

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 149 OF 2021

(Arising from the decision in Criminal Case No. 278 of 2020 of the District Court of Serengeti at Mugumu)

BETWEEN

JULIUS S/O MANG'ANG'A.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

30th March & 6th April, 2022.

A. A. MBAGWA, J.

This is an appeal against both conviction entered and sentence imposed by Serengeti District Court in Criminal Case No. 278 of 2020. The appellant, Julius Mang'ang'a was charged with, tried and convicted of two offences namely, rape contrary to sections 130(1) & (2)(b) and 131(1) of the Penal Code and unnatural offence contrary to section 154(1)(a) of the Penal Code.

It was alleged, in the first count, that on the 8th day of August, 2020 at Kenyana B village within Serengeti District in Mara region, the appellant, Julius Mang'ang'a unlawfully did have sexual intercourse with the victim (PW1) without her consent. Further, in the second Court, it was alleged that

the appellant did have carnal knowledge of the victim (PW1) against order of nature.

Upon arraignment, the appellant, pleaded not guilty hence the matter went to a full trial. In a bid to prove the allegations, the prosecutions paraded four witnesses to wit, the victim (PW1), Happiness d/o Fredinand (PW2), Konda Bwana @ Wambura (PW3) and WP 5665 DC Sijali (PW4). In addition, the Republic tendered two exhibits namely, the victim's underwear (PE1) and PF3 (PE2). The appellant, on his part, stood a solo witness and did not have any exhibit.

In a nutshell, the prosecutions' account was that on 8th day of August, 2020 at Kenyana B village within Serengeti District in Mara region around at 20:00hrs, on her way to home, the victim was invaded by the appellant. The appellant threatened her with a knife and forcefully had sexual intercourse with her. PW1 testified that the appellant ordered her to suck his penis. He then penetrated her vagina and lastly forcibly had sexual forcefully inserted his penis into the victim's anus. It was the testimony of PW1 that while the incident was on progress, she heard people who were passing nearby the scene hence she shouted for help. Konda Bwana @ Wambura (PW3) who was in company of Mwita Sembeli responded to the alarm raised but they

could not render assistance as the appellant threatened to cut them with a knife.

PW3 said that the appellant on seeing them, put on his trousers and ran into the bush. He said that he identified the appellant through voice, his phone light and moon light. Thereafter on the same night Konda Bwana @ Wambura (PW3) and Mwita Sembeli accompanied the victim to the hamlet chairman one Emmanuel Nyandema who wrote them a referral letter to police. On the following day, i.e. 9th August, 2020 PW3 escorted the victim to Kenyana Police Post where she was issued with a PF3. She thereafter went to Kenyana 'A' Health Care Centre where she was medically attended by Happiness Fredinand (PW2). PW2 observed bruises and sperms both in the victim's anus and vagina, a fact which confirmed that the victim was raped and carnally known against the order of nature.

On the above account, PW3 in the company of Mwita Sembeli and Kimende (bodaboda driver) managed to arrest the appellant after they were tipped that the appellant was at the pub of Nchota Mwikwabe. PW3 said that the appellant was armed with a panga at the time of arrest.

In defence, the appellant denied the accusations. He stated that at the time when the offence was allegedly committed, he was at the video place with his friend Mtongori Marwa. He said that they left the place at 22:00hrs and parted ways at the junction of Kenyana 'B' Secondary School. He stated that on 9th day of August, 2020 at around 15:00hrs while at the centre, PW3, Mwita Sembeli and Kimende Gisaka came on a motorcycle and told him that he was needed at Kenyana Police Post. He went with them on a motorcycle and upon arrival at the Police Post, he was told that he had accusations of rape hence he was remanded.

On account of the evidence presented, the trial Magistrate was satisfied that the allegations were proved beyond reasonable doubt hence he found the appellant guilty and convicted him of both offences. The learned trial Magistrate consequently sentenced the appellant to a prison term of thirty (30) years for each offence.

Aggrieved, the appellant brought the instant appeal. His petition of appeal contained complaints which can be reduced to one meaningful ground namely, that the trial Magistrate erred in law and fact to convict the appellant based on insufficient prosecutions' evidence.

The hearing of this appeal was conducted through teleconference. The appellant appeared in person, unrepresented whereas the respondent/Republic was represented by Nimrod Byamungu, learned State Attorney.

The appellant did not have much to tell the Court rather he prayed the Court to consider his complaints and allow the appeal. Mr. Byamungu, on his part, was in full support of the appeal. Byamungu submitted that the prosecution evidence in particular identification evidence was highly questionable. He said that the victim testified that she identified the appellant by the aid of moon and torch light but did not explain who was holding a torch which afforded her to see the appellant. He was thus opined that the conviction was unmerited because the identification evidence was not watertight.

I have had an occasion to go through and reevaluate the evidence. According to the testimony of the victim (PW1) and a nurse (PW2) who examined the victim, it is undisputed that the victim was penetrated both in her vagina and anus. The pertinent question therefore for determination of this appeal is whether it is the appellant who did the acts. PW1 said, during examination in chief, that she identified the appellant through his voice. However, during

cross examination she said that she identified the appellant by the aid of moon and torch light.

Similarly, PW3 testified that he identified the appellant by the aid of his phone torch light. Nonetheless, he could not state the intensity of that light nor did he explain the distance from where he stood to the appellant. Further, neither PW1 nor PW3 told the court on the attire of the appellant.

Apart from identification, PW3's testimony leaves a lot to be desired. He told the trial court that they forbore to arrest the appellant at the scene because he threatened to harm them with a knife. Surprisingly, we are told that it is the same people who arrested him with a panga on 9th day of August, 2020. The evidence is silent on what enabled PW3 and his friend Mwita Sembeli to arrest the appellant on 9th day of August, 2020 while they abstained to do that on the fateful day at the scene of crime.

Owing to the anomalies in the prosecution evidence as highlighted above, I am of unfeigned findings that the prosecution case was not proved beyond reasonable doubt and therefore the conviction was erroneously entered. In the circumstances, I allow the appeal and quash conviction of both rape and unnatural offence. Consequently, the sentences of thirty (30) year

imprisonment imposed by the trial court for each offence are hereby set aside. The appellant should be set free unless he is held for other lawful cause.

It is so ordered.

The right of appeal is explained.



A. A. Mbagwa

A. A. Mbagwa

JUDGE

06/04/2022

Court: The judgment has been delivered via video conference in the presence of the appellant and Nimrod Byamungu (SA) for the respondent this 6th day of April, 2022.

A. A. Mbagwa

A. A. Mbagwa

JUDGE

06/04/2022