

TANZANIA / JUDGMENT

20180720 TZHC Mbeya2

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IN THE HIGH COURT OF TANZANIA AT MBEYA CRIMINAL APPEAL NO. 126/2017 (A rising from the District Court of Mbarali at Rujewa, Original Case No. 23812016) IT Y.AIG.A s / o LUTAMLA..... APPELLANT VERSUS THE REPUB!..IC RESPONDE1IT'

JUDGMENT

Date of last Order: 2710612018 Date of Judgment: 2010712018 NGWALA, J: The Appellant was charged and convicted of Rape Contrary to Section 130 (2) (a) and 131A (1) of the Penal Code, Cap. 16 R. E. 2002 (The Penal Code). He was sentenced to thirty (30) years imprisonment and compensation to the victim to the tune of Tshs. 1,000,000/=. Aggrieved with that decision he has preferred this appeal. His Petition of Appeal contains eight (8) grounds in a narrative form. Those grounds of Appeal have been conveniently summarized as follows: - (1)That he was convicted without proof of rape. Page 1 of 7

(2) That he was convicted on insufficient and contradictory evidence.) (3)That the Court convicted him relying on a cautioned statement which was recorded contrary to the law. (4)That the defence evidence was not considered. During the hearing, Miss Makombe, learned State Attorney represented the Republic. The appellant was unrepresented. The appellant requested the court to adopt his written grounds of appeal to form part of his submission. Miss Makombe submitted in support of the appeal that the victim (PW1) proved penetration. Her evidence was corroborated. In respect of the second ground, she averred that the trial court's judgment was never based on the evidence of PW2 but on the victim's evidence (PW1). The testimony of PW2 was not hearsay evidence. The learned state attorney insisted that by virtue of the provisions of Section 130 (4) (b) of the Penal Code resistances such as physical injury to the body is not necessary to prove that sexual intercourse took place without consent. She added that the evidence of PW4 (the Doctor) corroborated that of the victim, that because after medical examination, as shown in the PF3 the victim was twelve (12) weeks pregnant and her hymen was perforated. On the alleged contradiction between the evidence of PW1 and PW3, Miss Makombe submitted that there is no contradiction. The Page 2of7 procedures of recording the cautioned statement as required by Section 54 (1) of the Criminal Procedure Act, Cap.20 R. E. 2002 was followed by the Police Officer. Miss Makombe argued further that the appellant did not object to the admission of

the cautioned statement. She fortified this point by citing the case of Robinson Mwanjisi and (3) others v. Republic [2003] T. L. R. 218 at page 226 where the Court held:- "Whenever it is intended to introduce any documents in evidence it should first be cleared for admission and be actually admitted before it can be read out." Miss Makombe further submitted that the defence evidence was considered as shown in the Judgment of the trial court. The case was proved beyond all reasonable doubt. The Republic complied with the duty to establish that there was penetration as held in the case of Selemani Makumba v. Republic [2006] T.L. R. 384. In rejoinder the appellant simply insisted the court to adopt and consider the grounds of appeal as his submission. It is rightly true as argued by the learned state attorney that Rape is proved by penetration. Section 130 (4) (9) of the Penal Code, Cap. 16 R. E. 2002 provides in clear terms that:- "(4) For purposes of proving the offence of Rape:- Penetration however slight is sufficient to constitute sexual intercourse necessary to the offence". Page 3 of 7 It is on the evidence on record and proceedings that, PW1 the victim stated that Nyaga did sexual intercourse with her by force. She also stated that another one by the name of Chambi did sexual intercourse with her by force. The said Chambi left with her from Mbarali District and went with her to Mahenge in Morogoro; where Chambi kept the victim at his home as his wife. This fact is also revealed in the Judgment of the trial court. The medical doctor, PW4 Hance Bernard Mwaipasi who examined the victim, PW1 found that her hymen was perforated. PW1 was twelve weeks pregnant. This was recorded in the PF3, exhibit on which the doctor had commented that the victim had been involving in sexual acts and that she was HIV positive. It is the argument of the appellant that he was not among the culprits who raped the victim PW1 as his blood was not taken for medical examination to see if he had impregnated the victim and was also HIV positive. On this Miss Makombe contended that the case against the appellant had been proved because penetration had been proved as elaborated in the case of Nebson Tete V. Republic, Criminal Appeal No. 419 of 2013, where the Court of Appeal defined sexual intercourse to mean penetration of male organ into the female organ. Page 4 of 7 But the crucial question in this appeal, in my considered view is whether the prosecution side had proved its case beyond reasonable doubt and to the standard required in criminal law. The appellant is resisting both the conviction and sentence on the ground that he was convicted as insufficient and contradictory evidence. Upon perusal of the proceeding in record, especially the testimonies of PW 1 the victim, PW2 Fadhili Mboje the father of the victim and PW3 Lata Mull, it is quite clear that the appellant was arrested after the victim was alleged to have disappeared from the village on 15/09/2016. . According to PW3 they had arranged to have the accused person marry the victim, but the appellant/accused feared his brother so he gave the victim to. Chambi. This Chambi was found by PW2 Fadhili Mboje, the father of the victim living with his daughter at Morogoro on 12/10/2016. Chambi was arrested but he was not charged with the offence of rape. It is not known and the record is silent as to way Chambi was not charged after being found that he had eloped the victim and was keeping PW1 a child as his wife. In my considered view, PW3 was an accomplice who had assisted the appellant and Chambi to commit the offence. His evidence should have been considered with caution. More so, as aforesaid Chambi too should have been charged and prosecuted.

The Page 5 of 7 I prosecution side should have further investigated on who exactly had made the victim pregnant and or laid a proper charge on the facts and circumstances of the case. The evidence of the PW3, the accomplice upon which the conviction was based ought to have been corroborated. This is a matter of practice, because an accomplice cannot support a conviction. The evidence of an accomplice requires corroboration. This position has been elaborated as the cases of Ally Salehe Msutu vs. Republic

[1980] T. L. R. 1, Paschal Kitogwa vs. Republic [1994] T. L. R.

65. That is if a person says he/she was at the event but did not participate in the commission of the crime, such statement cannot incriminate his fellow - accused person. (See also - Amani Mohamed China and three others vs. Republic, Criminal Appeal No. 230/2004 CAT, Dares Salaam. (Unreported), quoted in Ally Salehe Msuta's case. It is for the said reason that I am inclined to agree with the grounds of appeal by the appellant. Accordingly, this appeal has merit. The conviction and sentence is quashed. The appeal has merit. It is allowed. The accused person should be released from prison forthwith unless lawfully held for another cause. A.F. Ngwala Judge 20/07/2018 Page 6of7 I Date: 20/07/2018 Coram: A. F. Ngwala, J. Appellant: Present For the Republic: Miss Prostita Paul (State Attorney) B/C: Sarah A. Mungure Court: Judgment delivered in court in the presence of the appellant and State Attorney. Court: Right of Appeal to the Court of Appeal of Tanzania explained. \j RT .. (L ..._. \ *pAe i f w (- TW A.F. Ngwala :t I Judge 20/07/2018 * Page 7 of 7

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