

# IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

## CRIMINAL APPEAL NUMBER 144 of 2011

(Originating from the District Court of Morogoro at Morogoro, Criminal Case  
No. 355/2008- J.K. Mzonge-PDM)

**MASUDI s/o ABDALLA.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

## **JUDGMENT**

**Date of last Order:** 10-07-2012

**Date of Judgment:** 17-07-2012

**JUMA, J.:**

This is an appeal by the appellant Masudi s/o Abdalla, who was charged with an offence of rape contrary to sections 130 (3) (d) and 131 of the **Penal Code, Cap. 16**. He was on October 20, 2008 convicted and sentenced by the District Court of Morogoro at Morogoro to serve thirty years in prison with corporal punishment. Appellant was also ordered to pay the complainant compensation of TZS. 100,000/=. The conviction

and sentence was based on the information that the appellant had an unlawful carnal knowledge of the complainant Mariana d/o Issa (PW1). Her consent for sexual intercourse was obtained under the pretext that the appellant as a traditional healer was administering traditional medicine through sexual intercourse to cure her persistent abdominal pains.

The complaint was that on 24<sup>th</sup> June 2008 at around 15:00 p.m., Mariana and her husband Fikiri s/o Richard (PW2) were at the homestead of one Mzee Wami. Mariana told Mzee Wami about her persistent abdominal pains, for which she had failed to get proper treatment. Mzee Wami recommended a local traditional healer, who happened to be the appellant. Upon the complainant and her husband arriving at the homestead of the traditional healer, the appellant consulted his occult powers, and found that Mariana had witches in her abdomen which the appellant had the power to remove. Mariana paid TZS. 15,000/= for appellant's services whereupon her husband was asked to get out of the treatment room.

The prosecution brought four witnesses, including the complainant and her husband. Appellant testified on his own defence and did not call any additional witness. In a four page

judgment the trial court found the appellant guilty as charged. Appellant was not satisfied with his conviction and sentence. He filed this appeal containing eleven grounds of appeal. These grounds may in essence be summarized into three areas of grievance:-

1. Evidence before the trial magistrate was scant, contradictory and insufficient to establish the offence of rape.
2. The caution statement which the trial magistrate relied upon was not properly admitted.
3. The evidence of Medical Examination Report (PF-3) was improperly admitted.

In his Judgment, the trial court held that all prosecution witnesses had testified nothing but the truth that the appellant had in fact raped the complainant. The trial court also believed that the decision of the appellant to request the husband of the complainant and others to move out of the treatment room, manifested his intention to commit the offence of rape. The trial court also concluded that the evidence of the complainant was corroborated by the evidence of caution statement wherein the

Mr. Hyera referred back to the evidence of the husband of the complainant who had testified that he had returned home leaving his wife behind with the traditional healer. And when he returned later, he found his wife and the traditional healer outside the healer's house. It is not clear to the learned State Attorney why the complainant had to wait till when they reached home to complain to her husband. Mr. Hyera also submitted that these discrepancies created doubt in the evidence of the complainant regarding the alleged rape.

As his third reason, the learned State Attorney expressed his serious doubt over the probative value of the Medical Examination Report (PF-3) which, was taken into account by the trial magistrate without asking the appellant whether he had any objections. Mr. Hyera submitted that inasmuch as the appellant was not informed of his right to demand the attendance of a medical doctor who examined the complainant, the evidence of Medical Examination Report was admitted without complying with the provisions of section 240 (3) of the **Criminal Procedure Code, Cap. 20**. Mr. Hyera asked this court to discard the evidence of Medical Examination Report.

As his fourth reason, Mr. Hyera submitted that the evidence of caution statement should also be discarded. Mr. Hyera submitted that the caution statement was merely read over to the appellant, and nowhere was the appellant asked to indicate whether he objected to the admission of the caution statement.

Notwithstanding the articulate submission of the learned State Attorney in supporting this appeal, it still remains a legal duty of this court of first appeal, to determine the sustainability of the conviction and sentence entered by the trial court. This determination is to be made after re-evaluation of the evidence that was adduced at the trial court in light of ingredients of the offence of rape for which the appellant was charged, convicted and sentenced.

The offence for which the appellant was convicted and sentenced, is created by section 130 (3) (d) of the **Penal Code** which creates the offence of rape where it is established beyond reasonable doubt that a traditional healer has taken advantage of his position and trust to have sexual intercourse with his patient under pretext that the intercourse is for treatment or healing purposes. Punishment for this offence is prescribed under section 131 of the **Penal Code**. Section 130

(3) (d) discloses ingredients of the offence of rape against traditional healers which the prosecution had to prove beyond reasonable doubt:

**s. 130 (3) Whoever–**

**(a)...**

**(b)...**

**(c)...**

**(d)-being a traditional healer takes advantage of his position and commits rape on a girl or a woman who is his client for healing purposes;**

The main ingredients constituting an offence under section 130 (3) (d) of the **Penal Code** is the proof that a traditional leader had taken advantage of a girl or a woman and had sexual intercourse. To establish the taking of advantage, the prosecution relied on the evidence of the complainant (PW2), her husband (PW2), the caution statement of the appellant and the Medical Examination Report (PF3).

Let me in my re-evaluation of evidence begin with the probative value of the caution statement of the appellant which was recorded by Detective Sgt Boniphace (PW4), and admitted as exhibit P2. It is very clear that the trial magistrate relied on this caution statement as shown on page 3 of his judgment where the trial magistrate stated:

***“...The only issue to be considered is whether the accused person raped PW1. I have to answer this issue in positive. As from the evidence adduced, PW4 took the caution statement of the accused person as a free agent and after being given all his rights..... the accused said:... ni kweli, wakati nina mpaka dawa tumboni nikapata tama ya kufanya mapenzi ndipo nikatumia ujanja huo nikakamilisha haja yangu.....***

From the records of the proceedings of the trial court, Mr. Hyera is with due respect very right to question the probative value of the caution statement. The Principal District Magistrate did not take necessary precaution before relying on the cautioned statement of the appellant. Page 37 of the handwritten records of proceedings which are more accurate than the typed records, the trial court merely recorded that the caution statement was read over and tendered as exhibit P2. Apart from the chance to cross examine Det/Sgt Boniphace (PW4) which the court accorded the appellant, the trial court neither indicated how it regarded the confession as voluntarily given, nor was the appellant given a chance to object the admission of his caution statement as an exhibit.

It is clear from the judgment of the trial court that the trial magistrate relied on the corroborative value of the Medical Examination Report (PF-3). On page 4 of his judgment, the Principal resident Magistrate stated:-

***“Besides that the PF-3 supports and corroborates the allegations. It was endorsed on 24/6/2008 the day of the incident.”***

The records of the proceedings bears out Mr. Hyera in his submission that the appellant was not, in terms of section 240 (3) of the **Criminal Procedure Act, Cap. 20** informed of his right to cross-examine the medical witness who prepared Medical Examination Report (PF-3). In **Sprian Justine Tarimo vs. R., Criminal Appeal No. 226 of 2007** the Court of Appeal of Tanzania gave guidance that once a medical examination report 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 that report. And 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. I will with due respect agree with Mr. Hyera that the evidence of medical examination report should be discarded in



as much as it was admitted and relied upon as corroborative evidence without informing the appellant of his right to cross-examine the medical witness who prepared it.

After discarding both the evidence of caution statement and the evidence of medical examination report (PF-3), the only evidence remaining is that of the complainant (PW1), her husband (PW2), that of Bakari Melid (PW3) and the evidence of Det/Sgt Boniphace (PW4) who investigated the claim. Only the evidence of the complainant relates to what actually happened inside the appellant's treatment room. The complainant narrated the bizarre and weird advantage the appellant allegedly took over her when she was left alone with the appellant. The complainant testified on how the appellant allegedly put the traditional medicine on his male organ before having sexual intercourse.

In her evidence, the complainant testified that on the fateful day at 15:00 p.m. she met one Mzee Wami at latter's home who told her about a traditional healer residing at his home. The complainant and her husband (PW2) paid a visit at the healer's home. But her husband's account differs from the complainant's. According to Fikiri s/o Richard (PW2), it was

around 07:00 a.m. in the morning when he and his wife went to the appellant's homestead. After consulting the traditional healer, Fikiri s/o Richard was told to go back home but leave his wife behind for treatment. He was directed to return back between 13:00 and 14:00 p.m. PW2 returned at 15:00 p.m. and found his wife and the appellant outside. Because the treatment was not over yet, Fikiri s/o Richard left his wife behind with the appellant and went back home. Thirty minutes later the complainant followed her husband home and narrated how the appellant had administered the traditional medicine through sexual intercourse.

The evidence of Bakari Melid (PW3) also highlights the discrepancy of time. Bakari Melid testified that it was in the morning of 24<sup>th</sup> June 2008 when he met the complainant and her husband heading to the appellant's homestead for treatment. Later at 15:00 p.m., Bakari Melid met Meriana complaining that appellant had raped her.

There is a clear discrepancy of the time when the complainant and her husband visited the traditional healer. There is discrepancy between on one hand, the evidence of the complainant's husband (PW2) and Bakari Melid (PW3) and, on

the other, evidence of the complainant (PW1). Mr. Hyera is with due respect fully entitled to express his concern over the nine-hour discrepancy between the main witnesses. I consider this discrepancy on time as material and should have created some doubts in the mind of the trial court as regards the commission of the alleged offence of rape by the appellant. It is my considered opinion that this material discrepancy of time ought to have been resolved in favour of the appellant.

From the foregoing; I am in full agreement with the learned State Attorney that this appeal should be allowed. I hereby allow the appeal, consequent upon which the conviction is quashed and the sentence of 30 years imprisonment, 12 strokes of the cane and TZS 100,000/= compensation are all set aside. The appellant is accordingly set at liberty.

**DATED at DAR ES SALAAM this 17<sup>th</sup> July, 2012**

  
**I.H. Juma,  
JUDGE**

Judgement is delivered this 17<sup>th</sup> day of July, 2012 in the presence of the appellant and Ms Shelly, State Attorney (for the Respondent).

  
**I.H. Juma,  
JUDGE**