

IN THE HIGH COURT OF TANZANIA

AT TABORA.

APPELLANT JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO.40 of 2005

ORIGINAL CRIMINAL CASE NO.329 OF 2003

OF THE DISTRICT COURT OF SHINYANGA DISTRICT

AT SHINYANGA.

Before: D.E. MRANGO Esq., RESIDENT MAGISTRATE

1. HAGAI KOMANYA

2 MANGI GOSO @ ABDALLAH

}APPELLANTS
(Original Accused)

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

J U D G M E N T

28TH NOVEMBER, 2007 & 5TH DECEMBER, 2007

KIHIO, J.

Appeals No.40 of 2005 and 41 of 2005 have been consolidated.

The appellants, Hagai s/o Komanya and Mangi s/o Goso @ Abdallah were convicted of Gang rape Contrary to Section 131A (1) and (2) of the Penal Code, Cap.16 as amended by Section 7 of Sexual offence Special Provisions Act No.4 of 1998 by the District

Court of Shinyanga and were each sentenced to thirty (30) years imprisonment.

They were aggrieved by both Conviction and sentence, hence this appeal.

The Prosecution alleged at the trial court, inter alia, that the appellants, Mangi s/o Goso @ Abdallah and Hagai s/o Komanya, jointly and together, on 25/10/2003 at about 10.00 hours at Mumbu bridge within the Municipality, district and region of Shinyanga, did unlawfully have Sexual intercourse with Shida d/o Malagosi a girl of 14 years old.

Asha Ramadhani (PW1) told the trial court that on 25/10/2003 she was at the main market buying food stuffs and as she reached the government hospital she by passed the appellants and one girl. She (PW1) further told the trial court that she was arrested by the Police on allegations that she (PW1) knew that the appellants mishandled the said girl. She (PW1) informed the trial court that the appellants were later on found and she identified them as the people he saw on 25/10/2003.

E 9282 Detective Corporal Wandiba (PW2) told the trial court that on 28/10/2004 he was asked by Detective Constable Ruth to record the Statements of the appellants (Exh. P1 and Exh. P2). In cross-examination he told the trial court that he (PW2) did not beat them (appellants).

WP 3676 Detective Constable Ruth (PW3), a Police Officer at Shinyanga, told the trial court that she was in her office on 26/10/2003 and Shida d/o Malegesi appeared in her office and complained that she had been raped by the appellants whom they arrested. She argued that they (PW3 and others) gave the prosecutrix PF.3(Exh. P3). She (PW3) further argued that she recorded the statement of Shida d/o Malegesi (Exh.P4) on 27/10/2003 and also recorded the Statement of one Margreth d/o Shaurimoyo (Exh.P5). She (PW3) stated at the trial court that Shida d/o Malegesi said that she did not know the names of the appellants but she knew their faces. She (PW3) added at the trial was helped to trace them by the said Shida and Asha. In cross-examination, she (PW3) told the trial court that he (1st appellant) Confessed before her and his (1st appellant's) Statement was recorded by Corporal Wandiba.

The 1st appellant, Hagai s/o Komanya told the trial court that on 28/10/2003 at around 13.00 hours four Policemen went to his place of work at Highway Shinyanga, arrested him and took him to Shinyanga Police Station where he was put in lock-up. He (1st appellant) further told the trial court that in the night he was interrogated and when he informed the Police that he knew nothing in respect of the present case he was beaten and forced to sign on the Written paper. He (1st appellant) went on to say that the 2nd appellant was also beaten and forced to sign a piece of

paper. He (1st appellant) stated at the trial court that the Victim was not known to him.

The 2nd appellant, Mangi s/o Goso @ Abdallah told the trial court that on 28/10/2003 at 1.00 p.m. when he was at his Matanda Shinyanga residence five Police Officers, WP Ruth (PW3) inclusive, appeared, arrested him and took him to Central Police Station. He (2nd appellant) further told the trial court that at 2.00 a.m. he was sent into a room for interrogation and that two statement sheets were pulled out and they were forced to sign. He (2nd appellant) stated at the trial court that they were forced to admit to have raped a girl whom they did not know and who has

The appellants raised four grounds of appeal in their Memorandum of appeal. However, in essence, their grounds of appeal are two, namely, 1. that the Learned trial Magistrate erred in admitting the Statement of the Prosecutrix without herself appearing in court. 2. that the prosecution failed to prove their case beyond reasonable doubt.

Mr. Manyanda, Learned State Attorney, did not seek to support the conviction.

Mr. Manyanda submitted that the conditions under section 34 B (2) of the Evidence Act were not fulfilled in producing the statement of Shida d/o Malegesi (Exh.P4) and the statement of

one Margret (Exh.P5). He further submitted that failure to fulfill the conditions under section 34 B (2) of the Evidence Act renders the Statements inadmissible. In support of his submission he referred this court to the case of Republic V Hassan Jumanne (1983) T.L.R. 433 where the court held, inter alia,

“(i) The provisions of section 34 B(2) of the Evidence Act are cumulative, therefore to admit a statement in evidence under section 34B (2) (b) all the conditions set forth from paragraph (a) to (f) must be satisfied;

(ii) In this case only the first two provisions, that is (a) and (b) were satisfied hence the statement was inadmissible” He argued that the evidence of PW1 is of no

incidence and did not mention the name of the girl he had seen the appellants with.

He further argued that there is a question of torture which appears in cross-examination in respect of the taking of the Confessions of the appellants (Exhibits P1and P2) and the Convictions of the appellants were based on those statements as can be seen at page 4 of the trial court's typed judgment. He pointed out that it is trite law that Conviction may proceed from retracted confessions if they are approved to be truthful and he referred this court to the case of Hatibu Ghandi V Republic (1996) T.L.R. 12. He also pointed out that truthfulness of retracted Confession is proved by corroborative evidence and he referred this court to the case of Jackson Mwakatoka and two others V

Republic (1990) T.L.R. 17. He contended that in the present case there is no corroborative evidence to prove that the appellants raped Shida d/o Malegesi. He further contended that the convictions against the appellants has no supporting evidence and so they were improper in law.

The first issue in this case is whether the statements of the victim, Shida d/o Malegesi (Exh.4) and Margret d/o Shaurimoyo (Exh.P5) were properly admitted or not.

The trial court's record shows that on 20/8/2004 the Statements of Shida d/o Malegesi (Exh.P4) and Margret d/o Shaurimoyo grounds for their tendering in court as exhibits were not shown.

Mr. Manyanda rightly referred this court to the principle of law enunciated in the case of Republic V Hassan Jumanne (1983) T.L.R. 433 whereby the court expressed that "the provisions of section 34 B(2) of the Evidence Act are cumulative, therefore to admit a statement in evidence under Section 34 B (2) all conditions set forth from subsection (a) to (f) must be satisfied."

In the case of MT 5696 PTE Alphonse Mathlas V Republic – Cr. Appeal No.127 of 1990 (unreported) the Court of Appeal of Tanzania expressed that "**Section 34 B (2) outlines six conditions, paragraphs (a) to (f) for admitting a Statement under that section. Unfortunately the six paragraphs are not**

connected by the conjunction “or” to show that they are in the alternative. They are merely punctuated by semi colons. We also sadly note that paragraph (e) is not connected to paragraph (f) by a conjunction “and which would have meant that they are cumulative. However reading through them we have come to the firm view that they are cumulative, none of the six paragraphs can stand on it’s own. If one condition is violated then the statement is inadmissible.”

In the present case, Exhibits P4 and P5 offend paragraph (a) of Section 34 B (2) of the Evidence Act in that their makers are not beyond reasonable doubt witnesses or if all reasonable steps have been taken to procure their attendance but they cannot be found or they cannot attend because they are not identifiable or by operation of any law they cannot attend.

As the conditions laid down in some of the paragraphs in section 34 B(2) of the Evidence Act were not met in this case the Statements (Exh.P4 and Exh.P5) were inadmissible and the Learned Resident Magistrate wrongly admitted them. I entirely agree with the submission of Mr. Manyanda in this regard.

The second issue for determination is whether the appellants guilt has been proved beyond reasonable doubt or not.

It is quite apparent that the Learned Resident Magistrate based the appellants conviction on their retracted confessions.

The first question that arises is whether the conviction against the appellants was proper.

Mr. Manyanda correctly referred this court to the case of Hatibu Gandhi and others V Republic (1996) T.L.R 12 whereby the Court of Appeal of Tanzania laid down the principle that,

“A conviction on a retracted uncorroborated confession is competent if the court warns itself and is fully satisfied that such confessions cannot but be true.”

Also Mr. Manyanda rightly referred this court to the case of Jackson Mwakatoka and two others V Republic (above quoted) whereby the Court of Appeal enunciated the principle that “repudiated confession though as a matter of Law may support a Conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted.”

In the case of Hemed Abdallah V R (1995) T.L.R. 172, the Court of Appeal of Tanzania enunciated the principle, thus, “Generally it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or

unless the court after full consideration of the circumstances, is satisfied that the confession must be true.”

In the instant case, there is no body of evidence which corroborates the retracted confessions of the appellants.

There is no where in the trial court's judgment it is shown that the Learned Resident Magistrate had warned himself on the dangers of acting upon retracted uncorroborated confessions of the appellants and he was fully satisfied that such confessions were true.

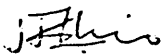
As the Learned Resident Magistrate did not show in the record that he warned himself on the dangers of acting upon retracted uncorroborated confessions of appellants and he was satisfied that such confessions were true it was unsafe to convict the appellants.

Once Exhibits P4 and P5 are excluded, there is no evidence left under which to base conviction.

I am satisfied that the prosecution has failed to prove the guilt of the appellants.


For the foregoing reasons, the appeals are allowed. The conviction is quashed and the sentence imposed against the appellants is set aside.

The appellants be released from prison forthwith unless otherwise held there on other lawful cause.


S.S.S. KIHIO
JUDGE
5/12/2007

Court: Judgment delivered in the presence of Mr.

the appellants who did not wish to be present in court.


S.S.S. KIHIO
JUDGE
5/12/2007