

IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA
DC CRIMINAL APPEAL NO. 61 OF 2018

(Original criminal case No. 375/2012 from Mpanda District Court)

SINDEHEBULA MSAVI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

W.R. MASHAURI

26/03/2020 & 05/05/2020

The district court of Mpanda at Mpanda meted out a sentence of 30 years imprisonment to the appellant Sindehebula Msavi upon convicted him for the unnatural offence contrary to section 154 of the Penal Code Cap. 16 RE 2002.

Feeling aggrieved with both the conviction and sentence, he has now appealed to this court against them. He has advanced five grounds of appeal as follows:-

1. That, the trial court erred in law and fact to convict the appellant basingly to adduced prosecution evidence while the same were not proved beyond all reasonable doubt.
2. That, the trial court wrongly convicted the appellant of the purported prosecution evidence while failed to make deep examining and evaluation of the same which lacks the credibility of the prosecution side.

3. That, the trial judgment is in contravention in the provision of law section 312 (2) of the Criminal procedure Act Cap. 20 RE 2002 for failure of the trial magistrate to cite complete section of law according to mandatory requirement.
4. That, the trial court misdirected itself in law and fact to convict the appellant based on the prosecution evidence while the same consisted full of shadow, constriction and suspicious which yield immaterial facts.
5. That, the trial Magistrate had lost site in point of law and fact to convict the appellant based on the prosecution evidence while failed to observe that the (PW2) victim was not examined by competent and qualified person who can prove the alleged offence something water down prosecution case.

At the commencement of hearing his appeal, the appellant, purporting, to give chance to the learned State Attorney for the respondent/Republic to start giving her opinion in the appeal prayed the court to adopt his grounds of appeal to be part of his submission in reply to the learned State Attorney upon opposing his appeal.

The court adopted them accordingly.

When Miss Scolastica Lugongo Senior State Attorney for the Respondent/Republic was given chance to address the court she did not support the appellant's appeal on the reasons that the decision and conviction of the appellant by the trial court was correct upon the prosecution's prove of it's case against the appellant beyond all reasonable reusable doubts.

That, bearing in mind of the evidence of Mercilina Suka (PW2) a victim in this case who is aged 89, she said in court that, while sleeping in her hut on the material night was pounced upon by the appellant.

Upon pounced upon her, he drugged her prone and carnal knowledge know her against the order of nature.

Being a woman of 89 years her evidence against the appellant was reliable.

That, currently, it is cardinal principle that, in cases of this kind, the evidence of the victim is sufficient to render the rapist convicted of rape.

To buttress her submission, she referred this court to the case of **Seleman Makumba v/s R (2006)** TLR 374 where the court of Appeal held thus:-

“The good evidence of rape has to come from the victim, if an adult that there was penetration but no consent and in case of any woman consent is irrelevant that there was penetration.”

That, in his evidence, Asbebora Elly (PW3) also supported the victim (PW2) by telling the court that, on the material night, he with his eyes witnessed the appellant sleeping in the victim’s hut and had raped her. He was too inebriated. After raped her, he slept in her hut beside her.

The learned Senior State Attorney went on submitting that, the appellant’s allegation in his grounds of appeal that, the victim was examined by a person not expert is immaterial because when the PF3 was not admitted in evidence, the trial magistrate did not relied upon it.

Having so submitted, she prayed the court to dismiss the appellant's appeal in its entirety.

Upon heard the learned Senior State Attorney submission in opposing of the appellant's appeal the appellant denied to have taken complicity of the offence.

That, the evidence of Ashebora Elly (PW3) was a lie. Ashebora Elly is grandson of the victim lied the court by saying that this appellant slept in the victim's hut.

That, PW3 said he heard shouts from the hut of the victim at the time he was going to the shamba and that, he was called by his grandmother (PW2) by using hand sign and when responded he found the appellant in the hut of his grandmother (PW2) sleeping covered with a bedsheet, but that person was not arrested and they did not say how they identified the said person.

Furtherstill, even the purported PF3 to support the victim's evidence that she was raped against the order of nature was not admitted in evidence as it was a forged document.

Having so submitted in reply, he prayed the court to allow his appeal for want of cogent evidence.

Miss Scolastika Learned State Attorney for the Republic insisted in rejoinder that, the prosecution's evidence against the appellant is cogent and on that record, the prosecution had proved its case against the appellant beyond all reasonable doubts. She again prayed the court to dismiss the appellant's appeal.

The issue for consideration and determination in this case is whether the prosecution had proved their case of natural offence against the appellant beyond all doubts.

This is an unnatural offences case in which on 22/12/2012 the victim Maliselina d/o Nunka (PW2) of the age of 89 was carnal knowledge known by the appellant against the order of nature.

In the case of **Seleman Makumba** (supra) the principle laid down is that, good evidence of rape comes from the victim, if an adult, that there was penetration but no consent and in the case of any woman consent is irrelevant that there was penetration.

The victim (PW2) said in her evidence that on the material day early in the morning, there was an accused person who entered in her hut. She did not raise a hue and cry because, no soon had that person entered into her hut than he grabbed onto her neck and twisted it. He carnal knowledge know her against the order of nature. Having done the episode that person slept in her house. In the morning while the sodomizer was still sleeping in her hut, one Ashebora Elly passed near her hut and upon seen him, she waved him a calling signal and he responded.

She told him what the accused had bad done to her.

Her evidence was backed up by the said Ashebora Elly (PW3). He told the court that, on 22/12/2012 at about 06.00hrs in the morning was along the way to his shamba. Upon reached near the victim's hut he heard her crying. He went to the victim's hut and upon seen him through the broken door of the hut, the victim raised a calling sign to him and he went to the hut. He found the accused sleeping in the victim's bed covering a bed

sheet. He did not know the accused's name and the accused was furious. Having seen so he did not take any action but he rushed to the village for collecting more man power. But before he went to the village, the victim told him that, the accused had carnal knowledge known her against the order of nature.

Having collected some men from the village and returned with them to the scene of crime, they found the accused had fled away.

It appears the matter was reported at a police post and on 23/12/2012 the officer commanding District (OCS)(sic) did visit one Dorothy Malipanga (PW4) at Ikanoge Health Center with a PF3. The victim was also there. She examined her (PW2) and found her anus oozing and stained with blood and bruises which were caused by a blunt object that forcefully penetrated into her anus, the act of which was sodomy.

She tendered the PF3 in court as an exhibit and was admitted and marked exhibit PROS-1 and there was no objection from the accused.

The last prosecution witness was WP 3207 D/G Regina an investigator of the case. She said in her testimony that, in the cause of investigating the case, she interrogated the accused appellant and he admitted to have done the offence. She therefore recorded his cautioned statement (exhibit PROS-2).

In his defence the accused/appellant denied to have done the offence of sodomizing the victim (PW2). He said on 23/12/2012 while in the market was arrested and put under custody by a militiaman called Shukurani. He was taken to the village chairman where he was told to be a suspect for

raping a person. He was taken to Mpanda police station where he was interrogated and forced to sign.

In his evidence PW1 said the victim was sodomized at 01.00hrs and was at home. He did not however see the rapist and/or sodomizer when raping the victim.

That, the allegation by PW3 that he saw the accused sleeping in the victim's hut is a lie. Also the allegation by the victim that she called Shobora Elly in the night and Shobora picked a radio under a Mango tree is a lie because the said was not brought in court as an exhibit. He therefore prayed the court to allow his appeal.

I have considered all that submitted by learned Senior State Attorney in opposing the appellant's appeal and the evidence adduced by the prosecution witnesses in the trial court as well as the submission by the appellant in support of his appeal and the evidence he gave in defence of his case in the trial court.

I have also put into account the principle of good evidence of rape laid down in the case of **Seleman Makumba v/s Republic (2006) TLR** (supra) that the good evidence of rape has to come from the victim, if an adult that there was penetration but no consent and in case of any woman consent is irrelevant that there was penetration.

I agree with the principle that, once a woman says was raped is a good evidence because she is the victim of rape or sodomy. But a mere say that she was raped is not absolute. She must prove to have seen the rapist and or identified the rapist under any circumstances.

The victim in this case is an old woman of 89 years and victim of a paralysis disease. She is abandoned by her family and or relatives in a far distant hut where she is served food by relatives.

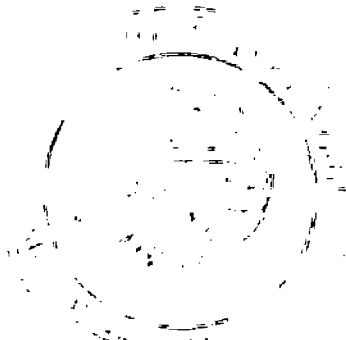
She said in her evidence that while sleeping in her hut on the night was the door of her hut broken by the accused who entered inside and sodomized her (jambazi alimfanya vibaya).

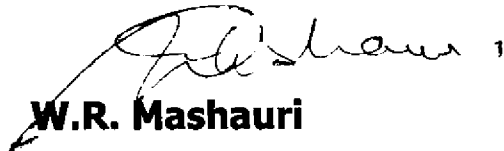
That, after sodomized her the said bandit slept in her hut until early in the morning when she saw Ashebora (PW3) going to his shamba and called him by sign who also said in his evidence was not called by sign but he heard the victim crying in the hut and when he went there, he found in a person sleeping being covered with a bed sheet. He did not make efforts to identify that person but instead, he just rushed to the village to called more power and when he returned to the scene of crime they found that person left away. There is no visual identification given by PW2 (victim) and (PW3) who alleged to have seen a person sleeping in the victim's hut to be the appellant in this appeal who sodomized the victim. This is not good evidence of rape from the victim of rape. Good evidence of rape must accompany with sentiments suggesting to the identification of the suspect.

If the victim was raped in this case her evidence that he was raped/sodomized by the appellant is too weak to be relied upon by this court.

The appellant's appeal is hereby allowed. He shall forthwith be released out from prison custody unless otherwise detained in connection of other lawful matters.

It is so ordered.




W.R. Mashauri

Judge

05/05/2020

Judgment delivered in court in camera in the presence of Mr. Mwandoloma and the appellant this 05/05/2020.




W.R. Mashauri

Judge

05/05/2020

Right of appeal explained.




W.R. Mashauri

Judge

05/05/2020