IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO.121 OF 2008

(Originating from Criminal case No.171 0f 2006 in the District Court of Singida at Singida)

BARAKA SHARIFU ---------- APPELLANT

VERSUS

THE REPUBLIC ----------RESPONDENT

Date of last order: 28- 09- 2009

Date of judgment: 12- 10- 2009

JUDGMENT

Hon. S. S. Mwangesi, J.:

The appellant in this matter namely, Baraka Sharifu, was charged and convicted in the District court of Singida sitting at Singida for the offence of rape contrary to section 130 (1), (2) (b) and 131 (1) and (2) of the Penal Code cap 16 volume 1 of the Laws Revised, Edition 2002, and was sentenced to go to jail for a period of thirty (30) years.

The facts of the case were briefly to the effect that on the 21st day of May, 2006 at about 2100 hours at Unyankindi area within the Municipality, District and Region of Singida, the accused who happens to be the current appellant did have carnal knowledge of Grace d/o Andrew, a girl aged nineteen years old. Three witnesses did testify to establish the offence against the appellant. And on his part, the appellant denied to had committed the alleged offence. His contention before the trial court, a narration which he had also accounted to PW 2 and PW 3 who happened to be police officers, was to the effect that the complainant had been his girl friend. He did also summon one witness by the name of Ashura Selemani to support his contention. The District court was satisfied without leaving any shadow of doubt that the offence against the appellant had been established and hence, the conviction and sentence. Such decision did aggrieve the appellant who preferred his appeal to this court.

In his memorandum of appeal, the appellant has raised about nine grounds of appeal, and during the hearing of the appeal, he did appear before the court to argue them in person. On the part of the respondent – Republic, the same was represented by Mr. Katuli, learned State Attorney who declined to support the conviction. Among the reasons that moved Mr. Katuli not to support the conviction was the irregularity on the proceedings. It was the contention of the learned State Attorney that the preliminary hearing of this case, was irregularly conducted by the trial court as the proceedings at page 2 do reveal that the facts disputed and those not disputed were not identified by the court. Indeed this court on going through the said proceedings, is in concurrence with the views of the learned State Attorney that, the provision of section 192 (3) of the Criminal Procedure Act 1985 that requires a memorandum of matters not disputed to be prepared and signed by both sides, was not complied with. Such omission was an irregularity which is fatal.

Regarding the evidence tendered to establish the case, it was the assertion of the learned State Attorney that the only evidence that was of assistance to the case, was that of the complainant only who testified as PW1. He however, hastened to state that, the testimony by the same did leave much to be desired. Bearing in mind that she was the main character in the whole incidence and thereby witnessing everything, the way she narrated the whole transaction from when she was met by the appellant at Ottu bar to when she

got raped at the appellant's home as she contends, cannot fail to make one raise eyebrows. For instance, PW 1 (complainant) did tell the court that at the bar, there had been a scuffle between the appellant and someone else, and that she did participate in the attempt to settle such dispute. At the same time, she contends that she was not knowing the appellant. And that when being forced by the appellant to leave with him, she claimed to had failed to raise an alarm or shout for help because she had chest problems, but she does not say anything as to why those other people who had been with them failed to assist her if she ever tried to resist.

The Learned State Attorney did further submit that, the complainant did in her testimony tell the court that the appellant used a bush knife to threaten her to leave with him to his home. However, when cross-examined by the appellant, she did tell the court that the appellant did force her to leave with him by threatening her using a stone which he had been holding. Such contradicting statements by the complainant, the State Attorney argued, may not easily convince someone to believe that what she had been saying in court was really what did transpire on the fateful night.

It was also averred by the learned State Attorney that, there were some people who according to the complainant's story, did eyewitness the occurrence of some of the events and therefore were material witnesses who were supposed to have been summoned to give their evidence in court. However, such people were never summoned to give their evidence. Such people included: Faraja, the sister of the complainant who was working at OTTU bar where the complainant was met by the appellant on the fateful night. Also there were people who are said together with the complainant attempted to settle the dispute between the appellant and the other person. These people must had seen the appellant forcing the complainant to leave with him. However, they were nowhere to give their evidence.

And on the issue of the PF 3, the learned State Attorney was of the view that the learned trial Magistrate misdirected herself to hold that it was the appellant who raped the complainant simply because it had been prescribed on it that she had been raped. He was of the view that, such generalization may be

misleading because there was no evidence to affirmatively establish that the sperms found in the complainant's vagina as prescribed in the PF 3, was from no one else other than the appellant.

The submission by the learned State Attorney, did in brief cover all the grounds of appeal of the appellant as contained in his memorandum of appeal though not in an orderly form. After going through the proceedings of the trial court as well as the judgment, this court is in agreement with all that have been submitted by the learned State Attorney. And before this court proceeds to consider the demerits of the evidence that was tendered at the trial court in support to what got submitted by the learned State Attorney, it considers pertinent to observe even to the wording in the charge sheet. The same reads:

> ***"That Baraka s/o Sharifu charged on 21st day of May 2006, at about 2100 hours, at Unyankindi area within the Municipality, District and Region of Singida, did have carnal knowledge of Grace d/o Andrew a girl of age nineteen years."***

Much as the particulars of the case in this matter stand, one is moved to hold that there was no offence that got committed. This is from the fact that there is nothing wrong in our laws for a man of the majority age to have carnal knowledge of a woman who is above the age of eighteen years as it was the case for the complainant in the matter at hand. According to the wording in sub-section (b) of section 130, there were some vital words that got omitted in the charge at issue, that is, "*without her consent*".

The question that crops thereafter, as to whether such omission did occasion any injustice. It is my considered view that it did not. This could be evidenced in the way the appellant did present his defence. There is no doubt that the appellant was well aware of the nature of the case which he was facing.

The issue that stood for consideration by the trial court as framed by the honourable trial Magistrate was;

" Whether or not the accused did have sexual-intercourse with Grace Andrew without her consent"

This court is in agreement with the learned trial Magistrate that, that was the disputed matter. And regarding the evidence that was tendered at the trial court, it was the only testimony by the complainant that tried to establish such fact. The other two witnesses, that is PW 2 and PW 3, the police officers, their testimony did just base on what they had been told by either the complainant or the appellant. The veracity of the complainant's story having been doubted as pointed above by the learned State Attorney, the case lacks the leg to stand on. On the other hand, the narration by the appellant was to the effect that the complainant was his girl friend for a long time. He did state such a thing to the police who arrested him, that is PW2, as well as the police who recorded his statement that is PW 3, and repeated the same story in court where he was supported by his witness Ashura Selemani. And in his evidence in court, apart from the fact that the complainant was his girl friend, the appellant denied to had ever have any sexual intercourse with the complainant on the material night as he claimed to had chased her when she followed him at his home after they had quarrelled when he met her at the bar.

In the light of the above situation therefore, even before the question of consent on the part of the complainant could be considered, it was relevant to establish if at all there was any act of carnal knowledge between the appellant and the complainant on the fateful night. Unfortunately, the testimony of the complainant who alleged so, was never corroborated by any other testimony other than the PF3 . Having discredited the testimony of the complainant, it is appropriate to consider the contents of the PF 3 which appears to had been very much relied upon by the learned trial Magistrate in finding the appellant guilty to the offence of rape as charged.

Regarding the PF 3, the learned trial magistrate did observe thus: "I have carefully read the PF 3 of the victim". The Medical Officer recommended as follows :-

"The victim was raped. Lacerated posterior vaginal wall bleeding. The spermatozoa have been seen as per hospital sheet." The learned trial Magistrate then proceeded " However, the accused admitted the victim to be her (sic) wife/ partner. The accused did not to have (sic) sexual intercourse without the consent of PW1. The law stated (sic) clearly that the lack of consent is an essential element of the offence. The consent must be freely and consciously given even to marriage issue. According to our case, there was a sexual intercourse (sic) which was against her will."

What one gathers from what the learned trial Magistrate is saying in the above excerpt, is that, she accepts the contention by the appellant that the complainant was his girl friend. She however goes on to find him guilty of the offence of rape because he did carnally know her without her consent. And that what established that there was carnal knowledge to the complainant by the appellant was the PF 3. Upon scrutinizing carefully the PF3 as the learned trial Magistrate did, this court was able to note that the examination to the complainant by the Medical Officer, was conducted on the 21st May, 2006. And according to the charge sheet that was drafted on the 24th May, 2006, the offence of rape was committed on the 21st day of May, 2006 at about 2100 hours. And the testimony of the complainant in court was to the effect that, she remembered to had been met by the appellant at the bar at about 2100 hours on the 21st May,2006, and that, it was after remaining there for some time, when she got forced by the appellant to move with him to his home. Thereafter, she could not recall the exact time when the act of rape was done and accomplished, she however recalled the time when she left the room of the appellant which was at about 0400 hours, which obviously was of the following day, that is the 22nd May, 2006.

Since the alleged rape is said to had occurred on the 21st May 2006, late after 2100 hours, the question which anybody can pose, is as to what time was the rape matter reported at the police station, where the PF 3 was issued to the complainant, who then send it to the hospital, where she got examined by the Medical Officer, who ultimately filled it. I hesitate to believe that it was

accomplished within such period of time. And it may not be easy to suggest that, perhaps it was a mere clerical error as the same could not have happened both at the police station and later at the hospital. Such anomaly on the dates notwithstanding, the way the PF 3 was filled is also questionable. The Medical Officer was requested to furnish a report as regards his findings after he had examined the victim. In his report, the Medical Officer did come out with the conclusion that the victim had been raped. Such reporting appear to be not in the common practise and one may be justified to comprehend it in either way.

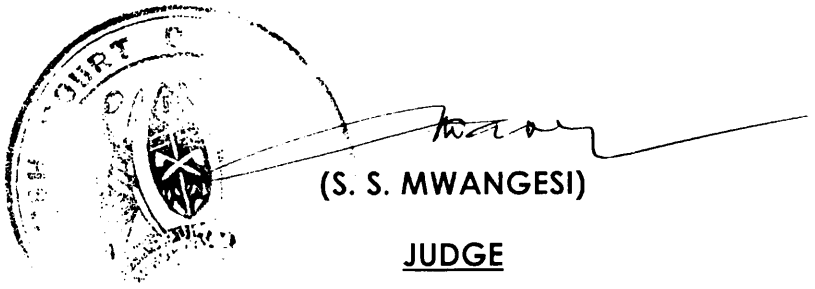
And perhaps the other important procedural requirement which was not observed by the learned trial Magistrate before admitting the said PF 3 as exhibit is non-compliance with the provision of section 240 (3) of the Criminal Procedure Act. The said provision provides interalia thus:

> ***"When a report referred to in this section is received in evidence, the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."***

Under the foregoing provision, the accused had the right of being asked by the court if he wished the Doctor who prepared the PF 3 to be summoned to appear in court and get cross-examined. It has been held that failure so to do by the court is a fundamental irregularity;- see Selemani Mwitu vs The Republic Criminal Appeal No. 90 of 2000 (CA) unreported and also Osca Mapunda vs The Republic Criminal Appeal No. 182 of 2005 (CA) unreported.

Be that it may, even if the authenticity of the PF 3 were not to be contested, it was a misdirection on the part of the learned trial Magistrate to base her conviction of the appellant on the said PF 3 because there was no any cogent evidence to satisfactorily establish that the appellant was the one who

carnally knew the complainant on the material date. And it was on those basis I believe, that the learned State Attorney did not wish to support the conviction. Under the circumstances thus, the appeal by the appellant is found to be meritorious. The findings of the trial court are hereby quashed and the sentence imposed set aside. The appellant is therefore to be set at liberty forthwith unless lawfully held for any other justifiable cause. Order accordingly.



(S. S. MWANGESI)

JUDGE

12th OCTOBER 2009