IN THE HIGH COURT OF TANZANIA
AT NJOMBE

APPELLANT JURISDICTION

(DC) CRIMINAL APPEAL NO. 24 OF 2007

(Original Criminal Case No. 44 of 2005 of the District Court of Ludewa District at Ludewa)

THOBIAS S/O KOMBA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

F. M. WEREMA, J.

The appellant, Thobias Komba aged 23 years old, was arraigned in the District Court of Ludewa at Ludewa. He was charged with the offence of rape c/s 130 (1) and 131(1) of the Penal Code, [Cap 16 R.E 2002]. It was alleged that the Appellant had on 9th May 2005 at about 1700 hours at Mbongo village; Manda in Ludewa District, Iringa region did unlawfully have carnal knowledge with one **Flora Milinga**, a girl of 14 years old.

The Appellant was successfully prosecuted. He was convicted by the District Court (Hon E.K Mwambeta, DM). He was sentenced to serve a term of 30 years

imprisonment and was ordered to pay a sum of Shillings Four Hundred Thousands (shs 400,000/=). This appeal is against conviction and sentence thereof. Ms Mango, the learned State Attorney who appeared for the Republic, supported the conviction.

The Appellant has in his Memorandum of Appeal raised about twelve substantive grounds on which his appeal is based. In his brief address to the Court, he asked the court to disregard the evidence of Alex Wambali (PW4) as unreliable and to discard it. The basis of this attack is that the witness who is the father had said that his daughter, Flora, was 14 years but later changed that position to say she was 16 years old. This is a simple matter to dispose. Whether the victim was 14 or 16 it does not matter much in to mitigation the sentence once the offence is proved. Section 130(2) (e) of the Penal Code regards this as rape as long as the victim is under 18 years old. The victim was under 18 whether her father said she was 14 or 16.

I have read the testimony of PW4. I do not agree that he is unreliable. The witness was consistent and it

does not infer any ill motive on his part that he wanted to obstruct justice adversely to the accused. This attack is therefore baseless.

The second ground of Appeal is that the Appellant is complaining that the trial District Court erred in law and fact by not taking into consideration that the appellant made no Cautioned Statement to admit that he had raped the victim, Flora Milinga, who testified as PW1. The substantive attack is that the Court did not inquire whether the Cautioned Statement, tendered as EXH P.2, was obtained through inducement, torture or promise. This is the essence of this attack.

This complaint is unjustified. The Appellant did not introduce anything during his trial that goes to vitiate his admission in the statement he made to a Police officer, PW5 D2530 CPL Ekania. There was no evidence or complaint that the appellant was induced, tortured or promised anything in return for his admission and the appellant did not allege anything to that effect during his trial. To raise this complaint at this point is rather nothing but an incredible afterthought. Ms Mango, learned State

Attorney conceded that the cautioned statement does not ipso facto comply with section 57 of the Criminal Procedure Act on the ground that the appellant was not informed that he had a right to remain silent. I agree with the learned State Attorney that this was supposed to be made clear to the appellant as a safety valve to his constitutional safeguards. However, I do not see on the basis of facts on record, and neither am I convinced that the appellant was prejudiced by the omission.

I have read ground 4 and I have to admit that it does not make intelligent reading. I take it to be part of ground 5 which is that the Court erred in law and fact in not investigating and find out whether or not there was consent. The interjection in that ground implicates the appellant by self incrimination. The Appellant alleges that the complainant consented to sex and reacted the way she did because of her peers, PW2 and PW3 conduct to call the victim's father. This is an interesting ground of appeal. The evidence of PW1, the victim, is that the appellant chased them and caught up with her. He grabbed her into the bush. He stripped her of her attire,

skirt and underpants were left on the road. The victim called PW2 Valiet and asked her to go to inform the victim's father about what the appellant was doing to her. The appellant assaulted Suzana, PW3 who was at the scene and chased her away. It is obvious that the alleged consent is farfetched. The appellant own testimony on page 10 of the Court's proceedings is a different version from the justification he is trying to paint on his heinous crime. In his testimony he said he was apprehended by a man on allegation that he had raped that man's daughter. This is a mixed up argument. If it is true that there was consensual sex, the appellant should stand on that position rather than shift grounds to seek the best that suits him in this case. I can only come to one conclusion that this was not consensual sex and the ground is baseless. This is evidence that corroborates the cautioned statement.

The appellant's view is that the victim was rather assaulted and the proper charge would have been grievous harm. I do not see for what reason this is being brought up. It is a fact that the victim was examined by a

medical doctor. This was an examination on her genitals. Her genitals were introitus, that is, the vargina was very wide to the extent that two fingers could be admitted into it. She was not a virgin. Spermatozoa were revealed. Nothing abnormal was detected. The little girl, in terms of her genitals, was like any other full grown up woman. The Doctor was of the view that this was just sexual abuse and not rape! I am not bound by the views expressed by a Medical Doctor on a matter like this. It is not an offence for a girl of that age not to be a virgin. The fact that the size of her genitals was bigger than her age can not be justification for her to be a focus of sexual gratification by any person. She is still protected as a child-girl and for her dignity as a woman the oversize of her vagina notwithstanding. She did not receive any grievous harm but that is not an ingredient for the offence and is no evidence that she was not raped. The perpetrator of that rape was the appellant. The appellant is implicating himself.

In ground 7 the Appellant is complaining that he was denied his right to call a witness and that the Magistrate

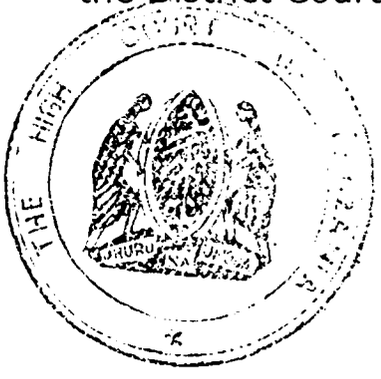
contributed to his failure to raise the defence of alibi. I understand that these grounds were not prepared by a professional practising lawyer. The Appellant told the Court that he had two witnesses. These were Faraja Mbunga and Doctor Tillo. When he concluded his testimony on 12/7/2006, he closed his defence case and stated that he had no witnesses. On the basis of this record, I do not give any weight to this complaint. It is baseless.

PW3 Suzana Mapunda, aged 9 years had testified at trial. The Appellant is complaining that no voire dire was conducted. Clearly, on page 5 of the proceedings the Learned District Magistrate did conduct an inquiry on PW3 intelligence. That was a voire dire that the appellant is complaining about. This ground fails.

The Appellant was hit at the back of his head by PW4 when the latter went to the scene and found the appellant lying on top of Flora Millinga, PW1. The appellant escaped but the witness managed to hit him with a stone at the back of his head. He was wounded. He had a wound when he was arrested. According to PW1, PW2, PW3 and

PW4 it was the first time for them to see the appellant. In such a situation it was advisable for a police identification parade to have been held. I have given thought to the idea but I do not think that the appellant was prejudiced by failure to conduct an identification parade. The appellant never denied that he was not at the scene of the crime. Such an identification parade was not necessary in the circumstances.

Other grounds are baseless. It is clear from the record that the testimonies of PW2 and PW3 corroborate evidence of assault of PW1. Appellant is admitting that in his ground 9 and once that is admitted, I do not appreciate the grounds upon which the appellant is attacking his conviction. In any event, this Appeal fails. The conviction and sentence imposed on the appellant by the District Court is hereby upheld.



F.M. Werema,

JUDGE

14.12.2007