IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 2 OF 2021

(Original Tandahimba District Court Criminal Case No. 62 of 2020

Before: Hon. J.J. Waruku, Esq. RM)

ZALAKASHI S/O AZIZI @ SHAIBU.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

9 June & 9 August, 2021

DYANSOBERA, J.:

The appellant herein was charged in the District Court of Tandahimba with and convicted of seven counts. In counts Nos. 1 and 2nd he was facing a charge of rape contrary to Sections 130 (1) (2) (e) and 131(1) of the Penal Code [Cap 16 R.E. 2002]. The particulars of the offence in both counts alleged that the appellant, on 31st day of August, 2020 at or about 1300 hrs at Lidumbe Mtoni village, within Tandahimba District in Mtwara Region, unlawfully did have carnal knowledge of one SS (not her real name), a primary school girl aged 11 years (1st count) and FA (pseudonym), also a primary school girl aged 11 years (3rd count).

In Counts Nos. 2, 4, 5, 6 and 7, the same appellant stood trial charged with unnatural offence contrary to Sections 154 (1) (a) and (2) of the same Code. In those five counts, it was alleged that the appellant on 31st day of August, 2020 at or about 1300 hrs at Lidumbe Mtoni village, within Tandahimba District in Mtwara Region, did have, in turns, carnal knowledges against order of the nature of NI, aged 11 years (2nd count), FA aged 11 years (4th count), AB, aged 11 years (5th count), MR, aged 11 years (6th count) and SY aged 12 years (7th count)

He was sentenced on all seven counts to life imprisonment. Aggrieved, he has appealed to this court seeking to challenge both conviction and sentence. He is armed with a total of ten grounds of appeal which boil down to one complaint that the offence against the appellant was not proved beyond reasonable doubt. Forsooth, this complaint is reflected in the first ground of appeal that:-

> *1. That, the prosecution side didn't prove its case beyond reasonable doubt.*

Briefly, the facts leading to the appellant's incarceration and the subsequent appeal are the following. The six victims mentioned above are school pupils. On 31.8.2020 at 1300 hrs they all went to collect some firewood. After the collection, a person who was driving some cattle passed

by. Few minutes later, the appellant appeared and asked them if they had seen some cattle. They answered in the positive. The appellant then told them that they had committed an offence by collecting the firewood at a wrong place. He told them that he would show them the right place to collect the firewood. He then led the six children to another bush where he told them that he was going to punish them. He gave them two options-either to have sexual intercourse among themselves or have their fingers cut. They opted the former option. The appellant then stopped them and told them that he was going to demonstrate how rape is conducted. He then took SS, removed her underpants, took his saliva and lubricated her vulva, inserted his penis into her vagina and started to carnally know her. He then carnally knew NI and FA after he had carnally known her (FA) as well. He later sodomised AB, MR and lastly SY. He then ordered them to go back home. The victims went back home and related the incident to Abdallah Khalfan (PW 8), the grandfather of FA, AB and MR. PW 9 one Sharifa Juma, the mother of SS as well as Bakari Ismail (PW 10), the grandfather of NI and SY were informed. The latter informed the father of SI, Juma Ahmad (PW 11). Following this information, the appellant was apprehended and taken to Mahuta Police Station where the victims identified him.

On 1st day of September, 2020 all the victims were medically examined by Daniel James Mwamakambe, a Doctor working at Mahuta Health Centreand a Medical Officer in charge. He then filled six PF 3's and at the trial he testified as PW 12.

On 3rd day of September, 2020, Muzamil Hamis Juma, a Resident Magistrate at Tandahimba Urban Primary Court and a Justice of the Peace recorded the appellant's extra judicial statement (exhibit P 7). At the trial, he testified as PW 7. The attempt by Inspector Danford Mahundu (PW 13) to tender the appellant's cautioned statement aborted as the document was found to have been recorded in violation of Section 50 (1) (a) of the Criminal Procedure Act.

In his defence, the appellant, a resident of Mahuta Chikongola admitted that on 31st August, 2020 he happened to go to the river to take bath and the went to the farm and met the six victims who were collecting firewood. The appellant, however, denied to have raped and carnally known them against the order of the nature.

During the hearing of this appeal, the appellant appeared in person whereas the respondent was represented by learned Senior State Attorney Mr. Kauli George Makasi. When called upon to argue the appeal, the appellant told this court that he had nothing useful to add his ten filed

grounds of appeal. on his part, the learned Senior State Attorney had the following to submit. He opposed the appeal by supporting the trial court's conviction and sentence. Replying the grounds of appeal generally, he submitted that the six victims who testified at the trial were clear on how the appellant did brutal acts on them by raping and sodomising them. In explaining the incident, their narration was consistent, the appellant failed to cross examine them and the learned trial Resident Magistrate analysed all evidence and came to the right conclusion. Mr. Makasi insisted that the evidence of these six witnesses which was corroborated in material particular by that of PW 7, PW 8, PW 9, PW 10, PW 11 and PW 12 proved the ingredients necessary to prove the case the appellant was facing. Further that the appellant before PW 7, a justice of the peace admitted to have committed the offence.

Apart from supporting conviction and sentence, learned Senior State Attorney noted that the PF 3's of the six victims which were tendered by the victims were wrongly tendered and improperly admitted in evidence. He explained that the contents of those exhibits were not read out in court. He urged the court to expunge them from the record. That notwithstanding, he insisted that the appellant's case was proved beyond reasonable doubt and urged the court to dismiss the appeal against conviction.

With regard to the appeal against sentence, learned Senior State Attorney was of the view that the sentence needed interference as it was against the law.

Having perused the trial court's record and considered the appeal, I have no doubt that the appeal against conviction is devoid of merit. It was amply proved by the six victims that the appellant on 31st August, 2020 carnally knew, SS (PW 1) and FA (PW 3), the children of 11 years each. Likewise, it was amply proved that the same appellant knew NI (PW 2), FA (PW 3), AB (PW 4), MB (PW 5) and SY (PW 6) against the order of the nature. The evidence of these six witnesses was corroborated in material particular with the evidence of PW 7, a Primary Court Magistrate and a Justice of the Peace who recorded the appellant's extra judicial statement (exhibit P 7). According to PW 7, the appellant admitted before him to have carnally known only females. The fact that the appellant did not tell PW 7 the truth and the whole truth is confirmed by PW 11, a Medical Officer (PW 12) who medically examined the six victims on 1.9.2020 was clear in his sworn testimony that PW 1 had pain in her vagina, complained to be raped and had tear in her vagina. PW 12 further testified that PW 2 complained to be both carnally known and carnally known against the order of nature. She had ruptures and bruises in her vagina and anus though no sperm was seen.

With regard to PW 3, the Medical Officer explained that he was complaining to have been carnally known against the order of nature and the medical examination revealed that he had bruises in his anus. PW 12 also testified that PW 4, PW 5 and PW 6 had bruises in their anuses. These observations by PW 12 on the victims were confirmed by PW 8, PW 9., PW 10 and PW 11 who physically examined the bodies of the victims and confirmed that they had been penetrated.

There is no dispute that on the material day at 1300 hrs in the broad day light, the appellant was with all the six victims. As to why he raped and sodomised them, he revealed this to PW 7 that 'aliwatamani'. In his extra judicial statement (exhibit P 7), the appellant told PW 7 that:

'ndipo hapo mimi ikanikuta tamaa ya kuwatendea kitendo hicho'.

The appellant's argument in his 2nd ground that the extra judicial statement (exhibit P 7) has no evidential value as it was extracted in the presence of the policeman which is contrary to law is devoid of any legal merit. PW 7 because, apart from not objecting its admissibility when it was being tendered, the appellant did not cross-examine him on the presence of a policeman when he volunteered to record his extra judicial statement after he was warned that it could be used in evidence against him.

The fact that the appellant admitted to have committed the offence is clear from his own statement during mitigation when he is recorded to have said 'it was my first time to commit an offence. I pray lenient'.

Further it was amply proved that the appellant was identified at the crime scene particularly by PW 6 who well knew the appellant prior to the incident. In his evidence, the appellant admitted that he and PW 6 knew well each other.

Lastly, the learned trial Resident Magistrate examined, evaluated and analysed the evidence and was satisfied that the case against the appellant was proved beyond reasonable doubt. For instance, at p.10 of the typed judgment, the Resident Magistrate observed:-

> *'I wish to address my mind on the issue whether PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6 was raped and sodomised. , is it the accused person who sodomised and raped the victims?*
>
> *The evidence that connect the accused person and the offence of rape and unnatural offence is the evidence of PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6, themselves. However, the accused person was not arrested in the scene of crime but he was proper recognised by PW 6, before the arrest aof the accused person, PW 6 made the description*

of accused person who sodomised him and his fellow victim to have known before the incident, he used to see him at Mahuta town, PW 6 fail to know the name of the accused person, evidence shows that after the accused person was arrested and sent before the victims managed to identify accused person by his face and clothes he wore and the offence was committed at or about 1300 hrs (day time) when the accuse testified before the court, he admitted to know PW 6, he admitted to meet with all victims to have sexual intercourse between themselves, I am of the view that what was said by prosecution evidence is admitted by accused person, the best witness is the witnesses who implicates him/herself

.....In addition to that I cannot say that the credibility of these witnesses was shaken, their evidence is free from inconsistencies and contradictions, they are reliable witnesses, hence I have no reason to disbelieve them'.

With those reasons, the Resident Magistrate declined to accept the defence in view of the cogent and compellable evidence of the six witnesses who eyewitnesses the incident.

In his rejoinder, the appellant asked a rhetorical question 'when I ejaculate, the 'steam cuts'. How possible that I committed such an offence to all those complainants/victims'.

I think the law on how penetration in law is established is settled. The Court of Appeal in the case of **Hassan Bakari @Mamajicho v. R**, Criminal Appeal No. 103 of 2012 quoting the provisions of Section 130 (4)of the Penal Code [Cap.16 R.E.2019] observed at pp 8-9 of the typed judgment thus:-

> *"for the purpose of proving the offence of rape-*
>
> *Penetration however slight is sufficient to constitute the* ***sexual intercourse*** *necessary to the offence;*

The law and case law tell it all that a slight penetration suffices to constitute sexual intercourse. The law was complied with. The appellant's complaints are baseless.

However, I agree that the victims' PF 3's were wrongly admitted in evidence as after they were cleared for admission and subsequently admitted, their contents were no read in court. With that defect, I agree that the said documents have to be expunged from the record and I, accordingly, expunge them. Notwithstanding the expunging of the PF 3's, the evidence by Daniel James Mwamakombe (PW 12) which detailed how the victims were

penetrated, sufficiently supported the element of penetration as testified by PW 1 to PW 11. He was believed and his evidence was watertight. The appellant's complaints against convictions are baseless.

As to the appeal against the sentences, I agree to the arguments by the appellant and the learned Senior State Attorney that the sentence of life imprisonment was excessive for the first offender and in the circumstances of the case. The proper sentences were, in my view, the sentence of thirty years prison term in respect of the offence of rape and unnatural offence as provided for under Sections 131 (1) and 154 (1) (a) of the Penal Code.

The sentence of life imprisonment is reduced to the sentences of thirty (30) years term of imprisonment in counts one, two, three, four, five, six and seven. The sentences are to run concurrently.

In the end result, the appeal against convictions is dismissed and the appeal against sentences is allowed to the extent explained above.

THE HIGH COURT OF TANZANIA

W.P. Dyansobera

Judge

9.8.2021

This judgment is delivered under my hand and the seal of this Court on this 9th day of August, 2021 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney for the respondent and in the presence of the appellant.

W.P. Dyansobera

Judge

9.8.2021