

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA - (MWANZA DISTRICT REGISTRY) AT
MWANZA CRIMINAL APPEAL NO. 234 OF 2018 (Appeal from the Judgment of the District Court of
Musoma at Musoma (Mus hi, SRM) Dated 28 th of February, 2018 in Criminal Case No. 48 of 2016)
MASH AKA JOSEPH APPELLANT VERSUS ' THE
REPUBLIC " RESPONDENT JUDGMENT OF THE COURT 02.05.2019
& 30.05.2019 M.K. ISMAIL, J This appeal is against the judgment of the District Court of Musoma
at Musoma, delivered on 28th February, 2018, on a rape charge, instituted in respect of Criminal
Case No. 48 of 2016. The appellant herein was charged with and convicted of the offence of rape
contrary, to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002. It was alleged
that on divers dates between November, 2015 and 9th February, 2016, at Kamnyonge area within
Musoma Municipality, in Mara Region, the appellant had 1 .--- \ ~ ~- 1 t i i' I i carnal knowledge of
one Chaysiku d/o Hassan, a girl of 16 years of i I I: age. \ I Brief facts of this case a~e that, in June,
2015, the victim, a I I . I student at Kamnyonge Primary \$chool student, was sent to buy meat I or
I at the appellant's butchery. arrival, he met the appellant who I offered her TZS. 5,000/= to bui
clothes and a further sum of TZS. I 10,000/= for what was known ~y the victim (PW1) as for "my
daily I activities products". At around ~.00 to 7.00 pm, in November, 2015, I . I the appellant went
to the PW1 ~ school and picked her and led her i ' I to a semi-finished house wher¢ she undressed
her, covered her i i mouth and raped her. It is alleged that the appellant threatened to I I kill her if
she disclosed what happened. She said that she I I experienced severe pains whidh prevented her
from attending I school for one week. The secon p incident occurred in December, 1 I 2015, when
the appellant allegedly picked her from school and took I I her to a bush where he indulged in a
sexual act, without her ! I i consent, after which he issued a threat, once again, that he would1 ! I
kill her if she revealed what happ~.med. On yet another occasion, on i 9th February, 2016, the
appellant took PW1 to Biafra ground where a i similar indulgence was performetl. After that, the
appellant took :I I ,,L ~ . ,.,----- ~ (} t, ____, ' \c- ~ ji ' i i PW1 to a restaurant where h~ bought her
chips and told her to go j1 I I home. PW1 resisted, an act that enraged the appellant who I II
decided to leave her there. Worried about what would befall her I when she gets home, PW1 ch9se
to spend the night at her friend's I I home at Mwisenge. This did not go well with her brother,
PW2, who 1, went to her school to establish \.where she was the previous night. It is I i i at that
point in time that the mdtttter was reported to Police, and PW1 I' I I' led them to the appellant's
bwtchery from which he was arrested I and charged with the offence. PW 1 was subjected to
~edical examination performed by ,, i PW4, who found that PW1 had \lost her hymen, meaning

that she is no longer virgin. She then filed P1 which was tendered as exhibit P1. The trial court proceeding culminated into a finding of guilt. Consequently, the court convicted the appellant and sentenced him to imprisonment for thirty years. Aggrieved by the conviction and sentence, he has appealed to this Court. His grounds of appeal are as follows:

1. That, the trial court had erred in law and facts by failure to detect that PW1 victim, was a suspect witness whose evidence dragged to succumbing pressure by her brother who absconded after school attendance so unsafe to base a conviction.
2. That the trial court erred in law and a fact to rely on the PW4 and P1 as corroboration, regardless the contents therein in P1 does not necessary mean rape and or carnal knowledge but may be other accidental.
3. That the trial Court based a conviction to the appellant on the case which was rather tainted with contrived evidence. At the hearing of the appeal, the appellant defended for himself while the respondent was represented by Ms. Gisela Alex, learned State Attorney. The appellant chose to let the counsel for the respondent submit first on the grounds of appeal before the baton was passed on to him. Ms. Alex began her submission by conceding that the judgment sought to be impugned suffers from one serious irregularity, in that, though the trial magistrate indicated, at page 7, that he had gone through the evidence of both sides and found the accused guilty, she did that without carrying out the analysis. The counsel submitted that the trial magistrate's analysis was only in respect of 4, the prosecution's evidence and she did not say if such evidence proved the case at the required standard. She was of the view that the analysis, if any, was not enough and what she said about the case was a general statement without any details of how she arrived at the finding of guilt. The counsel prayed, in consequence, that the Court should invoke the provisions of section 388 and order the trial court to re-evaluate the evidence and come to a proper conclusion on the guilt or otherwise of the appellant. The appellant supported the respondent's submission, praying that he be released on account of the fatal omission done by the trial court. Submitting on the grounds of appeal, the counsel for the respondent rubbished the first ground of appeal. She contended that page 9 of the proceedings clearly reflects that the trial court relied on PW1's testimony who testified to the effect that the appellant raped her on three different occasions between November 2015 and February 2016. The counsel relied on the case of Shija Misalaba v. R, Criminal Appeal No. 226/2011 in which the Court of Appeal held that, in rape cases, the best evidence is that of the victim herself. She contended further that the trial court was fortified in her view by the testimony of PW5 and exhibit P1 which showed that PW1 had lost her virginity. With respect to the second ground, the counsel was adamant that exhibit P1 was received and recorded at page 15 of the proceedings and that this testimony showed that the victim's hymen had been removed, meaning that she had been raped more than once. She argued in the alternative that, should the Court find that such evidence falls short of the required value, the Court can still rely on the decision in Sa'u Sosoma v. R, criminal Appeal No. 31/2006 in which the evidence of the victim was

found to be the best evidence. She urged the Court to disregard this ground. On ground three, the counsel for the respondent held that the prosecution's evidence was sufficient, especially that of PW1, the victim, who gave a good account of what happened. She argued further that the fact that the victim was 16 years of age and a student, meant that the appellant was guilty of statutory rape even if she consented. She prayed that the appeal be dismissed and the trial court's decision be upheld.

The appellant's rebuttal was concise and precise. She wondered how the alleged offence would be committed three times without other people, including local government leaders, knowing. He threw blemishes to the victim's brother who beat the victim and forced her to appoint a finger at him. He contended that he demanded that there should be a medical examination which would involve him as well, but that request was turned down. He submitted that the doctor's statement is still not a reliable evidence to be relied upon, arguing that the doctor said that the victim was not raped. He prayed that his appeal be allowed.

In the first ground, the appellant attributes his predicament to the victim's pressure from his brother, and he feels that the trial court ought not to have taken this as the basis for conviction. The respondent contends that the court was right and that the basis for its decision was the victim's testimony, PW5's evidence and exhibit P1. I find nothing to justify his position on this. What held a major sway in the trial court's decision is PW1's testimony which gave a narration on how the appellant made his first approach and all other subsequent meetings. PW2 came to know after the third incident, and chances are that he would not be in the picture if the victim hadn't disappeared after the third incident. It is quite incomprehensible that that one occasion would be the basis for pointing a finger at the appellant. The appellant did very little or nothing to controvert PW1's testimony. While I may discount testimonies of PW2 and PW5 which do not establish the appellant's culpability, I cannot hold that PW1's account is of no credence. Her testimony, which is recorded at pages 9 and 10 provide a very convincing detail which proves that the appellant had carnal knowledge of her on all those occasions. This is consistent with what the Court of Appeal held in Shija Salaba's case (supra). The victim has also stated with meticulous consistency, how the appellant entered her and the pain and agony she experienced. She recounted how she missed school for one week after the first act and the last act which forced her to go and sleep to her friend. This proves a vital ingredient of penetration, which is decisive in rape cases. These assertions were not mere statements of a general nature. They were articulate statements which are important in founding a conviction as was pronounced in the case of Ex-B 9690 I I - 8 SSGT Daniel Mshambala v R, Criminal Appeal No. 183/2004. It was held: "It occurs to us that this was too general statement, we think if at all PW 1 was raped, she ought to have gone further to explain whether or not the appellant inserted his penis into her vagina, whether or not the penetration was slight etc. In general, PW 1 ought to have been more forthright and thorough in her evidence on the alleged rape. It was not enough to make assertion that she was raped without more. She ought to have been forthcoming in her evidence in order to enable the court to make a meaningful finding on whether or not rape was committed." The position of the Court of Appeal in the above passage was emphasized in the subsequent decision of Mathayo Ngalya Shaban v R,

Criminal Appeal No. 170/2006. In this matter the Court held as follows: "... For the offence of rape it is of utmost important to lead evidence of penetration and, not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence." I am overly persuaded that the trial court was right in its finding, and I see nothing to fault her reasoning on this. I dismiss this ground. 9 ~~~ The appellant contends in the second ground, that the court was in error when it relied on PW4 and PF3 as corroborating evidence. The respondent contends that the court was right, especially when the testimony indicated that PW 1 had lost her virginity. I find the appellant's contention plausible. PF3 did not tell if there were sperms or bruises which would indicate that the victim was raped. Neither exhibit P1 nor PW4 provided a surest position that loss of hymen was caused by the appellant or was a result of a rape incident. I am of the firm view that the said testimony had nothing to offer as a corroboration to PW1's testimony. I, therefore, sustain this ground of appeal. The appellant's third ground of appeal takes serious exception to what the appellant alleges the trial court's reliance on tainted and contrived evidence. The respondent's counsel is of the view that the testimony that led to his conviction was quite sufficient and credible to found a conviction. I couldn't agree more with the respondent's contention. As stated earlier on, the trial court's finding of guilt was based on the testimony of PW 1, the victim, which pointed a finger at the appellant. Nothing can be said to constitute a fabrication in that 10 ~~~ testimony. The appellant has hurled an allegation that PW2 had a quarrel with his wife, following the farmer's suspicion that his wife had an affair with the appellant. I find nothing of credence to make this Court believe that the appellant was framed. It does not add up that PW2 would choose such a long and arduous route to settle 'score. This sounds more of an escapist contention which should not detain us. It is lame and devoid of any legal standing and I reject it out of hand. As stated, at the beginning of the address, the respondent conceded to the fact that the trial court's judgment was a one-sided affair that ignored the defence evidence completely. As rightly contended, judgment is an offspring of evaluation of testimonies led by the parties to the case. It is a process that involves evaluation and sifting of facts as submitted by the parties, to enable the adjudicator to arrive at a conclusion on which of the testimonies he believes as credible. Thus, a trial court has an inescapable responsibility of ensuring that, in arriving at a decision, it considers evidence tendered before it, in its totality. Evaluation of evidence in an exclusionist manner constitutes a fundamental error which renders the decision illegitimate and, therefore, unsupportable. This position has been stated time and again. In *Henry Mpangwe and 2 others v. R* (1974) LRT 50, the Court quoted with approval, the decision in *Ndege Marangwe v. R* 1964 EACA 156, and held, as follows: "It is the duty of the trial judge when he gives judgment to look at the evidence as a whole 1... It is fundamentally wrong to evaluate the case of the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it". Another impetus to this reasoning was provided in *Elias Stephen V. R* (1982) TLR 313 (HC), in which the following finding was made: "it is clear from the judgment that the trial magistrate did not seriously consider the appellant's defence. Indeed, he did not even consider the other defence witnesses who

testified to it. He merely stated 'defence of accused has not in any way shaken the evidence'. This position of the law got a backing of the Court of Appeal in *Malando Bad' and 3 others v. R (CAT) Cr. App. No. 64/93 Mwanza* (unreported), in which the appeal was allowed and the appellant was released. The superior Bench held: "As was held by the Court of Appeal in *Okoth Okale v. Uganda* --~

(1965) EA 555 it is an essentially wrong approach provisionally 12 to accept the prosecution case and then to cast on the defence the onus of rebutting or casting doubt on that case. It is an error separately to look at the case for the defence but evidence should be looked at as a whole. We believe that had the trial magistrate not fallen into this error, his decision on the case would probably have been different." I I am in total agreement with the respondent's counsel that what the trial court pronounced was not the judgment worth its name and knowri qualities of a valid judgment. It was a mere condemnation. Certainly, the conviction and the resultant sentence were a one sided affair whose cure is to have it vitiated, as was propounded in *Lockhart-Smith v United Republic* (1965) EA 217. The Court held: " .. .failure to take into account any defence put up by the accused will vitiate conviction ..". See also *Charles Samson versus Republic*, Criminal Appeal No. 29 of 1990 (Unreported). This fatal effect cannot be cured by invoking section 388 of the Criminal Procedure Act as coniated by the Counsel for the Respondent. In view thereof, I decline the Counsel's invitation. -----;;-/~ r ,. 13 • ,. Thus, while I substantially idismiss the , appeal as lacking in I , I ~•' material substance, I, on the basi\$ of serious flaws pointed out, quash I I the judgment and the ensuing c;:onviction, set aside the sentence, i i and set the appellant free, unless;;he is otherwise held on other lawful grounds. It is so ordered. DATED a ~ ~ . h i s 30 th day of May, 2019. (,)0 - ~/~;;~ ""'..'/! i. I ;, ~ . ,~. ~ =:;;;> . 'I'; ~-~ ,~\? 1! : 'o'" ~. • f.l!t\ .K. ISMAIL., >C<,'1!1>,.I. j ;;;> _1:~ 1 I ,.l JUDGE V -~ l_f ~~fi I ' \'-:;;:, -k', ' - ~<.Jw -, " rti')':.,,~ ::°,y,>Y• ,ri,r~~~, . 1lt'JlW. ~

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