

TANZANIA / JUDGMENT

20171211 TZHC Dar es Salaam 1

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM
CRIMINAL APPEAL NO. 80 OF 2017 (Originating from the Judgment of Kilombero District Court
in Criminal Case No. 205 of 2016) MOSES ULUNGA APPELLANT VERSUS
THE REPUBLIC RESPONDENT

JUDGMENT

MKASIMONGWA, J. Before the District Court of Kilombero District at Ifakara, MOSES S / 0 ULUNGA (Appellant) stood charged with Rape contrary to Sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap.16 R.E 2002]. It was alleged by the prosecution that: - "Moses s/o Ulunga charged on 6 th day of February, 2016 at or about 14.00 hrs at Mwaya Mang'ula within Kilombero District in Morogoro Region did .have sexual intercourse with one Christina D / 0 Msafiri @ Mgimwa a girl aged 5½ years." The appellant was convicted of the offence and sentenced to thirty (30) years imprisonment. He is aggrieved by both the convictions hence this appeal. In the petition of Appeal the appellant has raised seven grounds. The facts of the case are as short as that the Appellant who is commonly known as "Kapu la Nyege" did on 6/2/2016 come and 1 rented a Room in Usangi Guest House which is located near the working places of Rehema Juma Dundula (PW1) and Chuki Thobias (PW3) at Mang'ula. In the afternoon on that material date PW1 was at her work place with Christina Msafiri Mgimwa (PW2) when the appellant came and asked PW2 to buy him cigarettes and he gave her Tshs. 1,000/= for that purpose. When PW1 brought the cigarettes the appellant asked her to take them into his room. In the room she was undressed by the Appellant who smeared saliva ' on his penis and inserted it into her vagina. She felt pains thus cried for assistance. PW 1 heard PW2 crying from inside the Appellant's Room. She went to the room where she found PW2 getting out of it crying holding her underpants. PW2 told her that the appellant had penetrated his penis in her vagina. PW1 called PW3, the mother of PW2. Upon inspection PW3 found PW2 with semen and blood on her vagina. The police officers were called and they came to the place along with other people. Upon being asked, the appellant admitted to have raped the girl. One Cpl. Stephan interrogated the Appellant and upon admission, he recorded his · cautioned statement. At the police Station PW2 was provided with the PF. 3 for Medical Examination. She was medically examined by Dr. Mabere (PWS). In the examination PWS found PW2 with sperms flowing from the vagina to anus. He then filled in the PF.3. PW4 and PWS tendered in evidence the accused's cautioned statement and the PF.3 which were admitted and respectively marked as Exhibit P.E. 1 and P.E 2. 2 When the appeal came up for hearing

before me there appeared the appellant in person and the Respondent Republic was represented by Miss Veronica Mtafya, learned State Attorney. In his submission in chief the Appellant just contended that he has seven grounds of appeal and asked the court to consider them and determine the appeal in his favour. On the other hand, Miss Mtafya submitted that the prosecution did not prove the case beyond reasonable doubt. She therefore supported the appeal against both conviction and sentence. Miss Mtafya contended that going by the adduced evidence PW 1 and PW3 told the court in evidence that PW2 was found with sperms and blood on her vagina when they inspected the victim. This fact that PW2 had blood stains on her vagina was not confirmed by PWS, the Medical Doctor. The latter did not even tell the court if the victim had suffered. The latter did not even tell the court if the victim had a suffered any bruises and this raises doubt if the victim was raped at all. It is even doubtful on ground that although it is shown in evidence that the alleged rape was committed in the Guest House, no any attendant or officer of the Guest House that was called to testify to the court to show that it is true that the Appellant was in the room. She added that there was no Guest House Register tendered to the court to prove the accused's presence in the room. As regard to the testimony of PW 4, the police officer who had investigated on the case, she just read the case file and tendered the cautioned statement which she read to the court before it was admitted in evidence. The statement is not 3 properly in court and since it is the basis of the conviction, the conviction cannot be sustained. He prays the court that it allows the appeal. The appellant had nothing to say by way of rejoinder. In considering the matter, it is clear that the appellant was charged with and convicted of Rape contrary to sections 130 (1) (2)

- (e) and 131 (1) of the Penal Code. Subsection (2) (e) of Section 130 of the Penal Code reads as follows: - " 130 (2) any male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following description:
 - (a) ... (e) Not applicable
 - (e) with or without her consent when she is under eighteen years of age unless the woman is his wife who is fifteen or more years of age and is not separated from the man" So that an accused person of an offence under Section 130 (2)
 - (e) of the Penal code is found guilty the prosecution must prove beyond all reasonable doubt the following elements.
 - 1. That the accused did have sexual intercourse with a girl/or woman
 - 2. That the girl or woman is under eighteen years of age
 - 3. That the girl or woman is not the deceased's wife who are fifteen or more years of age and not separated from him. Determination of the case at hand depends on the findings of the Court on the following issues: - 4
 - 1. Whether the accused/ appellant did have sexual intercourse :with Christina Msafiri Mgimwa.

2. Whether at the time of such sexual intercourse Christina Msafiri Mgimwa was under eighteen years of age.
3. Whether or not Christina is the accused's wife who is fifteen or more years of age and not separated from him. I have considered the evidence on record. Before dealing with the issues, I find it is clear to the court that, PW1, PW3, PW4 and PWS did not have direct evidence in the case. It is PW2 who had such evidence. PW2 was a minor aged at Seven (7) years when was called to testify to the court. Section 198 (1) of the Criminal Procedure Act (Cap. 20 R. E 2002) provides that: - "Every witness in a Criminal Case or matter shall subject to the provisions of any other written law to the contrary, be examined upon oaths or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act" Again Section 127 (1) of the Evidence Act [Cap. 6 R.E 2002] reads as follows:- "Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers in those questions by reason of tender age, extreme old age, decease (whether of body or mind) or any other similar cause" The provisions of the laws above provide for general rules whose exceptions are provided under Section 127 (2) of the Evidence Act. The later provision of the law allows for unsworn 5 evidence be given in criminal matters or causes. It also allows for a child of tender age be called as a witness in any Criminal cause or matter as it was stated in the case of Khamis Samwel vs. R; Criminal Appeal No. 320 of 2010, CAT at Mwanza (Unreported) that " ... That Section 127 (2) of the Evidence Act provides exception to both Section 127 (1) of the Evidence Act and section 198 (1) of the Criminal Procedure Act because it allows not only children of tender age (which is defend to be of or below the age of 14) to give evidence but also to do so not on oath or affirmation, but only on certain conditions. These condition-precedent are that, the trial court must first find and form opinion and record in the proceedings; first that the child is of sufficient intelligence, and secondly that the child understands the duty of speaking the truth. In practice, this is proceeded by a process called voire dire examination" In the record, the trial court upon calling Christina Msafiri Mgimwa to give evidence it is recorded as follows. "VOIRE DIRE TEST Court -The accused has been stated whether she ·knows the nature of oaths. She does not know hence evidencing without oath" In my view it is important to note that the purpose of conducting and recording a viore dire examination is to show in the record how and why the court came to the opinion that the child intended to testify in court is or not of sufficient intelligence and that the child understands the duty of speaking the truth. It is a statutory requirement and the trial court has no option but to do 6 such examination and record its opinion. From the record it has not been shown how the viore dire examination was conducted. The record is also clear that the court apart from determining that the child (Christina Msafiri Mgimwa) does not understand the duty of speaking the truth, it did not determine if she is of sufficient intelligence. This cannot even be implied from the record because the trial court did not record the viore dire examination. As the court did not determine satisfying itself if the child has satisfied those tests and/ or where the viore dire examination stage is omitted by the court, the court cannot receive the evidence of such a child, because there the child remains

an incompetent witness by reason of tender age in terms of Section 127 (1) of the Evidence Act (See Khamis Samwel Case-Supra). The case at hand is caught by the fact that the trial court did not properly conduct the voir dire and even if it properly conducted the examination it did not form an opinion if the witness who is of tender age is of sufficient intelligence. PW2 was not a competent witness and her evidence ought to have not been accorded any legal value hence it is expunged. Having the testimony of PW2 being expunged the question is whether there is another piece of evidence that sustains the convictions. I have considered the testimonies of PW 1, PW3 and PWS which I found could have corroborated that of PW2 if it were of any evidential value. There remains the cautioned statement (Exhibit P.El). Part of Exhibit P.El reads as follows in Kiswahili:- "ONYO: Mimi F. 3159 D/CPL STEPHEN nakuonya wewe MOSSES S/O ULUNGA kwamba unatuhumiwa 7 • kwa kosa la KUBAKA chini ya kifungu cha 130 cha Sheria 16 ya K/A R.E 2002 ... " It is my considered opinion that for a cautioned statement to form the basis for conviction, the same must be voluntarily made and that it contains a statement which is a clear admission of all elements that constitute the offence with which the accused person is suspected to have committed and eventually charged with. Going by the Penal Code there is no offence known by the law that is established under the Section 130 for the offence does not exist. (This is why the charge sheet cites a different provision of the law contravened. It follows therefore that where the offence the accused was alleged to have committed, when he was being warned on the consequences of the making a confessional statement, is not known under the law, the cautioned statement in itself cannot form the basis for conviction. In the premises of this case, I find the accused was not properly convicted. As a result I quash the conviction and set aside the sentence imposed upon him. It is ordered that the appellant be immediately released out of jail if he is not therein for other lawful causes. The Appeal is allowed. ~-/- iN ~~~ E.J. a~o~ JUDGE 11/12/2017 8

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