

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT DODOMA (APPELLATE JURISDICTION) (DC) CRIMINAL APPEAL NO. 21 OF 2017 {Original Criminal Case No. 63 of 2016 of the District Court of IRAMBA at KIOMBOI) ROBERT MUSSA@ GISI APPELLANT VERSUS THE REPUBLIC ■ ... ■ I ■■■■ ... ■■ IE ■ .. ■■■ I I 11111!1!1 IPJ ■ Il ■ RESPONDENT

JUDGMENT

17/5 & 12/7/2017 KWARIKO, I. When the appellant herein was arraigned before the District Court of Iramba at Kiomboi he faced two counts of Burglary contrary to section 294

- (1) and Rape contrary to sections 130 (1) (2) (e) & 131 (1) both of the Penal Code [CAP 16 R.E. 2002]. It was alleged that on the 9th day of March, 2016 at 01.00 hours at Kidigida Village within Mkalama District in Singida Region the appellant broke into the dwelling house of one COLLETHA D/o RASHID and had carnal knowledge of one NEEMA D/o YUDA a girl of fourteen years of age. 1 The appellant denied all counts where the prosecution brought a total of four witnesses to prove the charge. The evidence by the prosecution can be summarized as here under; That during day time of the material date the appellant had met NEEMA d/o YUDA PW1 at one ADAM's place and said he wanted to marry her but the girl told him that she was still young where the appellant brushed that aside. PW1 returned home and narrated the incident to her mother COLLETHA RASHID, PW2 who reported to ten cell leader. That, at night hours the same day the appellant broke through the window into PW2's house armed with bush knife and assaulted PW2 by cutting her in the hand and near the eye. The appellant demanded to see his ex-girlfriend, PW1's sister ESTHER who had already escaped from the scene. When the appellant could not find the said ESTHER he took PW1 by force to his home at Kidarafa area when he knocked at his mother's house and after he was let in, took PW1 to bed and had sexual intercourse with her by force. In the morning he asked her to wash her clothes and ordered his younger brother to watch PW1 when he left. Later the younger brother left that is when PW1 tried to escape but the younger brother managed to restrain her. However, the Village Executive Officer rescued her and took her to his office whereas the appellant was arrested. PW1 was sent to hospital where Dr. GERALD MINJA, PW4 examined her and found there were signs of friction in her vagina and said she might 2 I. , I j , 'I ; , . , i , . ' . , , F, _ , ... i (have probably been raped since she was not

new to sexual intercourse. A PF3 was filled and admitted in court as exhibit Pl. The prosecution evidence further revealed that the appellant was interrogated on 10/3/2016 by No. G1737 DC SAMSON, PW3 where he is said to have admitted the allegations and his cautioned statement was recorded but after he objected it during the trial an inquiry was done where in the end it was admitted in evidence and marked P.E.3. In his defence the appellant denied the charge and said PW1's sister ESTHER had been his girlfriend but when he discovered her running with other men he stopped the affair that is when she swore to revenge which led to his arrest with the present allegations. The appellant -discredited the prosecution case since PW1 told the police that she was not raped by him as it was her sister who had an affair with him. That, PW1 was forced to implicate him and wondered why PW2 did not tender any PF3 if at all she was injured by him. And it was doubtful when the said ESTHER failed to testify in court. He did not call any other witness on his behalf. At the end the appellant was convicted and sentenced to fourteen

(14) years and thirty (30) years imprisonment for the first and second counts and the sentences were ordered to run concurrently. The appellant was aggrieved by the trial court's decision hence he filed this appeal upon six grounds of appeal which raise the following four important grounds of complaints; 3, t- I. (' ' r / (.. " . . ; ! . r 1. ' . ,

1. That, the defence case was not considered
2. That, PW2 did not tender PF3 to prove alleged injuries.
3. That, independent witnesses ought to corroborate family members evidence.
4. That, the offence of rape was not proved. This court considered the submissions given by both the appellant and Ms. Magili learned State Attorney for the respondent Republic for and against the appeal. The court is thus required to decide whether the appeal has merit. Being first appellate court this court will revisit the evidence on record and make it own conclusion in the course of deciding the appeal. As regards to the first ground of appeal this court finds that although the trial court considered the appellant's defence but what that court did was to shift the burden of proof to the defence side when it required the appellant to prove his innocence whereas what the appellant's defence was required to do was only to raise doubt onto the prosecution case. In criminal trial the burden of proof. ~lways lies on the prosecution and never shifts to the defence (see also HABIB VR [1971] H.C.D No. 71). The first ground of appeal thus succeeds. 4 ., . . 'I ,,,_ ' ,. ... ' ' . . -" . J: .. _ , t . . In the second ground of appeal this court disagree with the learned State Attorney that since there was no charge of grievous harm against the appellant then PW2 need not have tendered her PF3 to prove the alleged cut wounds. This court agrees with the appellant that PW2 who alleged that had cut wounds by her intruder ought to prove the same in order to substantiate the allegations of burglary and assault therein. Hence, PW2's PF3 would have been corroborative evidence to the complainants allegations. The second ground of appeal has merit. In the third ground of appeal the appellant complained that there ought to be independent corroborative evidence to PW1 and PW2 them being family members. In this

case looking at PW1, her evidence was taken without first there being voir dire test as she was said to be aged fourteen (14) years hence a child of tender age. Voir dire test ought to have been conducted as per then section 127 (2) of the Evidence Act [CAP 6 R.E. 2002]. The trial court only noted that PW2 knew meaning of an oath hence was sworn to tell the truth. The trial court ought to show what led it to conclude that PW2 knew the meaning of an oath that is where proper voir dire examination should have been conducted and properly recorded. Now, since no any voir dire test was conducted the testimony of the child of tender age is to be discounted. In the case of KIMBUTE OTINIEL V R, Criminal Appeal No. 300 of 2011, Court of Appeal of Tanzania at Dar es Salaam held thus; "Where there is a complete omission by the trial court to correctly and properly address itself on 5, ..., J " \; ', •. ,, , ... : f_ ' - .,; sections 127 (1) and 127 (2) governing the competency of a child of tender years, the resulting testimony is to be discounted'. For the foregoing the evidence of PW1 is hereby discounted. Having been discounted PW1's evidence there remains the evidence of PW2 only as regards the breaking at PW2's house. PW2's evidence as regards to the appellant's breaking has not been proved since PW2 did not prove that the appellant broke in her house. This relates to identity of the appellant during the material night. PW2 said she only used to talk with the appellant over the phone before the fateful night. And during the alleged night PW2 said she identified the intruder to be the appellant through torch light which he was holding. This court is of the considered view that PW2 could not have identified the intruder as she was shone by the torch hence hampering her also visibility. In this respect the law also says that torch lights are not effective in identifying thieves (see MOHAMED MUSERO VR

[1993] T.L.R 290). PW2 did not say how long she had the assailant under observation and did not explain or describe his appearance. Thus, PW2's evidence of identification was not sufficient (see also LUSABANYA SIYANTEMU VR [1980] T.L.R 275). Further, there ought to be witnesses from PW2's neighbourhood to corroborate that there had occurred breaking in her home at the material night. No any neighbour or local area leader testified. PW2 had said she reported the appellant's threats to ten cell leader but no one came to support that version. 6 - 'f'•• , • ' .. 1 i. .. •• Also, no one came to support PW2's evidence that PW1 had been taken by force by the appellant. PW2 said on cross-examination that the appellant stole a phone and was found in his possession during arrest and that the same was with the Village Executive Officer (VEO) but that allegation was never proved. The said VEO never came to testify. Now, although the law does not forbid family members only to testify but where their evidence creates doubt there ought to be corroborative evidence from independent witnesses and this applies to this case. The third ground of appeal has merit. In the fourth ground of appeal the appellant questioned the evidence of PW4 and the PF3 that it did not prove rape. Truly, PW4 said the complainant was used to sexual intercourse; there was no semen or blood in her vagina. He concluded that there was possibility that PW1 was raped. That evidence was not conclusive to prove rape, as essential ingredient i.e penetration was not proved. Further, the age of PW1 was not proved since her mother PW2 did not present evidence to that effect. This court is of the view that

since in order to prove this charge age of the victim was important the same ought to be proved (see also RAMADHAN JUMANNE VR, Criminal Appeal No. 587 of 2015, Court of Appeal of Tanzania at Dodoma (unreported)). Additionally, it was held by the trial court that the appellant had confessed to the allegations and his cautioned statement was admitted in evidence after inquiry was conducted to prove its admissibility following his 7 . i . , ' , , . , r (. , , ... objection. However, the appellant's cautioned statement was admitted contrary to law for the following reasons; One, the cautioned statement was taken beyond basic periods available as the law under section 50 (1) (a) of the Criminal Procedure Act [CAP 20 R.E. 2002] hereinafter to be called the Act says a suspect ought to be interviewed within four hours after being taken into restraint. In this case the appellant was arrested on 9/3/2016 but he was interviewed on 10/3/2016 starting from 3:00 pm. Hence, at whatever time the appellant was arrested on 9/3/2016, four hours had elapsed when the interrogation was conducted. There is no evidence, to show that the basic period was extended as required under section 51 of the Act. This omission was a fatal error (see also MUSTAPHA KUSA & ANOTHER V R, Criminal Appeal No. 51 of 2010 Court of Appeal of Tanzania at Dar es Salaam (unreported)). Two, exhibit P.E. 3 was taken contrary to section 57 (2) (a) of the Act since its form was not in questions and answers. This exhibit is only a narration as it is supposed to be taken under section 58 of the Act but it was not said the same was wholly volunteered, unsolicited statement from the appellant as required under that provision of law (see RAMADHAN SALUM VR, Criminal Appeal No. 5 of 2014 Court of Appeal of Tanzania at Mwanza (unreported)). For the foregoing, the said appellant's cautioned statement exhibit P.E. 3 was illegal evidence and as per the law and case authorities cited herein the same is hereby expunged from the record. Having been expunged the cautioned statement and on its overall the prosecution case 8I. _ _

lacks base within which to stand. It follows therefore that the trial court erred in law and fact to convict the appellant as the prosecution case was not proved beyond reasonable doubt against him. In fine this appeal has merit and it is hereby allowed, conviction quashed and sentence set aside. It is ordered that the appellant be released from custody unless he is otherwise held for lawful cause. Order accordingly. M.A. ARIKO JUDGE 12/7/2017 DATED at DODOMA this 12th day of July, 2017 JU.OGE 12/7/2,017 9 " Date : 1210112011 Coram : Hon. M.A. Kwariko, J. Appellant : Present For Respondent- Ms. Kezilahabi State Attorney C/c ;,R. Nyembe Ms. Kezilahabi State Attorney The matter is for judgment. Respondent: I am ready. Court: Judgment delivered in court today in the presence of the Appellant and Ms. Kezilahabi learned State Attorney and Mr. Nyembe Court Clerk. ~ MJ\,~o JUDGE 12/7/2017 Court: Right of Appeal Explained. JUDGE 12/7/2017 10

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