

IN THE HIGH COURT OF TANZANIA
AT MOSHI

CRIMINAL APPEAL NO. 53 OF 2001

(ORIGINAL CRIMINAL CASE NO. 292 OF 2000 D/COURT HAI)

LEONARD JONATHAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T
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BEFORE E. N. MUNUO, J.

In Hai District Court Criminal Case No. 292/2000 four accused persons namely:-

Accused No. 1 Leonard Jonathan;
Accused No. 2 Stephano Jonathan;
Accused No. 3 Anaufoo Justine; and
Accused No. 4 Jackson Elinawinga

Were jointly charged with rape c/s 130 (2) and 131 (3) of the Penal Code Cap 16 Vol. 1 of the Revised Laws as Amended by the Sexual offence Special Provisions Act No. 4 of 1998. It was alleged that on the 16/12/1999 at about 18.00 hours at Masama Mula Village in Hai District within Kilimanjaro Region the accused had carnal knowledge of one Aminiarra Elikira, a girl aged 23 years, without her consent. The accused persons denied the charge. The trial court acquitted accused No. 2 to 4. Accused No. 1 Leonard Jonathan, the appellant was convicted of the offence charged. He was sentenced to a term of 30 years imprisonment plus ten strokes of the cane. Aggrieved the accused lodged the present appeal to challenge the conviction and sentence.

The complaint, P.W. 1 Amina Elinkira, the daughter of P.W. 3 Elinkira Samanga testified that on the 16/12/1999 she was going home from church in the company of P.W.2 Neema Mengishu. They found the appellant Leonard Jonathan and

his co-accused on the way; people they knew from before. The accused persons caught the complainant and carried her to the house of Accused No. 1 Leonard Jonathan. In that capture the accused persons were armed with a matchet and sticks with which they threatened rescuers who responded to the victim's alarm. The father of the complainant got word of the captivity of his daughter.

He swiftly gathered and was accompanied by P.W. 4 Joram Mwasha, P.W. 5 Goodluck Amani and P.W.6 Wilson Nsaro. The father's contingent broke the door of the appellant's house and released the victim who had unfortunately already been sexually assaulted by Accused No. 1.

The complainant stated that when the co-accused carried her to the house of the appellant, the later locked the door. In that room one Eshiwakwe Justine who is at large helped the accused by holding apart the legs of the victim while Accused No. 1 sexually assaulted her. When Accused No. 1 had satisfied his lust, Eshiwakwe was ready for his turn but fortunately the victim's father broke the door open thereby interrupting the sexual assault by Eshiwakwe Justine who is at large. Dissatisfied with P.W.3's act of breaking the door and setting free his daughter who then ran home, Accused No. 3 struck P.W. 3 with a stick on the back of his head causing him to fall down. His colleagues rushed him to the hospital. Subsequently the accused persons were arrested and jointly charged with rape.

The complainant reported the matter to the police. She got a PF.3 form for treatment. Per her PF.3 form, P.W.1 suffered strangulation on her neck, bruises in her private parts which were smeared with spermatozoa, bruises and haemotoma on the knee joints and chest, dangerous harm inflicted by rape and the hands (blunt object). She tendered her PF.3 form as Exhibit P. 1.

In his defence on oath, the appellant admitted that he had carnal knowledge of the complainant. He claimed that he was in love with her and that had wanted to marry her but that she insisted on a Christian marriage which he could not afford. He then decided to ambush, catch and marry her under Chagga customary marriage norms, he stated. He said people pressed the complainant to go to the hospital and take action against him. The appellant took responsibility for the rape denying that his co-accused were involved in the matter.

In his twelve grounds of appeal the appellant denied the offence contending that his guilt was not proved beyond all reasonable doubt. He further contended that the ingredients of the offence were not established by the prosecution. He faulted the credibility of the prosecution witnesses and observed that no torn clothing was tendered to establish rape. He insisted that he, on the material day, married the complainant under customary norms so he committed no offence. He rejected the PF. 3 form exhibit P.1 as being of no weight.

The appellant faulted the trial magistrate for not finding the defence of contracting a Chagga customary marriage with the complainant on the fateful December 16, 1999 probable.

Ms. Makala learned State Attorney supported the conviction and sentence on the straight forward and strong evidence adduced by the complainant which evidence was fully corroborated by P.W.2, P.W.3, P.W.4, P.W.5, P.W.6 and also by the PF.3 form, exhibit P.1.

The issue is whether the accused raped the victim or married her under Chagga Customary law as he maintained in his defence and in ground seven of the appeal.

There is no speck of doubt that on the evidence on record, and in law the prosecution established the guilt of the appellant beyond all reasonable doubt. The evidence of the complainant was fully corroborated by her PF.3 form Exhibit P.1 which shows that she suffered a bruise in her private parts, which were smeared with spermatozoa; she suffered a bruised left knee and chest and a strangled neck: all injuries caused by the violence the appellant deployed on the victim. The appellant sexually assaulted the victim with the assistance of a co-suspect, one Eshiwakwe Justine who is at large. The later held the victim's legs apart thereby giving the appellant access to her private parts. The appellant muzzled the victim to prevent her from crying out but she did cry out all the same for P.W.3, P.W.4, P.W.5 and P.W.6 did hear her cry in the locked room which P.W.3 broke thereby releasing her.

The complainant was forcibly caught; carried to the appellant's house by a gang of five men including the appellant. The co-accused were armed with a matchet and sticks to keep off people who wanted to intervene. It was the victim's brave father who broke open the door of the assailant setting the complainant at liberty. She quickly dressed and ran home. The complainant was captured and carried to the house of the appellant with the assistance of his four co-suspects. He then locked the room and with the help of his co-colleague Eshiwakwe Justine who has since remained at large, the appellant sexually assaulted the victim. The complainant did not consent to the carnal knowledge. Under those circumstances the ingredients of the offence of rape were constituted thereby rendering the appellant liable of raping the complainant as charged.

The defence contracting a Chagga customary marriage through the rape is improbable and fallacious in fact and law.

Under the law of Marriage Act No. 5 of 1971 which governs all legally recognized marriage including customary law marriages, Section 2 of the said Act defines Marriage as follows:-

"S.2 marriage has the meaning attributed to it in Section 9, and any reference to a marriage means a marriage whether contracted before or after the commencement of this Act and

whether contracted in Tanganyika or elsewhere”.

Section 9 of the Law of Marriage Act No. 5 of 1971 defines marriage:

“9 (1) Marriage means the voluntary union of a man and a woman, intended to last for their joint lives”.

The appellant admitted in his sworn defence that he captured and carried away the victim where after he had carnal knowledge of her without her consent apparently because he could not afford a Christian marriage. As I stated earlier the victim did not consent to the rape, she was bruised and humiliated by the entire violent transaction which was beastly executed against her volition which completely negated anything called marriage under Chagga or other customary norms.

The complainant is protected by the domestic Law of Marriage Act No. 5/1971 for without volition there can be no marriage between parties intending or contracting a marriage. She is further protected by International norms notably under the provisions of Article 4 of the 1993 United Nations Declaration on Elimination of Violence Against Woman (DEVAW) which calls on States to protect and offer adequate relief to women victims of violence, and calls on States to condemn violence against women and not invoke custom, tradition or religion to avoid their obligations.

The complainant is also protected by Article 14 of the 1948 Universal Declaration of Human Rights which gives adults the right to choose ones spouse and the right to voluntarily marry the particular spouse by stating:

“Article 14 (1) Men and Woman of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal right as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

Article 14 (2) of the Universal Declaration of Human Rights is akin to the provisions of Section 9 (1) of the Law of Marriage Act No. 5 of 1971 which have a conditions of volition and the consent of the intending spouses for a valid marriage.

Finally there are the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1981. Article 2 of CEDAW calls on states to modify or abolish discriminatory:-

“Laws, regulations
Customs and
Practices.”

See, **TOWARDS A JURISPRUDENCE OF EQUALITY – TRAINING MANUAL**,
by Justice Nathali Kimaro and Pellagia Khaday,
Dar es Salaam, 2001. Tanzania ratified CEDAW on July 17, 1980.

Article 16 (b) of CEDAW guarantees the right to freely choose ones spouse and marry on ones volition by stating:-

“Article 16 States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure; on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse
and to enter into a marriage only with their
free and full consent;
- (c) to (h)

The complainant’s fundamental human right of marrying voluntarily is also protected under Article 23 of the Convention on Civil and Political Rights, 1966 which became affective in March, 1976 and which was ratified by Tanzania on June 11, 1976. Article 23 of C C P R states:

“Article 23.

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4.”

In view of the above provisions of domestic and international law, the appellant seriously offended the complainant's fundamental right to choose her spouse and marry on her own volition. These circumstances reinforce her complaint of rape which I have already observed, was proved beyond all reasonable doubt for she never consented to the appellant carnally knowing her nor marrying her under the obnoxious customary practice of grabbing women, locking them up and sexually assaulting them in the name of Chagga customary marriage.

All in all the appeal is devoid of merit. The sentence is statutory under the Sexual offences Special Provisions Act No. 4 of 1998. For those reasons the appeal is dismissed in its entirety.

It is so ordered.

E. N. MUNUO,
JUDGE.

21/9/2001

At Moshi this 21/9/2001

Appellant: does not wish to appear

Respondent: Mr. Kakolaki for

E. N. MUNUO,
JUDGE.

21/9/2001