IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA
CRIMINAL APPEAL No. 5 OF 2020
(Originating from Criminal Case No. 1 of 2019 District Court of Hanang at Katesh)

GIDAMIS BAYONGA.....APPELLAT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

9th August & 13th September, 2021

MZUNA, J.:

The appellant one Gidamis Bayonga was charged with and convicted of Rape contrary to sections 30(1)(2)(b) and 131(1) both under the Penal Code, [Cap. 16 R.E 2019] and sentenced to 30 years imprisonment term by the District court of Hanang. Being aggrieved, he lodged this appeal challenging both the conviction and sentence based on the five grounds which bolds down to three grounds:- 1. That, the charge sheet was defective; 2. That he was not properly identified by PW1. That the trial Court failed to evaluate the evidence thoroughly especially the defence evidence which raised reasonable doubts leading to an erroneous decision; And 3. That the charge was not proved beyond reasonable doubt.

During hearing of this appeal which proceeded verbally, the appellant appeared in person, unrepresented whereas Ms. Mmasy represented the respondent Republic.

A brief background story leading to this appeal, is that the appellant is alleged to have sexual intercourse with one Uya D/o Shabadi without her consent, the offence which is alleged to have been committed on 19th day of December, 2018 at Ming'enyi village within the district of Hanang in Manyara Region.

It is alleged that on the material date at 1:00 am, the appellant pushed the door and entered into the house of PW1 who was by then sleeping with her children whereupon her waking up, she found the appellant having sexual intercourse with her without consent. It is during this time when the victim and her children raised alarm. By then her husband was away on safari. The appellant managed to run away. The matter was referred to the hamlet chairperson who went there. She was given PF3. The victim was medically examined and found that indeed she was sexually abused (raped). The appellant was arrested on the following day. He was taken to the village office and later to the police station and subsequently charged in court.

On his part the appellant said that the whole case is a cooked up because he had a land dispute with the complainant and her husband.

The court based on the prosecution case, found that the charge was proved to the required standard of proof. The appellant was convicted and sentenced to 30 years imprisonment.

During oral submission, the appellant on the first ground of appeal argued that, the charge is defective because the offence is alleged to have been committed at Min'genyi village. While PW1 said that it was committed at Gridila village. To him, this shows that the charge was not proved beyond reasonable doubt.

On the ground of identification, the appellant argued that PW1 did not show the source of light which helped her to identify the appellant. Also that PW1 did not describe fully the attire and the distance from the source of light to where the offence was committed. The appellant also argued that PW1 alleged to have been raped from the back and therefore she could not identify the person who raped her because there is no person with eyes at the back. Owing to that, the appellant submitted that the identification was weak which could not have formed the basis of conviction.

On ground three, the appellant said that, the evidence of PW1 did not prove a charge of rape because she didn't prove penetration and therefore rape cannot be established.

Arguing ground four the appellant said that, despite the fact that PW1 and her children raised an alarm whereby neighbours attended still neither

children nor neighbours came as a witness to corroborate the PW1 evidence in Court.

Lastly, the appellant urged this Court to set him free as the conviction and sentence was baseless because the prosecution failed to prove the charge of rape to the required standard.

Ms. Mmasy, the learned state attorney at the outset, supported the appeal. She said that the charge sheet has some defects. She went on showing those defects as; first that, the charge was preferred under section 130(1)(2)(b) and 131(1) of the Penal Code while the said sections require presence of threats or absence of consent and also that the Victim must be under unlawful detention.

The learned state attorney submitted further that according to the evidence of PW1, it showed that she was at home sleeping with her children. Under such circumstances she said, the appellant couldn't have put her under detention. Ms. Mmasy further argued that, reading the evidence as a whole, there is no evidence of threat or force or even being in fear of death. Because of that she said, there is a variance between the evidence and the charged law.

In a nutshell, Ms. Mmasy says, viewed from the nature of this rape charge, issue of identification is immaterial. That observation notwithstanding still says, she agrees with the appellant that there was need to call the

neighbours and children as witnesses of the alleged offence. The learned State Attorney doubted the reality as alleged by the victim that the appellant went to rape PW1 at her home, a fact which is doubtful. There was no rejoinder submission for obvious reasons.

After going through all submissions and records of the trial court, I now come to the issue calling for determination. I start with the first issue of defectiveness of the charge sheet followed by the issue as to whether the charge was proved beyond all reasonable doubt.

On the charge sheet, the provision of the law establishing the offence that the appellant was charged with reads:-

"*S. 130.- (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:

(b) ***with her consent*** *where the consent has been obtained by the* ***use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention."***

(Emphasis added)

Now let me compare it with the charge which the court relied upon in convicting the appellant. It is hereby produced as under:-

"CHARGE

STATEMENT OF THE OFFENCE

RAPE: C/S 130(1)(2)(b) and 131(1) of the Penal Code Cap 16 RE. 2002

PARTICULARS OF THE OFFENCE:

That GIDAMIS S/O BAYONGA IS CHARGED ON 19TH day of December, 2018 at Ming'enyi village within Hanang' District in Manyara Region did have sexual intercourse with one UYA D/O SHABAN ***without her consent.*** *"*(Emphasis Added).

The bolded phrase in the charge suggest that the alleged offence was committed without the consent of the victim which is not within the spirit of the provision of the law (above cited).

In the case of **Nzararila Alfonce versus The Republic**, Criminal Appeal No. 371 of 2017 CAT at DSM cited with approval in the case of **Kassim Mohamed Seleman vs The Republic,** Criminal Appeal No. 157 of 2017 (both unreported), the court underscored ingredients of rape under section 130(1)(2)(b) of the Penal Code CAP 16 [R.E 2019] and emphasised that;

> *"...now looking at the particulars of the offence which were read to the appellant at the trial on the one hand and the contents of that section on the other hand, it becomes certain that the necessary ingredients of the offence under that provision; that is consent obtained by use of force, threat or intimidation by putting her in fear of death or of being hurt while she is in unlawful detention is missing."*

The Court in the case of **Nzararila Alfonce vs Republic** (Supra) went on starting that:-

"In terms of the above provision, the offence of rape is committed to a woman who has consented to a sexual intercourse but such consent is procured through force, threat or intimidation. ***So, presence of consent and use of force or intimidation are the crucial prerequisite ingredients in this category of rape..."***

The court observed that the correct provision ought to have been rape under section 130 (1) (2) (a) of the Penal code.

From the above observation, the evidence of the Doctor PW2 Catherine Ambrose, that there was rape (sexual intercourse without her consent and proof of penetration) was made out of context. I understand the victim wanted to convince the court that there could not have been consent because in her words she said that *"I had one month of delivery when the offence was committed."*

I revert to the second issue, proof of the charge. Starting with issue of identification. On the issue of identification, she said she managed to identify him because there was solar light. When she was cross examined by the appellant, she said that:-

"I grabbed you but you managed to run away from me, you are my neighbour and I know you, that is why I identified you... You did wear the same clothes you wore today. No you changed the clothes. You did wear a white clothes (sic)..."

The above evidence reminds me the well known case law of **Waziri Amani v. R** [1980] TLR 250 that the court must remove all possibilities of

mistaken identification for a valid conviction based on visual identification. The court is also guided by the principle laid down in the case of **Raymond Francis v R** [1994] TLR 100, where it was held that;

> *"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favoring a correct identification is of the utmost importance."*

Assuming as PW1, the victim said there was solar light, it is not clear on its intensity, how was the light illuminated whether it was by bulb or tube light and their number as compared to the size of a room. Was it illuminating from inside or outside the room. The record is silent on this aspect.

Reading the evidence on record, the evidence shows that after waking up, the victim and her children started raising alarm to alert whoever for help and because of that the man who was raping ran away. Under such circumstances where does issue of force and or threat or intimidation to death come from? Obviously it is non existent.

Having found as well said by the learned State Attorney, that no proof of presence of force and threat of intimidation for fearing death, I agree that there is no evidence showing that there was such kind of inducement from the appellant in order to win the unwilling victim. Again nowhere is it established that there was force, threat, intimidation or that the victim was in unlawful detention before giving the consent of sexual intercourse with the appellant. The alleged detention is a mere pretext and of course, sugar

coated. The charge and prosecution evidence as a whole, does not show that there was consent during the alleged sexual intercourse between the appellant and the victim. They are at variance.

That said, I agree with Ms. Mmasy, the learned State Attorney that it is practically impossible for someone sleeping in her bed room and thereby being put in unlawfully detention which is one of the crucial ingredients of the offence under consideration, but unfortunately such evidence is lacking in our case.

The prosecution and courts alike, should always ensure that the charge sheet and the evidence tallies. For the reasons above stated, on defectiveness of the charge, shortfalls in the identification, absence of consent and or use of threats or intimidation, the conviction and sentence cannot be allowed to stand.

The appellant should be released from prison forthwith unless otherwise lawfully held. Appeal allowed.

M. G. MZUNA,
JUDGE.
13th September, 2021.