THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 114 OF 2021
(Originating from Criminal Case No. 37 of 2019 of the Momba District Court)

Between

DAVIUS SYLIVESTER SICHALWE.....1ST APPELLANT

FRANK SAMORA AUGUSTINO.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

28th February & 21st April, 2022

KARAYEMAHA, J

The appellants were arraigned in the District Court of Momba for the offence of gang rape contrary to section 131A (1) (2) of the Penal Code [Cap. 16 R: E 2002]. It was alleged that on 24th February, 2019 at about 21:00hrs while at Ivuna Village within Momba District in Songwe Region the appellants jointly unlawfully had carnal knowledge of a girl aged 15 years who, for the sake of modesty and privacy, I shall refer to as "AA" or simply as PW2, the codename by which she testified at the trial.

The appellants denied committing the offence. The prosecution brought six witnesses and four documentary exhibits whereas the appellants defended themselves and tendered no exhibits.

To add flavour to the present judgment, I find it appropriate to narrate in a nutshell the factual background to the appellants' arraignment and appeal as can be discerned from the trial court's record. Essentially, it all started with PW2's pregnancy. It was a mounted complaint that one Rowland Romanus impregnated PW2. Therefore, Rowland Romanus was to be traced. The task of tracing him was upon the Village Executive Officer but sent the appellants to trace and arrest him. In order to facilitate the exercise the appellants used PW2 as a trap. On 24/02/2019 appellants left with PW2 to trace Rowland Romanus. It seems the way leading to where they trusted could find him was through the bush. On their way they passed through the said bush. It was at that area when the appellants forgot their responsibilities and set on PW2. According to PW2, the first appellant told her that they wanted to rape her. PW2 testified that she attempted to run but the appellant chased and successfully got hold of her. They beat her to the extent of becoming weak. Due to PW2's condition, the appellant succeeded to undressed and rape her one after another. After

that incident, PW2 went home and on getting there she narrated the episode to her mother PW3 (Grace Kalista) who formed an opinion that the matter should be reported to the VEO, Mashaka Jackson Mwashambwa (PW4). On account of those allegations, the appellants were arrested and sent to Kamsamba police station. At police station, PW1 (H.2198 PC Hassan) wrote cautioned statement the 1st appellant's cautioned statement (exhibit PE1), PW5 (H DC Deogratius) recorded the 2nd appellant's cautioned statement (exhibit PE2). It was evidenced that they both confessed to commit the offence. On the same line, PW6 (Kennedy Peter Mrosso) recorded both appellants' extra judicial statements (exhibit PE3 and PE4).

In defence the appellants denied committing the offence and discredited the prosecution evidence for being contradictory and insufficient to establish that they raped PW2.

At the end of the trial, the trial Court was satisfied that the prosecution proved its case beyond reasonable doubt. It found credence on the evidence of PW2 that she was raped. Consequently, they the appellants were convicted and eventually sentenced to serve thirty years imprisonment. The appellants were aggrieved hence filed the present appeal containing 10 grounds of appeal. I propose to start with ground

five (5) wherein the appellant complained that the ingredients of rape were not proved beyond reasonable doubt.

When the appeal came for hearing the appellants appeared in person while the respondent appeared through Saraji Iboru learned Principle State Attorney.

When appellants were called on to argue their appeal, they prayed the learned State Attorney to put up his defence after which, need arising, they would submit in rejoinder.

The major complaint in this ground by the appellants, as discerned from the memorandum of appeal, was they were convicted and sentenced apart from the fact that ingredients of rape, to wit, penetration and consent were not proved. To illustrated there point they cited the case of ***Ainea Gidion v Republic***, Criminal Appeal No. 183 of 2008. Mr. Iboru's reply was very short. He argued that PW2 explained that she was penetrated by the appellants on rotation.

I have carefully considered whether there was any rape committed on the victim (PW2). On this I shall be guided by the evidence of PW2, PW3 and PW4 and the law.

The law on rape is very clear. Section 130 (2) of the Penal Code makes it an offence (of rape) for a male person to have sexual intercourse with a girl or woman. The law provides further under subsection (4) that the offence of rape is proved by penetration even if it is slight. It states as follows:

> *(4)For the purposes of proving the offence of rape-*
> *(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*

It is now a common principle that true evidence on rape must be given by the victim. The rationale behind this principle, in my considered opinion, is simple to comprehend. It is that the victim of rape incident is actually the one who witnessed and knows what transpired and the one who felt what was inserted in her vagina. This principle was emphasized by the Court of Appeal in cases of ***Seleman Makumba v Republic*** (supra) and ***Julius John Shabani v Republic***, Criminal Appeal No. 53/2010 CAT, Mwanza (Unreported)

> *"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"*

See also the case of ***Said Majaliwa v Republic***, Criminal Appeal No. 2 of 2020 CAT, Kigoma) (Unreported)

It suffices to say at this moment, therefore, guided by the foregoing statutory and case law, that penetration being the necessary ingredient must be proved beyond reasonable doubt not inferred. The evidence must be led to prove every essential ingredient of rape, be it statutory or conventional rape. Worth to note is the point that it is not enough for the complainant/victim to make bare assertion that she was raped. She must be bold and thorough and explain whether or not the accused inserted his penis into her vagina, however slight it might have been.

The requirement and importance of proving penetration in rape case has been stressed in countless decisions of the Court of Appeal of Tanzania. They include: ***Nasibu Ramadhani v The Republic***, Criminal Appeal No. 310 of 2017; ***Seleman Maumba v Republic***, Criminal Appeal No. 94 of 1999; ***Imani Charles Chimango v The Republic***, Criminal Appeal No. 382 of 2016, ***Robert Karoly @ Tiuga v The Republic***, Criminal Appeal No. 117 of 2009; ***Mathayo Ngalya @ Shabani v The Republic***, Criminal Appeal No. 170 of 2006; ***Ex-B9690 SSGT Daniel Mshambala v The Republic***, Criminal Appeal No. 183 of 2004 (all unreported) to mention but a few.

In ***Mathayo Ngalya @ Shabani v The Republic***, (supra) the learned superior bench made the following observation:

> *"The essence of the offence of rape is penetration of the male organ into the vagina..... For the offence of rape* ***it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place****. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence" [Emphasis is mine].*

The most captivating position in this respect was accentuated in ***Robert Karoly @ Tiuga v The Republic***, (supra) in which it was held that:

> *"...an allegation of penetration can be effectively rebutted by the evidence going to show impossibility on the part of the accused to perform the alleged act, for various reasons. So to avoid a failure of justice,* ***it is imperative for the complainant to give relevant evidence going to prove beyond reasonable doubt every constituent element of the offence of rape****." [Emphasis is mine].*

In the present case we have similar facts as those in the case ***Robert Karoly @ Tiuga*** (supra) and ***Mathayo Ngalya @ Shabani*** (supra) where the victim made bare statement about rape. The victim was recorded testifying in chief as follows:

> *"... as we were at the bush one Frank (2nd accused) said we bring you (sic) here so as to rape you. That they hence robbed*

(sic) me hence I succeeded to run from them, they chased me hence Frank succeed (sic) to catch me and he told me that I better agree because I could not reach anywhere hence he took a stick and he started to beat me. Hence he harmed me hence I lost power and they undressed all clothes and they started to rape me and started one Frank (2nd accused) and followed Davius. That after they finish (sic) hence as we reached near home they left hence I turned back alone."

Responding to the 1st appellant's cross-examination questions, "AA" replied that;

"You raped me and I know you."

By the 2nd appellant, she replied that:

"You raped all of you (sic). You started yourself and accused person he (sic) followed 1st accused person then 2nd accused followed and then 1st accused person followed. You raped two times each."

From the above quoted extracts, there is no flicker of doubt that the victim made a bare assertion that she was raped by the appellant. No scintilla of evidence was given to prove, even on the balance of probabilities, that each appellant inserted his penis in her vagina. It is neither from the victim nor PW3. In the absence of clear evidence to that effect, it is very unsafe to hold that the offence of rape was committed be it the appellants or any other male person. I am,

therefore, satisfied that the offence of rape on PW1 was not established beyond all colours of doubt.

Under these circumstances, I am satisfied that the discussion above disposes of the appeal. That said, I think that it will only be pretentiously academic to deal with the rest of the grounds of appeal and convincing arguments by Mr. Iboru.

All said and done, I allow the appeal. The conviction for rape is hereby quashed and set aside as well as the sentence imposed on the appellants. The appellants should be released forthwith from prison unless they are otherwise lawfully held.

It is so ordered.

J.M. KARAYEMAHA
JUDGE
21/04/2022