

TANZANIA / JUDGMENT

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'f IN THE COURT OF APPEAL OF TANZANIA ATIRINGA (CORAM: RUTAKANGWA, J.A.,
KIMARO, I.A.,And MANDIA .J.A) CRIMINAL APPEAL NO. 32 OF 2009 STAN LEY WILILO
..... APPELLANT VERSUS THE REPUBLIC
..... RES PON DENT (Appeal from the decision of the
High Court of Tanzania at Iringa) (Mkuye, I.) dated 17th December, 2008 in (DC) Criminal
Appeal No. 37 of 2007 JUDGMENT OF THE COURT 26th August & 1st September, 2010
KIMARO, J.A.: The appellant was prosecuted for the offence of rape contrary to 'section 131
of the Penal Code, [CAP 16 R.E. 2002]. He was convicted and sentenced to thirty years
imprisonment. He was also ordered to pay a compensation of Tshs. 300,000/= to the
complainant. Aggrieved by the conviction and the sentence, he unsuccessfully appealed to
the High Court I of Tanzania. Still dissatisfied with the conviction and sentence, the
appellant has filed this second appeal protesting his 'innocence. With legal services of I I I'
Mr. Basil Mkwata, learned advocate, he has five grounds of appeal as i follows: 1 I
1. That the trial Court the 1st 9ppellate Court erred in i' I law when it relied on the evidence of
PW1 and I PW2 to convict the appellant w{th the offence of rape while the same was
incredible and inconsiltent to support the charge. ; I st
 2. That the trial Court and the 1 appellate Court I i misdirected itself in law ! and fact when
after 1 , I admitting the appellant's so called caution I statement (Exhibit P2) rkJected the
appellant's defence.
 3. That the trial Court and the appellate Court r;rred in I law in admitting the Medi~al
Examination I Report (Exhibit Pl} without regard to the mandatory Provisions of section
240(3) of the Ctiminal i Procedure Act [CAP 20.f?..£2002] and 'without scrutinizing and
analyzing itJ vivid deficienci~s . ! I 2 I I
 4. That the appellate Court's holding that PW1. had gone to PW2 at night while naked and
crying is not I supported by evidence on record thus extraneous.
 5. That the trial Court and the a)pellate Court erred in law when it condemned the kppellant to
pay Tsh. 300,000/= without calling ulon the appellant to I show cause why such an order
should not be made. Before we determine the grounds of appeal filed by the appellant, we

consider it important at this point, Ito first give a summary of the evidence which supported the prosecution case in the trial Court. The testimony of the complainant, Stella Malekela (PW1) was that on the night of 25/11/2006 while she was asleep, she felt something like a rat touching her arm. She lighted her lamp and saw a person standing by. Then a conversation took place between her and that person. What the complainant was interested to know was whether the person was a man and how he gained access to the house. In response to the questions, the appellant identified himself as a man and he said that he gained access to the house through the door. Stella (PW1) checked the door and found it open and the padlock was broken. She wanted to go outside but she could not because her neck was tied. Because of this constraint she even failed to raise an alarm. It was then that a struggle ensued between the two and in that process the appellant raped the complainant. During the same night after the appellant had left, PW2 went to Tumwihukage Mlowe (PW2) almost naked to report the incident. PW2 was the ten cell leader of PW1. It was further testimony of the complainant that PW2 provided her clothing and she spent the rest of the night at her home until the next day when steps were taken to have the matter reported to the police. When the appellant was arrested in connection with the commission of the offence, he wrote a caution statement to the police admitting that he had sexual intercourse with the complainant (PW1) on the alleged night but he maintained that it was a consensual sex. He said prior to that, he met the complainant at a "pombe" shop and after buying for the complainant a local brew and gave her Tshs. 200/=, for buying meat, they agreed to meet later at the complainant's house to satisfy their sexual desires. The appellant admitted further that after he left the "pombe" shop he went to the complainant's house. He found the complainant who was the first to leave the "pombe" shop, present at her house. She cooked food and after they had eaten the food they slept, had sexual intercourse as they had agreed, and the appellant spent the rest of the night there. The appellant promised to pay the complainant Tshs 3000/= later on. He left in the morning and went to his residence but he was arrested later on an allegation of committing rape to the complainant. The appellant did not change his defence at any given time in the trial. The trial court convicted the appellant because it believed the evidence of the complainant. It also relied on the PF form which the complainant tendered and was admitted in evidence as exhibit P1. What is shown in exhibit P1 is that the complainant was examined and found with 11 bruises in the vulva, sperms and blood. The appellant's conviction to the High Court was sustained basically on the evidence of the complainant PW1, that she ran to the residence of PW2 at night while she was naked and crying, and what she earlier on told the court on how the appellant gained access to the house of the complainant and how the sexual intercourse took place. At the hearing of the appeal, Mr. Mkata, learned advocate, appeared for the appellant while Mr. Michael Luena, learned Senior State Attorney, appeared for the respondent/Republic. The learned advocate for the appellant opted to argue in support of the grounds of appeal seriatim. Mr. Luena, on his part supported the appeal and responded first to ground 3, then 1, 2 and 4 jointly, and lastly ground 5. In support of the first ground of appeal the learned advocate for the appellant said

the evidence of PW1 was not credible because she failed to point out clearly how the appellant gained access to her house. Although PW1 said it was a padlock which was broken, the learned advocate contended, this evidence was not supported by PW2 who said she visited the house of the complainant on the next morning and found out that it was the inside shutter which was broken. On whether the complainant moved to the residence of PW2 naked or not, the learned advocate for the appellant said PW2 did not say so in her evidence. In the opinion of the 6 learned advocate, this discrepancy in the evidence of the two witnesses tends to support the defence of the appellant that he had a consensual sex with PW1. He prayed that this ground of appeal be allowed. I, As he made reference to the case of Idd Shaban V R Criminal Appeal No. 111 of 2006 CAT (unreported) the learned advocate supported his second ground of appeal, faulting the trial and first appellate court for failure to consider the defence evidence on the factual situation that took place between her and the complainant. He said the appellant's defence 'was brought in evidence in support of the prosecution case and it ought to have been considered in favour of the appellant who maintained that the sexual intercourse between him and the complainant was consensual to. On ground 3, the learned advocate for the appellant submitted that the appellant was entitled as of right, under section 240(3) of the Criminal Procedure Act, to have the doctor called as a witness for cross examination on the PF3 form which was produced in court as exhibit PL He relied on the case of Jackson Mlonga V R Criminal Appeal No. 200 of 2007 CAT (unreported). 7 The submission of the learned advocate for the appellant in support of ground 4 was a reiteration of what he said in respect of ground one. He could as well have combined the two grounds instead of separating them. In support of the ground of appeal on the compensation order, the learned advocate said the appellant was entitled to be heard before the court made the order for compensation of Tshs 300, 000/=. He prayed that the appeal be allowed, the conviction be quashed and the sentence and the compensation order be set aside. As already stated above, the respondent supported the appeal. The response by the learned Senior State Attorney in respect of ground 3 of the appeal was that there was no compliance with section 240(3) of the Criminal Procedure Act. He doubted the authenticity of exhibit PL because it does not show the hospital where PW1 was attended and the doctor who attended her. It does also not bear the stamp of the hospital. We are aware that this is a second appeal where this Court can only reverse concurrent findings of fact made by the courts below if those findings are unreasonable, perverse, were arrived at as a result of misapprehension of evidence or in violation of a principle of the law. On the PF3 form, we must outrightly point out that this ground of appeal has merit. It is not shown anywhere in the record of appeal that the appellant was informed of his right to cross-examine the doctor who examined the complainant and then fill the PF3 form. Section 240(3) of the Criminal Procedure Act makes it clear that the trial court has the duty to inform the accused person that he has a right to have the doctor called for cross-examination. In this appeal the appellant was not informed of such right. There was a violation of the principle of the law. The list of authorities on this point is a long one, and the case of Idd Shaban @ Amasi (supra) cited to us is among them. Moreover, the evidential value of exhibit PL was wanting because of doubts in its authenticity. The learned Senior State Attorney pointed out

correctly, that it does not show the name of the hospital where the complainant was referred to for examination, it has no stamp of any hospital and the signature of the doctor who examined her is doubtful. Given the defects in exhibit P1, it could not be safely relied upon as forming the basis of the conviction of the appellant. It is hereby expunged from the record. 9 • ... Mr. Luena submitted in respect of grounds 1, 2 and 4 that there was no dispute that the appellant and the complainant did have sex. The only issue in this appeal is whether or not the sexual intercourse between the appellant and the complainant was consented to. His observation was that this issue was also raised in the High Court. In his opinion the evidence to support that the sexual act between the appellant and the complainant was voluntary is found in the caution statement of the appellant which was tendered and admitted in court as exhibit P2. Both the learned Senior State Attorney and the learned advocate for the appellant submitted, correctly, that the only issue in this appeal is whether there was consensual sexual intercourse between the complainant and the appellant. On our part we have no difficulty in determining this point. The caution statement of the appellant, exhibit P2, was tendered in evidence in the trial court by No. E. 8812 D/CPL Jonathan (PW3). By tendering exhibit P2 it meant that the prosecution was relying on that evidence to support its case. But what does exhibit P2 say? In that exhibit, the appellant did not dispute having sex with the complainant. Throughout he stood to his word, I judge, that the sexual act was consented to by the complainant. If this was the position how could the two courts below say that the prosecution proved that the offence of rape was committed? In the case of *Iddi, Shaban @ Aman* (supra) the appellant was charged with the offence of rape, contrary to section 130(1)(3)(a) and 131, of the Penal Code. He was convicted by the trial court and the first appeal court; however, I sustained the conviction. In convicting the appellant the trial court had relied also on a caution statement (exhibit P4) made by the appellant to the police wherein he said the sexual act was consented to by the complainant. The Court, in allowing the appeal by the appellant said: "If the prosecution sincerely believed that the appellant raped PW1 on 21 April 2001 as alleged in the charge sheet, then it ought not to have..."

1. I introduced evidence to disprove this allegation. The appellant never disowned exhibit P4 neither at the time it was being admitted in evidence nor his defence. Exhibit P4 being part of the prosecution case, binds the prosecution and renders the charge against the appellant preposterous. "Even at the preliminary hearing, among the matters which were agreed upon by the prosecution and the defence were that on 25/11/2006 at about 29.00 hrs the accused and the complainant were at Meli Local brew shop. The accused brought the complainant two litres of brew and gave her Tshs 200/= for meat. These facts tally with the appellant's caution statement. Another fact which discredits the complainant is the conversation that she said took place before the appellant raped her. Under normal circumstances a person intending to commit a crime which he would not like to be detected would not take such a long period before committing the offence. Even the evidence of PW1 is in variance with that of PW2 on how the appellant gained access into the house of the complainant. The complainant said it was the padlock which was broken but

PW2 said it was the inner shutter which was broken. 12 I I ' i 11 i On the whole we are satisfied ~hat the incom;;istence in the I, I prosecution evidence entitled the appellant to an acquittal.I We thus allow 1 I the appeal, quash the conviction and set a~ide the sentence. I I I I . I' I I I I I In respect of the ground of appeal pn " the compensation order, the I I' I I I learned Senior State Attorney submitted that compensation for sexual I I I I offences falls under section 131 of the Penal I Code as well, as section 348A i of the Criminal Procedure Act , [CAP20 R£.2002] . Under the said section ,, I I , ' I it is the court which has the discretidn to determine the amount of I . ' I I I, I compensation which an accused person should pay to the victim of the I i I crime. In his considered opinion the a(:cused , person is given a hearing I .I' I I 1 when he is called upon to advance mitig ating factors before a sentence is ; I I imposed on him. i I I 11 I II I I I For this ground of appeal we neJd not waste time. We agree with I i I I the learned Senior State Attorney that it!' is the Court whi ch has the power 1 I, I to determine the amount of compensation which the acc~sed should pay to I ' ' i the victim of the offence. Since the appeal has been allowed, the order of I ' I I I I I 13 I ,Ir i I I I, I I: ,I 11 I i I I : compensation of Tshs 300,000/= to the c6mplainant is als? set aside. It is \ I I accordingly ordered. t' , I II I I . · I I . I I \ ! I I Consequently, we order the immediate release of t~e appellant from 11 I I I prison, unless he is held for any other lawful purpose. 1 : I I ~ i I ! I I th DATED at IRINGA this 30 day of!!August, 2010. I I, I I ' E.M.K. RUTAKANGWA I JUSTICE OF APPEAL I ' I ~ I I I I I I I I I , I I I ! I I I I I I I ! I I I I i I I I I I I I I I I I I I I I I I I I I j

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