

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

CRIMINAL APPEAL NO. 3 OF 2021

(Originating from Tandahimba District Court Criminal Case No. 71 of 2020)

Before: Hon. J.J. Waruku Esq. RM)

RAMADHAN ^{s/o} ISMAIL KAMBINI @ MANIFONGO...1ST APPELLANT

JAMADI HATIBU HASSANI @ CAPACITOR.....2ND APPELLANT

BASHIRU AHMAD ABDUL @ WADI.....3RD APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

23 March & 4 June, 2021

DYANSOBERA, J.:

The 1st, 2nd and 3rd appellants herein, were the 2nd, 4th and 5th accused persons at the trial District Court in which they were charged along with their two fellows, namely Yaziru Hassan Machora @ Villa (1st accused) and Ibrahim Abdallah Chikopa (3rd accused), with an offence of five counts. In the first count, the quintet was charged with conspiracy to commit an offence, the 2nd count was on burglary, in the 3rd count they stood trial

charged with assault. The 4th count was gang rape while the 5th count was unnatural offence.

The appellants and their fellows denied the charge and in the end, the trial court found them guilty, convicted them and sentenced them as follows. In the first count, the three appellants were sentenced to three months term of imprisonment each, the same applied to the 2nd and 3rd counts. In the 4th and 5th counts, each appellant was sentenced to thirty (30) years prison term. The sentences were ordered to run concurrently.

The 1st and 3rd accused persons were conditionally discharged in each of the five counts in that for a period of six months, they should be of good behaviour and be under the supervision of their parents.

Aggrieved, the trio have appealed to this court on a total of eleven grounds. Their main complaint is indicated in their 4th ground of appeal that:

‘That the prosecution side did not prove its case beyond reasonable doubt’.

The rest ten grounds of appeal are supplemental to this main ground and rest on identification, credibility, evaluation of evidence and the defence of alibi.

It was the case for the prosecution that on 30th day of October, 2020 at or about 2200 hrs. The victim HHN (real names reserved), a resident of Jangwani hamlet (Kitongoji) in Maheha village within Tandahimba District, Mtwara Region, was at home alone asleep. At that hour, she was awoken by a sound of a panga that hit at the door. She opened the door and a group of youths stormed in. The 1st accused covered her mouth with his hands to stop her from raising an alarm. Others took off her clothes and under pants. They pulled out their penises and inserted them into her vagina in turns. Then others carnally knew against and order of the nature. Meanwhile, the victim managed to scream for help. They then took her at the bush, assaulted her and abandoned her there. At 0600 hrs she managed to return back home but the culprits had vanished. She was then taken to Tandahimba District Hospital where Dr. Judith Frank Shoo (PW 5), a physician attended her at on 31st October, 2020 at 0800 hrs. After she had medically examined the victim, PW 5 made her findings and filled in the PF 3 (exhibit P 2).

As to how the appellants and their fellows were apprehended, the victim asserted that she managed to identify the 1st accused and 3rd appellant. PW 2 one Somoe Maulid Lusinga, the victim's neighbour recalled that in that material night she heard the victim screaming 'We Lusinga Njoo unisaidie, mwenzio nakufa wananibaka'. PW 2 tried to open the door so that

she went to assist the victim but the door had been closed from outside. She managed to peep through a hole and saw around nine youths at the victim. According to her, she managed to identify five of them together with others, namely Alishababu Shuku and Kamzuzu who were not apprehended. PW 3 who is also the victim's neighbour saw and identified the appellants and their fellows. She then informed Hassan Namalenga and discussed how to assist the victim. PW 6, PW 7 and PW 8 are the local leaders who, after being informed that the victim was invaded, raped and carnally known against the order of the nature managed to trace and apprehend the appellants and their fellows, informed the police who subsequently collected them.

In his evidence, PW 4 affirmed that prior to the incident that is at 2000 hrs the appellants and accused persons approached him for local brew. He reluctantly sold them the liquor and they went to drink it elsewhere. He then saw and identified the appellants and their fellows raping and sodimising the victim the appellant.

The appellant's defence was a flat denial. Yazina Hamis Mchora, the 1st accused denied to have committed the offence and said that he did not know why he was arrested. He argued that villagers disliked youths who had rasta styles. The same defence was given by the 1st appellant.

The 3rd accused told the trial court that he was implicated because all accused persons were his friends. He asserted that he was arrested due to 'group age.

The 2nd appellant said that he did not commit the offence. He was supported in this by the 3rd accused who, in addition, said that people with jealousy mentioned him. He argued that he had a quarrel with PW 8 though admitted to have not put this question on him when he was testifying.

The learned Resident Magistrate found the case against the appellants and the two accused persons proved to the hilt and punished them accordingly.

At the hearing of this appeal, Mr. Paul Kimweri, learned Senior State Attorney appeared for the respondent while the three appellants appeared in person and were unrepresented.

When invited to argue their appeal, all the three informed the court that they had nothing useful to add and argued that the filled grounds of appeal suffice.

On his part, Mr. Paul Kimweri supported both convictions and sentences. He submitted that the main issue in this appeal is identification as it was during the night time when the offence occurred. He informed the

court that on the material day, PW 1 was asleep in her house. She was invaded by a group of people who assaulted her, raped and knew her carnally against the order of the nature and then drag her outside. PW 1 managed to identify the culprits by light emanating from the solar power and was within a short distance. She identified the 1st and 5th accused persons. PW 1 raised an alarm screaming and mentioning the 1st accused: 'jamani weve Villa unanibaka'. PW 2 and PW 3 also heard the alarm raised by PW 1 '.....' Akida Mohamed Katema, the appellant, was charged in the District Court of Masasi with the offence of rape contrary to Sections 130 (1) (2) and 131(1) of the Penal Code [Cap 16 R.E. 2002]. The particulars of the offence alleged that the appellant, on 29th day of December, 2018 at or about 2000 hrs at Mikangaula village within the District of Masasi in Mtwara Region, unlawfully did have carnal knowledge of one SA (not her real name), a primary School girl aged 7 years. He was convicted and was sentenced to thirty (30) years' prison term. Aggrieved, he has appealed to this court seeking to challenge both conviction and sentence. He is armed with a total of six grounds of appeal which boil down to one complaint that the offence against the appellant was not proved beyond reasonable doubt.

Briefly, the facts of the case are the following. Stella Barnaba of Mtakuja village was a STD II pupil at Mtakuja Primary School. Beforehand,

she was living at Mikangaula village with her biological mother and foster father. That father is the present appellant. In 2018, the victim's mother one Marcelina Bernard asked Blandina Anthony Kassian to take the victim from Mtakuja to Mikangaula for girl initiation rituals commonly known as unyago. PW 2 found that the victim was wetting the bed. She examined her and found her private parts with bruises. On further inquiry, PW 3 was told that the victim used to have sexual intercourse with the appellant several times. PW 3 relayed the information to PW 2 who then took the victim to the police station where they were issued with a PF 3. PW 3 swore that she was not aware of any complaint in respect of the victim. Oscar Raphael Achila, is the Village Executive Officer at Kivukoni. He was informed that the victim was discharging urine uncontrollably as she had been raped by the appellant. He arrested the appellant and took him to the police station. He also took the victim to the hospital. The victim told him that she used to asking her mother to sleep, go to the farm or anywhere and in the absence of the victim's mother, the appellant was carnally knowing her. WP 8209 DC Subira who investigated the case by collecting evidence discovered that the victim had been raped by the appellant.

On 4.1.2019, Mwanaidi Khalid Kachenje, a Doctor was told by Stella Alexander that she had been carnally known by her step father but her

mother said that she was not aware of that incident. She medically examined the girl who was not in a good mood as she seemed to be distressed. She recalled that the victim's vaginal parts were normal but her thighs had bruises/scratches. The hymen skin was missing signifying that she was not a virgin. A further examination revealed that the anus was intact, there was no bruises in the vagina but the girl smelt urine. She came to the finding that the girl had been penetrated. She advised the victim to undergo counselling. She then filled in the PF 3 (Exhibit P. 1).

In his sworn evidence, the appellant stated that his daughter was taken to unyago and was bedwetting. He contended that he could not tell what they had done to her at unyago celebrations. He told the trial court that he had up brought her since she was two years old. He denied to have raped her.

At the hearing of this appeal, the appellant appeared in person whereas the respondent was represented by Ms Caroline Matemu, learned State Attorney. The appellant who had also filed additional grounds of appeal added that the victim went to unyago and the incident took place at jandoni. He denied the victim to have been with him. On her part, learned State Attorney supported the appeal. She contended that after going through the record and the grounds of appeal, she realized that the charge which had to be proved, shows that

Akida Mohamed Katema on 29.12.2018 at 2200 hrs at Mikangaula in Masasi, the appellant carnally knew Stella Alexander, aged 7 years. Learned State Attorney argued that during her giving testimony, the victim introduced herself to be Stella Barnaba which indicates that the evidence of who exactly the victim was was lacking.

Ms Caroline Matemu also noted that the date of incident was at variance. She insisted that where specific date and name is mentioned in the charge, there has to be led evidence to prove the same. Reliance was placed on the case of **Salum Rashid Chitende v. R.**, Criminal Appeal No. 204 of 2015. Learned State Attorney, on these anomalies, invited this court to quash and set aside the conviction and sentence.

The appellant had nothing to rejoin.

I think the case against the appellant was not proved beyond reasonable doubt.

First, the charge in the charge sheet shows that the victim was Stella d/o Alexander. The same applied to the facts of the case during the preliminary hearing stage. However, in the evidence, it is shown that the victim was Stella Barnaba. This is clear at p. 6 of the typed proceedings of the trial court when the victim was testifying and introducing herself. The victim's close relatives did not mention the exact name. While her biological mother (PW 3) spoke of the victim being her 'daughter', PW 3 was referring her as the 'victim'.

The Court of Appeal in the case of **Salum Rashid Chitende v. R**, Criminal Appeal No. 204 of 2015 referring to its previous decision in the case of **Mathias s/ o Samwel v. R.** , Criminal Appeal No. 271 of 2009 observed at page 7 thus:-:

“When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place. We think, it is also important that when specific name of the victim is stated in the charge sheet there should be no variance of the name of the victim which has appeared in the charge sheet with that which has appeared in the evidence in the proceedings, otherwise, that will create doubts as to who was the actual victim”

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order the appellant to be released from custody forthwith unless lawfully held for other causes.

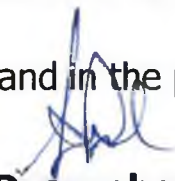



W.P. Dyansobera

JUDGE

4.6.2021

This judgment is delivered under my hand and the seal of this Court on this 12th day of April, 2021 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent and in the presence of the appellant.



W.P. Dyansobera

Judge

