

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 14 OF 2002

BETWEEN

ABDUL ATHUMANI APPELLANT

AND

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High
Court of Tanzania at Tanga)

(Mkwawa, J.)

dated the 17th September, 2001

in

Criminal Appeal No. 51 of 2000

J U D G M E N T

RAMADHANI, J.A.:

The appellant was convicted of raping the complainant, Zuhura (PW1), who was claimed to be a youth below the age of ten years, and was sentenced to life imprisonment by the District Court of Lushoto. His appeal to the High Court of Tanzania was dismissed by MKWAWA, J. This is his second appeal supported by a memorandum of appeal containing seven grounds.

The Resident Magistrate was satisfied with the prosecution evidence that the appellant was at one time married to one Daula, the elder sister of PW1 and that they had one daughter, Jasmin, who was residing with her maternal grandfather, Salehe Rashidi (PW2). On the fateful day the appellant went to the house of PW2 to see his daughter. After normal salutations, PW2 left the appellant at home and went away to attend to his business.

The appellant pretended to send PW1 to fetch him some lemons. As PW1 left the appellant followed her, took her to a bush and raped her. As PW1 raised an alarm some people saw what was going on and word reached PW2 who rushed to the scene in the company of one Yusuf Tengeza (PW4). They found the appellant with his trousers down, holding the hand of PW1, who was crying and was without her pants.

The appellant was taken to the Police Station where he was found to have his pants in his trousers pocket. PW1 was taken to a hospital where an examination disclosed that her hymen was ruptured and that she had some spermatozoa in her private parts.

The essence of the appellant's appeal boiled down to three grounds: One, the lower courts erred to believe the evidence of PW1, a girl of tender age. Two, PW2 could not corroborate the evidence of PW1 because of the filial relationship and so had an interest to serve. Three, it was not proved that PW1 was under the age of ten years.

For the respondent/Republic was Mrs. Stephania Ntilatwa, learned State Attorney. She pointed out that in the High Court the appellant in his memorandum of appeal conceded that he raped PW1 but contended that he was intoxicated at the time of committing the offence. The learned State Attorney went on to say that the learned judge dealt only with that defence.

We asked Mrs. Ntilatwa what was the legal effect of that acceptance of conviction on the part of the appellant in the High Court. She said that she was unable to do any research

due to lack of literature. It is our considered opinion that the appellant is precluded from challenging his conviction at this stage. We say so because, as Mrs. Ntilatwa pointed out, MKWANA, J. disposed the appeal by dismissing the defence of intoxication. So, if the appellant is now challenging conviction then what is before us is not an appeal from the decision of High Court but from the decision of the District Court.

This Court has jurisdiction to entertain appeals only from the High Court and from subordinate courts with extended jurisdiction [section 4 (1) of the Appellate Jurisdiction Act, 1979]. Obviously here there was no extended jurisdiction otherwise there would not have been an appeal to the High Court. So, we do not have jurisdiction to hear an appeal against the conviction by the District Court.

As for intoxication we are at one with the High Court but for a totally different reason. At the trial there was no evidence of intoxication at all. It was only D/Cpl Yussuf (PW3) who said "I could not take the statement of the accused on that day because he looked drunk". That was not evidence that the appellant was intoxicated. There was no such an issue before the District Court and so the court did not make any finding one way or the other. We are a bit surprised that the learned judge took up that issue.

However, as for the conviction by the District Court we invoke our powers of revision in the course of hearing an appeal under section 4 (2) of the Appellate Jurisdiction Act, 1979

(as amended), step into the shoes of the High Court and do what it could have done had the issue of conviction been before it. We are of the decided opinion that there was sufficient evidence to secure the conviction of the appellant. Even if, for the sake of argument, we discard the evidence of PW1 as being a child of tender age, there is the evidence PW2 and PW4 who found the appellant holding the hand of PW1 after she had been ravished. The appellant did not offer any explanation at all as to how he came to be with her in that state. Moreover, he was seen with his trousers pulled down and his underpants were in his trousers' pocket.

It is abundantly certain that the inculpatory facts of that circumstantial evidence are incompatible with the innocence of the appellant and are incapable of explanation upon any other reasonable hypothesis than that of guilt (Simon s/o Musoke v. R [1958] E.A. 715). It could only have been the appellant who raped PW1.

We agree with the appellant that there was no proof that PW1 was under the age of ten years. The age of the victim of rape is important in sentencing. Under section 131 (3) of the Penal Code, as amended by the Sexual Offences Special Provisions Act, 1998 (Act No. 4 of 1998), if the victim is under the age of ten years, the sentence is life imprisonment. If the victim is not under the age of ten, section 131 (1) provides for life imprisonment or imprisonment for a period not less than thirty years with corporal punishment and an order to compensate the victim.

So, we set aside the sentence of life imprisonment and substitute therefore a sentence of imprisonment for thirty years. The appellant should also suffer corporal punishment of twelve strokes of the cane and should pay a compensation of one hundred thousand shillings (shs. 100,000/=) to the victim PW1.

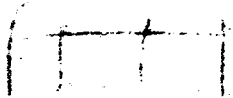
DATED in TANGA this 22nd day of November, 2002.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(F.L.K. WAMBALI)
DEPUTY REGISTRAR