

TANZANIA / JUDGMENT

michael anthony vs republic

2009 tzhc 147 24 august 2009

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IN THE HIGH COURT OF TANZANIA AT MTWARA CRIMINAL APPEAL NO. 49 OF 2008 ORIGINAL
NACHINGWEA DISTRICT COURT CRIMINAL CASE NO. 37 OF 2006 Before: O.H. Kingwete, Esq;
RM MICHAEL ANTHONY APPELLANT VERSUS THE R EPU B
LICRESPONDENT Date of Last Order - 25/5/2009 Date of Judgment - 24/8/2009

JUDGMENT

MIPAWA, J. The appellant was charge with rape c/ss 130(e) and 131 of the amended by sexual offences special provision Act no.4/1998. The ' appellant Michael Anthony it was alleged raped Awesa d/o Selemani aged 16 years, that was the first count. In the second count the appellant was charged under section 5 of GN No. 265/2003 that he married Awesu Selemani a school girl aged 16 years old. The appellant pleaded not guilty in respect of all counts. The gist of the matter before the lower court was that when the victim was called to testify as PW.1 she denied knowledge of anything and wondered why she was in court and learned Resident Magistrate recorded the witness in a broken English language as follows; 1 On 17/4/2006 at I didn't got anything (sic) I didn't be raped (sic), I don't know why he is be brought (sic) I have induce'd by my father to say lies..... The above excerpt is what I picked from the handwritten proceedings of the court and it cannot be said that there was any typing error. That was the English Language the learned Resident Magistrate a University graduate knew - The structure is astonishing to saythe least. When the witness had said that the prosecutor begged to treat the witness hostile and the court purported to conduct a trial within trial and the result were that an alleged statement explanation was produced in court as exhibit the court stated that; "...the statement sheet is admitted and marked as 1 that is all...." PW.2 Bakari Manzi and PW.3 Makame Jafari all adults testified more or less that when they went to the house of the appellant and knocked at the door the appellant denied to have PW.1 in his house instead he went to the mother of PW.1 and came with her. According to the testimony of PW.2 the mother of PW.1 advised them to settle the matter amicably but they refused. It was when the appellant brought outside PW.1 and when she was asked she replied that she was at his boyfriend and they had already made love. When the appellant was asked as to why he was with the school girl PW.3 is recorded to say that the appellant replied that the school girl was his fiancée though a pupil. Efforts by the mother of the appellant to settle the matter amicably also failed. The father of PW.1 who testified as PW.4

Selemani Kondo was only told that his daughter Awesa Selemani was caught ready handed with the appellant at his 2 (appellant) house. PW.4 then reported the matter to the police where he was given a PF.3 which he produced it in court as exhibit P1. Later on in that year he discovered that Awesa was pregnant and the expected Father in the card was named Michael the appellant. The witness produced the Clinic card in court as exhibit. The appellant in his defence before the lower court denied to have had PW.1 inside his house when PW.2 and other persons came at the house of the appellant and refused to enter inside in order to search. The appellant told the lower court that after they have refused to search inside the appellant's house, the appellant advised them to go to report at police station but they declined and left his house. The appellant was arrested at a meeting and later on sent to police station on 24/4/2006. The appellant in his petition of appeal dissatisfied with the sentence of thirty years imprisonment in respect of the first count of rape the appellant asserts that the PF.3 which was produced in court as exhibit does not point him as the one who raped the victim. That the learned Resident Magistrate erred in law for convicting him relying on a clinical card. That the evidence of PW.2 and PW.3 does not show that they saw him committing the offence. Generally he said that the prosecution has failed to prove its case beyond reasonable doubt. The learned State Attorney who appeared for the Republic declined to support the conviction of the appellant submitting that the appellant was implicated on mere suspicion that he committed the offence of rape. The learned State Attorney refreshed my mind to the 3 case of Benedict Ajetu v.R [1983] TLR at page 190 where the court held that suspicion is not a base for conviction. He further submitted that in Regulation 5 of GN 265 of 2003 in order for the offence to stand it must be proved that the pregnancy was caused by the appellant, evidence which is lacking in all counts according to the learned State Attorney. Now having gone through the evidence on record and paid due attention to the appellants grounds of appeal there was no evidence to implicate the appellant with the two counts because PW.2 and PW.3 who came at the house of the appellant did not testify that they saw the appellant committing the offence, rather they knocked at the door of the appellant and told him that PW.1 the victim was inside his house and the evidence shows that PW.1 was called out from the house of the appellant whereupon she emerged and told the witnesses that she was at the appellant's house because he is her fiancée [i.e appellant] and that they had just finished making love. This evidence is a mere "tell on tell" evidence because PW.1 herself in court denied to have done anything with the appellant and she was surprised why she was brought to court and said the same also in respect of the appellant that she was astonished why the appellant was brought to court. Although the prosecution treated the witness as hostile and applied to the court the learned Resident magistrate was wrong to conduct a trial within trial because the witness did not write the statement under duress or force and the like. A normal procedure on whether or not to admit the statement could have sufficed depending on the weight of the prosecutions submission on the fact at issue. 4 I entirely and respectfully agree with the learned State Attorney that suspicion had clouded the case of the appellant because even the trial Magistrate appeared to have fallen into the quagmire of suspicion when he stated like this in his judgment:-It is my inference however'for a girl who is matured and aged 16 years and lad of 30 years (sic) at the time and for the girl who had moved from her Mayaka Kitongoji to Madukani Kitongoji over the night of 21.00 hours that they must do nothing (sic) but love affairs..... The learned trial Magistrate also

relied on the evidence of PW.4 the father of the victim that the Clinical Card showed the name of Michael Anthony as the expected father of the child yet to be born and it [the court] admitted the Clinical Card as exhibit P2. However with respect to the findings of the trial Magistrate that since the Clinical Card had mentioned the name of the appellant Michael Anthony, it cannot be said that in the absence of any evidence from PW.1 - victim; That she was in affairs with the appellant which resulted for her being pregnant, that really the pregnancy was that of the accused person now the appellant. As evidence showed, the victim PW.1 denied any knowledge of having lover affairs with the appellant. The PF.3 of the victim cannot also be a proof to the fact that it was the appellant who had raped the victim although the trial court relied on it after PW.4 [father of PW.1] had produced the PF.3 in court as exhibit see the case of Selemani Mwituu v.R [C.A.T] Criminal Appeal No.90/2000 unreported as per Msoffe, J.A. For easy of reference I quote; 5

- At best the PF.3 was evidence that the complainant was raped. It was not evidence to the effect that she was raped by the appellant.... There was no evidence as agreed by the learned State Attorney that the appellant was the real causative of the pregnancy. All in all the evidence was lacking to prove the fact that the appellant was the rapist. The mere finding that the victim emerged from the house of the appellant in itself cannot be treated as a proof of the offence of rape which attracts life imprisonment and the minimum sentence of thirty years imprisonment. Therefore it needs (rape) to be proved beyond reasonable doubt rather than mere suspicions that the appellant raped PW.1 because she was found in his house as PW.2 and PW.3 claimed before the court. Now having considered all the submission of the appellant and the learned State Attorney I found that the conviction of the appellant in the event cannot be left the stand and therefore I entirely and respectfully agree with the learned State Attorney that the District Court was wrong to convict and sentence the appellant on the evidence tabled before it. Consequently I allow the appeal of the appellant quash the conviction imposed on the appellant and set aside the sentence of thirty (30) years imprisonment and order an immediate release of the appellant from prison unless he be held in connection with other matters legally and lawfully. Appeal allowed. I.S. I Judge 24/8/2009 6 Judgment delivered today the 24th day of August, 2009 in the presence of the appellant and M/S Mangu, State Attorney. I.S. I Judge 24/8/2009 Date: 24/8/2009 Coram: Hon. I.S. Mipawa, J. The Republic: Ms. H. Mangu, State Attorney Appellant: Present B/C; Namanga, RMA Court: Delivered judgment in the presence of the appellant and M/S Mangu, State Attorney. Judge 24/8/2009 7

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