IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: JUMA, C.J., MZIRAY, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 128 OF 2017

ISSA MFAUME..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the conviction and sentence of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 28th day of February, 2015
in
Criminal Apeal No. 37 of 2015

.....

JUDGEMENT OF THE COURT

18th & 26th February, 2019

MZIRAY, J.A.:

Before the District Court of Mtwara at Mtwara, the appellant, Issa Mfaume, was charged with and convicted of the offence of rape contrary to sections 130(1), (2) (e) and 131 (3) of the Penal Code, Cap 16 R.E 2002. He was sentenced to life imprisonment. Unsuccessfully, he appealed to the High Court where Mlacha, J. dismissed the appeal for lack of merit. From the decision of the High Court, this appeal has been preferred.

The case for the prosecution may briefly be stated as follows. **H.S**, (PW1), a girl of five (5) years old was the victim of the alleged rape. Her evidence was to the effect that on 11.5. 2014 while at Nalingu Village, in Mtwara District, she met the appellant who took her to his father's house. He undressed her and started having sexual intercourse with her. She felt pain but she could not raise an alarm as the appellant had threatened her not to do so otherwise, he would kill her. That night after the incident, she complained of stomach pains. PW2, her grandmother whom she was living with gave her some medicines to release the pains. She then slept. On the third day after the incident which was on 13.5.2014, PW2 sensed stinking smell coming from the victim. The victim complained also to have some pains in her vagina. PW2 inspected her and found sperms and foul discharge coming out of her vagina. On quizzing her, she revealed that she was raped by the appellant. She cleaned her private parts with warm water to remove the odour.

The matter was reported to the Village Authority and eventually to Police where a PF3 was issued for the victim to be medically examined. According to the evidence of PW3, Halima Manzi, a clinical officer, on 14.5.2014 she examined the victim and found that she had sperms and

bruises on her vagina something suggesting that she was raped. However, in the PF3, (Exh P1) allegedly filled on 15.5.2014 and signed by her on 18.6.2014, it reads that the vagina of the victim had bruises, redness and mucus discharge. It was WP 8404 D/C Joyce (PW4) who investigated the allegation. On 26.5.2014 she recorded the cautioned statement of the appellant (Exh.P3). According to her, the appellant confessed to have raped the victim at his father's house. On the strength of the evidence collected, on 28.5.2014 the appellant was brought before justice in the trial court and charged in connection with the offence.

In his defence, the appellant under oath denied any involvement in the alleged rape. He refuted the prosecution evidence implicating him in that he raped PW1. He further stated that he could not be involved in the alleged rape because on the material date, that is, on 11.5.2014, he was not within the locality of Nalingu village. He claimed that he was on a short errand to Namindondi village where he had gone to see his sick mother and that he returned on 12.5.2014. However, he admitted to have been arrested on 18.5.2014.

Based on the evidence on record, the trial magistrate was satisfied that the case against the appellant had been proved to the hilt.

Consequently, as already indicated, the appellant was duly convicted and sentenced to life imprisonment. On his first appeal, the High Court found no cause to fault the verdict of the trial court. It dismissed the appeal in its entirety.

In this appeal, the appellant was not represented by counsel, he appeared in person. He filed a memorandum of appeal consisting seven grounds of complaint and on 18.2.2019 he filed a supplementary memorandum of appeal with three grounds. Having carefully read the combined grounds of appeal in the two memoranda, we are of the considered view that essentially the main grounds raised which can conveniently dispose of the appeal are of two categories. **One**, that there are material discrepancies and contradictions in the evidence which have tainted the prosecution case. **Two**, the documentary evidence particularly the PF3, (Exhibit P1) and the cautioned statement (Exhibit P3) had some deficiencies with adverse effects to the prosecution case.

At the hearing, the appellant opted to allow the learned Senior State Attorney to submit first to his grounds of appeal and wished to respond thereafter, if need be.

Mr. Joseph Mauggo, learned Senior State Attorney who appeared for the respondent Republic did not support the appeal. He emphatically submitted, in response, that the case against the appellant was proved beyond all reasonable doubt. He said that the appellant was positively identified by PW1, the victim. He submitted that the evidence of PW1 is quite clear that the appellant took her to his father's house, undressed her and thereafter raped her. It was further testified that PW1 knew the appellant even before the incident and that the incident itself took place in broad daylight. PW1 also named the appellant as the culprit few days after the incident. As such therefore, there was no question of mistaken identity, he argued.

As to the issue of contradictions and discrepancies on the dates in the PF3, the learned Senior State Attorney was of the view that there were no material contradictions in the case for the prosecution. At any rate, he went on to say, contradictions in the evidence of PW1, PW2 and PW3 if any, were minor to the extent that they did not vitiate the case for the prosecution and should not be accorded any weight. In case it will be found otherwise that there were no contradictions, he asked the Court to confirm the conviction of the appellant relying on the evidence

of PW1 which the two courts below believed and accepted it as credible and above suspicion. On the discrepancies on the dates in the PF3, the learned Senior State Attorney, was of the view that PW3 attended PW1 on 14.5.2014 and it is on the same date the PF3 was filled, hence there is no valid reason to doubt the evidence of PW3.

On the complaint that the cautioned statement was improperly admitted without first being read in court, the learned Principal State Attorney admitted this anomaly but contended that it is a new ground which was not raised before the High Court. He submitted that the Court can consider to expunge this document despite the fact that the said complaint was not one among the grounds of appeal before the High Court.

On the part of the appellant he adopted the grounds of appeal in his two memoranda lodged. He confined himself to his defence of alibi he gave before the trial court and insisted that he was not at the scene of the incident at the material time.

As we proceed with the task of determining this appeal, we will be guided by the following principle lucidly expressed thus in **Ludovide Sebastian vs. R.,** Criminal Appeal No. 318 of 2009 (unreported):-

"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premises that the findings of facts are based on a correct appreciation of the evidence. If both courts below completely misapprehended the substance, nature and quality of evidence, resulting in an unfair conviction, this court must in the interest of justice intervene."

We have subjected the record of the entire trial court proceedings to a close scrutiny. If we may express at once, the cautioned statement, as rightly conceded by the learned Senior State Attorney was improperly admitted into evidence because the witness who produced the same did not read it in court as required by the law. This Court, in its several decisions on the subject matter has emphasized that it is wrong for the trial court to receive the cautioned statement as evidence without the same being read over in court. See, for instance, the case of **Sumni Amma Awenda vs R.**, Criminal Appeal No. 393 of 2013 (CAT) at Arusha (unreported), in which it was stated:-

"...The cautioned and extra judicial statements had a lot of details and immensely influence

the decision of the trial court. As such, before relying on them there was need for the trial court to see to it that they were properly received".

The Court went on further stating:-

"...to have not read those statements in court deprived the parties, and the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that this omission too constituted a serious error amounting to miscarriage of justice and constituted a mis-trial".

As the cautioned statement was not read over in court, then it was improperly received and obviously this omission constituted a serious error amounting to miscarriage of justice. In the light of that omission, we accordingly expunge the cautioned statement from the record.

The only crucial evidence for the prosecution in this case having expunged exhibit P3 is the testimonies of PW1, PW2 and PW3. We shall start by discussing the evidence of PW1. In her evidence in chief, PW1

testified that the appellant whom she knew prior to the incident took her to his father's house, undressed her and thereafter raped her and that she named him after three days from the date of incident. We have objectively considered the evidence of PW1. She named the appellant as the suspect three days after her health condition had become worse. The credibility of PW1 in our view, was eroded by her failure to name the appellant as suspect at the earliest possible opportunity. As we said in **Marwa Wangiti Mwita and Another vs. Republic** [2002] TLR 39.

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent Court to inquiry".*

And again in **Juma Shabani @ Juma vs. R.** (Criminal Appeal No. 108 of 2004 (unreported) we said:-

> *"Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the Courts. Such witnesses have always had their*

credibility doubted to the extent of their evidence discounted"

Since the appellant was well known to PW1 and she was certain that the appellant was the one who raped her, the delay in naming him for about three days, without any cogent explanation in our view tainted her credibility and made the prosecution case more suspect. We have doubted her credibility and for that reason we discount her evidence. Having discounted the evidence of PW1, we move now to discuss whether the remaining evidence of PW2 and PW3 is sufficient to ground conviction.

PW2 testified that having noted that the victim had sperms and a foul discharge was coming out of her vagina, she cleaned her with warm water and sent her to Nalingu Dispensary for treatment. PW3 on her part, testified that on 14.5.2014 when she examined the victim, she found some bruises and sperms into her vagina but she gave a contrary remark in the PF3 to the effect that the victim had bruises and mucus discharge in her vagina. There is a remarkable contradiction on her evidence in chief and in the contents of exhibit P3 as to whether what PW3 found in the vagina of the victim was sperms or mucus discharge.

Additionally, we noted that the PF3 was filled in on 18.6.2014 after the proceedings had commenced. It suggests that the appellant was brought to court when the offence had not yet been committed. It could not be possible as what was done was like putting a cart in front of the horse. With these contradictions we have no basis in believing the evidence of PW2 and PW3. These contradictions create doubt in the prosecution case which should be resolved in favour of the appellant.

That is not all. In a brief dialogue with the Court, the learned Senior State Attorney conceded and correctly in our view, that the time of the incident was neither prescribed in the charge sheet nor mentioned by PW1 or any other prosecution witnesses.

When all these glaring weaknesses of the prosecution case are considered, we fail to agree with Mr. Mauggo that the case against the appellant was established beyond reasonable doubt. In this regard, we wish to disassociate ourselves with his submission that it is the appellant who raped the victim. In the event and for the foregoing reasons, we fault the findings of the two courts below in grounding the conviction in question. We accordingly allow the appeal. We quash the conviction and

set aside the sentence imposed. We order for the immediate release of the appellant from gaol unless he is otherwise lawfully held.

It is so ordered.

DATED at **MTWARA** this 23rd day of February, 2019.

I.H. JUMA
CHIEF JUSTICE

R.E.S MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL