

IN THE HIGH COURT OF TANZANIA
AT MTWARA
CRIMINAL APPEAL NO. 6 OF 2013
Original Lindi District Court Criminal Case No. 98/2011
(Before: Hon. L. Rugarabamu – Esq, RM)

SALUM SELEMANI @BANDARI ----- APPELLANT
VERSUS
THE REPUBLIC ----- RESPONDENT

JUDGMENT

31ST July and 1ST November, 2013

M. G. MZUNA, J.:

Salumu Selemani @ Bandari is appealing against the conviction on a Rape charge contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2002 upon which he was sentence to thirty (30) years imprisonment.

The brief facts of this case are as follows:

PW1 Zainabu Khamisi is the mother of PW2 Salha Seif, aged 12 years (the victim of rape). She indulges in selling local liquor and the appellant is her neighbor and is the DJ at that pombe club. On the material date (which is neither mentioned by PW1 nor PW2) the former saw PW2 with Tshs 500/- (but PW2 said was 4000) which was given to her by the appellant for safe keeping and latter went to demand it. However, PW1 saw it in the

morning when she was sweeping and when asked was told it was given to her by the appellant.

PW1 went at home at evening at about 09.00 Hrs but never found PW.2 at home. Earlier on the appellant told her to handle his remote as he was called at home. She agreed. Then she decided to go to the toilet where she saw PW2 there. The appellant was also seen at the edge of the toilet. She raised an alarm and asked what he was doing to her child. This came after she had heard some foot steps as the toilet is made up of dry grass. His reply was that he had never done anything to her daughter. When they met at the pub he said she should not disclose what she saw.

Then, PW1 told her daughter that she was going to the pub to transfer her utensils. When she went back home she never found her and decided to make a follow up. She reported to the police but was not found. She was seen on the third day. When she interrogated her at first she was mute. Then she said that she was sleeping to Bandari's bungalow and said that the appellant was having sexual intercourse with her. She then went to hide somewhere after being given Tshs 500/-.

On the next day PW.2 was given PF.3 for medical examination. Indeed PW.3 Dr. Hamis Ajalo who examined her and filled the PF.3 (exhibit P1) said she had neither sperms nor bruises and was no longer virgin. She had also contracted with syphilis which it is said is transmitted through sexual intercourse.

The story of PW2 was that the appellant met her sleeping with her relatives and had with him an empty crate. Then he told her to meet him outside failure of which he was to tell her mother who could then beat her. She complied and met him at the toilet where he inserted his penis into her vagina after telling her to undress herself. She felt some pain. This she further said, was not the first time to have sex with him. Then she went to the traditional dance where she was told her mother was looking for her. The appellant traced her and sexed her. On the fourth day of his sexing her was in his house "Bungalow" and was given some money for tea. She was warned not to tell anybody or else she will be killed.

In his defence, the appellant denied to have committed this offence. That this case is a cooked one due to their long misunderstandings with PW.1 the victim's mother. That she was stopped to do any business at the club by the owner of the club DW2 Swalehe Kasim and that the appellant was a source as he told DW2 that PW1 refused to give him the collected taxes/revenue when he was collecting it.

The trial magistrate believed the prosecution case and proceeded to convict him.

The first issue is whether there is sufficient evidence which connect the appellant with the charged offence?

Mr. Makasi the learned State Attorney did not support this appeal for the reason that the evidence adduced clearly shows that the appellant and the victim were long time lovers. That, PW2 gave direct evidence that

they had been having sexual intercourse for more than 4 times on different places. He said, that is given support because the mother of the victim (PW1) was doing business at the place where the appellant was also doing business. This made it possible to have a relationship.

Further that, PW1 met the victim and the appellant at the toilet and the appellant never gave any explanation as to why they were there and what they were doing. He said the allegation that the case was cooked by PW1 was not true. He said if the appellant story was true where did he report it?

Secondly, that the victim aged 12 years could not have answered well the questions which were posed to her by the appellant. Mr. Makasi further stated that PW3 (that is the Doctor who filled PF. 3 Exhibit P1) his evidence corroborated the evidence of PW2 as he said PW2 was not a virgin and suffered from syphilis. He said the appellant never testified in relation to the charge of rape, he only said about the threats. He lastly submitted that this appeal should be dismissed.

In reply thereto, the appellant said that the trial court never touched on the evidence of his witness who testified in relation to the misunderstandings between him and PW1 at the *pombe* shop. Even the learned State Attorney never touched on this aspect. He went to report the conflict but he was told that PW1 lodged complaint that her daughter disappeared for 3 days and that he was suspected for her disappearance. He submitted that PW1 raised suspicious against him but she never found

him having sex. He said the doctor alleges that PW2 was found with syphilis which had no connection with him because he was not medically examined to see if he was suffering from such disease. He further stated that, the doctor never met PW2 with semen/spermatozoa. He also said that PW1 suspected him to be with PW2 but she never went to the appellant's home on that same night so as to confirm the story while he was staying at the 3rd house from her. He prayed for his appeal to be allowed.

In answering the first issue as to whether there is sufficient evidence which connect the appellant with the charged offence, I will try to highlight the relevant pieces of evidence.

It is evidently clear that the only evidence which connected the accused with the offence of rape was that of PW1, PW2, PW3 and PF3 (Exhibit 1).

I have noted that there are some shortfalls on the prosecution evidence which the trial magistrate never touched in her judgment.

First, upon PW1 raising an alarm when she saw the appellant with PW 1 not even any other person including her neighbours who responded to the alarm. Worse still, PW1 never asked PW2 what she was doing and never examined her on her private parts as one would have expected.

Secondly, she took for granted that it was the appellant whom PW1 saw at the toilet while it was at 9.00 Hrs (at night) without saying if there were the aids for unmistakable identification. The famous case of **Waziri**

Amani v. R (1980) T.L.R 152 which gives the tests on visual identification like the distance and time she observed him and the like was never considered. To assume that he was properly identified by simple reason that he was known to her was an error which occasioned a failure of justice. It was held in the case of **Raymond Francis V Republic** 1994 T.L.R 100 (CA) that:

"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance".

Thirdly, PW1 never bothered to report the matter to the police or cell leader instead proceeded to the club to collect her utensils. It is quite unimaginable that in a situation like that one could have proceeded with her business instead of pursuing the matter for what she said was told not to disclose it. Also PW1 did not bother to arrest the appellant on that day despite of seeing him inside her toilet where her daughter came from instead the appellant was arrested after some 3 days passed while he was staying nearby. No explanation was given for the delayed arrest while the appellant was her neighbour.

Fourthly, PW2 a daughter aged 12 years said she slept to the house of the appellant where they had sex and purported to list the properties which can be found there like a mattress, speaker and a net. The prosecution never bothered to move the court so as to visit the scene so as to satisfy court if what she said corroborated the scene she was referring

to. In a similar case of **Nguza Vikings @ Babu Seya & 3 Others vs. R**, Cr. Appeal No. 56 of 2005 (CAT) at Dar es Salaam (unreported) that evidence was found as corroborating evidence against the appellant.

Fifthly, PW2 at a certain time said went to play traditional dance at night. Nobody knows what transpired there though she said the appellant followed her there but one wonders why she stayed mute at first when she was asked her whereabouts.

Sixthly, the mere fact that PW2 had contracted syphilis did not have any connection with the appellant who was never medically examined to verify if he was suffering from such disease. If that was done it could have corroborated the evidence of PW2. The trial magistrate said at page 9 of the typed judgment that:

"...nobody proved if the accused had syphilis but such disease is transmitted through sex...what transpired in here is rape in which I can say that penetration took place considering the evidence of PW2 in which the same was corroborated the evidence of PW2 (sic)."

The trial magistrate (with due respect) went astray to find the existence of syphilis that it has connection with the appellant to have sexed PW2. There was no such connection whatsoever. Does the mere fact that syphilis is transmitted through sexual act necessarily connect the appellant? This was misdirection on her part.

The first issue is therefore answered in the negative that there is no sufficient evidence which connected the appellant with the charged offence.

The second issue is whether the offence of rape was proved beyond reasonable doubt as against the appellant?

From the above analysis of the evidence, it is clear that the evidence of PW1, PW2 and PW3 (plus the PF3) did not prove the offence in which the appellant was charged with. The learned State Attorney, with due respect, was shifting the burden of proof on the defence while aware that it is the duty of prosecution to prove the charge beyond reasonable doubt and that duty should not be shifted to the appellant. This position of the law was emphasized in the case of **Jonas Mkize vs R** (1992) T.L.R. 213 (HC). It was wrong to say for instance that the victim aged 12 years could not have answered well the questions which were posed to her by the appellant. I should remind him as it was held in the case of **Juma Kilimo vs. Republic, Criminal Appeal NO. 70 of 2012 (CAT)** (unreported) that:

"It is trite law that an appellate court will rarely interfere with a finding of fact by a trial judge based on demeanour as that judge has had the advantage of watching the behaviour and conduct of a witness. But it is now axiomatic that such impressions may be deceptive and trial judges should be wary of judging issues of facts by appearances only.

Lord Bingham in his work entitled, "The Business of Judging, Selected Essays & Speeches," (O.U.P. 2000) [1985] 38.CLP, 1-27, at page 10, says:-

"... a coherent, plausible, assured and well presented story has always been the mark of a confident trickster."

The above words are an answer to the learned State Attorney.

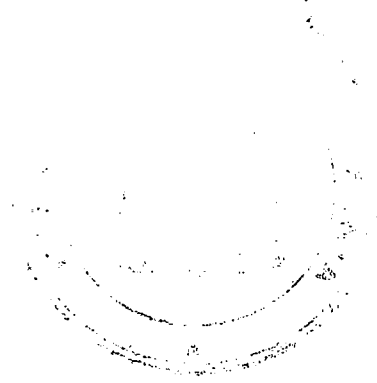
The appellant was just suspected to have committed this offence but suspicion however grave cannot be the basis for conviction. This legal position was stated in the case of **John Mgindi vs. Republic** (1992) TLR 377 (CA)

For the above reasons, I am satisfied that the appellant's convictions were found upon insufficient and unsatisfactory evidence. His conviction and sentence cannot be sustained. I allow the appellant's appeal, quash his convictions and sentence and order his immediate release from prison unless otherwise lawfully held.

Appeal allowed.

**M. G. MZUNA,
JUDGE.
1/11/2013**

Court: Judgment pronounced this 1st day of November 2013 in the presence of Mr. Makasi, the learned State Attorney and the Appellant.



**M. G. MZUNA,
JUDGE.
1/11/2013**