

IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA
(CORAM: RAMADHANI, C. J.; LUBUVA, J.A; And MBAROUK, J.A.)
CRIMINAL APPEAL NO. 82 OF 2007
IBRAHIM S/O MWAKALINGA ... APPELLANT
VERSUS
REPUBLIC ... RESPONDENT
(An Appeal from the Decision of the High Court of Tanzania,
at Iringa)
(Lukelelwa, J.)
dated the 11th day of December, 2006
in
Criminal Sessions Case No. 20 of 2006

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JUDGMENT OF THE COURT

22 & 25 July 2008

RAMADHANI, C. J.:

The appellant, Ibrahim s/o Mwakalinga, is the husband of Ledenda Kiwise, PW 4, and the father of Jestina Mwakalinga, PW 1, the complainant. They were living at Ifunda Village, Iringa. The appellant was convicted of incest c/s 158 (1) of the Penal Code and was sentenced to a term of imprisonment of thirty years. He is aggrieved by that and hence this appeal.

LUKELELWA, J. was satisfied with the prosecution case that on 21st December, 1998, PW 4 was away from home and left behind the appellant, PW 1 and a son called Burton who was younger than PW 1. The age of PW 1 was said to be 9 years but the learned trial Judge observed that there was uncertainty about the age and he resolved that in favour of the appellant. However, he made that finding when

he was considering what sentence to mete out: life sentence as for raping a girl under ten years or thirty years for incest.

When night time came, PW 1 locked the door and all the three inmates retired to sleep. In the dead of night the appellant went to the room where PW 1 and Burton were sleeping and ravished PW 1 ordering her not to shout or else he was going to slaughter her. PW 1 kept quiet and in the morning she went to school as usual. The following night the ordeal was repeated. She sustained more injuries and so, she did not go to school on the following morning.

PW 1 was so frightened by what the appellant told her that she did not tell anybody about what had befallen her but she waited to tell her mother upon her return. However, she was pre-empted because PW 4 detected the strange way she was walking and asked her what was the matter. PW 1 told PW 4 what had happened to her on the two previous nights. PW 4 confronted the appellant who merely gave her PPF powder to administer on PW 1 and then he left.

Later PW 4 became aware that the appellant had gone to complain to the village chairman, Victoria Nyalusi, PW 2, that PW 4 had insulted him and had alleged that he had raped PW 1. PW 4 became aware of that when she was summoned by PW 2. Both parents were asked by PW 2 to go back to her the next day, that is, on 23rd December, 1998. They did that and found PW 2 in the company of other elderly

women. PW 1 was called and she repeated before of all present the story she had told PW 4.

PW 2 and the other women examined the private parts of PW 1 and saw that:

... she had been destroyed in her private parts. We saw some dirt on her private parts, and directed them to go to the police, for further investigations. We wrote a letter which we gave them to take to the police.

The Assistant Medical Officer at Ifunda Health Centre, Norbert Kilosa Sanga, PW 3, tendered PF 3 which he filled after examining PW 1 on 24th December, 1998. He observed some bruises on her private parts, some bleedings, the hymen was ruptured, the vaginal walls were swollen, and some semen around showing that the child had not taken a bath.

The appellant in his defence stated that PW 4 disappeared on 19th December, 1998, without his permission and that he remained at home with PW 1 and Burton. On 21st December, 1998, PW 4 returned and slept until the following day when she accused the appellant of having ravished PW 1 who had sustained some injuries as a result.

The appellant was categorical:

It is not true that I went to the children's room on 21.12.98 and on 22.12.98 and that had carnal knowledge of Jestina. It is not true that I caused her [PW 1] bruises and wounds on her private parts.

The appellant was arrested on 22nd December, 1998 and when he was released on bail they continued to cohabit with PW 4 and got two other children with her. He confirmed what PW 4 had told the court.

Before us the appellant had the services of Mr. Justinian Mushokorwa, learned counsel, while the respondent/Republic was represented by Mr. Ponziano Lukosi, learned State Attorney. The appellant had two grounds of appeal, to wit:

1. The Honourable Judge erred to accept and act on the evidence of voice identification of a child of then 9 years, whose conduct was questionable, which he wrongly believed was corroborated by circumstantial evidence which itself did not measure to the required standard.
2. The Honourable Judge erred in not drawing an adverse inference against the prosecution for not summoning one Burton, the second occupant in the bedroom where the crime was alleged to have been committed.

Mr. Mushokorwa submitted that PW 1 was not reliable. He pointed out a number of factors to beef up this: it is unbelievable that a girl of such a tender age as she was would have been able to go to school the next day after what was done to her. Then one would not expect her to keep quiet and not to tell anybody at all on both

occasions. She had said that she did not know where her mother had gone to and when she would be back yet she was waiting to come to tell her what was done to her by her father. Mr. Mushokorwa contended that all that was unbelievable.

The learned advocate then submitted that the corroborative evidence fell short of the required standard of proof. PF 3 was taken to corroborate the evidence of PW 1. However, he pointed out a number of discrepancies. He gave some examples: PW 2 and the other women examined PW 1 on 23rd December but did not see blood. PW 3, however, recorded that he had seen blood when he examined PW 1 on 24th December. Mr. Mushokorwa submitted that the other corroborative evidence was circumstantial that there were only three occupants of the house: the appellant, PW 1 and Burton, who was much younger and was presumed not to be able to have sexual intercourse. It was also taken that the house had not been broken into. So, the court concluded that the only person who could have ravished PW 1 was the appellant.

Mr. Mushokorwa faulted that reasoning. He pointed out that the appellant confessed that he did not lock the door but that PW 1 did so. The learned advocate submitted that there was, therefore, no proof of the locking system and that the learned trial judge pointed out as much to the assessors in his summing up. He submitted that such evidence could not corroborate.

In reply, Mr. Lukosi argued that PW 1 was reliable and that her silence was because of the threats of the appellant who was her father. As for the presence of blood the learned State Attorney pointed out that PW 3 was trained in medical observation and so his report is more accurate than that of PW 2, a lay woman.

May be we pause here and take stock of the facts. There is no doubt that PW 1 was raped. That has been testified to by PW 2, PW 3 and PW 4. The appellant himself concedes as much. The question is who did it? It is also admitted that the incident occurred when PW 4 was away. The issue is when exactly did it happen? It is not in dispute that there were only three regular occupants of the matrimonial home at the relevant period of time: the appellant, PW 1 and Burton. But it has not been settled that another person could not have got in.

Let us start with when did the incident take place? Admittedly, these were peasants and the confusion as to dates is understandable. However, fixing the date or dates is crucial here. To start with PW 1 claimed that she was raped on two successive nights. Both PW 4 and the appellant are at one that PW 4 left the matrimonial home on 19th December. However, they do not agree on the date of her return. PW 4 said it was on 23rd December while the appellant gave it as 21st December. On the other hand, PW 2, the village chairman, said that she saw both parents on 22nd December and that they heard the

dispute on 23rd December. Admittedly, upon re-examination PW 2 said "It is a long time, I can't be sure of the dates".

However, what PW 2 said has a ring of truth as is supported by PW 3, the Assistant Medical Officer who examined PW 1 and produced the report on PF 3 on 24th December. If PW 4 had returned on 23rd then the village council would have sat on 24th to discuss the dispute and the medical examination would have been on 25th December.

So, three witnesses, PWs 2 and 3, and the appellant, dispute 23rd December as the day PW 4 returned. In that case PW 4 must have returned earlier than 23rd December. The appellant gave the date as 21st and went further to say that in fact PW 4 slept at home that day and that she confronted him about the rape on the next day, 22nd December. There are then two relevant matters:

One, why didn't PW 1 break the news to her mother at the first available opportunity while she kept saying that she was waiting for her mother to complain about what her father had done to her? The mother returned on the 21st but PW 1 kept quiet until the mother noticed her unusual way of walking on the 22nd and enquired.

Two, if PW 1 was raped twice then it must have been on 19th, that is, the day PW 4 left, and on 20th, the night before she returned. It is

only these two dates which makes us understand the statement of the appellant that:

When my wife left for Kaling'ombe, I slept in the house with my two children only. On 19.12.98 I returned home at 5 p.m. It is the children who locked the main door, while I was in my room. Nobody came at home in the night of 22/12/1998. I never got out in the night and went to the children's room.

So, on the day PW 4 left home the main door was locked by the children, in fact, by PW 1 who said:

I had locked the main door myself. The door was in normal working conditions and it was intact and it remained so till morning.

The appellant could not have known whether or not the door was properly locked and there was no proof adduced in court of the locking system, as properly pointed out by Mr. Mushokorwa. The learned trial Judge took the appellant to have confirmed that nobody got into the house after it was locked and that there were only three of them in the house. But what the appellant said was that "Nobody came at home in the night of 22/12/1998". That was so. On that day PW 4 was back at home. As already observed, the offence was done on 19th and 20th.

So, the holding that nobody got into the house on 19th and 20th has not been proved beyond reasonable doubt.

The narrative by PW 1 of the incident itself leaves much to be desired. This is what she told the court in examination in chief:

It was during the night, I was asleep, when father came and removed my underwear, then he removed my gown, and began to rape me. I did not know who was raping me. Then I wanted to raise an alarm. My father told me that if I raise an alarm he will slaughter me. I then realized that it was my father.

It would appear that the warning not to raise an alarm was given not before even the undressing of PW 1 by, up to that time, an unknown person. The warning was given after the sexual act had started and when PW 1 "wanted to raise an alarm". Two questions immediately come to mind: One, why did PW 1 wait for all those steps to be taken before "wanting to raise an alarm"? Two, how did the assailant know that PW 1 "wanted to raise an alarm"? These questions cannot now be answered.

We are left pondering whether PW 1 knew from the beginning who was doing that to her? Was it really the appellant, her father?

When cross-examined by the appellant's advocate PW 1 answered:

Although it was dark in the night, I identified the accused when he embraced me, and talked to me.

Now, this is different from what we have quoted above where it would seem that until the sexual act had started, PW 1 had not known who was raping her. She became aware when she was warned not to shout. Again in this second statement she became

aware when she was embraced. We ask what stage could have been regarded to constitute embracing?

Of course, we are disturbed by the nagging question why would PW 1 concoct such a vulgar story against her own father unless it was really true? The answer which Mr. Mushokorwa wants us to swallow hook, line and sinker is that the mother, PW 4, coached her what to say so that PW 4 could settle old scores with the appellant.

We also wonder with Mr. Mushokorwa why would the appellant behave in such a manner against PW 1 when he had brought up other daughters before and had stayed with them up to the time he gave them husbands? The appellant started his defence by giving a list of his elder daughters whom he had brought up without there being such accusations of incest. The appellant was wondering why there were these accusations now with regard to PW 1?

PW 4 came up, in cross-examination by the appellant's advocate, with an allegation that the appellant had sexual relations with one of his daughters called Aika. We wonder why that information was not disclosed in the examination in chief, if it were true? Why wasn't it raised in the meeting called by PW 2, the Village Chairman?

When confronted with such questions then the request by Mr. Mushokorwa that we make an adverse inference on the Republic for

not summoning Burton, who was the only other inmate of the house and the room in which PW 1 was sleeping, and suffered what she said she did suffer at the hands of the appellant, is irresistible to grant.

Mr. Lukosi merely submitted that it was not necessary to call every possible witness. Besides, he argued, Burton was asleep and did not know what was happening. But we would have known these from the horse's mouth. Burton was a key witness even if to say that he was asleep but cross-examination and questions from the bench and the assessors would have cleared some of the doubts.

In the end result with such nagging questions we give the appellant the benefit of doubt and allow the appeal. So, we quash the conviction, set aside the sentence and order his immediate release unless he is legally confined.

DATED in IRINGA, this 25th day of July, 2008.

A. S. L. RAMADHANI
CHIEF JUSTICE

D. Z. LUBUVA
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


DEPUTY REGISTRAR