

TANZANIA / JUDGMENT

20100513 TZCA Mwanza

COURT
TZCADECIDED
13 May 2010

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

' I ' I I I IN THE COURT OF APPEAL OF TANZANIA ' I ATMWANZA I ' I I (CORAM: MSOFFE, J.A., MBAROUK, J.A. And BWANA, J.A.) : I I CRIMINAL APPEAL NO. 31 OF 2006 SALU SOSOMA•..... APPELLANT VERSUS ' I THE REPUBLIC ~ESPONDENT (Appeal from the Judgment of the High Court of Tazania at Mwanza) : I I ' I (Mchome. J.) I I I I dated the 13th day of July, 2005 I I in I I HC Criminal Appeal No. 176 of 2003 I I I I ' I I JUDGMENT OF THE COURT I I I I 12 & 14 May, 2010 I BWANA, J.A.: this is a second appeal. Salu Sosoma, the appellant, was charged with and convicted of rape contrary to Sections 130 (1) and I '

- (2) (e) and 131 (2) (a) of the Penal Code as amended, by the Sexual I Offences Special Provisions Act No. 4 of 1998 (SOSPA):. The offence is I I alleged to have been committed on the 15th day of o;ctober 1998 at about 11.00 a.m. at !sole Village within Magu District of Mwanza I I I Region. The victim of the offence, one Migu Marko,: was a child of ! i I tender age. She is said to have been seven (7) years old when the rape took place. i The trial court, the Magu District Court at Magu~ convicted the appellant and sentenced him to life imprisonment, in terms of Section I I 131 (3) of the Penal Code as amended by the SOSPA. \His first appeal I before the High Court was unsuccessful, hence this sec<Dnd appeal. I I At the hearing of this appeal the appellant was unrepresented while the respondent Republic was represented by Mr. Edwin Kakolaki, I I learned Senior State Attorney. The respondent Republic supported both the conviction and the sentence imposed. The appellant raised four grounds of appeal in hi:s memorandum of appeal which may be summarized as: non-compliance with the I provisions of Section 240 (3) of the Criminal Procedur~ Act (the CPA); I lack of sufficient evidence supporting proof of rape; rnon-compliance I I with the provisions of Section 127 (2) of the Tanzania Evidence Act (the TEA); and the severity of the sentence imposed. 2 At the start· of the hearing this appeal, we fouQd it important firstly to clarify certain legal issues raised. It was imp~rtant to do so particularly when we took into account the fact that thEr appellant was unrepresented by counsel and the severity of the sent~nce he had to serve - life imprisonment. I I The first such issue was to establish when ~id the SOSPA become effective. · According to Section 2 of the SOSRA (Act No. 4 of I st 1998), the Act came into force on the 1 of July 1998.: Therefore, the offence with which the appellant was charged with ahd convicted of 1 I was committed when SOSPA was in force already. i The second issue for our consideration was the age of both the i I victim and the appellant. A

medical report (PF3) tendered in the trial court as an exhibit was successfully challenged before us. As ground I I one of the memorandum of appeal indicates, that PF3 1 was tendered in I I court without complying with the provisions of Section 240 (3) of the I I CPA. Mr. Kakolaki, learned counsel, conceded to i that deficiency. I Therefore the contents of that PF3 were expunged from our record. 3 I I - I I I However, the expunge of the PF3 notwithstanding~ the evidence I I of Marko Lutobola, PW2, the father of the victim, was cogent to I I ground a conviction. He testified that Migu Marko was between seven I I and eight years old when this incident took place. That evidence was I I not challenged. We are mindful of the fact that a parent is better I positioned to know the age of his child. Being a child of seven to eight I I years, the provisions of Section 130 (3) of the SOSPA were therefore, I rightly invoked by the trial magistrate when sentencing the appellant. I I I Concerning the appellant's age, he admitted :to have been I sixteen years old at the time of this incident. . However, he insisted . I I I before the trial court that he be medically examined to establish his I I I true age. That request was granted. A medical report subsequently tendered in court indicated. that the appellant's age~ was between I I eighteen and nineteen years and that he was capable~ of performing I I sexual intercourse. Be that as it may, it is our further view that whether the appellant was sixteen or eighteen years :old, still, as per that medical report, he was capable of sexual intercourse. 4 I • I ~ I The third issue was whether a voir dire was conducted by the i trial court in terms of Section 127 (2) of the TEA. We are satisfied that i the record shows that the trial court addressed itself properly on the I I issue and came to the conclusion that . the victim II was neither I possessed of sufficient intelligence to justify a reption of her , . I I evidence, nor understood the duty of speaking the truth. It is on I record that the said child cum victim was described by the trial court . II as one "who seems to be younger, who does not know I I anything to say, she is just playing when she is asked I questions " I I I We are therefore of the considered view that the foregoing I discourse on the three points, disposes of the appellant's I grounds of I appeal on aspects of Section 240 (3) of the CPA and Section 127 (2) of I I the TEA. I I I The next point is whether the appellant was rightly convicted of ' ! I the offence of rape. The facts of this case as established by the trial I court and accepted by the first appellate court leave ~s with no doubt I I I I I 5 I I I I ~ i I that he was so rightly convicted. We recapitulate the evidence of the I I three key prosecution witnesses. I I Kabula Lutobola, PW4, a primary school student, was on her way home from school. At one area, she saw a stranger pulling Migu, the I I victim, towards a cassava plantation. Upon arriving/ home, PW4 I I I reported the matter to Migu's father, Marco Lutobola, PW2. I Together I I I with Masanja Sambayi, PW3, they rushed to the scene.: At first they did not see where Migu and the appellant were. However, after a while they saw them, the appellant in "f/agrante delicto"~ having sexual . I I I intercourse with the victim. Upon realizing that there were people I I I around, the appellant ran away, leaving behind his red i trouser. PW2 chased him while calling for help. Eventually the !appellant was I I I apprehended and taken to a village executive office. Back I to his child, I I I the victim, PW2 examined her. He saw blood oozing from her vagina, I which had been ruptured. With that overwhelming evidence, the trial I court convicted the appellant. The first appellate court upheld the i I I conviction. We see no reason to fault those findings. 'i I I

6 The appellant tried to convince us that there was no sufficient evidence to prove rape. Having expunged the PF3, he may have thought he could escape criminal responsibility. However, the evidence of both PW2 and PW3 was sufficiently cogent to ground a conviction. It is settled law that penetration, however slight, of the vagina of the victim by the penis of the rapist is sufficient to constitute rape. (See for example: Daniel Nguru and Others v Republic - Criminal Appeal No. 178 of 2004 (unreported); Omari Kijuu v Republic - Criminal Appeal No. 39 of 2005 (unreported); Musa Mohamed v Republic Criminal Appeal No. 216 of 200~ (unreported). Likewise, it has been held by this Court that lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence point to the fact that it was committed (See: Prosper Mnjoera Kisa v Republic - Criminal Appeal No. 73 of 2003 (unreported). In the instant case, even if we were to leave out the said medical evidence, still, as we have already observed, the evidence of PW2 and PW3 was sufficient to prove beyond reasonable doubt, that the appellant committed the offence. 7 About the sentence of life imprisonment, it is said to be harsh and or excessive. However, it is the mandatory sentence for offences of this kind, as provided for under Section 131 (3) of the Penal Code as amended by the SOSPA, Act No. 4 of 1998. Therefore we cannot disturb it. In conclusion, this appeal fails in its entirety. The appellant is to continue serving the sentence of life imprisonment as imposed by the trial court and upheld by the first appellate court. DATED at MWANZA this 13th day of May, 2010. J. H. MSOFFE JUSTICE OF APPEAL M.S.MBAROUK JUSTICE OF APPEAL S. J. BWANA JUSTICE OF APPEAL This is a true copy of the original. c: (J. S. MGA) -,--- <J ~. --• DEPUTY REGISTRAR, ' Jr 8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/328319/source_file/9ba7567834c6c86b/20100513_TZCA_Mwanza.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/salu-sosoma-v-the-republic-rape-tzca-2010>

Prepared on 24 October 2026 · Esheria