced to 30 years imprisonment. The brief facts of the case at the trial are that on 8/2/2017 at the Cashman hotel situated at Airport Street within Dodoma Municipality, the appellant had carnal knowledge of two women 1 namely, X1, 20 years old and X3 aged 21 without their consent. In addition, the appellant had carnal knowledge of X3 against the order of nature. According to the prosecution case, the appellant called X1 to come to the said hotel. She went there in the evening accompanied by X3, her friend and college mate at Zion College where the two were students. After having soft drinks at first, the appellant ordered REDS beer which they drink and assured tem it was non alcoholic. Later on, the appellant led X1 to his hotel room no 111 and had sex with her. After some half an hour, dressed in a towel, he called X3 to the same room where she found X1 on a bed. Thereafter the appellant ordered another drink called K-VANT which they partook. Then, he locked them in the room and went out to bring food which all three ate. Thereafter the prosecution alleges, forced the two women to drink the K-VANT liquor which made them drunk. Once intoxicated and unconscious, the appellant had carnal knowledge of X3 both in the vagina and anus. And X3 came to know of the appellants misdeeds when she woke up the following morning and felt pain in her anus. It is further alleged X3 told X1 they should leave but X1 replied she was too tired and the appellant had refused to return her mobile phone, X3 similarly told the same story in relation to her phone. X3 left the hotel the next morning, followed by X1 much later. They did not report the incident to the police as they felt ashamed. But after X3's pains worsened, she told her colleague who advised her to report to the police. On 13/2/2017, some 6 days after 20 Li the incident, the two women finally reported the matter to the police and X3 was examined by Dr. Kaijage at the Dodoma General Hospital on 17/2/2017. His report did not indicate any unusual thing such as signs of bleeding, semen, bruises, rapture of X3 genitals, other than that she had no

hymen and her sphincter was normal. But in his court testimony, the doctor said when he examined X3; she was in pain and showed signs of rape and sodomy and she was admitted for 4 days treatment at the hospital. In his defence, the appellant admitted X1 was his girlfriend and he had sexual relations with her prior to the alleged incident. In his cautioned statement, he also admitted to have had sex with X3 with her consent, but denied ravishing her against the order of nature. The appellant's memorandum of appeal contains the following 13 grounds:

1. That the Trial Magistrate erred in his finding that the prosecution proved the case against the appellant beyond reasonable doubt. The matter was not reported to the police station within the time and no reasons were assigned for such delay. Doctor Paul Kaijage (PW2)'s testimony was not properly scrutinized as he presented what had been fold to him by PW1 instead of what he had examined as an expert. 3 There was need of PW2 to examine PW1 so as to test if it was true that PW1 had taken alcohol previously so as to corroborate her testimony that at the material time she was forced to fake alcohol by the appellant, a mere statement of the appellant was not enough, to ground a conviction. It was alleged the incident took place on 08/02/2017 surprisingly the victim was examined after six days on 14/02/2017 and no reason was given by the prosecution for such delay. V. Why didn't PW1 and PW3 immediately report the alleged incident to the authority of Cash money hotel. for legal steps? vi. PW1 's evidence was a cooked story as it it was not true that PW1 witnessed the appellant having sexual intercourse with PW3 as on page 3 of the judgment PW1 told the court that at that time she was unconscious.
2. That, your honour Judge the Learned trial Magistrate erred in law and fact for attaching weight unreliable evidence hence reached to erroneous decision. 4 I! That the trial Court erred as PW1 's evidence differed with PW4's who told the court PW1 told him the appellant was her boyfriend. That the trial Court erred in convicting the appellant without considering the facts of the case do not constitute elements of rape or of an unnatural offense. That the trial court erred in failing to consider PW1 and PW3's evidence was not corroborated by evidence from their co- students or the school administration that PW1 and PW2 were students at Zion College.
- i. There was need to call one Happiness Albert who was informed by the victims through text messages what had happened to them so as to corroborate their testimony. That the trial court erred in failing to consider the prosecution evidence was not certain especially that of PW1 and PW3. The testimony of PW4 did not refer to PW3 while the evidence of PW2 did not refer to PW3. And according to PW4 he accepted the appellant was with PW1 and not PW3 at Cash man hotel. Surprisingly PW1 was not examined but PW3 was but she was not known either to the appellant or the management of Cash man Hotel. 5 4- That his cautioned statement taken at the Police Station in the presence of his young brother was not tendered in court instead the prosecution tendered another statement which was not made in presence of his relative. He objected to its admission but the trial magistrate admitted such statement without conducting an inquiry to ascertain it was obtained within the law or not. That the trial Court erred in failing to consider his defense but only acted on the prosecution

evidence. At the hearing, the appellant fended for himself and adopted his petition of appeal without more. Mr. Sarara, State Attorney, appeared to defend the respondent Republic. Replying to the 1st ground, complaining the case was not proved beyond reasonable doubt, Mr. Sarara averred the victims X1 and X3 were ashamed of the ordeal and only reported the incident after X3's condition worsened. In response to the allegation Dr. Kaijage (PW2) did not testify on his findings in the medical examination but testified on stories told to him by the victims, Mr. Sarara observed PW2 told the Court X3 was both raped and sodomized. He averred it was not PW2's duty to ascertain whether the victims were intoxicated. LI The counsel brushed aside the 2nd ground of appeal alleging the trial Court gave undue weight to the prosecution evidence by repeating the prosecution's evidence at the trial. He similarly dismissed the alleged contradiction between X1 and PW2's evidence, comprising the 3rd ground of appeal. Mr. Sarara asserted Simon Stephen (PW4), the hotel Manager, did not state X1 was the appellant's girlfriend, but even if she were, it does not justify rape. In response to the 4th ground, it was his view; the offences of rape were established. Responding to the 5th complaint, the counsel insisted there was no need to prove the victims were students of Zion College. He observed, the sole testimony of a witness in rape cases is sufficient under section 127 (7) of the Evidence Act [Cap 6 RE 2002]. It was the counsel's view in the 6th complaint; the prosecution was certain PW4 spoke of X1 whilst PW2 testified on X3 as he had examined her. In the 7th ground assailing his cautioned statement, Mr. Sarara observed it was admitted after the Court conducted an inquiry. In his rejoinder submission, the appellant assailed PW2's testimony by averring the examination was done 4 days after the incident. And he pointed out PW2 had testified that X3 ought to have gone for the examination the day of the incident. He insisted X1 was his girlfriend and he had sex with her consent. 7 In essence, I think all of the appellant's grounds insist the prosecution failed to prove its case beyond reasonable doubt. I will begin with the evidence of Dr. Kaijage (PW2). After examining X3's genitals including her vagina, uterus and anus, he reported the examination revealed nothing unusual. His findings in exhibit P2 (the PF3) show there was no bleeding, no bruises no swelling and the sphincter was "normal". However PW2's Court testimony in Court was a different story altogether. He said X3 was in severe pain and his examination showed signs the woman had been raped and sodomized. And further that she had to be admitted for four days and underwent treatment. In addition, exhibit P2 shows X3 was sent for medical examination on 14/2/2017 but on the next page, PW2 wrote his observations on 17/2/2017. I think the contradictions in P2's testimony and the PF3 findings discredit this witness as well as the inconsistency of the dates on the PF3. In addition no evidence was led to prove X3 was admitted in hospital such as an admission or discharge form. Even X3 did not mention her admission to hospital. After discounting PW2's evidence, what remains are the victims' testimonies. I will now closely examine X1 and X3's testimonies, the subject of grounds 1, 2, 3, 4, 5, 6, and 8 of the appeal. In summary their testimonies are that the appellant "lured" them to take REDS beer by assuring it contained no alcohol. And later, in the hotel room, they were forced by the appellant to drink K-VANT liquor that induced R. L their intoxication. And the appellant thereby took advantage and had sex with them without their consent. After considering their evidence, I think the

learned trial Magistrate was swayed by the victims' testimonies. It is apparent X1 went to the Cashman hotel on her own volition accompanied by X3, drank REDS beer before the appellant led X1 to his hotel room and had sex with her. Therefore X3 was called by the appellant to the room and she obliged. In her testimony, X3 averred X1 was on the bed and awake when the appellant undressed her and had sex with her. Thereafter the appellant brought a meal and the three ate together before he went out of the room to fetch the K-VANT Uquor which they again drunk. The learned trial Magistrate found the appellant had taken advantage of their intoxicated state induced by the beer and liquor under section 130 (2) (c) of the Penal Code (Cap 16 RE 2002) that provides: "With consent when her consent has been obtained at time when she was of unsound mind or was in a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing administered to her by the man or by some other person unless proved that there was prior consent between the two" a I am satisfied the victims' story is doubtful. I think, had there been any compulsion to drink the liquor or have sex, they could have had screamed for help since there were other customers in the bar and hotel staff. I therefore find the above provision does not apply to the circumstances of the case. In fact PW4 told the Court X1 told Emmanuel Petro, one of the hotel's attendants, she was the appellant's girlfriend. And when P4 asked X1 the following morning, she said her mobile phone was missing but never reported any rape. Moreover, I think X1 and X3's failure to report the matter to the police immediately after the incident casts a heavy doubt on their testimonies. If is evident, the incident happened on 8/2/2017 but they reported it on 14/2/2017 according to Utta Mushi, a police officer (PW5) who arrested the appellant on 17/2/2017. Overall the evidence points X1 and X2 consented to having sex with the appellant. This is consistent with the appellant's version in his continued statement. And for emphasis, apart from X3's averments, I find the unnatural offence was not proved,. In the final, I am satisfied the appellant has been able to poke huge holes in the prosecution case. I think, had the learned trial Court Magistrate considered these lingering questions, he would not have fallen into the error he did. 10 After the foregoing, I find the prosecution failed to establish its case beyond reasonable doubt and it should be to the appellant's benefit. I consequently allow the appeal and quash the proceedings and set aside the conviction and sentence. The appellant is to be set at liberty unless held for other lawful cause. If is so ordered. (A. MOHAMED) JUDGE 5/9/2018 The right of appeal duly explained. U k "O ." NAT (A. MOHAMED) JUDGE 5/9/2018 11

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