

TANZANIA / JUDGMENT

20100224 TZHC Arusha

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TZHCDECIDED
24 February 2010

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MANDIA, J.A.) CRIMINAL APPEAL NO. 236 OF 2007 SAMWELI WILFRED MUSHI APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the decision of the High Court of Tanzania at Moshi) (Munuo, J.) dated the 29 th day of June, 1999 in Criminal Appeal No. 14 of 1999 JUDGMENT OF THE COURT 22nd & 25 th February, 2010 MJASIRI, J.A. This is a second appeal from the judgment of the District Court of Hai District at Hai, where the appellant Samwel Wilfred Mushi was convicted as charged for the offence of rape contrary to sections 130(1) and 131(1) of the Penal Code Cap 16 [RE 2002] and was sentenced to thirty (30) years imprisonment. He was aggrieved by this decision and unsuccessfully appealed to the High Court. Still dissatisfied with the decision of the High Court, the appellant has preferred this appeal to this Court. The appellant appeared in person, unrepresented, whereas the respondent Republic was represented by Mr. Jason Kaishozi, learned Senior State Attorney. The appellant denied the charge. In the memorandum of appeal to this Court the appellant listed 4 grounds of appeal essentially challenging the credibility of the testimony of PW1, PW2, & PW4. He stated that their testimony was unreliable, being members of the same family. The appellant was also of the view that given the totality of the evidence, the prosecution had failed to prove its case beyond reasonable doubt. At the hearing of the appeal, the appellant adopted the four (4) grounds of appeal, filed in Court. Briefly the background to the case is that PW1, Sarah Absalom the victim, who resides in Arusha went to visit her in laws at Maili Sita Village in Moshi on October 9, 1998. Upon arrival, at around 10.45 a.m. her hosts were not home. She was forced to wait outside the house. The appellant approached her and started asking her questions. She moved from the spot where she was sitting, under a 3 mango tree, ten (10) paces from her in laws' house and stood against the wall of the said house. As the appellant continued to bother her she decided to go to the main road. The appellant who was riding a bicycle pursued her, grabbed her shirt and dragged her to a construction site nearby. He threatened her with a knife and raped her twice. Following her ordeal, she proceeded to the main road and waited at the bus stand until 6.30 pm when her mother in law, PW2, arrived from Moshi town. She narrated the incident to her mother in law, who attended to her and gave her medication. Her father in law was not home. On October 11, 1998 two days after the incident PW2 summoned PW3 and asked him whether he was the one who raped PW1. He denied committing the offence. PW2 then called the appellant who admitted seducing PW1 and having sex with her. The appellant did not confess to committing the

offence of rape. PW2 also testified that her husband PW4, then met the appellant on October 12, 1998 in privacy to settle the matter. The appellant even brought money for the settlement but PW4 decided to report the matter to the police. 4 No further action was taken by PW2 until October 12, 1998, after the arrival of PW4, when the incident was reported to the police. PW4 returned home on October 11, 1998 at around 7.00 p.m. It was not until October 13, 1998 that PW1 was taken to Mawenzi hospital for examination after obtaining a PF 3 form from the police. On his part the learned State Attorney did not support the conviction. He submitted that there were various factors which did not warrant the conviction of the appellant. First of all the PF 3 report was admitted as exhibit contrary to the requirements under the law and should therefore be expunged from the record. He also submitted that the conviction of the appellant was based on the testimony of PW1 PW2, & PW4. There were contradictions and inconsistencies in the testimonies of the said witnesses. He submitted further that the conduct of PW1, PW2 and PW4 failed to demonstrate the fact that a serious and abominable crime had been committed. He also stated that there was no evidence to the effect that the appellant confessed committing the offence. 5 According to Mr. Kaishozi, the appellant was consistent that, though he had sex with PW1 it was consensual, and with the full agreement of PWL This was also stated in the testimony of PW2 and PW3. However the appellant admitted owing PW1 Shs. 500. Mr. Kaishozi stated that the case was not properly investigated to determine when and where the appellant was arrested. The appellant's defence of alibi, though not watertight raised some doubts. The crucial issue in this appeal is whether or not the offence of - rape was committed and whether or not it was the appellant who committed the offence. Looking at the evidence of PW1, PW2 & PW4 it is difficult to establish that the offence of rape was committed. Their evidence was inconsistent and contradictory. The major complaint by the appellant was the credibility of PW1, PW2 & PW4 since they were related. The fact that the witnesses are related to each other is not enough to discard their evidence. It is trite law that no particular number of witnesses is required for the proof of any fact. What is 6 important is their credibility. See *Yohanis Msigwa v Republic*

[1990] TLR 148. Indeed section 143 of the Evidence Act, 1967 provides as follows: "(143) subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for proof of any fact." According to Black's Law Dictionary (Abridged) Sixth Edition rape is defined as follows: "Unlawful sexual intercourse with a female without her consent. The unlawful carnal knowledge of a woman by a man forcibly and against her will. " In Smith and Hogan on Criminal Law (9th Edition), it is stated thus:- " The essence of rape is the absence of consent It is for the prosecution to prove that the victim did not consent" 7 In a second appeal the Court may interfere with findings of fact by the Courts below where it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. See *Ambrose Severin Lekule @ China v Republic Criminal Appeal No. 145 of 2007* (unreported) and *Daniel Nguru v Republic, Criminal Appeal No 178 of 2004* (unreported). The central issue therefore is whether or not there is a basis for us to interfere with the concurrent findings of facts by the Courts below that the evidence of PW1, PW2 and PW4 established the appellant's guilt beyond reasonable doubt. Our own evaluation of the evidence of these

key witnesses has led us to the conclusion that they did not give the trial Court a truthful account of what had transpired. Failure by PW1 to seek immediate help, the conduct of her mother in law in not taking any action and adopting a cavalier attitude for 4 days, and the in action by the father in law renders their evidence highly suspect and unreliable. 8 In relation to the PF3 report we are inclined to agree with Mr. Kaishozi that the PF3 report cannot be relied upon and we would therefore expunge it from the record. Under Section 240 (3) of the Criminal procedure Act, 1985 [RE: 2002] the trial Court was duty bound to inform the appellant of his right to require the person who made the report to be summoned for cross examination. This was not done thereby offending the relevant mandatory provisions of the subsection. See *Kashana Buyoka v R*, Criminal Appeal no. 176 of 2004 and *Sultan s/ o Mohamed v R*, Criminal Appeal No. 176 of 2003 (unreported). In criminal cases, the prosecution is required to prove the case against the accused person beyond reasonable doubt. Given the evidence on record we have no doubt in our minds that the prosecution has failed to meet the standard required under the law. It was important for the prosecution to produce clear evidence to prove that PW1 was raped. Having said the foregoing we are satisfied that there is no sufficient evidence to warrant the appellant's conviction. We 9 therefore allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment. The appellant is to be released forthwith unless otherwise lawfully held. It is so ordered DATED at ARUSHA this 24th day of February, 2010. E.MK RUTAKANGWA JUSTICE OF APPEAL S. MJASIRI JUSTICE OF APPEAL W.S MANDIA JUSTICE OF APPEAL I certify that this is a true copy of the original DEP COURTO

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Prepared on 23 October 2026 · Esheria