THE COURT OF APPEAL OF TANZANIA

AT MTWARA
(CORAM: RAMADHANI, Ca; MUNUO, J.A; And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 187 OF 2005

BETWEEN

ARABI ABDU HASSAN ... APPELLANT

AND

REPUBLIC ... RESPONDENT

(An Appeal from the Decision of the High Court of Tanzania, at Mtwara)
(Lukelelwa, J.)
dated the 12th day of September, 2005
in
Civil Appeal No. 99 of 2004

JUDGMENT OF THE COURT

13 & **20 November, 2009**

RAMADHANI, C. J.:

The appellant , Arabi Abdu Hassani, was convicted of raping ZJL (PW 1) on 29/01/2003 at 0200 hours c/ss 130 and 131 of the Penal Code as amended by ss 5 (1) (c) and 6 (1) of the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was jailed for thirty years.

PW 1 told the trial court that on that day and time she woke up finding the appellant, her first cousin, raping her. She took a hoe and wounded the appellant on the head while he was still on her chest. The appellant then withdrew his member and went out holding his shirt and jacket. PW 1 went to the Police where she was given PF 3 and went to a hospital.

Hamisi Ali (PW 3) was woken up from his sleep when his bedroom door was smashed and saw the appellant bleeding from a cut wound on the head while PW 1 complained that the appellant had raped her. PW 3 took no action but resumed his sleep.

PW 4, D/Cpl Juma, investigated the case and was told of the rape incident by PW 1. He gave her PF 3 which he tendered in court as Exh. A. He claimed to have arrested the appellant but when cross-examined by the appellant, he said that the appellant was taken to the police after being arrested by villagers. The appellant told him that PW 1 owed the appellant shs. 2,000/= and that the appellant was wounded by PW 1 when demanding his refund.

The appellant, on the other hand, claimed that on 8/01/2003, and not 29/01/2003, he was selling meat when PW 1 took some meat worth shs. 200/= on credit and also borrowed shs. 1,800/= for buying a pair of khanga. After that PW 1 became inebriated, quarreled with a certain young man and

consequently fell down sustaining some bruises and swellings. When she stood up she picked a bottle and hit the appellant wounding his head. The appellant went to report to the police but found that PW 1 had already been there.

The trial court believed the prosecution's case and the appellant's first appeal was dismissed by LUKELELWA, J. In this second attempt his grounds of appeal could be reduced to two: One, the case was not proved beyond reasonable doubt. Two, his story was rejected while it was supported by PF 3. Before us the appellant was in person and added two or more grounds of appeal: One, the doctor who prepared PF 3 was not summoned, and two, he contested the place where he was arrested.

For the respondent/Republic was Miss Angela Kileo, learned State Attorney, who did not support the conviction and the sentence. She conceded that the appellant was not informed by the trial court of the provisions of sec. 240 (3) of the Criminal Procedure Act [Cap 20 R. E. 2002] of his right to have the doctor who prepared PF 3 summoned. Ms. Kileo asked for the PF 3 to be expunged from the evidence. We hereby expunge it.

We may as well point out that this is the third instance in this session we find that that provision has been violated. The transgression has been committed elsewhere, too, for example in Shabani Ally v. R, Criminal Appeal No. 50 of 2001; Prosper Mnjoera Kisa v. R., Criminal Appeal No. 73 of 2003; and Meston Mtulinga v. R., Criminal Appeal No. 426 of 2006, all three are unreported decisions of this Court. We think that it is high time we direct all Judges-in-Charge to instruct Magistrates to observe that law.

Ms. Kileo submitted that PW 4 contradicted himself when he said that he arrested the appellant and then answered that the appellant was arrested by villagers. Then she pointed out that PW 4 did a shoddy job: he did not investigate whether or not there were any broken doors. The learned State Attorney also contended that the trial Magistrate shifted the burden of proof to the appellant when he held in his judgment that the appellant was the one to produce the youth who quarreled with PW 1 as a witness.

Ms. Kileo submitted further that though sec. 127 (7) of the Evidence Act [Cap 6 R. E. 2002] does not require corroboration in sexual offences nevertheless corroboration was essential in this case since the Magistrate did not warn himself as required by that subsection. Miss Kileo pointed out that though the age of PW 1 was 45 years that subsection still applies because it is not restricted to a child of tender years but refers also to a "victim of sexual offence" and PW 1 was such a victim.

The learned counsel agreed with the bench that PW l's claim is a shade uncertain: could she have inflicted that sort of injury on the appellant's head by using a hoe while the appellant was still on top of her chest?

There is a question of what was the date of the incident: 29/01/2003 as the prosecution maintains or was it 08/01/2003 as the appellant claimed? The prosecution ignored that. LUKELELWA, J. made some unsupported presumptions when he said:

> It would appear as if the appellant is talking of a different incident which took place on 8/1/2003 while this case concerns the incident which took place on 29/1/2003. It

> would appear that both incidents were reported at the police station, on the same date, but PW 1 was the first to lodge a complaint.

Therefore, we have here the story of PW 1, the complainant, against that of the appellant. We agree with Miss Kileo that PW l's evidence requires corroboration since the trial Magistrate did not warn himself. The only independent witness is PW 3 who did not show whether he was in the same house as PW 1 or not. Then why was his bedroom door broken into while there was nothing he did but to resume his sleep! Besides, there is a discrepancy between his observation and PW l's evidence. He saw both PW 1 and the appellant not naked. But according to PW 1 the appellant had his shirt and jacket in his hands.

We agree with Ms. Kileo that the case for the prosecution raises more questions than answers while that of the appellant has a ring of probability. We, therefore, give the appellant the benefit of doubt and allow his appeal. We quash the conviction, set aside the sentence and order his immediate release unless there is a lawful cause for continuing his imprisonment.

DATED in MTWARA, this 20th day of November, 2009.

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

(K I T U S I)
SENIOR DEPUTY REGISTRAR