

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA ATTANGA (CORAM: MUNUO, I.A., MSOFFE, I.A., And KIMARO, I.A.) ' CRIMINAL APPEAL NO.138 OF 2009 SAID HUSSEIN

~ APPELLANT I VERSUS I • ■■ THE REPUBLIC ■■■ • ■■■ • ■■■■■■■■ •■

■■■■ ■■■■ I • • • ■■■■■■■■ •■ RES PONDENT (Appeal from the Judgment by the High Court of Tanzania I at Tanga I (Teerriba, J.) dated 11th December, 2008 .In Criminal Appeal No.27 of 2007 I JUDGMENT OF THE COURT 16th & 22nd March, 2010 KIMARO, J.A.: The appellant was, in the District Court of Pangani at Pangani, I arraigned for rape contrary to section 130 of the Penal Code CAP. 16 R.E. !

2002. He was alleged to have carnally known one Rehema Juma, a girl 17th aged 12 years on 11 October, 2005 at about 15.00 hours. He was convicted and sentenced to suffer a term of thirty years imprisonment. Being aggrieved by the conviction and the sentence, the appellant lodged an appeal in the High Court of Tanzania at Tanga but he lost the appeal. Still aggrieved, he has filed a second appeal to the Court. The complainant Rehema Juma testified as PW1. Her testimony was that she was a pupil at Funguni Primary School. On 11th October 2005 at 1.00 p.m she was walking home from school along Pangani Tanga Road. At Muhembo area, two people emerged, each holding a "panga", and she identified the accused as being one of them. She knew him before by the name of Said Hussein. She was scared and shouted for help. However, the appellant and his colleague caught her mouth and prevented her from shouting. Then the appellant pulled off her underpants and had his penis penetrate her vagina while the other person assisted the appellant by holding the complainant's legs apart. This ordeal came to an end when a motor vehicle coming from Tanga direction stopped at the scene of crime. The motor vehicle had two people who carried PW1 to a certain shop and told her to report the matter to the police station. She reported the incident to the police station where she was taken to hospital and was admitted for treatment for one day. In cross-examination of the complainant, the appellant wanted to know how PW1 was able to identify him. PW1 said she knew him before by name, as he was a villager of Kimanga village where PW1 used to see him, and she also mentioned his name to the police, immediately she reported the matter. She said it was the appellant himself who informed her his name when she met him at a hotel at Kimanga where her sister in law was working. Phillipa Julias (PW3) was the doctor who treated PW1 at the hospital where she was admitted. His medical finding was that PW1 had

bruises and blood stains in the upper and outer part of the vagina. The inner part was also affected and the hymen was ruptured. He also noted that PW1 was forcibly penetrated. Further observation was that PW1 was crying in agony and it was not possible to use other medical instruments to carry out thorough investigation. PW3 said PW1 had external and internal genital injury and she was bleeding and cried because of severe pain. After the appellant was arrested, PW1 was summoned at the police station to identify the appellant and she easily identified him. It was at that time she knew that the appellant had other names of Saidi Omari @ Marasta. 3 The appellant raised the defence of alibi without giving any notice under section 194 (4) of the Criminal Procedure Act, CAP 20 R.E.2002 and that the trial court seemed to have ignored it. The appellant was convicted and his appeal to the High Court was dismissed. The appellant filed eight grounds of appeal and at the time of the hearing the appeal he added another one. All the grounds can safely be reduced into four grounds. In the first ground the appellant's complaint is that the prosecution did not prove the case on the standard required. His second ground is on his identification in that he was not properly identified. The complaint in the third ground is that the ingredients of the offence of rape were not established and lastly is that the evidence of the complainant was not corroborated. Before us the appellant was not represented. He appeared in person. The respondent Republic was represented by Mr. Tumaini Kweka, learned State Attorney. In arguing the appeal the appellant was more comfortable to respond to his grounds of appeal after hearing the views of the learned State Attorney for the respondent Republic. 4 The learned State Attorney supported the conviction but not the sentence. Starting with the ground on identification, the learned State Attorney said that there was no mistaken identity of the appellant because PW1 knew him very well before the commission of the offence and she mentioned his name to the police when she reported the horrifying incident. The appellant generally had nothing useful to add to his grounds of appeal. The evidence of PW1 was straight forward. The identifying circumstances were favourable for a correct identification. She said she knew the appellant by name before the incident and it was the appellant himself who told her his name. She used to see him at Kimang'a village. PW1 even mentioned the name of the appellant to the police, immediately she reported the incident. Moreover, the incident took place in broad daylight, at around 1.00 p.m. where there was more than sufficient light to enable the complainant identify the appellant. See the case of Waziri Amani Vs R [1980] T.L.R.250. This ground has no merit. Regarding the ground on the ingredients of the offence, the learned State Attorney said in terms of section 130(4) (a) of the Penal Code, the offence of rape is proved by penetration of the penis into the vagina. If 5 the victim of the sexual abuse is above eighteen years, consent is another ingredient which must be proved. For a victim who is under eighteen years consent is irrelevant. Mr. Tumaini said in this case the ingredients of the offence were proved by the evidence of PW1 and PW3 as well as the PF3 form which was admitted in court as exhibit Pl. On his part the appellant said that the PF3 form was evidence to prove that rape was committed but it did not prove that he was the one who committed the offence. On our part, we agree with the learned State Attorney that the ingredients of the offence of rape were proved. PW1 said that the appellant forcibly put his penis into her

vagina. PW3, the doctor, corroborated her evidence. He noted that, PW1 was forcibly penetrated. PW1 was under the age of 18 years so the question of consent was irrelevant. It is true that evidence of the PF3 form assists only in ascertaining whether rape was committed but not who committed the offence. This ground as well has no merit. As regards the ground on whether the offence was proved beyond reasonable doubt the learned State Attorney said that the totality of the evidence on record proved that the offence was proved beyond doubt. He said the courts below were satisfied with the demeanour of the witnesses 6 and therefore there is no justification for the Court to interfere with the concurrent findings of the courts below. As for the complaint that the evidence of PW1 was not corroborated, the learned State Attorney said section 127(7) of the Evidence Act allows the court to convict on the sole evidence of the victim of the sexual abuse. The learned State Attorney said in this case the situation is different because the evidence of PW1 is corroborated by the evidence of the doctor and the PF 3 form which confirms that rape was committed. In the trial court, Rehema Juma, the complainant testified as PW1. Since she was aged 13 years "voire dire" examination had to be conducted in compliance with section 127(2) of the Law of Evidence Act Cap, 6, R.E.2002. The record of appeal at page 8 shows that the trial magistrate did not comply fully with the procedure for conducting "voire dire" examination. The trial magistrate did not record the questions which were put to the witness. He recorded the answers only. That was improper. The question and answer session must be recorded. The said section provides: "Section 127(2) Where in a criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of oath, the evidence may be received though not given on oath, or affirmation, if in the opinion of the court, which opinion must be recorded in the proceedings, he is possessed of sufficient intelligence to justify reception of his evidence, and understands the duty of speaking the truth." We entirely agree with the learned State Attorney that the evidence of the complainant was corroborated by that of PW3 the doctor who examined her. As indicated above, PW3 confirmed that the complainant was sexually abused and she cried in agony as he examined her. Considering the totality of the evidence on record, the prosecution proved the case beyond doubt and there is no reason for faulting the first appellate court for upholding findings of the trial court. The appeal is devoid of merit. It is dismissed in entirety. 8 On the sentence, the learned State Attorney said that the evidence of PW1 shows that when the appellant committed the offence he was with another person who assisted him. ~he appellant should have been sentenced in accordance with section 131A (1) which provides for life imprisonment as punishment for gang rape. He urged us to exercise our power of revision and enhance the sentence to life imprisonment. The section reads: "Where the offence of rape is committed by one or more persons in a group of persons each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape." Reading through the said provision, for a person to be convicted for the offence of gang rape, he must be charged with the offence. Although I ; the evidence shows that the appellant was with another person abetting the commission of the offence, that person was not arrested and charged. For this reason, the

appellant was properly charged and sentenced for the 9 offence of rape. However, section 131 (1) which provides for sentence of the offence of rape, also provides for corporal punishment and an order for compensation, in addition to imprisonment. The trial court neither imposed corporal punishment nor made an order for compensation. Using powers of revision under section 4(2) of the Appellate Jurisdiction Act, CAP 141 R.E. 2002 we order the appellant to suffer twelve strokes of the cane and order him to pay Rehema Juma, (PW1) the complainant, an amount of five hundred thousand shillings as compensation. It is accordingly ordered. DATED at TANGA this 19th day of March 2010. E.N.MUNUO JUSTICE OF APPEAL J. H. MSOFFE JUSTICE OF APPEAL N. P. KIMARO JUSTICE OF APPEAL (N. N. CHUSI) DEPUTY REGISTRAR 10

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