

TANZANIA / JUDGMENT

20170428 TZHC Dar es Salaam

COURT
TZHCDECIDED
28 April 2017

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM MISC. CRIMINAL APPEAL NO. 50 OF 2014 (Original Criminal Case No. 33 of 2010 in the District Court of Kilindoni at Mafia) LICAS CHIKWENYA APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

Kitusi, J. Before the District Court of Mafia at Kilindoni Lucas Chikwenya was charged and convicted for rape contrary to Section 130 of 131 of the Penal Code Cap. 16, the allegation being that on 7th of September, 2010 at around 23.00 hours at Kichangachui area within Mafia District he raped Fatuma d/o Ally without her consent. He was sentenced to thirty years imprisonment. Briefly the evidence that resulted into the appellant's conviction was that Fatuma Ali (PW1) was walking from a pombe 1 shop at 11.00 hours after closing her business. The pombe shop is located at a place known as Kichangachui and she was proceeding to Msufini area, both within Mafia. When she was walking, she came across four men who pounced upon her and dragged her to a bush where they proceeded to rape her in turns. She could identify two of her assailants as the appellant whom she identified from his voice and another by the name of Baba Ubaya. PW1 raised alarms to get help from people, in response to which Hamisi Ali (PW2) Abdallah Akbar (PW3) and Ndibi (PWS) went to the scene. PW2, PW3 and PWS could only see young men running away from the scene where PW1 lay, naked. PW2 and PW3 helped PW1 to the Police Station but not before they had heard PW1 say she had been raped by Baba Ubaya and Luka. At the hospital where PW1 was later taken she was attended by Dr. Chambo Ali (PW4) who concluded that she had been raped. In his brief defence, the appellant denied raping PW1 saying that at the time of the alleged rape he was at his home. He pointed out that there is no eye witness to the alleged rape. When cross-examined by the Public Prosecutor, the appellant 2 stated that he had a previous misunderstanding with PW1 because he had ever taken her alcohol on credit. In convicting the appellant, the learned Resident Magistrate relied on the voice identification by PW1 and that it was supported by appellant's own defence which shows that he was a known customer at PW1's pombe shop. The appellant is aggrieved and petitions that the appeal be allowed on three grounds. The first two grounds fault the decision of the trial court on evidential insufficiency and the third raised a legal violation in that the witnesses testified without oath. At the hearing of the appeal Honorina Munishi, learned State Attorney supported the appeal on the ground that the case proceeded on a defective charge. She submitted that ~he charges levelled

against the appellant are defective for non citation of the specific sub section under which the charge is preferred. The learned State Attorney cited the decision of the Court of Appeal in the case of Marekano Ramadhani V. The Republic, Criminal Appeal No. 202 of 2013 at Arusha (unreported), to support the view that such a defect renders the proceedings incurably defective. 3 With respect I agree with the learned State Attorney in her view that the charge of rape under Section 130 and 131 of the Penal Code is defective for not specifying the category of rape under which the charge is preferred. I also agree with her that this defect is incurable as it affected the appellant's right to a fair trial. I subscribe to the decision cited by the learned State Attorney. This court has observed, not once, that such defects are incurable and amount to denial of the right to a fair trial. Suffice to refer to the case of Lucas Vicent Lwiza Vs. The Republic Criminal Appeal No. 13 of 2015, HC at Dsm (unreported) in which Dr. Feleshi, Judge, having heard the submissions for and against the proposal that the defect is curable, held: 11 / therefore do not agree with Ms. Mushi that Section 388 of that Act can be invoked now to cure the defects. It is always upon the prosecution to ensure that the charge founding the criminal trial is capable of offering a fair trial. " For the reason that the defects in the charge rendered the trial of the appellant unfair, I allow the appeal. I quash the conviction of the appellant for rape and set aside the sentence. 4 • " The appellant, if not otherwise lawfully held, should be immediately released. 5 . " 28/4/2017 Coram I.P.Kitusi, J. For the Appellant Present For the Respondent: Ms Imelda Mushi, SA CC: Masasi COURT: Judgment delivered in court. I.P.Kitusi JUDGE 28/4/2017 6

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/lucas-chikwenya-v-the-republic-rape-tzhc-2017--6a3ea5293b1caa91298212a9

Prepared on 14 October 2026 · Esheria