THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO 81 OF 2020

(Originating from Judgment of the District Court of Ruangwa in Criminal Case No 84 of 2020)

EVODIOUS DENIS CLETUS KISA @ MADUNDO ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Hearing date on: 09/6/2021
Judgement on: 23/6/2021

NGWEMBE, J:

Evodious Denis Cletus Kisa @ Madundo is in this court intending to challenge his conviction and sentence of life imprisonment. The record indicates that the journey of the appellant to life imprisonment commenced on 11th and 12th April, 2020 when he was alleged to have unlawful carnal knowledge with Gift Wofram Kaspari and the second count of having unlawful carnal knowledge with the same woman against nature. It is alleged such offence occurred at Michenga "A" Village within Ruangwa District in Lindi Region.

Accordingly, he was arraigned in court, charged for those offences under sections 130 (1) (2) (e) and 131 (1) and section 154 (1) (b) of the Penal Code Cap 16 R.E. 2002.

The brief facts of the case as read on preliminary Hearing, indicates that the two are relatives living in the same village of Michenga "A". The victim was a cousin of the appellant. After the event of rate, the appellant was arrested on 1st May, 2020. Upon being arraigned in court, he denied to commit such offence, hence the prosecution lined up three prosecution witnesses to establish and prove a prima facie case against the appellant. At the end, the appellant was found guilty and sentenced accordingly.

When the appellant found himself in jail for life, timely he filed notice of intention to appeal and finally, appealed to this court armed with seven (7) grounds, which same may conveniently be summarized into two namely;

1. *Failure of the prosecution to call key witnesses; and*
2. *Failure of the prosecution to prove the offence against the appellant beyond reasonable doubt.*

On the hearing date of this appeal, the appellant appeared in person and being a lay person, had very limited contributions to his appeal. He briefly argued that the prosecution failed to call a key witness Ms. Eliza who was the first person to call the alleged victim to the appellant's house. Added that the trial court made total alliance to the evidence of the victim (PW1), while PW2 contradicted with PW2 who said the offence occurred on 12/4/2020 instead of 11/4/2020 as per PW1. Thus the whole case was not proved against the appellant beyond reasonable doubt, he added.

The learned senior State Attorney, supported the trial court's decision that, the offences preferred against the appellant were proved to the standard required. Argued that the victim and the appellant were relatives and living as neighbours in the same village. Submitted further that, the evidence of PW1 left no doubt on the involvement of the appellant in the commission of the offence. That the appellant threatened the victim by machete before he fulfilled his ambition of rape and unnatural offence. Such evidence was corroborated by PW3. To justify his argument, he referred this court to the case of **Ally Mparagana Vs. R, Criminal Appeal No. 213 of 2016** at page 8.

Admitted that the caution statement was not read in court after being admitted as exhibit, which is fatal, same may be expunged. Rested by praying this appeal be dismissed forthwith.

Having summarized the arguments of both parties, and reading the trial court's proceedings and judgement, I find the first issue to be determined is whether the offence of rape and sodomy was committed by the appellant? But before considering and answering this fundamental issue, let me put some basic legal principles related to the offence of rape. Commencing from year 1998 to date, through amendments of Penal Code (Sexual Offences Special Provisions Act 4 of 1998 - SOSPA), the definition and ingredients of rape have received special attention. For instance, in statutory rape, penetration, however slight may constitute the offence of rape. Section 130 (4) (a) of the Penal Code Cap 16 R.E. 2019, specifically states that:-

"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"

To supplement that statutory meaning of rape, the Court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No. 271 of 2006 (CAT)** (Unreported), asked and answered the question of what constitutes the offence of rape? They answered:-

"under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of 18 years without her consent. Two, having sexual intercourse with a girl of the age of 18 and below with or without her consent (Statutory rape). In either case, ***one essential ingredient of the offence must be proved beyond reasonable doubt.*** *This is the* ***element of penetration*** *i.e.* ***the penetration, even to the slightest degree, of the penis into the vagina"***

In similar vein the Court of Appeal in the case of **Mbwana Hassan Vs. R, Criminal Appeal No. 98 of 2009 (CAT – Arusha)** (Unreported) the same position was repeated as follows:-

"It is trite law also that, for the offence of rape, there must be unshakeable evidence of penetration"

Based on the section and precedents aforementioned, I may summarize the fundamental elements of the offence of rape as that:- first is sexual intercourse without consent to a woman above the age of eighteen years, but if she is eighteen or below, consent is immaterial; second, is penetration of male penis to a female reproductive organ (Vagina); third, is availability of unshakable evidence proving the offence of rape beyond

reasonable doubt. Upon prove of these three elements of rape, among others, (the list is not exhaustive), may lead the court to convict and sentence the accused to statutory minimum sentence.

Since 1998 to date, the sentence of offences related to rape were enhanced by putting a minimum of thirty (30) years to a maximum of life imprisonment. Prior to 1998, determination of appropriate sentence was placed under the discretion of the trial court. The amendments made in year 1998, the legislature found it wise to enact minimum and maximum sentence leaving the court without discretionary powers to determine appropriate sentence, based on the circumstance of each case.

Now, the duty of the court nowadays is to give breath to the applicable laws before arriving to the final verdict of either thirty years' imprisonment or life imprisonment or acquittal.

Considering the gravity of punishment, this court and the Court of Appeal have placed strict proof of all elements constituting rape and unnatural offence to the shoulders of the prosecution. In other words, the evidence against the accused must be watertight leaving no doubt that the accused was the one committed the offence.

Having that background in mind, the question remains, whether those elements of rape were established and proved against the appellant?

In this appeal, on the fateful night, the victim was a matured woman, cousin of the accused/appellant, both were living closer to each other, both

were yet to be married, but the appellant had his own house. According to PW1, the ordeal, commenced when the appellant instructed one Eliza to call her cousin Gift Woflam Kaspali to his house. It is on record that:-

> *"Came Eliza and said that my cousin who is the accused here in court need me and I went there and he told me let us go to his house and* ***he beat me and told me to clean his compound I did it*** *and his mother came and call him to eat and he went to his mother and we eat and we eat and he told me that I am supposed to stay there at my aunt's house and he told me to go and collect my clothes and stay in my aunt's house who is his mother and he escorted me to my mother's house and I took my clothes and I carried them and we were going to my aunt and he told me let us pass in his house"*

This piece of evidence, leave a lot to be desired, if at all the victim was beaten in the house of the appellant before they left together to the appellant's mother to eat food. Thereafter, together they went to the victim's mother to collect her clothes, then went back to where she cleaned the house. Logically, a matured person cannot behave like that, if she was forced to clean the said house and that she was beaten, why she did not disclose it to her aunt? How possible that they had to go all along together from one house to another if were enemies to the extent of being beaten? These are some of the issues which have no answers.

Secondly, PW1 continued to testify that she was forced to have sexual intercourse while machete of the appellant was in her neck. The question is how possible such an event, while they were together all along?

Another serious doubt is on the date of event. While PW1 clearly testified that the event occurred on 11th April, 2020, PW2 a village chairperson, testified that the victim reported the event on 12 April, 2020. On the same date she reported the matter to police and according to PW3 a clinical officer of Michenga Dispensary examined the victim on the same day that is, on 12 April, 2020. However, according to the facts read on the preliminary hearing, the appellant was arrested by police on 1st May, 2020 equal to twenty days from the date of event.

As aforesaid, the two were neighbours, living in the same village, same locality and relatives, none of them dared to arrest the accused or report the incidence to police and make sure the accused is arrested and taken to police. Such delay to arrest the appellant raise reasonable doubt if at all there was rape.

Moreover, it is evident, the offence was not investigated by competent and professional police officer, because none of the investigator appeared and testified in court. Such poor investigation has reminded me to the lamentation made by the justices of Appeal in the case of **Hosea Francis @ Ngala & Maria Hosea @ Ulanga Vs. R, Criminal Appeal No. 408 of 2015 (CAT at Dodoma)** held:-

> *"We are obviously concerned about the failing standards of professionalism in the collection of evidence at scene of crimes. We are as surprised why, after visiting the alleged scenes where the deceased met her unlawful death, PW1 and other police officers who were in his entourage, failed to collect physical evidences which the police according to PW3 were shown"*

More serious remarks were made in the case of **R, Vs. Issa Mohamed @ Chiwele & 3 others, Criminal session No. 39 of 2016 (HCT at Lindi)** held:-

> *"Having found that the prosecution has failed to prove the case to the required standard, I feel it necessary to sound a note to the investigators, in the hope that they will take a lesson therefrom. Too often in criminal cases, I have noticed an inexplicable lack of seriousness on the part of police investigators a rather casual way of going about the business of collecting, handling, preserving and analyzing evidence. The result is a prosecution case that lacks crucial pieces of evidence that one would expect in a well-handled case"*

I fully subscribe to the sentiments made in these cases on lack of seriousness of investigators. Even in this case one may wonder why police failed to act immediately after being informed by PW2, (village chairperson) Why police failed to investigate the crime and place of where the alleged crime was committed? Why police failed to arrest the available offender within the date of event? Why they failed to appear in court and help the court on what they investigated? All these questions have no answers because of poor investigation which crime lead into poor prosecution, and the trial magistrate had she directed her minds on these issues, no doubt she would have arrived into a different conclusion.

Repeatedly, this court and the Court of Appeal have pronounced that due to intrinsic nature of offences related to morality like rape and sodomy, where only two persons (the victim and the accused) are involved, the testimony of the victim must be scrutinized with extreme caution, otherwise, no doubt even family conflicts may lead into accusations of rape

or sodomy which in nature attract long sentences. As such, the prosecution evidences must stand or fall on its own merits.

I have seen in court, almost every day, it is very ease to accuse a person on rape or related offences, but it is extremely difficult for the accused person to stand firm and defend against that accusations. Sometimes the accused when appears in court for hearing of his case and the court asks him to proceed with his grounds of appeal, he becomes nervous, confused, and ignorance of not knowing what to say, instead of arguing his case, stand up in court saying nothing. Sometimes, says *"I have filed my grounds of appeal, let the court consider them and find me not guilty"* Others, just says, *"I did not go to school, so I don't know what to say"* This has been happening not only to uneducated persons, but even to the most educated ones.

Such state of mind has trigged me to suggest to the legislature through Regulations if applicable, to facilitate the accused persons on sexual offences to have a help of an advocate to speak for them. That cannot be a new thing, for the Government pays for advocates on homicide cases, some of them, especial Manslaughter, may end up on total acquitted or acquittal under certain conditions, but a person who is facing a statutory rate, when convicted is sentenced between a minimum of thirty (30) years imprisonment and life imprisonment, if such person is not assisted by legally trained brain for the costs of the Government, the danger is obvious. If justice is to be done, and seen to be done the accused persons of rape related cases must have a help of someone to speak for them.

In the absence of another person to speak for the accused in rape related cases, majority of young and unexperienced male persons are likely to end up their lifetime on earth languishing in jail. Bearing in mind such long incarceration, the court must, undoubtedly, satisfy itself beyond reasonable doubt, that the evidence adduced in court are unshakably directing all fingers to the accused person himself.

In this appeal, I have reviewed with due care the whole evidences adduced in court, I find the prosecution evidence was very weak to lead into conviction of the appellant.

In totality, I proceed to allow this appeal, quash the conviction and set aside the sentence meted by the trial court, consequently order an immediate release of the appellant from prison, unless otherwise lawfully held.

I, accordingly order.

Dated at Mtwara in Chamber on this 23rd day of May, 2021

P.J. NGWEMBE
JUDGE
23/6/2021

Date: 23/6/2021

Coram: Hon. A.H. Msumi, DR

Appellant: Present in person

For Respondent: Mr. Ndunguru, Senior State Attorney

B/C: Asha – RMA

Order: Judgment delivered today in chambers in the presence of the Appellant in person unrepresented and Mr. Wilbroad Ndunguru learned Senior State Attorney.

A.H. Msumi

DEPUTY REGISTRAR

23/6/2021