

IN THE HIGH COURT OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 50 OF 2020

(From the Decision of Kilindi District Court
in Criminal Case No. 05 of 2020)

RAMADHANI MSANGAZIAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MKASIMONGWA, J.

Ramadhani Msangazi (Appellant) stood before the District Court of Kilindi District at Songe charged with Grave Sexual Abuse Contrary to Section 138C (1) (a) and (2) (a) of the Penal Code [Cap 16 R.E 2002]. It was alleged before the court that on the 19th day of January, 2020 at about 01:00 hrs at Komunyu Mafisa Village within Kilindi District and Tanga Region, Ramdhani Msangazi did have sexual gratification by touching one Mboni d/o Kamote on her breasts without her consent. He pleaded not guilty to the offence and after a full trial the appellant was found guilty hence convicted of the offence as charged and consequently sentenced to fifteen (15) years imprisonment with three stokes corporal punishment.

The Appellant, Ramadhani Msangazi is dissatisfied by both conviction and sentence imposed. He therefore preferred this is appeal challenging both the conviction and sentence. In the Petition of Appeal filed the Appellant listed the following grounds of Appeal:

1. That the trial Magistrate erred in law and in fact by convicting the appellant basing on weak and unreliable visual identification.
2. That the learned trial Magistrate was not scrupulous to notice palpable contradiction in the evidence of the prosecution witnesses in regard to the exact time the alleged offence occurred.
3. That, the prosecution failed to prove the case beyond reasonable doubt.

On the date the appeal came for hearing, the Appellant appeared in person whereas Mr. Pius Hilla (Senior State Attorney) appeared on behalf of the Respondent. Before stating what the parties submitted in support of their respective cases, let me, though briefly, state the facts of the case one may learn from the evidence adduced before the trial court. They are that: Mboni Kamote is a peasant living at Mafisa Komunyo along with her three children namely Ally Shabani, Mganga Shabani and Mwajuma Shabani. She knows the Appellant for the later is her own sister one Kawishe Kamote's son. On 19/01/2020 Mboni Kamote was sleeping home with her last born one Salma Shabani. At or about 01:00am there came a person who slept with on the bed with her. That person started touching her breast and genital parts and she woke up. As the electricity light was put off, she lit the mobile phone touch when she identified the person to be the Appellant. Upon mentioning his name the Appellant blocked her eyes and mouth and the two started wrestling and the Appellant managed opening

the door and got outside. Ally Shabani (PW2) saw the person there outside the house and from the moon light, he identified him to be the Appellant. The matter was reported to Hatibu Bakari (PW3), a ten cell leader who confirmed of having been informed of the incidence at or about 22:00 pm on that material right. Later the Appellant called the complainant so that he apologizes and when he came for that purpose, the appellant had a knife with which he wanted to stab the complainant. From the facts the trial court was of a view that the appellant was properly identified by the witnesses there at the scene of crime and that the evidence given by PW1 sufficed proving that the appellant committed the offence he was charged with.

Coming back to submissions, in his submission the Appellant had nothing to state in respect of the grounds of appeal. He only requested the court that it considers the grounds and accordingly determines the appeal in his favour.

On the other hand on behalf of the Respondent, Mr. Hilla (SSA) supported the Appeal against the conviction and the sentence imposed to the Appellant. The learned Senior State Attorney in the first place referred the Court to the decision in the case of **Andrew Lonjine v. Republic**: Criminal Appeal No. 50 of 2019, to support his argument that in the charge the same as that the appellant was facing in court the prosecution must prove, among others what was the purpose of touching the complainant on her breasts and genital organ; that is sexual gratification. This was not shown in the

evidence in the case at hand which fact rendered the offence not proved beyond doubt.

Secondly Mr. Hilla (SSA) stated that looking at the court proceedings it cannot be said that the victim (PW1) was a credible and reliable witness. The later did not tell the court as to how the Appellant got into the house. She did not tell the court if the accused broke into the house. Further to that, although the witness was sleeping with her last born the evidence is silent if the child woke up on the incidence and no any statement was taken from the child. The learned Senior State Attorney added that the Appellant and PW1 are relatives. That the later is the former's young mother which relationship raised doubt for under normal circumstances it is near to impossible for one in the position of the Appellant to do what was alleged against the complainant. Mr. Hilla said the testimony of PW1 should be looked at with an eagle eye and submitted that the testimony was not that which could be absolutely believed in. This is cemented by the contradicting evidences of PW1, PW2 and PW3, whereas PW1 and PW2 told the court in evidence that the event took place at 1:00 am, PW3, was recorded stating in evidence that it was at 22:00 pm when he was awakened informed of the offence.

Mr. Hilla opined that from the adduced evidence the end result of the case depends on the credibility of the witnesses which was doubtful. The doubt would have moved the trial court in finding the Appellant not guilty of the offence.

I have considered the submissions along with the records in involved in this matter. It is in common that the Appellant is a peasant resident of Mafisa Village in Kilindi District where again Amboni Kamote (PW1) lives. On 19/01/2020 both the Appellant and PW1 were at their home village and that the two are close relatives. As said the appellant stood charged with Grave Sexual Abuse Contrary to Section 138C (1) (a) and (2) (a) of the Penal Code. The Section reads as follows:

“138C (1) Any person who for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument or any orifice or part of the body of another person, being an act which does not amount to rape under section 130, commits the offence grave sexual abuse if he does so in the circumstances falling under any of the following description, that is to say.

(a) Without consent of the others person.

(b) ...

(c) ...

(2) Any person who:

(a) commits gave sexual abuse is liable, on conviction to imprisonment for a term of not less than fifteen years and not exceeding thirty years, with corporal punishment, and shall also be ordered to pay compensation of an amount determined by the court to the person in respect

of whom the offence was committed for the injuries caused to the that person”.

The law that is Section 110 of the Evidence Act [Cap 6 R.E 2019] is clear to the effect that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those that facts exist. In criminal cases, the burden of proving existence of facts asserted is on the prosecution. Subsection (2) (a) of Section 3 of the Act provides for the standard of proof in criminal cases. The provision reads as follows.

“3 (2) A fact is said to be proved when:-

(a) In Criminal matters except where any statement or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the act exists”.

The provision above was echoed by the decision of the Court in the case of **Magendi Paul and Shabani Benjamini v. R:** Criminal Appeal No. 1993, CAT (Unreported). The case against the accused person is said to have been proved beyond reasonable doubt where the prosecution proves each element constituting the offence with which the accused is charged. The Section under which the accused/appellant was charged with and convicted of was judicially considered by the court in the case of **Andrew Lonjine** (Supra). In the case, the court was of the view that among the essential ingredients of the offence of grave sexual abuse, are “for sexual

gratification” and *“lack of consent”*. There the court stated as follows:

“... the prosecution cannot be taken to have proved the offence of grave sexual abuse beyond reasonable (doubt) when essential ingredients “for sexual gratification” and “lack of consent” were neither included in the particulars of offence nor was evidence presented to prove these ingredients”

As it is indicated by the trial court, Mboni Kamote (PW1) was the key witness in the case at hand. The central part of the witness’s evidence is recorded as follows;

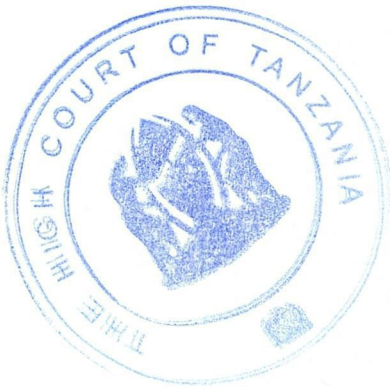
“On 19/01/2020 I was in my house around 01:00 hrs I was sleeping with my last child one Salma Shabani then accused person came to sleep with me and started “Kunishika matiti na kunipapasa sehemu za siri nilishituka” and I saw electricity were off, then I took my mobile phone and switch on the light and I identified the accused person who was coming to sleep with me and did such thing ...”

Suppose this is actually what happened on the material night, as it is rightly submitted by the learned Senior State Attorney, based on the authority above it is not enough that the Appellant touched the complainant’s breasts and genital, the prosecution had to show in evidence the purpose of the touches, that the accused did so *“for sexual gratification”* an essential element of the offence which in my view, the evidence adduced did not mention. In the

circumstances, it could not be safely held that the charge leveled against the accused was proved beyond doubt. This answers affirmatively to the third ground of appeal which necessitates not my indulgence in discussing the two other grounds.

In event, I find merit in this appeal and the same is hereby allowed. The conviction is therefore quashed and sentence set aside. It is hereby ordered that the Appellant be released from jail if he is not therein for other lawful cause.

Dated at Tanga this 22nd of October, 2020.




E. J. Mkasimongwa

JUDGE

22/10/2020

Date: 22/10/2020

Coram: F. J. Kabwe, DR

Applicant: Present in Video Conference.

Respondent: Ms. Mkumba S/A for

C/C: Alex

Court: Judgment delivered by way of video conference in the presence of parties.

Right of Appeal Explained.

Sgd: F. J. Kabwe

DEPUTY REGISTRAR

22/10/2020