

TANZANIA / JUDGMENT

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I' r IN THE COURT:OF APPEAL OF TANZANIA ATTABORA (CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI, J.A.) CRIMINAL APPEAL NO. 459 AND 494 OF 2002 SHIMIRIMANA ISAYA} SABIMANA FOI(AS } APPELLANTS
VERSUS THE REPUBLIC RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Tabora) (Kihio, J.) dated the 11 th day of July, 2007 in Criminal Appeal No. 32 and 33 of 2002 JUDGMENT OF THE COURT 101I & 15 June, 2010
MBAROUK, J.A.: In the District Court of Kibondo at Kibondo, the appellants Shimirimana s/o Isaya and Sabimana s/o Fokas, were charged and convicted of the offence of rape contrary to sections 5 and 6 of the Sexual Offences Special Provisions Act, No. 4 of 1998. They were sentenced to forty (40) years imprisonment with twelve (12) strokes of cane each. Aggrieved, the appellants unsuccessfully appealed to the High Court at Tabora (Kihio, 3.). Undaunted, the appellants have filed this second appeal. Briefly stated, the facts giving rise to the case at the trial which led to the conviction of the appellants are as follows: on 26.9.1999 at 8.00 p.m. while at home with her husband, Buchumi Stephano (PW1) heard cries from outside that led PW1's husband to go and see what transpired. However, he did not return early, hence leaving PW1 in the house. Thereafter, two people came to the house and inquired where PW1's husband has gone. PW1 named the two people as the appellants and identified them by the help of the bright hurricane lamp. The appellants forced PW1 inside the house to check whether her husband was in there. Having found that PW1's husband was not there, the appellants got hold of her and fell her on the bed. The 1st appellant managed to pull off PW1's under pant while the 2nd appellant held her firmly. Thereafter, the 1 appellant undressed himself and inserted his penis into PW1's vagina while still I: held by the 2nd appellant. When her husband returned, she gave him the whole story and then went to the hospital next morning for medical examination with a PF3 which was issued to her (PW1) at Nduta Police Station. In their defence at the trial court, both the appellants naturally denied to have committed the offence of rape against PW1. In this appeal, the appellants were represented by Mr. Mgaya K. Mtaki, learned advocate, whereas the respondent/ Republic was represented by Mr. Edgar Luoga, the learned Senior State Attorney. The appellants filed a joint memorandum of appeal containing two grounds of appeal, namely:

- 1) That the learned Judge erred in law and in fact in holding that there was sufficient evidence to justify the conviction of the appellants with the offence of rape. 91

- 2) That the learned Judge erred in law in holding that the evidence of PW1 and PW2 was all credible evidence against the Appellants. At the hearing, Mr. Mtaki added another ground of appeal in addition to the two found in the memorandum of appeal. The additional ground of appeal is to the effect that the appellants were wrongly charged under sections 5 and 6 of the Sexual Offences (Special Provisions) Act instead of sections 130 and 131 of the Penal - Code. Submitting on the additional ground, Mr. Mtaki stated that the right provisions of the law to be invoked to charge the appellants were sections 130 and 131 of the Penal Code. In the event of being wrongly charged, Mr. Mtaki was of the view that the appellants' conviction was highly misconceived leading the whole trial to be a nullity. Mr. Mtaki further argued that, even the sentence imposed to the appellants was illegal, because under the provisions to which the appellants were charged with, no such sentence exists. He said, instead of forty (40) years imprisonment, the correct sentence should have been thirty (30) years. On his part, Mr. Luoga who supported the conviction and sentence imposed upon the appellants reacted to what has been submitted by Mr. Mtaki on the additional ground as follows. He contended that sections 5 and 6 of the Sexual Offences Special Provisions Act are "in pari materia" with sections 130 and 131 of the Penal Code. He added that, the substance in those two provisions are the same. After all, Mr. Luoga said, the appellants were not prejudiced, and no miscarriage of justice was occasioned. He further elaborated by submitting that the charge was rape and the testimonies of all the prosecution witnesses were centred on the issue of rape. For that reason, Mr. Luoga was of the view that, the appellants knew the offence they were charged with, and they defended themselves on the same basis. In his view the irregularity is curable under section 388 of the Criminal Procedure Act (Cap. 20 R.E. 2002). As on the issue of sentence, Mr. Luoga agreed that, the sentence of forty (40) years imposed to the appellants by the trial court and confirmed by the High Court was illegal. He simply urged the Court to impose a proper sentence. We, on our part, fully agree with Mr. Luoga that sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998 are "in pari materia" with sections. 130 and 131 of the Penal Code. All the contents in those two sections are the same. However, it is true that the appellants ought to have been charged under sections. 130 and 131 of the Penal Code, [Cap. 16 R.E. 2002] which incorporated all the necessary amendments therein. Furthermore, section 135 (a) (ii) of the Criminal Procedure Act prescribes on the mode in which offences are to be charged. It reads as follows: no 5.135 "The following provisions of this section shall apply to all charges and informations • and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section -
- (a) (i) (ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;" Even though sections 130 and 131 of the Penal Code were not specifically cited in the charge sheet, we are of the view that, the appellants were not prejudiced by the charge as it appears, because the

offence of rape was specifically mentioned and its essential 7 elements stated. Furthermore, all the prosecution witnesses directed their testimonies on the issue of rape. Not only that, even the appellants directed their defence on the issue of rape. Hence, we are increasingly of the opinion that no miscarriage of justice occasioned to the appellants. For those reasons, we agree with Mr. Luoga that such an irregularity is curable under section 388 of the Criminal Procedure Act. In the event, we find no merit in the additional ground. Then, Mr. Mtaki jointly argued on the two grounds found in the memorandum of appeal. He submitted that, the prosecution case mainly relied on the evidence of PW1 and PW2 to prove the offence charged against the appellants. However, he said it is only PW1 who testified on the evidence of rape. Mr. Mtaki added that PW1's testimony shows that it was only the 1 Appellant who committed rape. 8 Apart from that, Mr. Mtaki submitted that, the record shows after PW1 was raped, she became scared as she was alone. Thereafter, she went to sleep at Block C. 6 at her sister in law. But, he said, PW1's sister was not called to testify to bear out PW1 on this. Mr. Mtaki argued that, even Haboniamana Roza (PW2) failed to cry for help and has not stated anywhere in her testimony that she saw the appellants committing rape to PW1. He further submitted that, the prosecution failed to submit medical evidence from a doctor to prove that PW1 had not had any sexual intercourse before she was raped. Mr. Mtaki was of the view that, such medical evidence would have corroborated the evidence of PW1 and PW2 which he believed was shaky evidence. In support of his argument, he cited to us the decision of this Court in *Alfeo Valentino v. R.*, Criminal Appeal No. 92 of 2006 (unreported). For that reason, Mr. Mtaki urged us to find the evidence of PW1 and PW2 not credible and that it raises doubt whether the appellants committed rape as charged. He then prayed for the appeal to be allowed. 9 On his part, Mr. Luoga submitted that PW1 and PW2 gave enough evidence to prove that the appellants committed the offence of rape. He said, both PW1 and PW2 knew the appellants before, as they were living in the same refugee camp and in the same block for a long time. In addition to that, he said, PW1 testified that, there was bright light from a hurricane lamp, which enabled her to identify the appellants. Mr. Luoga added that even PW2 stated that she saw the 1st appellant raping PW1 while the 2nd appellant was holding PW1's hands. He said that PW1 and PW2 tendered enough evidence to prove that the appellants raped PW1. For that reason, he urged us to find both PW1 and PW2 as credible witnesses. In support of his argument he cited to us the case of *Richard Matangule and Ella Richard v. R.* [1992] TLR 5 at p. 9. In his response to the issue of not submitting a medical report, Mr. Luoga was of the view that, the evidence of PW1 as an adult victim was enough to prove that rape was committed. He referred to us to the decision of this Court in *Alfeo Valentino (supra)* at p. 21. 10 We, on our part, are of the considered opinion that the evidence adduced by PW1 and PW2 sufficiently proved that the appellants committed the offence charged against them. Firstly, the record clearly shows that both PW1 and PW2 knew the appellants for a long time as they were living in the same refugee camp in the same block. Also, as PW1 testified, the appellants forcefully entered her house at night time when there was bright hurricane lamp, hence she identified them. Even PW2 said she saw the appellants committing rape. Secondly, PW1 testified that she was raped when she said, "Accused one managed to pull off my under pant while accused two

was holding me strongly. Accused one then undressed himself and raped me by deeping his penis into my vagina. I was still being held by accused two." (Emphasis added). This piece of evidence from PW1 surely proves that both appellants involved themselves in committing rape to PW1. As 11 pointed out in the decision of this Court in Alfeo Valentino (supra) the proof of rape comes from the victim herself. In the instant case PW1 who was an adult victim of rape clearly testified on how she was raped by the appellants. She was elaborative and clearly stated on the ordeal as the law requires. See, for instance the decision of this Court in Selemani Makumba v. Republic, Criminal Appeal No. 94 of 1999 (unreported) where it was stated: "True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration." Hence, we are of the opinion that her testimony is enough evidence to prove the ordeal she encountered. For that same reason, we are of the opinion that even the medical evidence claimed by. Mr. Mtaki is of less value. Furthermore, we have noted that when PW1 finished her testimony, the appellants when given their right to cross examine her, failed to do so. Being a principal witness and a victim of rape depended by the prosecution, we thought that, the appellants would 12 have taken that opportunity to cross examine PW1. Failure of that, gave credence to the evidence of PW1. For that reason, we find the two combined grounds of appeal are without merit. In the event, and for the reasons stated herein above, we dismiss the appeal against convictions. As for the issue of sentence, we invoke section 4(3) of the Appellate Jurisdiction Act and reduce the sentence of forty (40) years imprisonment to that of thirty (30) years imprisonment to each appellant as the relevant provisions of the law direct. The punishment of strokes of the cane remains undisturbed. It is so ordered. DATED at TABORA this 12th day of June, 2010. E. K. RUTAKANGWA JUSTICE OF APPEAL 13 p M. S. MBAROUK JUSTICE OF APPEAL S. A. MASSATI JUSTICE OF APPEAL I certify that this is a true copy of the original. 14

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