

TANZANIA / JUDGMENT

ramadhani john another vs republic

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IN THE HIGH COURT OF TANZANIA AT PODOMA (APPELLATE JURISDICTION) (DC) CRIMINAL APPEAL NO. 21 OF 2016 (Original Criminal Case No. 148 of 2014 of the District Court of Singida District at Singida) 1, RAMADHAN JOHN APPELLANTS

2. KARIM JOHN.....J VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

02 & 09/9/2016 KWARIKO, J. Before the District Court of Singida appellants herein stood charged with 'Gang Rape' contrary to section 131 A (1) (2) and (3) of the Penal Code [Cap. 16 R.E.' 2002] where it was alleged that on the 30th day of July, 2014 at Veta area Mandewa Ward within the district and region of Singida the appellants jointly and together had sexual intercourse with one SABRINA D/O SHABAN a girl aged below eighteen years. Upon denying the charge a total of eight witnesses were brought to prove prosecution case and that evidence can be recapitulated hereunder. On the material night PW1, SABRINA SHABAN the complainant herein who is appellants' niece was sleeping in her room when appellants entered therein and raped her in turns starting by the first appellant RAMADHAN JOHN. PW1 who testified after voir dire examination said she identified appellants through moonlight which penetrated inside through the window. That, PW1's aunt SABRINA ANTONY, PW2 who was next door heard the sounds of people and when she waited for fifteen minutes without knowing what was going on switched on mobile phone torch and approached PW1's room. On reaching near PW1's room PW2 found first appellant raping PW1 while second appellant stood at the door watching. There were trousers, dress and underwear on the floor. That, PW2 who also identified appellants by moonlight which penetrated through the window closed the room door from outside and instructed one Sifael to call PW1's mother who was in another house. However, during that process appellants jumped through unfinished wall and run away. When PW1's mother ASHURA ANTONY, PW3 came to the scene she found PW1's vagina with sperms and appellants' trousers were left behind in the fateful room. It was PW3's further testimony that upon inquiry PW1 revealed that appellants had earlier when PW3 travelled to Morogoro had been raping her. Thereafter, PW1 was bathed and taken to hospital for examination in the morning of 31/7/2014 where PW4, Dr. MSABAHA KOMBA inspected her and found with no hymen but no bruises were seen in her vagina. PW4 said it was

not easy to detect rape since PW1 was taken to hospital a day after the alleged incident. PF 3 was filled which was tendered and received in court as exhibit PI. The evidence by the prosecution further shows that following alarms by PW2 and others search was conducted while appellants were apprehended at neighbour's house and sent to police. At the police station appellants were interrogated and said to have admitted the allegations before PW5, EXAUD WAYA and Asst. Inspector MCHAU, PW 7 respectively where their cautioned statements were recorded and were admitted in court as exhibits P2 and P5 respectively. Also, appellants were sent to justice of the peace one DEUDATIUS N. PATRIC, PW6 where their extra judicial statements were recorded and were admitted in court as exhibits P3 and P4 respectively. In their defence appellants testified on their own behalf and called no any witnesses. Appellants denied the allegations and said they were tortured to admit the same. That, the evidence by prosecution was doubtful as PW1 who said was raped by two people was not found with any bruises in her vagina as per doctor's evidence. Lastly, appellants contended that prosecution evidence did not prove that they were identified at the scene of crime as conditions thereto were not favourable. At the end of the trial both appellants were found guilty and accordingly convicted and sentenced to life imprisonment. Having been aggrieved by trial court's decision appellants filed separate grounds of appeal raising similar points of complaints. In their totality appellants' grounds of appeal can be summarized into the following six grounds of complaints;

1. That; rape was not proved.
2. That; identification of appellants was not water tight
3. That, PW1 's evidence was doubtful.
4. That\ trial court erred in law to admit appellants' cautioned statements and extra judicial statements.
5. That, trial court erred in law to ignore appellants defence and convicted them on weak prosecution evidence.
6. That; trial court erred in law to convict appellants where prosecution failed to tender alleged appellants' trousers found at the scene of crime. When the appeal was called for hearing at first appellants opted for the respondent/Republic first to respond to their grounds of appeal. Whereas Mr. Sarara learned State Attorney appeared to argue the same on behalf of the respondent/Republic and started by opposing the appeal. Mr. Sarara submitted that appellants were sufficiently identified at the scene of crime as they are PW1's uncles and there was moonlight to help identification. That, the rape was done in close proximity and PW2 also saw them while in the act of rape. Also, that the incident of rape was done before and appellants left their trousers at the scene which were identified to be theirs. Further, Mr. Sarara contended that appellants confessed to the allegations where their cautioned statements and extra judicial statements were recorded and admitted in evidence. Also, rape was proved through PF3 which was duly tendered by medical doctor. It was Mr. Sarara's further argument that appellant's defence evidence was considered and did not raise any doubt on the prosecution case and it was found that appellants did not account of their

whereabouts at the material time. He charged that gang rape was proved as per law. Hence, he conclusively argued that appellants' conviction was proper. However, Mr. Sarara learned State Attorney was of the view that the second appellant ought not be sentenced to life imprisonment since he was aged 17 years at the material time but ought to be sentenced to corporal punishment as per section 131 A (3) of the Penal Code. In their rejoinder submissions appellants insisted on their grounds of appeal and explained further, that the evidence of identification was not water tight, prosecution evidence was doubtful as alleged trousers left at the scene of crime were not tendered, PVV1 having been found without bruises in her vagina and they were tortured to admit the allegations. After hearing the parties' submissions this court is poised to decide an issue whether appellant's appeal has merit. To decide this issue the court will deliberate on the grounds of appeal seriatim as follows; Starting with the first ground of appeal this court is of the view that evidence of rape should come first and foremost from the victim herself. In this case PW1 said that she was raped by the appellants in turns but she did not explain what actual acts were done to her to amount rape. PW1 did not prove that appellants' male organs penetrated into her vagina where penetration however slight amounts to rape. She only said she was raped. She did not say what was done. She did not say how it was done and what physically happened to her during the alleged act taking into account that she was aged below ten years being raped by two young men. I find support in the foregoing stance in the case of EX-B 9690 SSgt DANIEL MSHAMBALA I/ R, Criminal Appeal No. 183 of 2004, Court of Appeal of Tanzania at Mwanza, (unreported) where it was said thus; "PW 1 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 PW1 ought to have been more forthright and thorough in her evidence on the alleged rape. It was not enough to make bare assertion that she was raped without more. She ought to have been more forthcoming in her evidence in order to enable the court to make a meaningful finding on whether or not rape was committed". In addition to the foregoing there is evidence by PW2 who said she saw PW1 being raped but also this evidence was not different from PW1's evidence as mere assertion that rape was being committed was said. Further, the medical doctor PW4 said did not find any bruises in PW1's vagina and sperms were not found. It is strange PW1 being aged below ten years not to have sustained bruises after rape which was said to occur less than a day earlier, taking the fact that it was said she was raped by two young men. Thus, PW4's evidence defeats PW3's evidence which said she found sperms in PW1's vagina after rape. Even though PW1's vagina was washed but since she was taken to hospital in the early hours of the morning something might have been found through physical and laboratory examination. This court do not believe that PW1's inner parts of the vagina was also washed, to clean all traces of sperms if at all. Even though PW4 said PW1's hymen was not intact but this does not infer that it was result of alleged rape. And PW3's evidence that PW1 told her that she was being raped previously by appellants was not supported by either PW1 herself or any other witness. Therefore, the first ground of appeal succeeds. The second ground of appeal relates to identification of appellants at the scene. PW1 and PW2 said appellants were identified through moonlight coming through the window and mobile phone light. It is this court's

view that these witnesses did not say how the moonlight was strong to be able to penetrate through window and enable them identify the assailants. It was not said how open the window was to enable the moonlight sufficiently illuminate the material room. It was not either said how strong the mobile phone light was to enable PW2 identify the assailants. Even though as rightly submitted by Mr. Sarara learned State Attorney rape, if at all, was committed while perpetrators were in close range with victim but in the absence of light for visual identification one cannot say they identified the assailants. Therefore, there was no proper conditions for visual identification at the scene (see also WEREMA MATIKU V R, Criminal Appeal No. 51 of 2002, Court of Appeal Tanzania at Mwanza (unreported)). The second ground of appeal has merit. In the third ground of appeal this court is in agreement with appellants that PW1's evidence is doubtful and most of her shortcomings have been discussed in the preceding grounds of appeal. But further this court has been wondering how a girl aged nine years could have withstood rape by two young men without any physical injuries or trauma which definitely should have been revealed by herself, her parents or most importantly medical doctor who examined her few hours later after alleged incident. Even though PW1 was used to sexual intercourse gang rape must have been a bitter pill for her to swallow. Also, while PW3 said PW1 informed her that incidents of rape were also committed previously, PW1 did not say that and this brings doubt as to why she kept quite if at all that happened. The third ground of appeal also succeeds. In relation to the fourth ground of appeal the court finds that although the first appellant did not object to his cautioned statement (Exhibit P2) but the same violated the law under section 50 (1) (a) of the Criminal Procedure Act [Cap 20 R.E. 2002] herein-after the Act as it was recorded beyond four hours provided thereat. It is in record that appellants were arrested before mid-night on 30/7/2014 but they were interrogated on 31/07/2014 starting from 14.35 hours. No reason was given for the delay and no extension was sought and granted as required under section 51 (1) (a) of the Act (see also ABDALLAH RA.MADHAN V. R Criminal Appeal No. 219 of 2009, Court of Appeal of Tanzania at Arusha, (Unreported)). Moreover, first appellant's cautioned statement did not comply with section 57 (1) (a) of the Act since it was not taken in the form of questions and answers. The statement is just a narration as if appellant wrote his own story. If that is the case the prosecution should have said so as required under section 58 of the Act. And time of completion of interview was not stated but only starting time was shown and that was contrary to section 57 (2) (e) of the Act. Therefore, exhibit P2 was illegal evidence and it is hereby expunged from the record. As regards second appellant's cautioned statement and although he objected it but did not explain why he objected the same and the court rightly overruled it but it suffers the same fate as first appellant's cautioned statement. Therefore, exhibit P5 is hereby expunged from the record. Coming to the appellants' extra judicial statements exhibits P3 and P4 respectively this court also refers to the definition of rape. All appellants said in the statements that they raped PW1 but they did not say what acts they did to her to amount rape. Even the second appellant was reported by the justice of the peace, PW6 that he had fresh wounds which proves appellants' complaint that they were beaten and tortured after arrest and at the police hence even when they were sent to PW6 some few minutes after they were interrogated by police were still in

fear and could have said anything to save their skins. Therefore, the fourth ground of appeal also is meritorious. This court further agrees with appellants that prosecution evidence was weak to ground conviction. I have herein above explained various shortcomings to that end, but additionally, no any neighbour or local area leader came to testify on whether they heard the incident. As appellants were said to have eloped to neighbour's house from the scene of crime but the said neighbours did not come to support such allegations and more so to state what their physical appearance were having been said they left trousers at the scene. 9 On the other hand this court do not agree with appellants that their defence evidence was not considered. Going through the judgment it is clear that trial magistrate from page eight (8) of the typed judgment did consider evidence from both sides before decision was reached to convict appellants. This ground of appeal thus succeeds in part. Lastly, in the sixth ground of appeal it is this court's opinion as complained by appellants that that alleged trousers left at the scene of crime were crucial evidence to corroborate what PW1, PW2 and PW3 said in their evidence. The trousers, if any, ought to have been taken along to the neighbours and to police to show that really appellants were found in flagrante delicto making iove to the complainant. The absence of such evidence only deepens doubt on the prosecution case which are hereby resolved in favour of the appellants. This ground of appeal also has merit. In the totality of the foregoing, it is clear that the prosecution case was not proved beyond reasonable doubt against the appellants and thus this appeal is allowed, conviction quashed and sentence of life imprisonment in that respect is set aside. Henceforth, appellants are ordered to be released from prison unless their continued incarceration is related to some other lawful cause. It is ordered accordingly. M.A. KWARIKO JUDGE 08/9/2016 10 Judgment delivered in court today in the presence of Appellants, Mr. Sarara learned State Attorney for the Respondent/Republic and Mr. Nyembe Court Clerk. 08/9/2016 Court^ Right of.Appeal Explained. j . M.A.KWARIKO JUDGE 08/9/2016 11

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