IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 312 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

NAZIR MOHAMED @ NIDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated 16th day of June, 2014
in
HC. Criminal Appeal No. 67 of 2013

.....

JUDGMENT OF THE COURT

2nd & 8th December, 2015

KAIJAGE, J.A.:

The appellant was convicted by the District Court of Musoma, at Musoma (the trial Court) of the offence of Gang Rape contrary to sections 130 (1) (2) (b) and 131A(1) and (2) of the Penal Code. He was then sentenced to thirty (30) years imprisonment. His appeal to the High Court was unsuccessful, hence this second appeal.

The prosecution case in the trial court rested on the evidence of six (6) witnesses. These were: PW1 Telesia Domician, PW2 Sanda Kassimu

Suleiman, PW3 Mary Charles, PW4 Florensia Shabani, PW5 F.1574 D/Sgt. Stephano and PW6 F.681 D/Cpl. Ernest.

In their respective testimonial accounts, PW1, PW2, PW3 and PW4 told the trial court that at the material time of the rape incident, they were all students at Mshikamano Secondary School in Musoma Municipality. On 15/11/2011 during the afternoon hours, they were on their way home from school. At some point on the way, they saw a familiar notorious gang of armed youths which operated in the name and style of *"East."* The group comprised of the appellant and his youth colleagues. The said prosecution witnesses made attempts to avoid the gang by changing the way home, but the former were pursued and the latter caught up with them.

The trial court was further told that PW1 was singled out from her students colleagues by the appellant who grabbed and whisked her away to a semi-finished house in the bush where the other gang youths joined in the physical and sexual assault on her. On this aspect of the case, we shall let the evidence of PW1 speak for itself on what exactly transpired in the semi-finished house. She told the trial court the following, among other things:-

". . . Accused (appellant) beat me and ordered me to release my clothes and underpant and I refused, but accused's colleagues came and put off my clothes and underpants, accused started to release my underwear, and his colleagues touched and tightened my hands by force. Accused also released his trouser and took his penis then started to have sexual intercourse with me by force, and I was crying bitterly but there were nobody else to help me as they were armed with panga. He ejaculated once and he ordered me to wear my clothes and I obeyed him. Then I left the place and went away . . ."

PW1 left her ravishers at the scene of crime and took the way home crying in pains. Her ordeal was immediately reported to her student colleagues, her mother and later on the same day, to the police station where a PF3 (EXHP1) was issued for her medical examination and treatment. In the course of police investigations, PW6 D/Cpl. Ernest obtained and recorded the appellant's cautioned statement (EXHP3) in which he confessed raping PW1 with the assistance of other youth members of the gang.

The appellant, in his defence, flatly denied having committed the offence he was convicted of, stating that he was forced to sign the cautioned statement and that the incriminating evidence adduced by the prosecution witnesses against him was a mere fabrication without any foundation.

The two courts below made concurrent findings of fact that PW1 was a credible witness and that the case for the prosecution against the appellant was proved beyond reasonable doubt.

In his memorandum of appeal, the appellant is faulting the lower courts upon the following grounds:-

i) That, the two courts below erred in predicating the appellant's conviction on a cautioned statement which was obtained involuntarily.

ii) That, the trial was illegally conducted in an open court.

iii) That, both courts below erred in convicting the appellant upon placing heavy reliance on the uncorroborated evidence of PW1.

iv) That, the sentence meted out by the trial court against the appellant and affirmed by the first appellate court was illegal.

Before us, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Mwamini Fyeregete, learned State Attorney, who resisted the appeal.

Submitting in support of the first ground of appeal, the appellant belatedly challenged the admissibility of his cautioned statement (EXHP3), stating that it was involuntarily taken from him by PW6. In her sharp but focused response, the learned State Attorney argued, first, that this is a new ground which was not raised before and decided by the first appellate court. Secondly, she contended that when, in the course of trial, the prosecution had sought to tender for admission in evidence of the said impugned documentary exhibit, no objection was forthcoming from the appellant. For these reasons, she pressed us to dismiss the appellant's first ground of appeal.

On our part, we are, with unfeigned respect, in full agreement with the learned State Attorney's submission on this ground of appeal. The law is now settled that as a matter of general principle, this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal. (See, for instance, **JAFARI MOHAMED V. R;**

Criminal Appeal No. 112 of 2006 and **ELIAS MSAKI Vs. YESAYA NJATEU MATEE;** Civil Application No. 2 of 1982 (both unreported).

That apart, a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground, either that it was not voluntarily made or not made at all. (See; **SELEMANI HASSANI V. R;** Criminal Appeal No. 364 of 2008 (unreported). In this case, the record is clear that when, in the course of trial, the prosecution sought to tender for admission in evidence of the impugned cautioned statement, the appellant is on record to have unequivocally stated the following:-

> *"Your honour, I have no objection at all for its production in court as the exhibit against me."*

From the foregoing brief discussion, the appellant cannot be heard, at this stage, to complain that EXHP3 was obtained from him involuntarily. That said, we dismiss the appellant's belated first ground of appeal.

The appellant, on the second ground of appeal, is essentially complaining that his trial was conducted in open court contrary to section 186 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) which provides:-

"186 (3) Notwithstanding the provisions of any other law, ***the evidence of all persons in all trials involving sexual offences shall be received by the court in camera,*** *and the evidence and witnesses involved in these proceedings shall not be published by or in any news-paper or other media, but this subsection shall not prohibit the printing or publishing of any matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions."*

[Emphasis supplied].

Reacting on the second ground of appeal, the learned State Attorney conceded that the trial was conducted in an open court, but there was nothing prejudicial to the appellant which could have occasioned a failure of justice. Once again, we are in agreement with the learned State Attorney's reasoning.

Admittedly, the provisions of section 186 (3) of the CPA enjoins trial courts with competent jurisdiction to conduct trials involving sexual offences in camera. However, the appellant in this case was tried in an open court. There is no gainsaying that this was, certainly, a procedural

irregularity. But since that provision of law was intended to protect the privacy of the victims of sexual offences, we, like the learned State Attorney, do not see how this procedural lapse could have prejudiced the appellant. On this, we hold a firm view that the said procedural lapse did not occasion any failure of justice and was curable under section 388 of the CPA: (See; **GOODLUCK KYANDO V. R;** (2006) TLR 363.

On the third ground of appeal, the appellant is faulting the two courts below for, allegedly, predicating his conviction on the uncorroborated evidence of PW1, the victim of gang rape. Again, on this ground, the learned State Attorney's submission is not without substance. She correctly maintained that the appellant's confessional statement in EXHP3 which both courts below found as containing nothing but the truth, afforded sufficient corroboration to PW1's testimony.

Without prejudice to the foregoing, the learned State Attorney further asserted that even without corroboration, the evidence of PW1 standing by itself, without more, could have safely secured the appellant's conviction on the charge of gang rape, the two courts below having made concurrent findings of fact that PW1 was credible, reliable and truthful. To buttress

regard to the cogency of her evidence and her credibility, the trial court in its judgment appearing at page 51 of the record had this to say:-

> *"I have carefully considered this matter, and as I have already said, this witness* ***PW1 impressed me to be a witness of truth.*** *It is therefore my considered opinion that* ***PW1 was a credible witness . . ."***
>
> *[Emphasis ours].*

In the same vein, the first appellate court in its judgment appearing at page 69 of the record had this to say:-

> *"The trial court found PW1 to be a witness of truth and I have no reason to doubt it . . . I see no reason to differ with the trial court as to the evidence of PW1."*

So, we agree with the learned State Attorney that the two courts below having made concurrent findings of fact that PW1, the victim, was a credible and truthful witness, her evidence alone, even without corroboration could have as well secured the appellant's conviction in terms of section 127 (7) of the Evidence Act. After all, true evidence of

rape has to come from the victim: (See; **SELEMANI MAKUMBA V. R;** [2006] TLR 379.

All the same, we have found ourselves having no material basis upon which to fault the first appellate's court's finding, in its judgment, that the evidence of PW1 was corroborated by the appellant's confessional statement in EXHP3. On this note, we dismiss the third ground of appeal.

On the whole of the evidence on record, we hold a firm view that the conviction of the appellant cannot be assailed. However, we have found merit in the appellant's fourth ground of appeal which is against sentence. The learned State Attorney readily conceded that on the basis of the material available in the record, the appellant committed the offence he was convicted of when he was eighteen (18) years of age. But the trial court took no notice of this and imposed a sentence of thirty years imprisonment in contravention of section 131A (3) of the Penal Code which provides:-

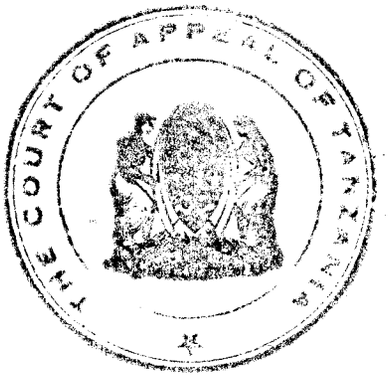
> *"Where the commission or abetting the commission of a gang rape involves a person of or under the age of eighteen years the court shall, in lieu of sentence of imprisonment, impose a sentence of*

corporal punishment based on the actual role played in the rape."

In the light of the provision of law hereinabove quoted, we allow the appeal against sentence. Consequently, we quash and set aside the illegal sentence of 30 years imprisonment imposed against the appellant and substitute thereof a sentence of twelve (12) strokes of the cane.

We so ordered.

DATED at MWANZA this 7th day of December, 2015.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL