

TANZANIA / JUDGMENT

republic vs muhibu mohamed lihonge 2007 tzhc 246 10 august 2007

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IN THE HIGH COURT OF TANZANIA AT MTWARA CRIMINAL SESSION CASE NO. 3 OF 2004 THE REPUBLIC VERSUS MUHIBU MOHAMED @ LIHONGE Date of Last Order: 9/8/2007 Date of Judgement: 10/8/2007

JUDGEMENT

SHANGALL J. The accused person in this case, namely MUHIBU S/O MOHAMED @ LIHONGE middle aged 38 years old stand charged with the offence of incest contrary to section 158 (1)(a) of the Penal Code, Cap 16 of the laws as amended by section 19 of Act No. 4 of

1998. It has been alleged that on or about 14th January 2003 at Namiyonga Village within Newala District in Mtwara Region the accused committed prohibited sexual intercourse with one HAIBUNI SAIDI LIHONGE a female person aged fifteen (15) years old who is to his knowledge his daughter. The accused person categorically denied the truth of the offence. In its endeavours to prove its case against the accused, the Republic, advocated by Mr. Hyera, Learned State Attorney called seven witnesses and produced several exhibits. The defence side which was marshaled by Mr. Mlanzi, Learned advocate elected to give a sworn defence by the accused with no additional witness to call. It is not irrelevant to state here that during the Preliminary hearing conducted on 25th July 2005 nothing important was agreed between the parties as matter not in dispute save for the name of the accused person, his residence and his arrest. The rest of the facts of the case were put for evidential proof. The prosecution evidence in this case is not too wanting and may briefly be summarized as follows; In the night of 13th January 2003 at about 9.00 pm, PWI, Haibuni Saidi Lihonge, a young girl of 15 years old and the victim in this case was at home studying in her room. Her two young brothers namely Raisi Saidi and Yasin Saidi were sleeping in the next room. Their both parents were on safari. By then PWI was a standard seven pupil at Namiyonga Primary School. According to her evidence suddenly she heard a knock at the door and queried who it was. The person knocking replied that, "I am your father". Then PWI proceeded to open the door and realized that it was Muhibu Mohamedi, the accused, who is the brother of PWI's father. The accused entered in the house and gave PWI some sadine, rice and cooking Oil and requested her to prepare a meal for him. There and then, the accused went away promising to be back later for his meal. It is in the evidence of PWI,

that she stopped studying and started to prepare the meal for his uncle (Baba mdogo) but when the meal was ready the accused was nowhere to be seen. The accused returned very late in the night at about 4.00 am. He woke-up PWI and demanded for his meal. PWI testified that she obediently served the meal on the table for the accused and that when he started to eat his meal she went away to her room to continue with her sleep. PWI complained that, later her uncle (Baba mdogo) the accused followed her in the room, ordered her to wake-up and take off her clothes while threatening to kill her. PWI testified that she cried and pleaded with the accused not to harm her but the accused hold her by force, took off her dress and sexually assaulted her. PWI further complained that the accused raped her while covering her mouth with a piece of cloth to prevent her shouts and that after satisfying his lust he went away leaving PWI helpless with pains. 2 PWI went on and testified to the effect that after that bad experience she immediately went to report the incident to her aunt Hawa Mohamedi (PW2) who is the physical sister of the both accused person and PWI's father. On hearing the disgusting story of PWI, her aunt PW2 decided to refer the matter to her elder brother Juma Mohamedi Lihonge (PW3) who is also the physical brother of the accused and who happened to be also the Village Executive Officer. According to the evidence of PWI and PW2, when they reached at the house of PW3 early that morning the later had already gone to the mosque for morning prayers. They waited for him and when he was back PWI narrated the whole story to him. PW3 testified that when he reached at his house from the mosque in the morning he found PWI and PW2 at his house waiting for him. He stated that PWI who was crying, dirty and limping complained to him how the accused person had sexually assaulted her. PWI stated that as a Village Executive Officer he directed the village Militiaman (PW4) to arrest the accused and at the sametime he (PW3) took PWI to Newala Police Station to report the matter. It is on evidence that at the Police Station PWI was issued with a PF3 and taken to Newala Government Hospital on the same date of 14th January 2003. At the said Hospital PWI was examined and treated by PW5, Mr. Abdul Songa, a Clinical Officer who testified to the effect that in his examination he discovered that PWI has been sexually involved because in her vagina there was yellowish jelly which was laboratorilly ditected to be human sperms. The PF.3 of the victim (PWI) duly filled by PW5 was tendered in Court and marked Exhibit P2 (During preliminary hearing the same chit was marked PI for identification purposes only). There is also the evidence of PW6, Detective Coplo Geoffrey who testified on how he received PWI at Newala Police Station on 14th January 2003 at around 11.00 am. He stated that the little girl was dirty confused, crying and walking with difficulty and that she was only able to tell her ordeal when she was questioned by a woman Police. PW7, Detective Sgt. John testified before this Court on how the accused was taken before him in order to record his cautioned statement. He stated that before recording the accused's cautioned statement he warned him accordingly and informed him about his rights. Then the accused freely agreed to give his caution statement. However during the trial and when PW7 was about to produce the cautioned statement as exhibit, the defence objected to its admission on the ground that it was obtained under dures and torture because the accused was beaten-up by the Police. As a result a trial within trial was conducted and eventually

the defence allegations were declared unfoundable and an afterthought. The cautioned statement was admitted and marked Exhibit P3. In the cautioned statement the accused admitted to have performed sexual intercourse with PWI on her own will. In his sworn defence the accused person categorically denied to have committed the offence charged against him. He only admitted that on the alleged early morning at about 5.00 am he went to the house of his brother Saidi Mohamedi Lihonge (PWI' home) to check the welfare of the children because his brother Said Mohamedi Lihonge and his wife were on safari. The accused claimed that his said brother has requested him to keep an eye on his children especially PWI who was a truant. The accused testified that when he reached at the house he found all the children and then he went away. He further complained that the case was fabricated against him by his relatives due to the inheritance feud between them. He claimed that there is enmity between him and his relatives Saidi Mohamedi Lihonge (father of PWI), Juma Mohamedi Lihonge (PW3), Hawa Mohamedi Lihonge (PW2) and even PWI herself. The accused contended that the whole matter from his arrest was dealt with by close relatives and most of the prosecution witnesses were same relatives. Lastly, the accused stated that PWI is not his physical daughter as claimed by the prosecution but a daughter of his brother Saidi Mohamedi Lihonge. 4 During my summing up to the gentlemen assessors I reminded them that in Criminal cases the burden of proof is beyond all reasonable doubt. I reminded them the salient features of the case together with the position of the law involved especially the Sexual Offences and special Provisions Act, No. 4 of 1998 including non-requirement of corroboration as provided under section 127 (7) of the Evidence Act, 1967. I also attempted to elaborate to them the position of the law in regard to the offence of incest and the type of blood related persons prohibited in Sexual intercourse. In giving their opinions, and after a short consultation among themselves, all gentlemen assessors subscribed to the prosecution side and unanimously opined that all prosecution witnesses were credible and the prosecution case has been proved beyond doubt. They found the accused guilty as charged. Let me now proceed to evaluate the evidence and revisit the law involved. The first question in this case is whether PWI (Victim) was actually Sexually assaulted by the accused person. Mr. Hyera, Learned State Attorney for the Republic submitted that there is overwhelming evidence to show that PWI was Sexually assaulted by the accused on the alleged date. He submitted that all the prosecution witnesses were credible ones particularly PWI who clearly narrated her ordeal. Mr. Hyera contended that the evidence of PWI was highly supported by the evidence of PW5 and Exhibit P2. He further submitted that under section 127 (7) of the evidence Act, this Court has powers to base a conviction on the evidence of PWI (Victim) alone provided it is satisfied that she was telling nothing but the truth. Mr. Hyera contended that if this Court requires more evidence to support the evidence of PWI, then there is also the cautioned statement of the accused in which the accused narrated how he approached and sexually assaulted PWI. Mr. Mlanzi, Learned advocate for the accused submitted that PWI was not a credible witness and that her story was not supported by any other independent evidence. He contended that according to the evidence on record PWI was in the house with her two young brothers but none was called to testify before the

Court. Mr. Mlanzi also stated that PW1, PW2 and PW3 were close relatives who could easily fabricate the case against the accused person taking into consideration the existence of bad blood and enmity between them. He contended that the accused went to the house of his brother simply to see the children because his brother Saidi Mohamedi Lihonge was on safari. Mr. Mlanzi learned advocate for the accused contended further that even the age of PW1 who was said to have been 15 years old when the offence was committed was not sufficiently proved. Having seen and heard PW1, PW2, PW3, PW4, PW5, PW6 and PW7 testifying I have no reason whatsoever to doubt their credibility. They were simply trustworthy and credible witnesses. They all appeared to be impressive witnesses with no malice whatsoever. I agree with Mr. Hyera, Learned State Attorney that the evidence of PW1 was perfectly supported by the evidence of PW5 together with exhibit P2 and P3. PW1 a sexually assaulted young girl was mercilessly cross-examined by the defence side but she remained stable and firm despite of psychological and mental torture she might have suffered following that savage attack. I am convinced without a shred of doubt that even in the absence of other evidence the credibility and demeanor of PW1 would perfectly justify the application of section 127(7) of the Evidence Act, 1967. In my view, the fact that the two young brothers of PW1 were not called to testify does not mean that PW1 was not telling the truth. It must be appreciated that what is important and required in Court is the credibility of the witness and not number of witnesses. I am also in disagreement with the defence side that the case was fabricated by the accused relatives who had grudges on him following inheritance feud and enmity. The defence picked on PW1, PW2, PW3 and even PW1's father who did not testify in Court to be the relatives behind the plot against accused. In my considered view this is a far fetched argument considering the weight of the prosecution evidence and circumstances of the case. There is nothing to suggest that this case was fabricated and there is no evidence to suggest the existence of such serious misunderstandings in the accused's family to the extent of fabricating such a heinous crime against him. By all stretch of imagination, if there was such a serious family inheritance feud as the accused would like this Court to believe, it would have been impossible for his brother Saidi Mohamedi Lihonge to entrust him (accused) with responsibility of caring for his family while on safari. Secondly, the evidence of these related witnesses is credible and there is no rule of practice or law which require the evidence of relative to be discredited unless there is good ground to do so-see the case of R Vs. Lulakombo s/o Mikwalo and Libugu s/o Kibage (1936) 3 EACA at Pg.44. For the above reasons I am satisfied beyond doubt that the prosecution evidence lead to an irressistable conclusion that PW1 was actually sexually assaulted by the accused person. On the issue of the age of PW1, the evidence is clear right from the charge sheet/notice of trial on information that when the offence was committed she was 15 years old. In her testimony PW1 repeated the same and insisted that at that time she was a standard seven pupil at Namiyonga Primary School. PW3, Juma Mohamedi Lihonge repeated the same when he was being cross- examined by the first assessor. The defence side never attempted to cross-examine any prosecution witness on that aspect until during their defence when they started to cry foul that the age of PW1 was not proved. With due respect the cries are baseless and too late because PW1

and PW3 testified on the matter and they were not cross-examined by defence side. The second crucial and important question in this case is whether the consanguinity relationship between PW1 and the accused person falls within the ambit of prohibited Sexual relations in law. In other words whether they are father and daughter in terms of the law. In order to determine this question let me reproduce the provision of the law involved. Section 158 of the Penal Code which create the offence of Incest by male provide; "(1) Any male person who has prohibited Sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction -

- (a) If the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years;
 - (b) If the female is of the age of eighteen years or more, to imprisonment for a term of not less than twenty years.
- (2) It is immaterial that the Sexual intercourse was had with the consent of the woman..." Then, section 161 of the Penal Code provide for the test of relationship. Under that provision of the law it is provided that in Section 158 and section 160 the expression "brother" and "Sister" respectively include "half brother" and "half Sister and that the provisions of those sections shall apply whether the relationship between the person charged with the offence and the person with whom the offence is alleged to have been committed is or is not -traced through lawful wedlock. 8 Incidentally the law is silent regarding to the definition of the expression "grand daughter" "daughter" and "mother" appearing under section 158 and even expressions "grandfather" "father" and "Son" appearing under section 160 of the Penal Code. For the purpose of our present case the most important word is "daughter" appearing under section 158 of the Penal Code. Mr. Mlanzi, Learned advocate for the accused submitted that the law is clear that the prohibited sexual relationship under section 158 of the Penal Code is between father and daughter. He contended that the accused is the partenal uncle of PW1 and not her father. He argued that the Parliament was specific to prohibit certain types of sexual relationship but not sexual relation between partenal uncle and his niece. Mr. Hyera, Learned State Attorney conceded without a wince that according to the evidence available the accused is not PW1's father but a partenal uncle. He also conceded with the position of section 158 of the Penal Code. Nevertheless, Mr. Hyera invited this court to venture on the spirit and objectives behind the enactment of section 158 of the Penal Code which is to prohibit Sexual relations activity between the blood related persons and employ Section 14 of The Law of marriage Act, 1971 which define the term father to include "uncles and great uncles". With due respect to the Learned State Attorney the law of Marriage Act, 1971 is inapplicable in this criminal case. I do join hands with Mr. Hyera on the genuine objectives of the Parliament in the enactment of incest laws and indeed it is not hard to see how incest can make family life very complicated, potentially, turning brothers into fathers, mothers into sisters, daughters into wives and sons into husbands. Generally incest has been defined as sexual activity between two people with actual blood relation and

in law those people are normally defined. In my opinion it is elementary principle that where a statute create an offence it equally lays down, in uncertain terms the sort of persons to be covered 9 to enable the court to enforce that law within the strict language of it. In our case the law is clear that section 158 of the Penal Code is strictly limited to “grand daughter”,”daughter”, “Sister” or “Mother” and Section 161 defines “Sister” to include “ half sister”. It leaps to the eye that there is no mention of a niece or uncle. It means therefore the expression “daughter” under section 185 of the Penal Code means a physical or biological daughter. In my considered opinion, I stand to be recorded that the Prosecution had no legal justification to charge the accused with the offence of incest. I am therefore satisfied that the consanguinity relationship between the accused and PWI does not fall within the ambit of prohibited sexual relation in law. Nonetheless, I must admit that this case has somehow caused considerable concern on me. On one side there is overwhelming prosecution evidence to prove that the accused committed the offence of rape against PWI, a little girl of 15 years old. On the other hand the accused was only charged with the offence of incest without an alternative charge of rape. The position now is that, there is no evidence to nab the accused with the offence of incest. At the sametime the stance of the law is that, the Court may substitute the charged offence with a cognate and minor offence although the accused was not charged with it-see the case of Robert Necho and another Vs. R. (1951) 18 EACA 171. In my considered opinion the offence of rape is cognate and kindred to the charged offence of incest but rape is not a minor offence to incest. Both offences are either at per in form of seriousness and they carry the same punishment of a Minimum Sentence of 30 years imprisonment and by all standards, the offence of rape seems to be more serious because it carries a maximum sentence of life imprisonment with corporal punishment. It has been empharized that it is wrong in Principle to convict the accused person for a graver offence than that charged even though both offences are cognate-Leonard Raphael and another V. R Crm. Appl No. 4 of 1992 CA (Arusha Registry) and Stephen Ndagizi and Jumanne Said Vs. Republic (1994) TLR 62 (CAY 10 Let it be clearly understood here that I have departed with the unanimous views of the gentlemen assessors because the prosecution evidence does not prove nor establish the commission of the offence of incest as required by the law. Having said so and inspite of that depercation with the Gentlemen assessors, I am satisfied that the prosecution side has failed to prove its case to the required standard in this criminal case. In the final analysis, I hereby pronounce the accused not guilty of the offence of incest and acquit him accordingly. The accused is to be released and set free forthwith, unless otherwise lawfully held on any other matter. It is so ordered. M.SV JUDGE 10/8/2007 Court: Right of appeal Explained. Gentlemen Assessors thanked and discharged. 10/8/2007 Judgement delivered todate 10/8/2007 in the presence of Mr. Hyera, Learned State Attorney for Republic and Mr. Mlanzi, Learned Advocate for accused. Accused present in person. © % M.S. Sh^ngali N •J \> JUDGE 3 . 10/8/2007 Y V

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