0753 IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 4 OF 2013

FARAJA LESERIAN ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated the 4th day of December, 2008
in
Criminal Appeal No.154 of 2008

JUDGMENT OF THE COURT

3rd & 7th June 2013

KILEO, J. A.:

This is an appeal against the decision of the High Court of Tanzania sitting at Arusha in Criminal Appeal No.154 of 2008 whereby the conviction and sentence for the charge of rape entered against the appellant Faraja Leserian by the District Court of Arusha were upheld. Being aggrieved, the appellant has come to this Court on a second appeal.

Evidence upon which the appellant was convicted showed that on the material day the victim of the rape (PW2) had gone to fetch firewood in the company of another child (PW3) in the church farm. While she was on

a tree picking the firewood the appellant is said to have appeared and thrown a stone at them telling them that the tree did not belong to their father. As she came down the tree the appellant carried her into the bush and raped her. She was unable to call for help as the assailant had covered her mouth with his hand while he raped her. Soon after he finished raping her she cried for help. By the time help arrived the assailant had already taken to his heels. The victim was taken to hospital. She was attended by PW1, Dr. Joackim Lekundayo who testified that upon examination of the victim he found that her vagina had been ruptured with the tear stretching to the anus. She was hospitalized for seven days. Subsequently, the appellant was identified at an identification parade. He made a cautioned statement which, alongside his identification formed the basis of his conviction.

The appellant is aggrieved by the decisions of the lower Courts on the following five grounds listed in his petition of appeal dated 30/1/2013:

1. *That both Courts below violated the provisions of section 312 (2) of the Criminal Procedure Act.*

2. *That both Courts below erred in admitting the cautioned statement and the parade register while the two documents were not listed as exhibits during committal proceedings.*
3. *That the cautioned statement was wrongly relied upon as it had been taken in contravention of the law.*
4. *That it was wrong to rely on the PF3 as it was not tendered by the person who made it.*
5. *That the Courts below failed to assess the credibility of the prosecution witnesses.*

The appellant also filed additional grounds of appeal, complaining among other things that the trial Court erred in not conducting the proceedings in camera as it was a sexual offence which involved a child. He further submitted that section 127 (2) of the Evidence Act was not complied with.

At the hearing of the appeal the appellant appeared in person, unrepresented. In addition to his grounds of appeal he submitted to us written arguments which he asked us to adopt. The respondent Republic was represented by Mr. Zakaria Elisaria, learned Senior State Attorney.

It is not in dispute that PW2 a child aged about 10 years at the material time was raped sustaining serious injuries which necessitated hospitalization for seven days. This came out in the evidence of the victim herself and the physician who attended her (PW1).

The key issue before this Court as well as the Courts below is basically, whether it was sufficiently established that it was the appellant who raped PW2. Identification therefore becomes crucial. Before we resolve this issue however, we deem it fit at this point, to take care of a few other matters that were raised by the appellant in his grounds of appeal.

Ground one challenges the Courts below for failure to comply with section 312 (2) of the CPA which requires that the Court in the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced. The trial magistrate when entering conviction stated as follows:

> *"I therefore find the accused person guilty of the charge against him and convict him of the same".*

Mr. Elisaria argued that the non- mention of the particular section at the conclusion of the judgment under which conviction was entered was a minor error that was curable under section 388 of the CPA. We agree with the learned Senior State Attorney. We have noted that at the beginning of the judgment the trial magistrate specifically mentioned that the accused was charged with rape contrary to section 130 and 131 of the Penal Code. Rape was the charge that was framed and prosecuted against the appellant. It cannot, in the circumstances be said that the appellant was not aware of the charge of which he was convicted.

In ground 2 of his petition of appeal the appellant attacked the decision of the Courts below for having admitted the identification parade register and his cautioned statement while they were not listed as prosecution exhibits during committal trial under section 192 of the Criminal Procedure Act (CPA) thus violating the provisions of section 289 of the same Act. In response to this attack Mr. Elisaria pointed out, and rightly so, that application of section 289 of the CPA is the domain of the High Court. Indeed committal proceedings are conducted in the lower Courts only where a case is triable by the High Court. Section 289 falls

under Part VIII of the CPA which deals with the procedure pertaining to trials before the High Court. Section 192 of the CPA which is applicable to both the High Court and the subordinate Courts refers to the conduct of preliminary hearings which are intended to ascertain matters not in dispute for purposes of accelerating trials. The appellant was thus laboring under a misconception to think that the trial Court erred in the non- observance of section 289 of the CPA.

The appellant also challenged the decision of the Courts below for taking into account the PF3 which was tendered by PW4 who was not its maker.

It is true that the PF3 which was admitted in Court as exhibit P 1 was tendered by the complainant's mother. However, the maker of the document gave evidence about his examination of the victim and he was available for cross examination by the appellant. We agree that ideally the PF3 ought to have been tendered by the examining physician. However, even if the PF3 was to be expunged from the record, there is ample evidence from the victim and the doctor who examined her to prove that she was sexually molested.

The complaint by the appellant in his additional grounds of appeal that the trial which involved a child was not heard in camera need not detain us. It does not hold water as he was not prejudiced thereby.

As for the complaint that there was non-compliance with section 127 (1) and (2) we must say outright that the complaint lacks merit. It is clear from the record that the trial magistrate carried on a thorough voire dire examination of the child witnesses and was satisfied, and further recorded that the children possessed sufficient intelligence to understand the obligation of telling the truth and the nature of an oath.

The central question as we posed earlier is whether the appellant was sufficiently identified as having been the one who raped the child. PW2 and PW3 who were ambushed as they were picking firewood were the identifying witnesses. PW3 made a dock identification of the appellant. In addition to the dock identification the appellant had been picked out by the rape victim at an identification parade conducted by PW6. The parade register was tendered in Court as exhibit P3. The appellant challenged the propriety of the identification parade and further argued that he was not given an opportunity to cross examine the witness (PW6) who tendered

the identification parade register. We wish to observe, as this Court also observed in **Moses Charles Deo v. Republic** (1987) TLR 134 (CA) that:

> *"an extra-judicial parade proceeding is not substantive evidence, it is only admitted for collateral purposes, in the majority of cases it serves to corroborate the dock identification of an accused by a witness in terms of section 166 of the Evidence Act, 1967"*

Concerning the complaint that the appellant was not availed of the opportunity to cross examine PW6 we have examined the record of the trial court and have noted that the appellant was in fact given an opportunity to put questions to PW6 after he had finished testifying. The record further shows that having been given that opportunity he opted not to ask any questions. The typed proceedings of the record of the Court at page 15 do not indicate that the appellant was given an opportunity to question PW6. This was a typographical error as it is clear from the original record that he was given such opportunity. The proceedings of 5/12/05 of the original record read in part:

> *"...PW6 recalled under oath.*
> *Xd by PP*
> *I pray to tender the identification parade register as an exhibit.*
> *Accd: I have no objection.*
> *Court. Admitted as EXH P3*
> *Xd by accd: Nil"*

The identification parade register shows that 15 people were lined up in the parade. PW6 testified to the effect that these people were of the same age as the appellant. The appellant was given an opportunity to change position and clothes. PW2 picked him out from the line up more than once even after he had changed clothes and positions. The evidence of PW2 was re in forced by evidence from her mother which show that after the rape she took her to various places including the school to see if she could identify any one. She did not identify anyone in these places telling her mother that the rapist was not there. She however picked out the appellant at the identification parade without hesitating. The learned trial magistrate found PW2 to have been a very truthful and sincere witness. The first appellate judge confirmed the finding of the trial magistrate. It is a long established practice that a second appellate Court may only interfere with the concurrent finding of fact made by lower Courts where there are misdirection or non- directions- see for example **Director of Public Prosecutions v. Jafari Mfaume Kawawa**, (1981) TLR 149 and **Ludovick Sebastian v. R.**, Criminal Appeal No. 318 of 2009 (unreported).

Given the whole circumstances of the case before us we find no reason to differ with the findings of the two Courts below. We, in the event find no merit in this appeal. We accordingly dismiss it in its entirety.

DATED at **ARUSHA** this 5th day of June 2013.

E. A. KILEO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

Malewo M. A.
DEPUTY REGISTRAR
COURT OF APPEAL