

TANZANIA / JUDGMENT

20190717 TZHC Mwanza2

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TZHCDECIDED
17 July 2019

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IN THE HIGH COURT OF TANZANIA IN THE DISTRICT REGISTRY AT MWANZA CRIMINAL
APPEAL NO. 299 OF 2018 (Originating from Criminal Case NO. 255 of 2017 at Mwanza District
Court) MAGOTI KUSAGA@ MAREGESI. APPELLANT VERSUS THE REPUBLIC.
..... RESPONDENT

JUDGMENT

On 23.4 & 17.7.2019 Madeha, before the District Court of Musoma, the appellant Magoti Kusaga Mageresi was charged with and convicted of the offence of rape C/S 130 (2) and 131 (1) of the Penal Code Cap 16 of the Revised Edition 2002 (hereinafter referred as the Penal Code). He was sentenced to serve a mandatory minimum sentence of thirty years in prison. The conviction and sentence did not amuse him, he lodged this first appeal on fourteen grounds of complaints. For easy reference, I reproduce as follows;

1. That the case was not proved beyond reasonable doubts.
2. That the Judgment delivered by the honourable court does not contain points for determination and reasons for the decision.
3. That, the learned trial magistrate failed in totality to consider the defence evidence in a whole judgment
4. That, the learned trial magistrate erred in law and fact for failure to take into consideration the age of the appellant which was 17 years old.
5. That, the learned trial magistrate erred in law and fact as the appellant was not properly identified as required by law.
6. That, the learned trial magistrate wrongly admitted the prosecution evidence as required by law.
7. That, the learned trial magistrate misdirected himself when took into account irrelevant matters
8. That, the learned trial magistrate misdirected himself on his view that finding blood in the victim's private is a total proving of the offence of rape.

9. That, from the above reasons I therefore pray to this court that I this appeal to be al/owe~ conviction to be quashe~ sentence set aside and an order for immediate release from prison. I
10. That, the trial magistrate denied the appellant an adequate I chance for mitigation. 2
11. That from the above reasons I therefore pray to this court that I this appeal to be a//owea conviction to be quashea sentence set aside and an order for immediate release from prison.
12. That section 240 (3) of the Criminal Procedure Act Cap 20 was not sufficiently compliea
13. That the trial magistrate denied the appellant and adequate for mitigation.
14. That I wish to be present at the hearing of his appeal. At the hearing of appeal on 16/5/2019, the appellant appeared in person unrepresented while Mr Juma Sarige Senior State Attorney I represented the republic. Defending himself the appellant faulted the decision of the Court below in which he stated that, the Court did not consider the age of the appellant who was 17 years old at the time of the incident. For the respondent/Republic Mr. Juma Sarige Senior State Attorney, stated that, the judgement of the Court has reasons for such decision. PW3 saw the victim was going to the appellant's room. The evidence of PW3 collaborates with the evidence of PW2. Sixth and seventh grounds have no merit. The evidence of the blood confirms that rape exists) that the evidence 3 of the penetration was not proved as to the fourth grownd of appeal the I Court did not consider the age of the appellant which was! 17 years old, and it is not proper looking at the age of the appellant during the appeal. The appellant when testifying in the trial Court he explained that he was 17 years old. As the evidence shows that the appellant was 17 years old, he was supposed to be tried in the Juvenile Court. I With the foregoing response of the state Attorney jthe appellant had nothing in rejoinder. Dissenting from the Court records the facts of the case led by the prosecution were as follows. The prosecution called four Witnesses in which they stated that; on the day of the event the appellant was with the victim in the house and had a carnal knowledge with the victim. The victim's young I . I brother who saw them on their way to the appellant's room, followed them I through the window, the two underdressed each other when they realized that someone was looking at them, they decided to close the window. PW1 informed his mother about the incident and locked the door outside. The appellant was arrested with the victim in the house. At the time of arrest, the appellant and the victim were aged 17 years old. 4 ~----____.; I I In the defence case the appellant admitted to entelwith the victim in the house, but according to him it was· the victim hers .If who called the I appellant and asked him through the mobile phone to embrace with her. I I I I will determine this appeal by discussing all the grollnds of complaints I as were presented by the Senior State Attorney. Starting with the first ground of complaint that the Court jlldgement has n~ reasons for its decision. I have perused the Court records and see that the reasons for the . I decision were elaborated by the trial magistrate, in page , of the judgement elaborates about the points for determination. With regard to the second ground of complaint that the defence has not been considered, it was elaborated that the accused

defence lacks merit. This ground of complaint is hereby dismissed. Coming to the third grounds of appeal that the appellant was not identified by PW3, that he called the victim and took her to his bed, stripped her clothes and hugged her. There was enough evidence on the ground of the conviction of the appellant. PW3 and PW4 saw the appellant taking the victim to his room and committing the offence of raping the victim. The appellant was identified by the victim, this ground of complaint is hereby dismissed. 5 With regard to the fourth ground of complaint that, failure of the trial Court to consider the age of the victim which was 17 years old. I support the Senior State Attorney's view that; the appellant was charged at the age of 17 years old, so he has to be taken at the juvenile Court, for the juvenile Court has got jurisdiction to try the cases of children below the age of 18 years old. The Court did not consider the age of the victim. This ground of complaint is hereby allowed. The fifth, sixth and seventh grounds of complaints which are concerning the issue of identification as it was noon hours the identification was clear, and the trial court based on irrelevant matters. These grounds of complaint have no merit and hereby dismissed. With regards to the eighth ground of complaint on the issue of the blood of the victim in private parts. In my view, I see that the only evidence of rape comes from the victim, the offence of rape is proved if penetration occurred. The prosecution side did not prove the offence beyond reasonable doubt that the appellant committed the offence of rape, and rape is being proved by the male organ entering into the female organ, the one who supposed to prove is the victim, and that the evidence of rape comes from the victim. This ground of complaint is hereby allowed. In the case of *Gingi Pius V. R Criminal Appeal No 264 of 2008*, in holding this case they cited the case of *Seleman Makuba V. R Criminal Appeal No. 94 of 1999* the Court held that: "True evidence of rape has to come from the victim if an adult that there was penetration and no consent.. a medical report or evidence of the doctor may help to show that there was sexual intercourse, but does not prove that there was rape i.e. unconsented sex, even if, bruises are proved in the female sexual organs." Coming to the ninth ground of complaints concerning the issue of penetration. The Court records indicating that PF3 was tendered in Court as an exhibit, but I have perused the Court records, I looked for the PF3 in the Court records I did not see it and never saw, the comment in the PF3, it was admitted as an exhibit, but in the case records, the document does not exist. The issue here is whether the appellant committed the offence of rape to PW1. Section 130 (4) (a) of the Penal Code, Cap 16 (R. E 2002), states as follows: "130 (4) (a) Penetration, however slight, is sufficient to constitute the sexual intercourse necessary to the offence." Considering the above position there is a lack of the PF3, the penetration was not proved. As the prosecution side supposed to prove all the ingredients of the offence beyond reasonable doubt. This ground of complaint is hereby allowed. In the case of *The Director of Public Prosecutions V Morgan Maliki and Nyasa Makorii*, Criminal Appeal No I 133 of 2013 (Unreported) states that: "A prima facie case is made out unless shaken, it is sufficient to convict an accused person with that offence, which he is charged or kindred cognate minor offence... the prosecution is expected to have proved all the ingredients of the offence or minor cognate are thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defence, so as to fill it in, as this would amount

to shifting the burden of proof'~ 1 I The prosecution must establish the prima facie case. This is important because if no prima facie case is established the Court could I . always give an 8 accused person the benefit of the doubt and acquit him. This case was not proved by the required standards that is beyond a reasonable doubt due to I the penetration which was not proved by witnesses of rape. Concerning the tenth, eleventh, twelfth, thirteen and fourteen grounds of appeal which elaborates about the adequate mitigation, conviction to be quashed, the appellant was not addressed under section 240 of the Criminal Procedure Act, Cap 20, these grounds of appeal elaborated hereabove has no merit and hereby dismissed. To the said done, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I further order for an immediate release of the appellant, unless held for other lawful reasons. Order accordingly. U. E. Madeha Judge 17/7/2019
Delivered in Mwanza on 17th day of July 2019 ~ U. E. Madeha Judge 17/7/2019 9

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