IN THE HIGH COURT OF TANZAANIA

AT TABORA
APPEDLLATE JURISDICTION

(Tabora Registry)

CRIMINAL APPEAL NO. 85 OF 2008

ORIGINAL CRIMINAL CASE NO. 99 OF 2007

OF THE DISTRICT COURT OF IGUNGA DISTRICT

AT IGUNGA

BEFORE. D.D. MALAMSHA, Esq; PRINCIPLAL DISTRICT MAGISTRATE

NYINDWA KUNDIGA…….APPELLANT
(Original Accused)

VERSUS

THE REPUBLIC ……..RESPONDENT
(Original Prosecutor)

JUDGMENT

A.K. MUJULIZI, J.

The Appellant, **NYINDWA S/O KUNDAGA** was convicted by the Igunga District Court on three counts of Rape Contrary to sections 130 (1) and (3) (d) of the Penal Code – Cap. 16. R.E. 2002.

Consequently, he was sentenced to thirty years imprisonment on each of the three counts the term running concurrently , on 10/09/2007

Dissatisfied he appeals against all convictions and the respective sentences.

The prosecution case was to the effect that, the appellant, a traditional healer (herbalist) had pitched camp at Kinungu village, on 05/05/2007, near to the residence of PW.1 Yunge d/o Luchangule, the first victim and subject of count number one, where she resided with her two daughters, **HOLLO D/O ZENGO (PW.4) and MILEMBE D/O ZENGO** (PW.5) the 2nd and 3rd victims of the alleged rape.

Further, that after pitching camp (building a temporary grass thatched hut) , the appellant bei9ng a stranger and traveler, went to Mr. Zengo s/o Kumbuka's residence to ask for some provisions; fire wood at around 7.00 am. He met PW.5 (the third victim) who told him that her parents were not at home at the time.

Later on, the appellant's daughter one Shija d/o Kashindye, went to the Zengo'[s residence, this timed asking for water and vegetables. PW.1 provided the same and asked her two daughters to accompany the visitor and help her to carry the given provisions to her father's hut. What followed thereafter, is a story of offering treatment to PW.1 and her two daughters, by the appellant, which, if it is to be believed involved rituals requiring the insertion of herbs into the three women's virginal with the aid of the Appellant's penis to place the medicine to the required depth.

It was alleged that, the Appellant successfully accomplished this exercise by not merely inserting his erect penis into the three women's virginals, but, by actually performing full sexual intercourse with all of them in turn.

After the alleged rituals, it is alleged that, the appellant retained the third victim PW.4 **HOLLO D/O ZENGO** overnight and continued to have overnight sexual intercourse.

The trial Magistrate believed the story to be true. The Respondent Republic, through Miss Naweka, learned State Attorney, also believes the story to be true.

The Appellant challenges this belief. He says: It is not only an incredible fit if it were to be true, but, he says: it was not possible for a man of his physical build and frail health to have accomplished the alleged sexual orgy in the space of the time frame alleged.

He has raised four grounds of appeal. I will reproduce them:

"2). That, the Principal District Magistrate erred on point of law and fact in believing that the prosecution side proved its case beyond reasonable doubt while knowing that there had been no any evidence which could prove that the accused person (appellant) was the one who had carnal knowledge with (sic) the victims (complainants).

3. That, the report of the Igurubi Health Centre does not pinpoint me that I was the one who (had) carnal knowledge with (sic) the victims (complainants). Furthermore the said report PF.3 is hearsay evidence under section 240 subsection 93) of the Criminal Procedure Act 1985. Because the prosecution didn't summons (sic) an expert to prove the truth contained in three (3)? Rule MAGISTRATE (1969)

page 149. That a statement made by a person not called as witness which referred is to prove the fact contained in the statement is hearsay and is not admissible. In addition to that the accused person – appellant) was not examined to prove if he was the one who had sexual intercourse with the victims (complainants). Hence the PF,.3 exhibit was admitted illegally.

4. That, the Principal District Magistrate erred on point of law and fact in dealing only with the prosecution evidence without e valuating the whole evidence on record before the Principal District Magistrate drawn (sic) his judgment he was supposed to ask following questions inter alia:-

a) Why the clothes the said native chains (shanga) of PW.1, PW.4 and PW.5 were not tendered in court as exhibits to certify their evidence ?

b) Why the V.E.O. one Amos Mshana (PW.3) who arrested the accused (Appellant) was not appeared (sic) to certify or to offer his evidence who received the report of concurrency of that incident why?

Why the prosecution side failed to summon expert Doctor in order to prove the repot which was made by him ?

5. That, the prosecution case failed to prove its case beyond all reasonable doubt as required by the law that means to prove the all ingredients of the offence alleged in the Criminal Case, Also the weight of the evidence adduced before the trial Court it is not sufficient to establish the conviction on me.''

The above grounds written in what in clearly poor English present three clear grounds (issues) for determination in this appeal;

a) Whether there was credible evidence adduced to prove the charged offence the case was not proved beyond reasonable doubts.

b) Whether the PF.3 – Forms were wrongly admitted in evidence without calling the doctor who conducted the medical examination on the victims.

c) Whether the trial Court erred in law and fact in failing to evaluate the evidence on record.

At the hearing, the appellant elaborated that the complainant's testimony was not credible. They alleged that they were raped simultaneously in an incredible space of one hour. He wondered why; if that were so, why; did those who were waiting their turn or after not raise alarm.

Further, that the appellant's two children were also present at the scene of the

alleged Crime, how come they never witnessed the alleged rape.

Finally; that if the victim's beads and clothes were taken from the scene of the crime, how come they were not produced as exhibits.

Countering those arguments, Miss. Ndaweka learned State Attorney reverted to the victim's narration on how they were induced into inserting herbs in their virginals, followed by the Appellant's insertion of his penis.

She argued therefore that according to section 130 (3) (d) the Appellant being a traditional healer, he committed the offence by falsely inducing the victims to believe that sexual intercourse was part and parcel of the treatment administered on them by him.

She therefore concluded that this part of the three witnesses' testimony, i.e. PW.1` PW.4 and PW 5 was not impeached during cross examination. Consequently, in accordance with section 127 (7) of the Evidence Act, Cap. 6 R.E. 2002, the victim's evidence was sufficient to sustain a conviction on a sexual offence if the trial court were to find such victim's evidence to be **nothing** but the truth.

In that case, she concluded, the **trial** magistrate was entitled to determine the credibility of the witnesses in the way he did.

On not the allegation that the Doctor was not called to produce the P.3 Form – section 240 – CPA Cap. 20 provides for the court to call such Doctor if requested by the accused. In this case, shed argued, the accused did not request to call the examining Doctor for cross examination.

In any event the concluded, as held in **SELEMANI MAKUMBA V.R. Cr Appeal No. 94 of 1999 – CAT @ Mbeya (unreported)-** a medical report may only help to give credence to an allegation of forced sexual intercourse but would not, on its own be conclusive. Evidence of rape would in case of the victim being an adult come from the victim, that there were penetration of the accused's is penis into the victim's virginal without her consent. The critical factor is; that the victims testimony, be believed to be truthful.

Finally, on the issue as to whether failure to produce the victims' clothes and beads in evidence was fatal to the prosecution 's case, she urged me to find that the said pieces of evidence; were not relevant and that, Amos Mshana – the VEO who arrested the accused testified as PW. 3, thus corroborating the victims' story.

Consequently, she the urged the me to dismiss the appeal.
In my considered opinion the issue for determination boils down to whether; on the

evidence on record, a cased was made out by the prosecution proving rape beyond reasonable doubt on all, or any of the three counts.

I have carefully gone through the evidence of the three victims account of the incident. I will quote portions of the critical pieces.

PW. 1 YUNGE D/O LUCHAGULA at page 3:

'On 5/5/2007 at 7.30 pm. I was at the place of the accused to see my two daughters who went there to have medicines (sic) so that they could get married promptly.

The accused gave my daughters medicines (sic) to apply into the virginal as I was also given and we were all put the same into our virgina. After that the accused claimed to escort (sic) (sic) the medicine using his person (penis) into our virgina.

We slept on the ground and the accused started with Milembe by inter coursing her followed by Hollo. and I became to last person. The accused ejaculated at (six) me once.

After that the accused prepared hot water and medicines which we were covered a bed sheet to smelt (sic) the moisture of the said medicine and we shivered.

After that this witness concluded her testimony as follows:

''After that it was morning all of us became confused and became temporally insane and later became sane and reported at the V.E.O. of Kinungu Village and later at the police where P.F.3 were disused to us and went to beexami9ned at the Hospital. This is the said PF.3 Admitted as exhibit P.F.''

According to P.W. 21 – E 1901` PC JOAKIM, the complainants went to the Igurubi police outpost on or about 08/05/20-07 at 6.30 pm and he went to the Dispensary to interrogate (sic) the victims at the dispensary on 8/05/2007.

Apparently no statements were made to the police, as none was produced at trial. In thatg event the story was told at least three days after the alleged incident and after the three victims including the3ir father are said to have gone through a period of temporary insani9tyh (whatever that meant) or confusion.

According to P.W 4 HOLLO D/O ZENGO – at page 7 after she and pw.5 Milimbe had gone to the appellant's hut:

''The accused started to interrogated us (sic) about our affairs and said

that I have a disease and wanted to seed P.W. 1.

Aftefr that I followed P.W. 1 as requested by the accused and I came with PW. 1 to the accused. The accused said that he wanted to treat us sos that we could be married. The accused told P.W. I that the charge will be shs. 156,000/= each of us Shs. 5,000/= PW.1 said that she has no money.

The accused insisted that P.W. 1 has money. P.W. 1 told him that she was able to pay two hens and one tin of maize. The accused agreed. We followed the said maize and the two hens. I left HOLLO there. (This is confusing because HOLLO is the witness) . The maize were brought in the morning.

We found the accused seated with Milembe and we gave the hens to his children.

We found the accused inter coursing Milembe saying that it was part of the treatment.

I was also called and the accused gave me medicines by that time Milembe and P.W 1 were ordered to stay at the camp.

The accused ordered me to undress all of my clothes including my waist and neck native chains. I was ordered to put the medicine into my virgina and ordered me to lay down and the accused undress himself his trouser and started to intercourse me. He ejaculated once. After tat the accused told me that men will come for engagement of marriage and I will be married at the town together with Milembe.

After that I was told to cover up myself using khanga and left the rest of the clothes there, and told to call PF.1.

After THAT PW.1 went at the accused and I went to put on fire at the camp so as to boil the medicines and we did so by boiling medicines mixed with water.

Later the accused came, there while with P.W. 1 and we were ordered to cover up our faces and the whole body. We did so and then we used the said medicines to have a bath. Each one with her port.

Our mother (PW. 1) never told us what treatment she received.

Later the accused ordered us to bring all our clothes at him so that he could treat them. We gave him our clothes at his camp. I gave him all my

clothes and shoes and remained with one piece of khanga.

My mother and Milembe were ordered to go at home for sleep while he prevented me saying that I will sleep at his camp.

The accused took me as his wife and we slept together with him while intercourse (sic) me . He then allowed me to go at home and it was about 5..00 am… when it was morning I started to be confused and ran away going at the accused and re3quested him to give me my clothes.

I continued to be confused till I was taken at the office of V.E.O. of Kinungu Village.''

According to PW. 5, Milembe Zengo, in part – page 9:

''On arrival, the accused said that we have problems and he would like to treat us. We refused., He told us that he will treat us so that we could be married. P.W. 4 followed our mother (PW.1) . IO remained at the accused and he took me out of his camp, and intercourse me once after giving me some medicines and put the same into my virgina.

Later P.W I came while with P.W 4 and found me being intercourse by the accused. The accused finished his work on me and tole me to go at the camp and then called P.W 4 HOLLO.

When the accused wanted to intercourse me he told me to undress all my clothes while he undressed his trousers and put his person into my virgina saying it was part of treatment.

When HOLLO went for her turn she was also raped and then followed P.W 1 who was also raped.'

Later on this witness also confirms that they all got confused the next day, that is, 06/05/2007.

I find the story to be rather contradictory. Contrary to what P.W. 1 painted the painted the picture to have been, the three were not laid on the ground in turn in their presence, but each was 'raped' separately in turn. According to the account of P.W. 4 and P..W. 5, P.W 2 and P.W. 2 and P.W. 4 may have witnessed P.W. 5 being raped by the appellant., however, I find this evidence also to be contradictory., in one moment P.W. 4 says they found the accused sitting with P.W. 5, and in another breath she says they found the accused inter coursing P.W. 5! Which is which?

The picture I get, is that, when PW.1 and PW.4 reached the accused's camp, they found that PW. 5 was away somewhere with the appellant. However, they did not see him physically. Their narration in that event will refer to what they were told by P.W. 5, since according P.W 5, she had been taken away from the Camp.

P.W. 5's statement that; P.W. 1 and PW. 4 were raped also confirms this position, because PW. 4 says that. P.W. 1 did not *''tell them what treatment she had.''*

This evidence, answers the appellants' question: as to why: his children who were also at the camp did not witness the act of alleged sexual intercourse - it, if sis it to be believed, took place some where outside the appellant's camp.

Now, each of the victims story stands alone. As submitted by the learned state attorney., it should, if believed be sufficient to sustain a conviction.

In determining this fact we need to pay close attention to the appellant's defense.

After summing up the prosecution and the defense cases, the learned trial Senior District magistrate concluded his judgment as follows:

> ''***From the above evidence found t hat, there is no dispute that the accused did treat the complainants locally at an agreed consideration of which part of it was paid by P.W.1 to the accused.***
>
> ***After such treatments the complainants became confused and shows (sic) to be temporary insane.***
>
> ***In that regard, reports were made at the VEO (PW.3) who also witnessed the complainants to be in such conditions. This made the VEO to take legal actions against the accused. There (sic) complainants were examined as per exhibits P.1, P.2 and P.3 which shows that PW. 4 and PW.5 have virginal discharged frothy like milk and spermatozoa were seen in the virginal vulva of P.W.1.***
>
> ***Taking into consideration the observation made on the PF.3 and live (sic) evidence of PW.1, pw.2 and PW.1 I have no doubt to says that the accused committed the said crime.***
>
> ***The prosecution has therefore proved its case beyond all reasonable doubts and the accused is found guilty as charged and do convict him accordingly.''***

Now, before proceeding further, with much respect to the learned trial Senior District Magistrate, I find this judgment to fall short of the mandatory requirements of section 312 (1) and (2) of the Criminal procedure Act, Cap. 20 R.E. 2002.

It provides:

> ***312 (1) Every judgment under the provision of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the Court and shall contain the points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.***
>
> ***2) In the case of conviction the judgment shall specify the offence of which and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.''***

The judgment of the trial Senior District trial Magistrate did not frame the points for determination. It does not state the section of the law under which the appellant was convicted or sentenced.

In that event the judgment is not a judgment.

However, I will leave it at that. Coming back to the victim's testimony, it was the duty of the trial magistrate in terms of section 1276 (7) of the Evidence Act, Cap. 6 R.E. 2002., not only to believe each of the victim's testimony to be true but to record the reasons for such belief.

As it is the only basis of that belief may be taken to be this statement;

> 'The complainants were examined as per exhibits P.W, P.2 and P.3 which ''shows'' that P.W. 4 and P.W5 have virginal discharged frothy like milk and spermatozoa were seen in the virgina vulva of PW.1.''

But again with respect to the learned trial Senior District Magistrate, Exhibit P.2and P.3 relating to pw.4 and pw.5,, the subjects of the first and second counts of rape were issued on 07/05/2007. The alleged rape took place on05/05/2007. The alleged rape took place on 05/-05/2007.

The report of the clinical officer of Igumbi centre-states that **'milk like discharge seen not offensive.''** Even on the assumption that the said clinical officer was qualified to render the report, and even on the further assumption that the 'milk like discharge'' was from the alleged victim's virginas, that finding would not be enough to establish the fact of rape in the circumstances. Both witnesses had testified that they had inserted herbs (medicine'') into their virginas. Now without evidence eliminating the possibility that such 'discharge'' was externally inserted

into the virginas and not as a result of sexual intercourse that evidence leaves reasonable doubts, since it was not qualified to be spermatozoa, as is the case for P.W. 1.

That being the case it, was not sufficient independent evidence to corroborate the contradictory testimony of the two PW.4 sand PW.5.

In the circumstances, it was necessary for the trial Court to consider the appellant's version of the story in his defence and only discount it for reasons put on the record. The judgment as is, does not show whether the learned trial Magistrate considered the testimony of DW. 1 at all.

As held by the court of Appeal of Tanzania, in **GOODLUCK KYHANDO V.R.** Cr. Appeal No. 118/2003 CAT @ Mbeya, unreported);

> **''It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.**

The good and cogent reasons for not believing the witness must **ipso facto** be in writing, and not in the head of the trial magistrate or judge.

As held in **JOSEPH MAJUNE V.R. (1986) TLR 44-** the defence must be considered as a whole and given adequate consideration and should only be refused on sufficient.

In my considered judgment the appellant's version of the events was more consistent with the true version of the events than the account given by the three victims.

Since the trial Court did not make any finding on the credibility of either witnesses, I am entitled to re-evaluate that evidence and make a finding of my own on the basis of the evidence on record.

I have already found it as fact that there were material discrepancies in the three accounts of the story by PW. 1, PW.4 and PW.5. These give rise to reasonable doubt about their credibility.

In his testimony the appellant gave a detailed account oof the events and finally concluded:-

> ''..***The complainants reported that I raped them and the VEO was there and he insisted so.***
>
> ***When PW.1 was being interrogated she became confused claiming that she***

has saturns (sic) (mizimu). The . complainants contended tat they were the only witnesses.

It is impossible for me to rape three people at one time.
Their complaints were false.

The evidence of PW. 4 Hollo was false as, if she had found me doing sex with Milembe she could have raised alarm or she could repot at (sic) her neighbours.

I never committed the offence of rape to the complainants, except I treated them with local medicines., I am sick person and I could not do such act. I have a problem of two ribs at the left side as I got an accident of vehicle on February 2006. That is all.''

Now, as held in **MATGHIAS TIMONTHY V. REPUBLIC (1984) TLR 86 –** in considering testimony of a witness, where the issue is one of false evidence, the falsehood has to be considered in weighing the evidence as a whole and where the falsehood is glaring and fundamental its effect is to destroy utterly the confidence in the witness. All together, unless there is other independent evidence to corroborate the witness.

Now, according to PW.1, after the appellant had 'built a small hut under a tree where he indulged as a local doctor. He started in Treating me as I wanted to be a star at our husband as I was the second wife.

On 05/05/;2007 at 7.30 pm I was at the place of the accused to see my two daughters who went there to have medicine so that they could get married promptly."

Contrary to this version of the story, PW.5 and P.W. 4 tried to show that they had gone to the appellant's camp to carry vegetables, and while there, the appellant had started to inquire into their affairs and that he asked PW. 4 to go to call PW.l and upon the return of the two – PW.4 and PW1 – the appellant was already "treating"PW.5.

PW.5 tried to paint a picture that the Appellant had forced his 'treatment"' on her. But this is contradictory because, PW.4 alleges that they agreed to pay a certain price for the treatment. It would be inconceivable, that the Appellant forced the treatment first and then exerted payment later.

In that event the Appellants version of the story seems to be more coherent he said – (page.11);

"…***PW.1 helped me with firewood and water. PW.1 asked me about my***

work of a local doctor. She told me that her daughters have problems as they have not got men to marry them. I told PW. 1 that I can do the work of having her daughters to be married and she required me to work on them on the same day. Ii told her to pay me Shs. 15,000/= as an advance, she agreed. She told me that she has Shs. 5,000 and shs. 10,000/= will be paid by her husband. She paid me two tins of maize and two hens which were paid on the next day morning. The tins of maize were paid on the same day 4/5/2007.

When it was 5.00 pm. I started to treat the two daughters by covering them by cover under medicines which were put in hot water kujifukiza).

After that they both left for their home at 5.30 p.m. On the next day 55/5/2007, PW.1 brought the two hens. She told me she sent Hollo to call her husband who was at another homestead who could permit to give me a goat in respect of the remaining money shs. 10,000/=. I told her that she will come later as customers started to come to me PW. 1 left with my daughters to her home and were given vegetables which they brought at (sic) me."

In my considered opinion this version of the story is more consistent with a correct account of the events, I therefore find the testimony of PW.1, PW. 4 and PW. 5 to have been false, so as to render their entire testimony utterly destroyed and hence incapable of sustaining a conviction on the charged offence of rape.

Consequently I allow the appeal.

I quash the convictions of the appellant on the three Counts of Rape c/ss 130 (1) and (3) (d) and 131 of the penal Code, Cap. 16. R.E. 2002. I substitute it with an order acquitting him of all the three count of Rape C/ss 130 (1) and (3) (d) and 131 of the Penal Code Cap. 16. R.E. 2002.

The sentences are also set aside. The Appellant is set at liberty.

He should therefore be released forthwith unless he is held on other custodial orders.

Order accordingly.

A.K. MUJULIZI
JUDGE
19/11/2008

The Republic is reminded of its right to appeal.

Appellant to supply particulars of his address.

A.K. MUJULIZI
JUDGE
19/11/2008

Judgment delivered in the presence of the Appellant under custody and Mr. Salum for the Respondent Republic.

A.K. MUJULIZI
JUDGE
19/11/2008

Date: 19/11/2008
Corum: Hon. A.K. Mujulizi, J.
Appellant: Present
Respondent: Represented by Mfr. Salum the State Attorney for the Republic.
CC: Mire, R.MA.

Judgment delivered.

A.K. MUJULIZI
JUDGE
19/11/2008