

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL. NO. 114 OF 2017

(C/f in the District court of Karatu at Karatu in Criminal Case No. 85/2015)

ZAKARIA PETER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

DR. OPIYO, J.

In the District Court of Karatu at Karatu, the appellant was charged with and convicted of the offence of rape contrary to section 130 (2) (c) and (c) and 131 of the Penal Code Cap 16 R. E 2002. He was sentenced to 30 years term of Imprisonment. It was the prosecution's case built on the evidence of seven witnesses, that on 04/05/2015 at Baino Guest house at Karatu Township within Karatu District in Arusha Region, the appellant did have a carnal knowledge of Pendaël d/o Olden Robert without her consent.

In a nutshell, the facts of the case are that, on 29/04/2015 Pendaël Oldean Robert (PW2) was informed by her auntie that, the appellant who works with an Non-Governmental Organization known as 'Compassion' was

looking for people to work with. They met in church where the appellant was talking to several people who were all job seekers. PW2 said they were issued with forms to fill in and they were told to meet again on the following day, as promised, they met in church the appellant appointed PW2 as the manager. On the third day the appellant followed PW2 at her parent's home and requested them to go with her to Karatu for the purpose of opening Bank account for them. On 04/05/2015 PW2 and the appellant went to Karatu. The appellant took her for breakfast and later he asked her that they should go to a guest house where he would give her medicine for her to be smart. They entered the guest house and the appellant gave her some tablets which looked like piriton, she swallowed them and became dizzy and was losing her strength. The appellant undressed her, from there she lost her consciousness. PW6 was suspicious as the appellant sent a boy by the name Peter to buy him piriton pills and viroba, PW6 decided to go in the the room where PW2 and appellant where in, there she found the appellant and PW2 was sleeping naked and unconscious. PW6 went to NBC Bank which was nearby and called a police who came and arrested the appellant in the room. PW2 woke up and found herself in the hospital. PF3 was issued which was later tendered in exhibit without objection from the appellant. In his defence he denied to have committed the offence but admitted to have been arrested at the guest house but the arrest was not in connection with this offence. The trial court found that the prosecution case was proved beyond reasonable doubt. Hence conviction. Aggrieved the appellant has preferred the present

appeal against both conviction and sentence. The four grounds of appeal reads:

1. That, the trial court failed to evaluate and put into account the elements constituting the offence of rape.
2. That, the trial court erred in law and in fact by not finding that the charge sheet was defective.
3. That, the purported cautioned statement of the appellant was taken beyond the statutory limited time.
4. That, the trial magistrate erred in law and in fact when he ignored his legal duty to evaluate the purported cautioned statement of the appellant.

Before me the appellant appeared in person unrepresented, in his elaboration of the grounds the appellant told this court that, the case of rape was not proved by PW2, He said she just explained that she was left naked and lost consciousness, her evidence does not show that she was penetrated by penis, saying that her clothes were removed without proving penetration is not enough.

He went on telling this court that, the Magistrate also erred in convicting him using a defective charge, he said, the charge sheet shows section 130 (2) (c) and 131 (1) of Penal Code. It was to be section 130 (1) and (2) (e) and 131 (1) of the Penal Code.

On the cautioned Statement he argued that, the same was recorded contrary to Law. As during Preliminary Hearing at Page. 5 shows that, he was arrested on 5/5/2015, but the one who recorded the statement said

he recorded the cautioned statement on 4/5/2015 even before he was arrested. He added that, the perusal of the Statement the same is not in form of the question and answers. He also failed to prove the exact date when he was arrested he was arrested on 5/5/2018.

He further told this court that, Also charge sheet is in discrepancy with the other evidence where the charge sheet shows it happened at Baino Guest house while PW6 Says it is the guest or lodge near NBC 5th, he said, the victims' evidence is in discrepancy with the one who examined her. Victim says she was raped but the doctor says she was raped and sodomised. He therefore prayed that the appeal be allowed.

Ms Adelaide, Learned State Attorney appeared for the respondent/ Republic, she did not support the appeal, she submitted that, the Evidence of PW2 shows how she was made naked but she lost consciousness so she did not know what went on until when she gained consciousness on the 3rd day at the Hospital, and Her testimony is corroborated by that of PW1 the doctor who said at Page 7 of the proceedings that the victim was penetrated both at her anus and vagina. She said, also PF3 shows how she was penetrated. In that, rape was proved by PW1 who examined her while she was unconscious.

On the 2nd Second ground that the charge sheet was defective, it was her argument that, the charge sheet is not incorrect as the provision of Law he was charged with i.e. Section 130 2 (c) and 131 (1) are correct. The appellant's argument that, it was to be written section 130 (1) and 2 (e) is wrong. The section he was charged with is the one appearing in the charge sheet correctly, as PW2 was drugged and raped. The Subsection (e) is on statutory rape which is not applicable here.

On the 3rd ground that cautioned statement were irregularly taken as per evidence of PW6 he says the evidence was recorded on 4/5/2015 at 13 hours. PW6/s testimony, Supervisor of guest says at 4/5/2015 at about 10.am they realized that the offence has been committed they called the police who came and apprehended the appellant. It shows he was apprehended at 10 am and at 13 hours his statement was taken. This reason is also not meritless.

On the 4th ground that there is discrepancy on Crime scene, whether the crime was committed in Baino or lodge near NBC, PW6 – evidence shows that he was at his guest house by name of Baino and he saw appellant who went and booked a room. He also said that he is supervising another guest at the vicinity near NBC. So that does not show that offence was committed at a different place. She said this ground lacks merit as well.

On the complaint that, PW1 evidence shows the victim was raped and sodomized but appellant was charged for only one offence of rape instead of two offences. She said no discrepancy is noted there as long as the

prosecution evidence proved the offence of rape against him. She said the, prosecution proved their case beyond reasonable doubt. She did pray for the appeal to be dismissed for lack of merits.

I have considered appellant's grounds of appeal, his oral submission and that of the Respondent and I have also gone through the trial court record.

I will start addressing the appellant complaint that the charge sheet was defective, it is on record that, in the District Court of Karatu the appellant was arraigned before it and charged with Rape contrary to Section 130 (2) (c) and 131 of the Penal Code, Cap 16 (supra) the particulars of the offence are hereby reproduced:

"PARTICULARS OF OFFENCE: That Zakaria S/O Peter GWANDU charged on the 4th of May 2015 at about 09:00hrs at Bayno Guest house Karatu area within Karatu District in Arusha Region did have carnal knowledge one PENDAEL D/O OLDEAN ROBART without her consent."

The trial court after receiving evidence from both sides found the appellant guilty and accordingly, convicted him as charged. It is the appellant complaint that the charge sheet was defective as he ought to be charged under S. 130 (1) and (2) (e) of the Penal Code. I have gone through the charged sheet as clearly submitted by the Learned State Attorney, the said

section is related to statutory rape but in the case at hand the victim was above 18 years of age therefore the appellant was properly charged.

Another complaint is that, the cautioned statement was taken beyond the statutory limited time. Section 50 (1) (a) of the Criminal Procedure Act, Cap 20 R.E provides:

- (1) For the purposes of this Act, the period available for interviewing a person who is in restraint in respect of an offence is –*
- (a) Subject to paragraph (b), the basic period available for interviewing the person that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*

The trial record shows that, appellant was arrested on 04/05/2015 and the cautioned statement was recorded on the same day commencing from 13:30hrs to 14:48 hours, in those circumstances it is clear that, the cautioned statement was recorded within the provided statutory time, which is four hours.

Coming now to the merit of the appeal. The main issue is whether the charge against the appellant was proved to the required standard of proof?

The Cardinal principle in criminal law is that the charge sheet against the appellant must be proved beyond reasonable doubt. See, **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda V Republic** [2006] TLR 385 The Court in emphasizing the burden of proof in criminal cases had the following to say:

*"As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, the case of **Mohamed Said Matula V R** [1995] TLR 3 this court reiterated the principal by stating that in a charge of murder the burden of proof is always on the prosecution. And a proof has to be beyond reasonable doubt"*

Although in that case the Court of Appeal dealt with an appeal involving murder charge the principle is always the same for all criminal cases except where the law provides otherwise. In this appeal the charge involved is rape, It is important at this juncture to summarize the evidence upon which the appellant was convicted. According to the testimonies of PW2, PW3, PW4 and PW5 the appellant presented himself as a supervisor of the Compassion based in Moshi and that he was looking people who could be employed and he was looking for form four leavers. It was the testimony of PW2 that, she was among the people who were in need of the job announced by the appellant and she met the appellant in church where she filled in the forms and she was appointed as a manager, and on 03/05/2015 the appellant went to her parents telling her that they need to go to Karatu to open the bank account for the Compassion, on the following day they left to Karatu and when they arrived at Karatu the

appellant asked her that they should go to guest house where the appellant would give her the medicine for her to be smart in job. PW2 said, when they entered the guest room the appellant gave her some medicine which looked like piriton pills, she swallowed them she lost energy and the appellant undress her from there she lost consciousness and she woke up found herself in the hospital, PW1 Felician Salaho A Clinical Officer who examined the victim and filled in the PF3 testified that, on 04/05/2015 at about 11:45 hrs. the victim was brought unconscious she gave her the first aid and examined her she found her vagina to have a fluid like water he took the specimen to the laboratories and found them to be the man spermatozoa, she also found that the anus had fluid too and there were several bruises and excrement. He tendered Exh. P1 which is the PF3. The testimony of PW4 who is the mother of PW1 she said, on 03/04/2015 the appellant went to her house asking if he could go to Karatu with PW2, she agreed and on the 04/05/2015 in the morning the two went to Karatu but at about 10:00hrs when she tried to call PW2 she was not reachable, she reported the matter at police and it is when she got an information that her daughter (PW2) was raped at Baino guest house at Karatu. PW6 Testimony was that, on the 04/05/2015 at about 08:30 hours he was at Baino Guest House, while there the appellant went and book for the room and before giving him the room he filled his particulars in the guest house register book and the appellant entered the room with a woman. At about 10:00 hours he was told that the appellant sent someone to buy for him piriton and viroba following that information he went to the appellant's room and found PW2 lied naked and unconscious he went to

look for a police and the appellant was arrested. PW6 tendered the guest house register as the exhibit and it was admitted as Exhb. P2. PW7 testified that, he interrogated the appellant who admitted to have committed the offence he tendered the cautioned statement the same was admitted as Exhibit P3.

The appellant in his defence made a general denial that, he was not the one who committed the offence. He admitted to have been arrested at the room but in connection with another issue.

The principal of law is that, in criminal case the duty of the prosecution is twofold, one, to prove that the offence was committed and two, the accused is the one who committed it. In this appeal there is no doubt that from the testimony of PW1 and exhibit P1 the PF 3 the complainant (PW2) was raped. The other issue is whether it was the appellant who raped her, although the appellant denied being the one who committed the offence but from the testimony of PW2, PW3, PW4, PW5, PW6 and PW7 there is no dispute that the appellant raped the complainant as from the testimonies of these witnesses they knew the appellant as the person who represented himself as the person who works with Compassion and he went in church looking for form four leavers to employ them, in the cause of the search she appointed the complainant as her manager and on 04/05/2015 she left with her to Karatu where they booked a guest house by the name of Baino guest house where the complainant was found there raped on the same day. As I put the evidence of the prosecution and the defence on the scale of truth, that one of the prosecution weighs more than that of the appellant, I say so because there was no reason given by the appellant to

show why the offence of rape should have been framed against him. From the prosecution evidence the offence of rape was proved to have been committed, the evidence left no doubt that, it was the appellant who raped the complainant .

That said, I find no reason for interfering with the finding of the trial court that it was the appellant who committed the offence of rape. In the final result I dismiss the appeal in its entirety.



A handwritten signature in black ink, appearing to read "M. Opiyo", is written over a horizontal line.

DR. M. OPIYO

JUDGE

03/08/2018