

IN THE HIGH COURT OF TANZANIA
AT TANGA
CRIMINAL APPEAL NO.20 OF 2009
[Originating from mCr.C.No.323/2001 Muheza District Court]
BAKARI SHABANI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

Date of last Order: 27/07/2010
Date of Judgment: 22/10/2010

JUDGMENT

Mussa, J;

This appeal originates from Muheza District Criminal Case No.323 of 2001. The appellant was arraigned there for rape, contrary to sections 130(1) and 131(1) of the penal code, chapter 16 of the laws. The particulars alleged that on the 6th day of October, 2001 at Magila village, within Muheza District, the appellant had carnal knowledge of a certain Agness Paulo, aged 8 years. The appellant denied the accusation but; upon full enquiry, a conviction was had, results of which he was sentenced to 30 years imprisonment. Aggrieved, he now seeks to impugn the verdict upon a petition comprised of seven points of grievance. To those points, I shall later revert in my judgment and; presently, the factual background first.

The case for the prosecution was comprised of four witnesses, from whose account, it was commonplace that the alleged victim used to reside at Magila village under the protection of her mother, namely,

Agness Paulo (PW.1). Speaking of the mother, it is noteworthy that she is the namesake of the alleged victim. For some obscure cause, the prosecution did not deem it opportune to feature as a witness the other Agness Paulo whom; as it turned out, was the alleged victim of the occurrence. Needless, for the moment, to have to digress on this prosecution ailment; evidence was to the effect that around 5.00pm or so, fateful day, the senior Agnes was plentiful at her residence. Soon after, a man called thereat to break news of the junior Agnes being heard crying from inside the appellant's room. To this, the mother was prompt in action; going straight into the appellant's room to see what was brewing. And, indeed, there was some odd happening in there and; to get to the specifics, it is best if I tape right from the horse's mouth:-

I and one Jane and Esther went to the room of the accused person we found the accused person lying on my daughter who was sleeping backwards. I got hold of the accused person and asked him what he was doing (shangingi unafanyaje) the accused person had no reply to me. I got hold of my daughter, the accused got up and ran away.

And that was, paradoxically, all what was there to constitute the substantive portion of the prosecution version. If I may interject a remark, Agness did not go so far as to impute penetration. Thus, the detail about

the appellant "lying on my daughter" was left to hang about; unelaborated. The senior Agnes did, however, additionally testify that within no moment, she relayed the details of the occurrence to the village authorities. In the meantime, there was some further telling from Shabani Selemani (PW.3); whom was occasioned to see the appellant on his heels towards the bush, shoes in hand. Soon after, there was an alarm raised at the village; which was when Shabani learnt of the occurrence. Almost immediately, the wheels of law enforcement were set in motion and; it did not take long before the appellant was securely apprehended by a militiaman called George Hubert (PW.2).

The remainder of the prosecution evidence was routine stuff; coming, as it were, from constable Mwanaidi (PW.4) who handled the investigation. Lest I forget, there was some further prosecution evidence comprised of a PF.3. Only, the same was improperly adduced into evidence without affording the appellant opportunity to express whether or not he wished the medical officer called. Such is an unbeatable non-compliance by the presiding officers below. As a result, the document at hand is useless stuff; unworthy of the slightest of a consideration. That would conclude the version as told of prosecution witnesses.

In reply, the appellant was very brief. He did not quite dispute the telling about the alleged victim being in his room on that fateful day. But then, he claimed, he was away from home and had found the young girl

in his room upon, return. Agness was playing around the room holding a chicken egg in hand. At some stage, she stumbled about and fell down. That was when the senior Agness emerged at the scene to fabricate him with the raping the young girl. Reading him between the lines, the appellant completely disassociated from the accusation laid at his door. His was, nonetheless, an account that did not, in the least, appeal to the learned trial Magistrate. The alleged fact that the appellant took to his heels upon confrontation; particularly weighed in the mind of the Magistrate. As already hinted, in the upshot, a conviction was had.

At the hearing before me, the appellant fully adopted the petition of appeal without more. Miss Athuman, learned state attorney on the shoes of the Republic, declined to support the conviction. To her, the testimonial account of a victim of a sexual offence is critical to the hoisting of the case for the prosecution. Thus, the most wretched of the prosecution's omissions was for not featuring her and; much worse, for not offering any explanation in that regard. To this submission and; without beating about the bush, I entirely subscribe. In the absence of a positive account from the mouth of the alleged victim; the case for the prosecution miserably fell short. More so, in a situation, as here, where the eye witnesses account is barely adequate. Accordingly, this appeal is allowed, results of which the conviction and sentence are, respectively, quashed and set aside. That is to say, the appellant is set at liberty

forthwith; unless he be held in custody for some other lawful cause. It is so ordered.




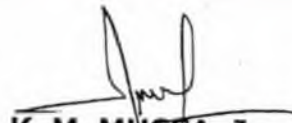
Coram – Mussa, J;

Appellant: Present

Respondent: Mr. Mfinanga, state attorney

Judgment delivered in the presence of the parties.


K.M. MUSSA, J.
21/10/2010


K. M. MUSSA, J.
22/10/2010