

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 334 OF 2009

ONESPHORY MATERU APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court
of Tanzania at Tanga)**

(Mussa, J.)

**dated the 31st day of July, 2009
in
Criminal Appeal No. 3 of 2009**

JUDGMENT OF THE COURT

22 & 28 March 2011

MANDIA, J.A.:

On 25/2/2007 PW4 WP 3503 Anna of Lushoto Police Station was resting at home. At 14.20 hours (2.20 p.m.) in the afternoon a fellow police officer called PC Jumanne called her by telephone and asked her to go to the Police Station to attend to an emergency. She went there and found one suspect, who was in remand, crying. The suspect is the complainant PW2 Salma Yusuf who alleged that the appellant had raped her inside a police cell and had promised to

release her in writing. The suspect Salma Yusuf showed PW4 WP 3503 Anna a written note in the appellant's handwriting (Exhibit P1) in which the appellant had directed the release of Salma Yusuf from remand custody. During cross-examination by Mr. Ntonge, learned advocate who appeared for the appellant in the trial, WP 3503 Anna divulged to the court that the complainant was crying out as to why the appellant had carnal knowledge of her on promise of release but was now refusing to release her, and that the appellant had washed her (PW4's) private parts with water after the act of sexual intercourse in order to wash away the seminal fluid. PW4 also revealed under cross-examination that it was abnormal for a male police officer to enter a female cell, and that it was also abnormal for a suspect to be released using the method of writing a note in the form of Exhibit P1. All the same PW4 WP 3503 Anna directed one PC Jumanne, a fellow police officer, to report the matter to their seniors. PC Jumanne was not called to testify in the court of first instance, but the senior officer, to whom he made the report as directed by PW4 WP 3503 Anna, testified. He is PW1 Assistant Inspector Athumani of Lushoto Police Station. Inspector Athumani in turn interviewed the

complainant and thereafter reported the matter to the officer in charge SP Maganga. SP Maganga in turn was not called to testify. All in all, on the following day 26/2/2007 PW3 WP 3257 Corporal Agripina took the complainant to hospital where she was examined and a medical report PF3 filled in for her and tendered in court as Exhibit P2. WP Corporal Agripina, while giving evidence-in-chief told the trial court that the victim was found with bruises and remains of semen in the vagina. The certified proceedings showed that PW3 was not cross-examined by the appellant's advocate, but when the original record was called up it transpired that PW3 was indeed offered for cross-examination, and this is what she said:-

"xxd by accd:

I am explaining what I had witnessed. I know the semens as I am old enough. I know not the semen at the vagina of victim was of whom. Yes, there is difference between semen and milk. I brought the said victim on 26/2/2007."

This bit of evidence shows clearly that PW3 WP 3257 Corporal Agripina not only took PW2 Salma Yusuf to hospital for medical examination but in fact attended the medical examination and was an actual witness thereof.

In her narrative to court, the complainant PW2 Salma Yusuf, a fourteen years old girl, gave evidence under affirmation after *voire dire* test. She first gave evidence on 12/10/2007 and was duly cross-examined by the accused person. She was recalled to court on 12/12/2007 at the application of Mr. Ntonge learned advocate, who had entered appearance on behalf of the appellant. In her testimony on 12/10/2007 the complainant alleged that the appellant first undressed her and then undressed himself and the sexual act followed, whereas in her testimony on 12/12/2007 she said the appellant first undressed himself before undressing her. Apart from this inconsistency, the evidence of the complainant is straightforward, and it shows that on 25/2/2007 she was in remand custody at Lushoto Police Station on a charge of theft. At 11 a.m. in the morning the appellant, who was a police officer on duty at the

Police Station, approached her and took her from her police cell, where she was the lone suspect, to a bench outside where she could sit in the sun. Apart from affording her the sunshine treat, the appellant gave her Shs. 1,000/= . Thereafter the appellant took her back to her cell and wrote her a "release note". The note was quoted in full by the learned first appellate judge when the matter was in appeal, and it makes interesting reading. It goes thus:-

BOND SHEET

Mimi Salima Nimeachiliwa na Polisi kwani
nimeonekana sina hatia leo tarehe 25/2/07

Cpl. Materu
CHUMBA CHA MASHTAKA } Stamped
POLISI KITUO LUSHOTO }

After giving the complainant the "release note" the appellant left her inside the police cell. He went back after her at about 2 p.m. and had sex with her while the two were both in a state of undress. The appellant disengaged from the sex act when PC Jumanne called, and this is what made the complainant cry out when she realized that

the appellant would not keep his promise of releasing her after the sex act.

The appellant gave sworn testimony in his defence in the trial court. He admitted that he was on duty at the Police Station on 25/2/2007 as alleged by the prosecution witnesses. He also admitted that he wrote the "release paper" as alleged by the prosecution witnesses who were fellow police officers. Giving the reason why he wrote the "release note", the appellant testified that he wrote the note on behalf of one PC Mboka of Bumbuli Police Station who made a verbal promise to release the complainant but did not put the promise into writing. The appellant alleged that the complainant got agitated and demanded written assurance that she will be released and he (appellant) gave the written note on behalf of PC Mboka. After receiving the note the complainant cooled down and he, the appellant, left on other duties. The appellant refuted the allegations of sexual misconduct leveled against him, and fielded one witness in defence DW2 Getruda Aloyce who claimed that she saw the appellant writing the "release note" in order to cool down the complainant.

Notwithstanding all his protestations of innocence, the trial court found the appellant guilty, convicted him and sentenced him to thirty years imprisonment, twenty four strokes of the cane and an order that he pays Shs.700,000/= as compensation to the complainant. This package aggrieved the appellant, and he preferred a first appeal to the High Court of Tanzania at Tanga. The appeal was dismissed in its entirety, hence this second appeal.

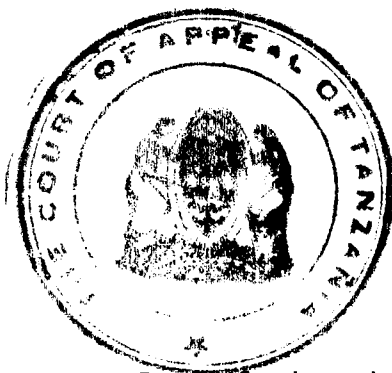
When the appeal was called on for hearing the appellant appeared in person, unrepresented, and the respondent/Republic was represented by Mr. Faraja Nchimbi, learned State Attorney. The appellant filed a memorandum of appeal consisting of two main grounds. The first ground is that the trial court did not warn itself of the dangers of convicting on the basis of the uncorroborated evidence of the victim. The appellant argued that the victim PW2 Salima Yusuf was not worth of belief because she contradicted herself by first saying that the appellant undressed her before undressing himself, and later changing to say the appellant undressed himself before undressing her. In the second ground the

note" written by the appellant as proof that the offence was committed.

On the requirement of a self-warning by the court we find that the appellant had raised this same point in the second ground of his memorandum of appeal to the High Court. The High Court addressed this point very adequately at page 60 of the record by tracing the history of the law before and after the advent of Section 127 (7) of the Evidence Act as amended by the Sexual Offences Special provisions Act, Number 4 of 1998. Prior to the amendment there was a requirement for the court to warn itself of the dangers of basing a conviction on the uncorroborated evidence of a child where a sexual offence was involved. After the amendment, the need for the warning was done away with. The only burden imposed on the court now is to give reasons that it is satisfied that a child of tender years or the victim of the offence is telling nothing but the truth. We dismiss ground one for lack of merit.

In the second ground the appellant faults the courts below for relying on the "release note" which he wrote to the complainant. The record of trial shows that in his defence the appellant admitted to writing the "release note" and even fielded a defence witness DW2 Getruda Aloyce to prove that the appellant indeed wrote the note Exhibit P1. It is instructive that the note was tendered in evidence without any objection from the appellant. Ground two has no merit and we dismiss it as well. In the final analysis, we find that the appeal has no merit and we dismiss it in its entirety.

DATED at TANGA this 25th day of March, 2011.



J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "E.Y. Mkwizu", is written over a horizontal line.

(E.Y. Mkwizu)
DEPUTY REGISTRAR