IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

TANGA

CRIMINAL APPEAL NO. 19 OF 2020

BETWEEN

MICHAEL ABDALLAH @ KHALFANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MRUMA, J.

The Appellant was charged with the offence of Rape Contrary to **130 (1) and (2) and 131(1)** of the Penal Code Act [Cap 16 R.E. 2019]. The facts leading to the offence are that on the 30th August, 2019 at around 09:00 hours at Masimbani area within Muheza District in Tanga Region the accused did have carnal knowledge of Sharifa d/o Haruna a school girl aged 14 years.

The accused pleaded not guilty. He gave sworn evidence and though he told the court that he would call a witness, he later on informed the court that his witness has refused to testify on his behalf. He did not therefore call any witnesses. The prosecution called 4 witnesses in a bid to prove its case.

For chronological reasons I will start with the evidence of the victim, PW2 who told court that she was raped by Michael a barber shop owner who came to their home to collect his CD which she had hired from him. She said that the Appellant found her sleeping in the sitting room. She went to her bed room to take the CD but the Appellant followed her in the bed room. At the bed room the Appellant picked some clothes which were on the floor and put them into the victim's mouth. He then took a piece of 'Khanga' and wrapped it tightly around her victim's neck. He then pulled up her skirt and pushed her to the bed. Thereafter, he undressed himself and he inserted his penis into her vagina.

Haruna Hamis (PW1) the father of the victim told court he knew the accused person one of the boys in their area. He testified that on the at around 08:00 hours, while at his business place at Mandela area selling some water melons he received a phone call from his daughter Sharifa Haruna (PW2) informing him that she was very ill. He rushed back home and found about five to six people at his home. They informed him that his daughter had been raped by one Michael. By that time the Appellant had already left. He tried to follow him up at their home but he couldn't find him. He went back and interrogated his daughter who told him that she was attacked and threatened with knife by the Appellant who raped her. According to PW1, the Appellant was seen by a neighbor.

Aubrey Rajab Maonga (PW3), a medical doctor, at Muheza Teule (District) Hospital presented a report of an examination carried out by him. He said that he received PW2 on 30th August 2019 at the Out Patient

Department (OPD) and examined pregnancy, HIV, Veneral Related Deceases (VDRL). She tested negative to all those tests. She was also found to be HIV negative. This evidence was admitted in court as **Exhibit P1.** PW3, added that, in records kept in the ordinary course of the discharge of his professional duty, as a document dated, written and signed by him. In this report, Exhibit P1, his findings were that the victim's hymen was raptured vagina (vulva) reddish substance and that the probable cause was active penis penetration. From the medical report the act of Sexual Intercourse took place. This corroborates the victim's statement that she was raped. In my opinion on this evidence there was no resistance by the victim. She only rejected to the sexual act when she realized that a neighbor had seen the act. The victim did not have any evidence of injuries or bruises on any other parts of her body. I do however hold that it is necessary for the victim to have injuries in her genital since she was young girl and who has not been having sex consistently.

Apart from her testimony there is nothing on court record to show that it was the accused person who raped her. The prosecution didn't call the neighbor who came and saw the Appellant while raping the victim and explanation as to why this witness was not called to testify. In my understanding even if the victim is familiar with the accused person, the alleged rape was witnessed by a neighbor who knew both the Appellant and the victim and it is alleged that there was conversation between the neighbour, the victim and the Appellant at that material time. In my opinion even though the victim told PW1 that she was raped by the

Appellant, and both the victim and PW1 testified to that effect, still the prosecution has the burden of proving its case.

The accused admitted that at the time the alleged incident is said to have occurred he was at the victim's home where he had gone to collect his CD but he did not commit the offence. PW4 testified that she interrogated the Appellant who denied the charge. She tendered in evidence a pair of rubber shoes which were said to be recovered from the victim's home. The appellant admitted that the shoes were his but the chain was not his property.

As indicated hereinabove, in criminal trials the burden of proof is always on the shoulders of the prosecution requiring them to prove all the ingredients beyond reasonable doubt. (See for instance in **Woolmington versus DPP (1935) AC 463** and **Andreya Obonyo & Others versus R (1962) EA, 550).** The standard of proof is beyond reasonable doubt though this does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability of the accused being innocent. As in the old case of **Miller v Minister of Pensions [1947]2ALLER 372,** the prosecution case against the accused person should be so strong as to leave only a remote possibility in his favor. **Section 110 of the Evidence Act** provides 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 that those facts exist. The law on Rape was well stated by the court of Appeal for East Africa in

the case of **Kibazo versus Uganda (1965), E.A 507 that** in a charge of Rape the onus is on the prosecution to prove that sexual intercourse took place without the consent of the complainant. In statutory rape like the one at hand consent is not an essential element. The court should address its mind to the question of reasonable doubt on the issue of sexual intercourse only. The fact of there being the act of sexual intercourse must be proved to the satisfaction of the court and where the court is not satisfied beyond reasonable doubt in the issue there cannot be a convict.

The essential elements requiring proof beyond reasonable doubt in the offence of Rape are:

1. That there was unlawful Sexual Intercourse with the complainant.
2. That the complainant is of the age below 18 years.
3. That it was the accused who had the unlawful sexual intercourse with the complainant.

Section 130 of the Penal Code [Cap 16 R.E. 2019] provides as follows;

.-(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is

not separated from the man.

Whether there was Unlawful Sexual intercourse with the complainant is a matter of fact. The act of Sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of Defilement to prove Sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.
Regarding the first ingredient, carnal knowledge means penetration of the vagina, however slight, of the victim by a sexual organ where sexual organ means a penis. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.

The victim in this case did testify. As stated earlier she narrated how it occurred. According to her evidence there were struggles before she gave in. In other words she says that she was raped after a struggle with the Appellant. The medical doctor did not testify to have seen any sign of force being used before the intercourse. Similarly there is doubt if penetration was secured. No medical evidence was led on the point. The report (Exhibit P1) which was tendered in evidence by Doctor Aubrey (PW3) reveals that no sperms were seen. It should be noted that the examination of the victim was done few hours after the incident. The fact that few hours after the act no sperm could be traced doesn't on its own negate sexual

intercourse because in rape cases it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient.

PW1 told the court that he arrived at the scene immediately after the alleged act after being called through phone by his daughter who told him that she was sick and that on arrival he found about five to six people discussing the incident. He said that he didn't find and see the Appellant there. In his statement in cross examination, he said he didn't see the person who had sexual intercourse with his daughter but he believed her and a neighbor who saw and recognized him as the present Appellant. On the hand the victim (PW2) gave a completely different version of the story. She told the court that their neighbor who found them in bed is one Mama Moddy and that after seeing Mama Moddy the Appellant doubled away using the back door but he was spotted by PW1.

If the trial court had directed its mind to the evidence of these two witnesses it could have found that the two versions of their evidence contain irreconcilable contradictions. According to PW2 he received a phone call from his daughter at around 08:00 and proceeded back home left his business place at around. He arrived home and found about six people discussing the incident. By the time he reached home, the incident had already occurred and the Appellant was not there therefore he didn't see him. The charge sheet indicates that the incident occurred at around 09:00 hours. This means that PW2 called PW1 before she was raped. But PW2 didn't mention anything about calling PW2 on phone.

The prosecution had to prove that it is the accused who committed the unlawful act. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime not as a mere suspect but as the perpetrator of the offence. There is no direct evidence save for the contradictory statements of PW1 and PW2. For reasons not disclosed by the prosecution didn't call the victim's neighbor or one Mama Moddy who is said to have seen the Appellant in flagrante delicto (i.e. in the very act of having sexual intercourse with the victim). This witness could have been a very important witness in this case. Failure to call her, leaves the prosecution case with shadows of doubt as to whether the Appellant had sexual intercourse with the victim on the material morning.

In criminal trials any reasonable doubt should be resolved in favour of the accused. Having found that the prosecution's case is tainted with doubts I resolve them in Appellant's favour and allow his appeal. The findings conviction and sentence of the District Court of Muheza in Criminal Case No 102 of 2019 is quashed and set aside. It is ordered that the Appellant Michael Abdallah @ Khalfan should be released from prison unless he is lawfully held.

I so order.

THE HIGH COURT OF TANZANIA

A.R. Mruma

Judge

Dated this 26th day of October, 2021

R.A. Explained

26/10/2021