IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)
CRIMINAL APPEAL NUMBER 148 of 2006

(Originating from Criminal Case 132/2005 in the District Court of Kilombero-P.M. Nkombe-PDM)

MUSSA NGAOLOKELA..... APPELLANT

VS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 28-02-2011
Date of Judgment: 02-05-2011

JUMA, J.:

The Appellant, Mussa Ngaolokela, was charged with the offence of rape contrary to Section 130 (1) and (2) (e) read together with Section 131 (1) of the **Penal Code, Cap. 16 [R.E. 2002]**. The facts leading to his conviction were that on the 20th day of May, 2004, at around 7.30 a.m. at Jongo Area in Ifakara Township, Kilombero District of Morogoro Region the appellant had sexual intercourse with Tatu Kambenga a 14-year old girl. The law in Tanzania strictly prohibits sexual intercourse between a man and a woman with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

On 7th March 2006, after his trial before the Principal District- Magistrate P.M. Nkombe; the appellant was found guilty of the offence. Taking into account his mitigation and the fact that he was a first offender, the trial magistrate sentenced him to serve a statutory minimum term of thirty years in prison with twelve strokes of the cane. Being aggrieved, on 28th November 2006 the appellant forwarded his Memorandum of Appeal to this court. Appellant's grounds of appeal are contained in a four-page Memorandum of Appeal which includes not only cited authorities which appellant relied for his defence, but also detailed submissions in support of his grounds of appeal. I have for the purposes of this appeal paraphrased his grounds of appeal to read:

i) trial magistrate erred by relying on evidence of a medical report (PF-3) which was tendered without calling the medical officer who had examined the victim of alleged rape as required by section 240-(3) of the **Criminal Procedure Act, 1985**;

ii) trial magistrate should not have grounded his conviction on extremely suspicious evidence of PW1, PW2 and PW3;

iii) failure of the trial magistrate to conduct a trial within trial to determine admissibility of a cautioned statement;

iv) trial magistrate erred by failing to evaluate the evidence of defence witness (DW1) and the doubt it created on the case of the prosecution;

v) trial magistrate failed to carry out his judicial duty diligently. This created the impression that the trial court was in a hurry to conclude the case;

vi) appellant had no legal representation; and

vii)appellant was not accorded a chance to call his witnesses as provided for by section 194-(5) of the **Criminal Procedure Act**.

When this appeal came up for hearing on 28 February 2011 the respondent Republic was represented by Ms Lushagara, the learned State Attorney. The appellant Mussa Ngaolokela argued his own appeal. Submitting briefly on his grounds of appeal, the appellant strenously denied that he committed the offence of rape. He contended that there was no police RB looking for him from the time the offence is alleged to have been committed to the time of his arrest. The appellant believes that his arrest was an afterthought and the the accusation levelled against him was a fabrication designed to frustrate him out a parcel of land which his late father once transacted on with the father of his accuser. The appellant further contended that he had asked without success, the trial magistrate to summon his headmaster since the offence was allegedly committed when he was still a primary school pupil.

On the ground of appeal contending that the trial court should not have grounded his conviction on evidence of PW1, PW2 and PW3, the learned State Attorney did not see any problem with the evidence of the three witnesses because PW1 and PW2 were credible witnesses who identified the appellant in broad day light. Responding to the ground of appeal that the trial magistrate should have conducted a trial within a trial; Ms Lushagara submitted that she found nowhere in the trial records where the prosecution tendered an extra-judicial statement of the appellant to require

any inquiry by the subordinate court to determine its voluntariness for purposes of admissibility. Ms Lushagara has asked this court to dismiss the ground of appeal where the appellant wants his appeal to be allowed because he had no legal representation. According to the learned State Attorney, the appellant did not ask for legal representation and he only preferred this ground of appeal as an after-thought. Ms Lushagara rejected the argument that appellant was not accorded a chance to bring his own witnesses. That the appellant was given the chance but he elected not to call his witnesses to testify on his behalf. She referred to page 8 of the typed proceedings to support her submission that that the appellant told the trial court that he had no witnesses and he would testify on his own defence.

I have considered the submissions made on either side and perused the record of proceedings of the trial court. It is a legal duty of this court on first appeal to reconsider the evidence adduced at the trial court in light of ingredients of the offence for which the appellant was charged and convicted. It is also the duty of this court of first appeal to re-evaluate evidence and come up with its own conclusions regarding whether the appellant committed the offence of rape contrary to Section 130 (1) and (2) (e) read together with Section 131 (1) of the **Penal Code, Cap. 16**.

Let me begin with the ground of appeal where the appellant contended that the trial magistrate should have conducted trial within a trial to determine the admissibility of a cautioned statement. I have looked at the record of proceedings of the trial court to determine the veracity of this ground of appeal. With respect, Ms Lushagara is correct in her submission

that there was no need for the trial magistrate to conduct a trial within a trial because at no point during the trial did the prosecution tender any extra-judicial statement of the appellant to require any inquiry by the subordinate court to determine its voluntariness for purposes of admissibility. This ground of appeal is devoid of merit and is hereby dismissed.

In another ground of appeal cited section 194-(5) of the **Criminal Procedure Act, Cap 20** to contend that the trial magistrate failed to accord him a chance to call his own witnesses in his defence. This, according to the appellant infringed his legal right as provided for under that provision. Section 194-(5) of the **Criminal Procedure Act** states,

> 194-(5) - Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.

Citing page 8 of the record of typed proceedings, Ms Lushagara invited this court to dismiss this ground of appeal because appellant was accorded a chance but he elected not to call any witness in support of his defence. Upon my reading of section 194-(5) of **CPA** I failed to appreciate the relevance of this provision to appellant's contention that he was denied a chance to bring his own witnesses. With respect, the learned State Attorney is correct, the records of proceedings do not support the appellant's ground that he asked but was denied the chance to call witnesses. In addition, the

section 194-(5) which the appellant cited in paragraph 8 of his memorandum of appeal is not about the chance to call witnesses but it is about the defence of alibi. After scrutinizing the record of proceedings I found nowhere the appellant either giving a notice of his intention to rely on the defence of alibi before the hearing of the case or furnishing the prosecution with the particulars of the alibi. Court of Appeal of Tanzania in **Rashid Seba vs. Republic, Criminal Appeal No. 95 of 2005 (CA) at Mwanza** provided the guidance that the court is not exempt from the requirement to take into account the defence of alibi, where such a defence has not been disclosed by an accused person before the prosecution closes its case. What this section means is that where such a disclosure is not made, the court, though taking cognizance of the defence "may in its discretion, accord no weight of any kind to the defence. Applying this guidance, there is nothing on record upon which this first court of appeal can re-evaluate to determine whether a defence of alibi was available to the appellant. This ground of appeal whereby the appellant contends that he was denied the chance to call witnesses is also without merit and is hereby dismissed.

Through paragraphs 1 and 7 of his memorandum of appeal, the appellant claims that he was prejudiced by the decision of the trial magistrate to rely on evidence of a medical report (PF-3) which was tendered without calling the medical officer who had examined the alleged victim of rape. The appellant is in other words questioning the admissibility of Exhibit **P1** (medical report) which showed that nothing was seen on PW1 after her medical examination because it had taken too long before that examination.

Ms Lushagara did not dispute the right of the accused (appellant) to cross examine the medical doctor on the PF-3 he prep;ared. The learned State Attorney hastened to point out that the relevant section 240-(3) of the **Criminal Procedure Act, 1985 Cap. 20** does not oblige the trial court to summon the medical officer who examined the victim to come and testify. Ms Lushagara noted that the appellant was well aware of his right to request the attendance of the medical officer and he should have exercised that right. Ms Lushagara invited this court to disregard this ground of appeal because failure to summon the medical officer did not occassion injustice to him because the judgment of the trial court did not rely on evidence of PF-3 but on evidence of PW1.

With due respect, my perusal of the records of the trial court do not support the contention by Ms Lushagara that the appellant was given the chance to say anything with respect to his right to cross examine the medical doctor who prepared the PF-3. Records show that when admitting the PF-3 as court exhibit the victim of the alleged rape (PW1), stated- "here is the said PF-3 which I tender in court as exhibit:"

Court: Admitted and marked Exhibit P1.

Court of Appeal of Tanzania restated a settled law in **Sprian Justine Tarimo Vs. Republic, Criminal Appeal No. 226 of 2007** to the effect that once the medical report like the PF3 has been received in evidence under section 240 (1) of **Criminal Procedure Act, 1985** it becomes imperative on the trial court to inform the accused of his right of cross-examining the medical witness who prepared it. If such a report is received in evidence without complying with the provisions of section 240 (3) of the CPA, it should not be

acted upon. With respect, it is clear from the decision of the trial magistrate that **Exhibit P1** was not acted upon in arriving at the decision of the subordinate court. This Exhibit was at best inconsequential because the Appellant was arrested on 30 April 2005 which was almost a year after he had allegedly committed the offence.

The remaining grounds of appeal relate to what the appellant regarded as suspicious evidence of PW1, PW2 and PW3; failure of the trial magistrate to evaluate evidence of the defence witness (DW1) and the impression the appellant had that to his detriment, the trial court was in a hurry to conclude the case. Ms Lushagara saw nothing wrong with the evidence of PW1, PW2 and PW3. According to the learned State Attorney PW1 and PW2 were credible witnesses who identified the appellant. That since the alleged rape took place in broad day light; the evidence against the appellant was beyond suspicion.

Although the appellant was arrested on 24 May 2005, the offence is alleged to have taken place almost 12 months earlier on 20th May 2004 at 07.15 a.m. Tatu Kambenga the victim of the alleged rape testified as PW1 on how she was allegedly duped by the appellant that her head teacher wanted to see her at Tech Fort School. On the way somewhere in the bush the appellant allegedly told her that the head teacher had gone to the local witch doctor to obtain medicine designed to assist the victim and other pupils to pass their impending standard seven exams. The appellant gave her some medicine to inhale. Upon inhaling she became tired and felt a sense of helplessness. The appellant proceeded to undress her and had

sexual intercourse with her. Upon gaining consciousness, she pushed off the appellant and went to report to her friend who happened to be head teacher's younger sister. Then it was up to a year later on 24 May 2005 when the incident was reported to the police. The medical examination found no semen due to long period after her assault. PW1 identified the appellant through a gap in appellant's teeth.

Tatu Kambenga was supported by PW2 (Zerafi s/o Sabu) who was 13 years old when she testified after the trial court had conducted a voire dire examination. PW2 testified that it was around 7.00 a.m. on that fateful day when she saw the appellant near the PW1's home. That appellant stopped her and asked her to call PW1 because the head teacher wanted PW1 urgently. It was PW2 who fetched out PW1 for the appellant before she left them alone.

PW3 Mwajuma Mwipi was the head teacher of Jengo Primary School where both PW1 and PW2 were pupils. PW3 did not know the appellant. According PW3, she learnt about the alleged rape on 20th May 2004 through one Mariam, a pupil at her school. Then PW1 confirmed later that indeed she was raped. It was until 30 April 2005 when PW1 and another person known as Dogo who told PW3 that they had spotted the man who had raped PW1. He went to where the man was and PW3 was shown the appellant to be the culprit. The appellant was then arrested.

On his part, appellant testified on oath as DW1 on how he was arrested on 29th April 2005. DW1 protested at the way PW1 identified him through a gap in his teeth. He contended that it is quite possible a different person

could have similar gap in his teeth. DW1 also claimed that he only moved into the area in 2005 and was not living in that area in 2004 when PW1 was allegedly raped.

In his judgment, trial magistrate [P.M. Nkombe PDM] believed the evidence of PW2. That PW2 identified the accused as the one who asked him to go and tell PW1 that the head teacher urgently wanted to see her at the school. With respect to the evidence of the complainant (PW1), the trial magistrate stated on page 2 of his judgment,

> *"I do not find the reason as to why PW1 should fabricate evidence against the accused that he raped her taking into mind that for woman of the age of PW1 to publish that she was raped is shame. I find that the act was done to her and by the accused person. I find the charge has been proved against the accused person. I find him guilty as charged. I convict him."*

The purpose of the trial was to establish beyond reasonable doubt whether the appellant committed the offence of rape contrary to Section 130 (1) and (2) (e) read together with Section 131 (1) of the **Penal Code, Cap. 16**. Apart from lack of explanation why it took almost a year between the alleged offence and involvement of the police, prosecution and defence offered different accounts on how the appellant was arrested. According to PW3 it was PW1 and someone called Dogo who on 30 April 2005 told her that they had seen the appellant. That PW3 went to the place where appellant was and appellant was arrested and then taken to the police station. This version of how appellant was arrested is different from the version narrated by the appellant himself when he testified as DW1. According to appellant, on 29 April 2005 he was at Vunjo bar where he roasted potato chips for sale. At

around 5 p.m. he briefly left his place of business to change money when a woman accosted him to ask his name and to also enquire whether the appellant knew her. Appellant did not know that woman. The woman all the same asked him whether he was cohabiting with her daughter. It was when he declined that he was living in with the woman's daughter when she shouted for help accusing him of being a thief. The commotion attracted a crowd. He was arrested and taken to police. With respect, I have perused the judgment of the trial court, the trial magistrate neither weighed nor evaluated the veracity of this account on how the appellant was arrested, taking into account that the arrest was made almost a year after the event.

Bearing in mind that it took almost a year for the appellant to be arrested, the trial magistrate should have provided clear reasons why he believed PW1, PW2 and PW3 but not the appellant. The trial magistrate had a legal duty to evaluate the evidence of both prosecution and that of defence to determine whether the evidence before him raised any reasonable doubt. PW1 testified that she identified the appellant to be her assailant through a gap in appellant's teeth. PW2 was not at the scene of alleged crime. PW2 who was allegedly sent out by the appellant to summon PW1 did not testify whether she too identified the appellant through a gap in his teeth. I am mindful here of the observation by the Court of Appeal of Tanzania that delay in arresting a suspect cast doubt on the credibility of a witness: see- **Kulwa s/o Mwakajape and two others vs. Republic, Criminal Appeal No. 35 of 2005 (CAT) at Mwanza**.

The actual age of the victim of the alleged rape is another doubtful aspect of the trial which was not resolved by evidence levelled against the appellant. The age of PW1- Tatu Kambenga was an important ingredient of the offence since the entire criminal case lined up against the appellant was pegged on section 130-(1) and (2) (e) of the **Penal Code** emphasizing the unlawfulness of having sex with a girl or a woman under eighteen years of age:

> ***130***.*-(1) It is an offence for a male person to rape a girl or a woman.*
> *(2)-A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
> *(a).....*
> *(b).....*
> *(c).....*
> *(d).....*
> *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

Neither the victim (PW1) nor her head teacher (PW3) led any evidence to establish the age of PW1. PW3 testified that PW1 was her pupil at Jongo Primary School. On his part, the trial magistrate did not make any finding on the actual age of PW1. In my opinion, it is not enough to allege that the victim of the crime was a girl of 15 years of age without proving that age by appropriate evidence. PW3 could have for example indicated the record of the age of PW1 as extracted from school records. Central to a proper conviction of a person accused of raping an underage girl under sections 130 (1), (2) (e) of the **Penal Code** is proof of lack of consent by reason of

tender age. I will therefore hold that the age of PW1 was not established for purposes of convicting the appellant for offence of rape c/s 130-(2) (e) of the **Penal Code, Cap. 16.**

The foregoing doubts on prosecution's case were not in my opinion adequately evaluated by the trial magistrate. I cannot with respect agree with the conclusion reached by the learned trial magistrate that the prosecution had proved the guilt of the appellant beyond reasonable doubt. The benefit of doubt I have identified should operate in favour of the appellant.

Before concluding, I should perhaps address myself to an interesting ground of appeal wherein the appellant contended that he was denied legal representation to which he was entitled. According to him, this legal right is recognized by the **Legal Aid (Criminal Proceedings) Act, Cap 21** which makes provisions on when it is desirable, in the interests of justice, to extend legal aid in the preparation and conduct of accused person's defence or arguing an appeal in criminal cases. Further, appellant contends that section 310 of the **Criminal Procedure Act, Cap 20** recognizes this right of legal representation which he was denied by the subordinate court. The relevant section 310 of the **Criminal Procedure Act** provides,

> ***310.*** *Any person, accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court subject to the provisions of any written law relating to the provision of professional services by advocate.*

Although Ms Lushagara on behalf of the respondent Republic brushed off this ground of appeal as an after-thought by contending that the appellant did not raise it up during his trial; I am of the opinion that this ground deserves a closer attention by this court of first appeal at least to guide future proceedings before subordinate courts where accused persons face offences attracting lengthy sentences. In my opinion, the law is settled that right to legal representation is guaranteed where an accused person is tried for murder. Court of Appeal of Tanzania sitting in Arusha in **Hunay Langwen & 3 Others Vs. R., Criminal Appeal No. 120 of 2002** cited its own earlier decisions in **Laurent Joseph v. R. [1981] TLR 351** and **Lekasai Mesawarieki v. R, Criminal Appeal No. 31 of 1993** to restate the law that in offence of murder, a trial cannot continue any further where the accused person has no legal representation.

It is also my opinion that section 310 of the **Criminal Procedure Act** applies to situations where an accused facing any other offence triable at the district court, a Resident Magistrates Court or at the High Court has on his own engaged an Advocate to represent him. The words "*may of right be defended by an advocate of the High Court*" in section 310 are couched in a permissive but not in a compulsive way. This court has in the past suggested that the right to be represented by an Advocate under section 310 must be reasonably exercised. Korosso, J. (as he then was) had an occasion to expound on reasonableness expected under this provision in the case of **Hassan Mohamed Mkonde & Another V Republic 1991 TLR 148 (HC)** when he stated that,

> *... Under the provisions of section 310 of the Criminal Procedure Act, No. 9 of 1985 an accused has a right to engage an Advocate. But such a right has to be reasonably exercised and must be considered along with other equally important rights. For example, a court of law cannot consider only the right of an accused before it in complete oblivion of the rights of witnesses who appear before it after they have travelled from near and far.*

In my opinion, since the appellant did not on his own free will engage an Advocate under section 310 of CPA and he was not facing a charge which attracts capital punishment, he could not demand state provided legal representation under section 310 of CPA. In other words section 310 governs situations where an accused person has at his own cost engaged an Advocate. Ms Lushagara has suggested that the appellant did not in fact specifically ask the trial court that he needed legal representation. The learned State Attorney seems to imply that it is the accused person who should take the initiative if he or she wants legal representation under the **Legal Aid (Criminal Proceedings) Act, Cap 21**. I am of a slightly different view with respect to access to legal representation under the **Legal Aid (Criminal Proceedings) Act**. In my opinion, courts as much as the accused can initiate legal representation under this law.

In operation for 42 years since 1969, it is now the time to inject some life into **Legal Aid (Criminal Proceedings) Act, Cap 21.** This law governing legal representation should be read as an extension of section 310 of the **Criminal Procedure Act**. While section 310 of CPA governs right to legal representation by those accused who can afford the services of Advocates, the **Legal Aid (Criminal Proceedings) Act, Cap 21** should be resorted to

assist those accused who cannot afford to engage the services of Advocates. **Legal Aid (Criminal Proceedings) Act** should for example be invoked to extend legal representation to indigent litigants who face offences attracting lengthy prison sentences. Thirty years in prison sentence is a lengthy prison sentence by any standard. In this respect, I totally agree with what Mwalusanya, J. (as he then was) suggested in the case of **Haruna Said V Republic 1991 TLR 124 (HC)**:

> *"...Under s. 3 of the **Legal Aid (Criminal Proceedings) Act No. 21 of 1969** where in any proceedings it appears to the certifying authority that it is desirable, in the interests of justice that an accused should have legal aid in the preparation and conduct of his defence or appeal and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have free legal aid. For proceedings in the High Court the certifying authority is the Chief Justice of the Judge of the High Court conducting such proceeding, and in the case of a proceeding before a District or a Court of a Resident Magistrate, the certifying authority is the Chief Justice.*
>
> *In the following circumstances it will normally be procured that the interests of justice require that the accused should be legally represented at his trial:*
>
> *a) Where an accused is charged with a serious offence, whereof a very lengthy prison sentence is likely to follow upon a conviction e.g. offences of robbery with violence, economic crimes under Act No. 13/1984 etc.*
>
> *b) When the trial is likely to include complicated issues of law arising from concepts like alibi, possession, burden of proof, consent, knowledge, confessions, hearsay evidence, special circumstances or special reasons etc. But each case has to be decided on its merits to find out if it has complicated issues of law or not.*
>
> *In these two instances, there is a presumption that the interests of justice require that the accused should be legally represented. Therefore whether these two instances present themselves the trial magistrate is enjoined to conduct an inquiry to determine the means of*

the accused person to see if he or she can afford to hire an advocate. After that the report of the inquiry as well as the certified copy of the proceedings be sent to the certifying authority (the Chief Justice) for the consideration as to whether legal aid should be granted or not."

In my opinion courts assigned to conduct trials where accused persons face the potential of lengthy prison sentence should always take it upon themselves to determine whether interests of justice require that the accused should be legally represented. Courts should be obliged to conduct inquiries to determine the means of the accused person to see if he or she be afforded an Advocate and set into motion the provisions of **Legal Aid (Criminal Proceedings) Act**. My reading of section 3 of the **Legal Aid (Criminal Proceedings) Act** leaves me in no doubt that courts also have a positive duty to initiate an inquiry to in order to certify whether any accused person before them should have legal aid. The law does not say that this initiative should only come from the accused person.

In the upshot, this appellant's appeal is allowed, his conviction is quashed and the sentence of thirty years in prison is hereby set aside. Unless the appellant is otherwise lawfully held, he should be set at liberty forthwith.

I.H. Juma,
JUDGE
02-05-2011

Delivered in presence of: **the Appellant in person and Mwanaamina Kombakono (State Attorney) for Respondent.**

I.H. Juma,
JUDGE
02-05-2011