IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 52 OF 2019

(Arising from Criminal Case No. 294 of 2017 of the Resident Magistrate's Court of Mtwara at Mtwara)

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

HAMIS MOHAMED @ KAZUMARI.....RESPONDENT

JUDGMENT

8th & 25th Nov. 2021

DYANSOBERA, J:

The appellant, the Director of Public Prosecutions, is assailing the judgment of the Court of the Resident Magistrate of Mtwara in Criminal Case No.294 of 2017 in which the respondent Hamis Mohamed Kazumari was acquitted of the offence of rape under Sections 130 (1), (2) (a) and 131 (1) of the Penal Code [CAP 16 R.E.2019]. It had been alleged by the prosecution that the respondent, on 30th day of November, 2017 at Mtiniko village within Nanyamba Township in Mtwara Region, the respondent did have carnal knowledge of one Zainabu d/o Yusuph Mwaya without her consent. According to

the petition of appeal filed on 11th June, 2019, the appellant's complaint is the following:-

> **That the Honourable trial Magistrate erred grossly both in law and fact by failure to evaluate and appreciate the prosecution evidence as adduced n court during trial.**

Briefly, the prosecution case established that the reswpondnt was married to the victim's daughter one Maimuna d/o Salum. The said victim was, on 29th May, 2018 when giving testimony at the trial, aged 45 years. On 30th day of November, 2017 at 1000 hrs she was in her farm. The respondent approached her and demanded sexual favour from her but he got the chuck. The respondent decided to way lay her. When she was going back home, the respondent invaded her, tore her underpants and forcibly had sexual intercourse with her. The victim cried for help but with no assistance. She reported to Mtiniko Village Executive Officer. She was later escorted by a militia man to Mtiniko Health Centre and medically examined. She then went to Nanyamba Police Station, obtained PF 3 and went to Nanyamba Health Centre and was, on 30th day of November, 2017, medically examined by Israel Deogratias Matumaini (PW 2), a clinical officer at Nanyamba. In his evidence, the clinical officer testified that the victim's vagina

had bruises, severe pain was wet and there was sperm like fluid. The laboratory test indicated neither venereal disease, HIV nor pregnancy. He admitted that he did not know that the victim had been previously attended at Mtiniko Health Centre.

On cross examination, PW 2 said that Zainabu had no bruises or pain but sperm like fluid.

Shaban Rashid Machingi (PW 3), was told by the Village Chairperson that the victim had been raped and he was required to arrest the rapist. The respondent was, accordingly, arrested, taken to the village office and locked up. PW 3 escorted the victim to Mtiniko hospital where she was given two tablets it being said that the victim had been raped. The Clinical Officer at Mtiniko referred them to Nanguruwe Health Centre. PW 3 reported back to Mtiniko Chairperson who referred them to Nanyamba Police Station instead of Nanguruwe Health Centre as had been directed by the clinical officer.

The respondent did not enter his defence.

In acquitting the respondent the learned Resident Magistrate was satisfied that the case against the respondent was not proved beyond reasonable doubt.

Before me, the appellant appeared through Mr. Wilbroad Ndunguru, learned Senior State Attorney. The respondent was absent despite the legal notification by way of publication.

Supporting the appeal learned Senior State Attorney submitted that the evidence unfurled by the prosecution had proved the case against the respondent beyond reasonable doubt. He contended as follow. The charge is of raping a woman on 30th day of November, 2017 in the morning where PW1 Zainab Yusuph met the respondent in the farm. The respondent told her that he wanted to have sexual intercourse with her. PW1 rejected the offer but after a while the respondent waylaid the victim and had sexual intercourse with her. PW1 and the respondent well knew each other as the victim was the respondent's mother in law. With regard to proof of penetration, Mr. Ndunguru told this court that the element was proved as there were bruises and spermatozoa that is fluid – like sperms. Although PW1 tendered a PF3, the learned Counsel pointed out that the said document was not read out in court and urged the court to expunge it from the record. With respect, I agree. Accordingly, I expunge exhibit P 1 from the record.

Learned Senior State Attorney was, however, quick to also point out that the oral evidence sufficiently proved the contents of the exhibit P3. It was further submitted on part of the appellant that PW 1 testified that she screamed but the Magistrate said that there was no alarm raised. Mr. Ndunguru insisted that PW1 raised had an alarm for assistance. It was also contended that the victim went to Mtiniko Dispensary and then referred to Nanyamba Health Centre where PW2 diagnosed her and filed in the PF3. Mr. Ndunguru argued that getting served at two dispensaries does not belittle the evidence of a witness. He cited the case of **Joshua Nyaya v. R**, Criminal Appeal No. 205 of 2018 to support his argument. This court was also referred to the evidence of Shaban Rashid Mchinga (PW 3) who was directed by the village government to go to the higher authority. Further that the evidence of PW2 and PW3 was supported by the evidence of PW1. Learned Senior State Attorney egged on the court to re – evaluated the evidence.

I have considered the trial court's record, the ground of appeal and the submission by learned Senior State Attorney. The issue for consideration is whether the prosecution proved its case to the required standard.

In this case, the respondent was charged with rape contrary to Sections 130 (1), (2) (a) and 131 (1) of the Penal Code. Under paragraph (a) of sub-subsection (2) of section 130, a successful prosecution of the crime of rape depends on proof of two important elements: one, the accused had sexual intercourse with the victim and two, that act was committed with her consent. A critical analysis of the evidence reveals that the fact that the respondent had sexual intercourse with PW 1 was PW 1's word not bolstered by other evidence. There was no witness who saw PW 1 being raped. PW 1 told the trial court that she cried. However, no witness proved not only that PW 1 ever cried by also her tone of the voice.

Besides, there was no physical injury such as bruises or bleeding which could be corroborative of any violence on PW 1. Likewise; there was no biological evidence such as semen indicating that sexual intercourse did take place. Although PW 2 who medically examined PW 1 had, during examination in chief, asserted that PW 1's vagina had bruises, severe pain, wet and fluid-like sperm, the same PW 2, during cross examination, was clear that on vaginal examination, there was no tenderness, no any bruises, no any bleeding, no wound at labia majora and minora but that the vagina was wet.

It is my finding that, in order for the conviction to be sustained, the prosecution had to lead associative evidence collaborating that a rape occurred and linking the respondent with the scene of the crime and the victim. Such crucial evidence was wanting. In such circumstances, the case against the respondent was not proved beyond reasonable doubt. The acquittal of the respondent was, in the circumstances, inevitable.

This appeal fails and is dismissed

W.P.Dyansobera

Judge

25.11.2021

Judgment has been delivered this 25th day of November, 2021 in the presence of Mr. Kauli George Makasi, learned Senior State Attorney for the appellant but in the absence of the respondent.

W.P.Dyansobera

Judge