

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 19 OF 2020**

(Arising from Mtwara District Court Criminal Case No. 86 of 2018)

**BONIPHAS <sup>S</sup>/o PATRICK @ MCHAPO ..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

17 March & 4 June, 2021

**DYANSOBERA, J.:**

The appellant Boniphace Patrick @ Mchapo stood trial along with Ackram Hassan Mbilinga (2<sup>nd</sup> accused) and Mohamed Bakari (3<sup>rd</sup> accused) charged before the trial District Court of Mtwara with three counts, viz. conspiracy, gang rape and armed robbery (3<sup>rd</sup> and 4<sup>th</sup> counts). In the first count, it was alleged that the appellant and his fellows at unknown date, place and time within the Municipality and Region of Mtwara did conspire to commit offence to wit, gang rape and armed robbery. In the second count, the prosecution alleged that the trio, on 19<sup>th</sup> day of March, 2018 at Litingi Beach area within the Municipality, Region of Mtwara, jointly and together, had carnal knowledge of Theresa Katarina Jakovlev without her

consent. In the third count, it was alleged that the trio, on 19<sup>th</sup> March, 2018 at Litingi Beach in Mtwara jointly and together robbed from Class s/o Janzen some properties, that is one mobile phone TECNO Spark valued at Tshs. 230,000/= and cash money Tshs. 20, 000/=, all total valued at Tshs. 250,000/= and immediately before such acts they used actual violence by using stones and sticks in order to obtain and retain the said property.

The appellant and the accused persons are also alleged to have robbed Katarina Jakovlev of cash Tshs. 20,000/= and immediately before such stealing they used actual violence by using stones and sticks in order to obtain and retain the said property. This is the fourth count.

When the charge was read over and explained to the appellant and his fellows, they pleaded not guilty and the prosecution, in their endeavour to prove the charge, called a total of seven (7) witnesses.

A brief recount of facts of the case for purposes of this appeal is that Theresa Katalina Jakovlev (PW 3) and Claas Janzen (PW 4) are Germans by nationality. PW 3 came in Tanzania and was residing in Mtwara working at Salem Primary School. PW 4 left Germany and was living in Iringa. He had come to Mtwara to visit her friend, PW 3.

On 19.3.2018 at about 1700 hrs, the duo was at Litingi Beach for recreation purposes. While there, a group of around seven people armed with stones and sticks approached and surrounded them. They tied PW 3's and PW 4's hands, stole a cell phone, cash. Tshs. 20, 000/= and a book. They then took the two victims to the bush. While PW 4 managed to slip away, PW 3 had her skirt and underpants undressed and was carnally known by the culprits in turn. The culprits then went back to Litingi Beach. PW 3 who was naked hid herself until she secured assistance by being given clothes. PW 4 managed to report to the police. A motor cycle was hired and took her to Mitengo Police Outpost where PW 3 found PW 4. They then went to report to Mtwara Police Station where she was issued with a PF 3 and was taken to Ligula Referral Hospital. There she was attended by Mwajuma Kimbau (PW 5), an Assistant Medical Officer. PW 3 told her that she had been carnally known by a mob of people at Mikindani Beach. PW 5 medically examined her and found her with bruises on the thighs and abdomen.

PW 6 one Inspector Mwimba Sinkara supervised an identification parade and filled in the identification parade register- PF 186 (exhibit P 2). The appellant's police statement was recorded by No. G.8714 DC Lameck

(PW 7) which was admitted in evidence as exhibit P 3 on 14<sup>th</sup> March, 2019 after an inquiry was conducted.

On 20.3.2018 at 1000 hrs, G. 1203 DC Grayson went to Litingi Beach and drew a sketch plan of the crime scene (exhibit P 4).

On 14<sup>th</sup> May, 2019 the appellant and his fellows entered their defence. The appellant told the trial court that he is a resident of Magomeni, Mtwara Municipality. On 21<sup>st</sup> March, 2018 attended burial ceremony at Ufukoni cemetery and while the way back home he was stopped by a mob of people who ordered him to go to Mitengo Police Outpost. There he was interrogated and the following day he was taken to Mtwara Police Station where he found other persons who were alleged to have raped PW 3. He denied involvement but the police forced him to admit. The appellant and his fellows were taken to Mikindani Primary Court to record extra judicial statement. On 28<sup>th</sup> March, 2018 at about 9000 hrs, he was ordered to sign on a piece of paper. He was then arraigned in court. On 2<sup>nd</sup> January, 2019 the police officers took him to Mtwara Police Station and assaulted him and after four days he was taken to Ligula prison.

The appellant denied to have committed the offence. He also denied to know his two fellows prior to the incident. He denied his statement to have been recorded by DC Lameck.

The 2<sup>nd</sup> accused testified that on 21<sup>st</sup> March, 2018 at about 0300 hrs the police officers took his mother to Mtwara Police Station and on 22<sup>nd</sup> day of March, 2018 at 0900 hrs he went to report to the Police Station following the arrest of his mother. The police arrested the 2<sup>nd</sup> accused and discharged his mother. He stayed at the police station for almost three days and then joined with another person he did not know. On 28<sup>th</sup> March, 2018 he was brought to court to answer the allegations which he denied.

The 3<sup>rd</sup> accused is a resident of Kihoro area. At the trial court he testified that on 22<sup>nd</sup> March, 2018 was arrested at Mbae and taken to the Police Station where he was alleged to have stolen and raped PW 3. The 3<sup>rd</sup> accused denied. An identification parade was conducted and he was identified. He admitted to have recorded his cautioned statement but argued that it was after he was assaulted. On 27<sup>th</sup> March, 2018 he was taken to the Justice of the Peace and recorded an extra judicial statement. Later, he was required to sign another statement which he did not know and was assaulted. On 28<sup>th</sup> March, 2018 he was informed by police officers

to sign on a piece of paper. He denied to have recorded a cautioned statement at the Police Station.

In its judgment, the trial District Court was satisfied that the prosecution had failed to prove the case against the two accused persons. The same court was, however, satisfied that the case against the appellant was proved to the required standard. The appellant was not satisfied with the trial court's decision hence this appeal. According to the petition of appeal, four grounds have been preferred. In the first ground, the appellant is complaining that the case against him was not proved beyond reasonable doubt as he could not be found guilty of gang rape after his two fellows were acquitted.

In the second ground of appeal, the appellant is challenging the identification. The appellant, in the third ground takes issue with the admission of exhibits P 2 and P2 and in the fourth ground of appeal, he is challenging the credibility of witnesses.

On 17<sup>th</sup> March, 2021 when the appeal came for hearing, the appellant was present in person while the respondent was represented by Ms. Caroline Matemu, learned State Attorney. The appellant told this court that he had filed a total of four grounds of appeal which he has clarified.

He therefore, asked the learned State Attorney to start replying them and then, if need be, he would rejoin.

Before me, the appellant appeared in person while Ms. Caroline Matemu stood for the respondent. When invited to argue his appeal, the appellant told this court that he had filed a total of four grounds of appeal and had clarified them. He, however, preferred the learned State Attorney to start responding them and then he would rejoin if need arose.

Ms. Caroline Matemu supported both conviction and sentence. She contended that the offence against the appellant was proved beyond reasonable doubt.

With respect to the first count, learned State Attorney contended that PW 3 was clear in her evidence on how the incident happened and mentioned the appellant as one of the culprits. PW 3 said that she was penetrated, one of the essential ingredients of the offence of gang rape. According to her *kubakwa* meant that she was raped or carnally known. Ms Caroline sought support of her argument from the decision in the case of **Hassan Bakari Mamajicho v. R**, Criminal Appeal No. 102 of 2012 where the Court of Appeal stated that a general term suffices to indicate penetration. It was further contended on part of the respondent that it was

proved that more than one person participated and PW 3 proved this fact. Learned State Attorney argued that though PW 3 was raped by more persons in turn, she managed to identify the appellant who was the first in the queue and that whoever was present is deemed to have committed the offence notwithstanding how he participated. Reference was made to the case of **Imani Charles Chimanga v. R.**, Criminal Appeal No. 382 of 2016. She argued further that PW 3's evidence was supported by that of PW 4 and the evidence of the expert who was a Doctor.

As to the offence of robbery, it was submitted on part of the respondent that PW 3 and PW 4 who are victims proved the offence and that their evidence was supported by that of PW 1. The evidence was clear that the appellant was amply identified as the incident occurred at 1700 hrs which was in a broad day light and PW 3 and PW 4 were clear that the culprits were not covered.

I have considered the trial court's record, the grounds of appeal and the submissions by both learned State Attorney and the appellant.

As far as the first ground of appeal is concerned, it is argued by the appellant that the offence of gang rape cannot be committed where the appellant's fellows were acquitted. On her part, Ms Caroline Matemu insisted that the appellant committed the offence of gang rape as proved



by PW 3 and PW 4. With respect, I agree to the learned State Attorney's argument. The evidence of PW 3 clearly established that on 19<sup>th</sup> March, 2018 at about 1700 hrs while she and PW 4 were at Litingi Beach, a group of seven people arrived. They were armed with stones and sticks. They surrounded them, tied them robbed them and took them to the bush where they ordered her to undress her skirt and underpants and had sexual intercourse with her in turn and the appellant was the first in the queue. The identification of the appellant by PW 1 was supported by PW 1 who stated that the appellant appeared from the long grasses and together with other five people pursued PW 3 and PW 4. He then heard that PW 3 and PW 4 were robbed and reported to the police PW 1 participated in apprehending the appellant. it is true that the appellant's fellows were discharged but that in no way meant that the acquittal or discharge of those fellows absolved the appellant of the culpability in the offence of gang rape. The Court of Appeal in the case of **Imani Charles Chimango v. R**, Criminal Appeal No. 382 of 2016 at p. 9 thus:

'Again, the prosecution need not prove that each member of the group achieved any penetration for the offence to be committed. Penetration by one member of the group, facilitated by another or others, will be sufficient to ground a conviction.

The fact that there was penetration on part of PW 3 was clearly demonstrated by PW 3, the victim and PW 4 who eye witnessed the incident. The evidence of these two witnesses implicated the appellant. The prosecution evidence is to the effect that the appellant did not only facilitate the gangrape but also he raped PW 3. This is clear from the evidence of PW 3 herself and that of PW 4 as well as the evidence of PW 1. According to PW 3, the appellant was the first in the queue of the people who raped her. PW 4 told the trial court that he warned the appellant 'acha tabia zako' but the latter replied 'acha kuongea.' Further, PW 1 affirmed that he was told by the appellant to mind his own business. PW 7 who interviewed the appellant stated how the appellant was involved in the commission of the offence.

PW 5 who medically examined PW 3 supported the element of penetration. It is axiomatic that true evidence of rape has to come from the victim. The Court of Appeal in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 stated that:-

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant that there was penetration."

This position was re-iterated by the same Court in the case of **Mhina Zuberi v. R:** Criminal Appeal No. 36 of 2016 (unreported).

The appellant's complaint in the first ground of appeal has no merit.

In the second ground of appeal, the appellant is complaining that he was not sufficiently described. He, however, admitted that the conditions for identification were favourable. He was right that the conditions for correct identification were favourable. The evidence is clear that the offence occurred at 1700 hrs which was in a broad day light. PW 1 well knew the appellant. PW 3 and PW 4 not only identified the appellant at the crime scene but also had an opportunity to converse with him. Indeed, the oral evidence of PW G 8417 D/C Lameck indicates that when he was interviewing the appellant, the latter detailed how he and his fellows managed to commit the charged offences. I find the appellant's second ground of appeal lacking legal merit.

In the third ground of appeal, the appellant is complaining that the contents of exhibits P 1 and P 2 were not read out to him. This omission was admitted by the learned State Attorney. It is trite that after a document is cleared for admission and admitted in evidence, it should be read out to the accused to enable him understand the nature and substance of the facts contained therein. That document is subject to be

expunged from the record. However, the record is clear exhibit P 1 was admitted after the appellant had withdrawn his objection and in the course of an inquiry. Besides, the contents of exhibit P 1 were clearly detailed by PW 7 who recorded exhibit P 1. The Court of Appeal in the case of **Issa Hassan Uki v. R**, Criminal Appeal No. 129 of 2017 was of the view that oral testimony of a witness is quite sufficient to cover the contents of the document and I find that the oral evidence of PW 7 sufficiently covered the contents of the appellant's cautioned statement. Indeed, the appellant who had raised an objection against its admission withdrew the objection and the cautioned statement was accordingly admitted. It cannot be suggested that the appellant was prejudiced in any way. The complaint in this ground has no basis.

With regard to the fourth ground of appeal, the appellant is arguing that the prosecution witnesses that is PW 1, PW 3 and PW 4 were not credible. The record clearly shows that PW 1 identified the appellant at the crime scene. He participated in apprehending him. He affirmed that he well knew him as they were living in the same street at Magomeni Kagera area. PW 3 and PW 4 were strangers to the appellant but managed to identify him at the crime of the scene. The appellant did not suggest that these witnesses had any interest to serve when testifying. Their evidence was

supported by the police officers, that is PW 6 and PW 7 who participated in the whole investigation exercise. Likewise, I am not oblivious of the principle enunciated in the case of **Goodluck Kyando vs Republic**, [2006] TLR 363, the Court that:

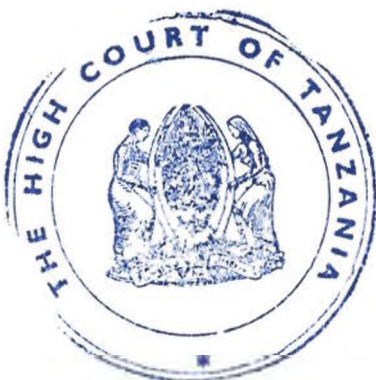
"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."

In the present case, the witnesses gave evidence which was pregnant with probative value and not suspect hence capable of proving the offence against the appellant beyond reasonable doubt. This ground, too, fails.

In view of what I have discussed, I am in no doubt the conviction was well deserved and needs no interference.

The sentences meted out to the appellant were the bare minimum which the law prescribes.

For the stated reasons, I find the appeal lacking any legal substance. The appeal against conviction and sentence is dismissed in its entirety.



  
**W. P. Dyansobera,**


**Judge**

**4.6.2021**

This judgment is delivered under my hand and the seal of this Court on this 4<sup>th</sup> day of June, 2021 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent and in the presence of the appellant in person.

Rights of appeal to the Court of Appeal explained.



  
**W.P.Dyansobera**  
**Judge**