IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 183 OF 2017

SABAS KALUA @ MAJAWALA ..... APPELLANT
VERSUS
THE D. P. P. ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga.)

(Mgetta, J.)

Dated the 15th day of May, 2017
in
DC Criminal Appeal No. 1 of 2016

JUDGMENT OF THE COURT

29th October, & 4th November, 2019

MZIRAY, J.A.:

The appellant herein was arraigned in the District Court of Sumbawanga with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002. The prosecution alleged that on 4/5/2015 at Matanga village within Sumbawanga Municipality and Rukwa region did have sexual intercourse with one CM (name withheld to hide her identity), a

girl aged 15 years. The appellant pleaded not guilty to the charge. The prosecution case was built up by evidence of four witnesses and reinforced by three documentary evidence, which are, the medical examination report (exhibit P1), the extra-judicial statement (exhibit P2) and the cautioned statement (exhibit P3).

The brief uncontroverted facts of the case as could be grasped from the prosecution witnesses and the defence side are that in the morning of 4/5/2015 when CM, who testified as PW2, was heading to school, on the way, she realised that she forgot her pen at home. She decided to go back home where she found the door closed by her mother (PW3), who had already left to work in her farm. She decided to follow her to get the keys for the house. On the way she met the appellant who called her by name but she did not respond. Suddenly, the appellant grabbed, dragged her into a narrow ditch, stripped off her underpant, and forcefully had carnal knowledge of her amidst protests in agony. After the ordeal, she went straight to her mother and narrated what had befallen her. The incident was reported to police whereupon she was issued with a PF 3 for medical examination. The appellant was subsequently arrested and upon interrogation, he gave a cautioned

statement to police. On his own request, he voluntarily gave an extra judicial statement before a Justice of the Peace. The appellant was subsequently indicted for rape. The appellant completely dissociated himself with the offence. His two witnesses alleged that he was insane at the material time.

In the trial which ensued, he was convicted and sentenced to thirty years' imprisonment. Aggrieved, he unsuccessfully appealed to the High Court where his sentence was enhanced by imposing, in addition to the prison sentence, a corporal punishment of twelve strokes of the cane and a compensation order of Tshs. 500,000/= to the victim of the offence. Still protesting his innocence, the appellant lodged this second appeal.

In the memorandum of appeal, the appellant has raised three (3) grounds of complaint which we reproduce them as hereunder:

> *"1. That the trial judge erred in law and in fact when he dismissed the first appeal without considering that the caution statement was not voluntarily made.*
>
> *2. That the trial judge erred in law and fact when he dismissed the first appeal of the appellant by*

disregarding that the appellant is uneducated person who does not know well the language of Kiswahili.

3. *That the charge against the appellant was not proved by the prosecution side beyond reasonable doubt."*

When the appeal was placed before us for hearing, the appellant appeared in person, unrepresented; whereas the respondent had the services of Mr. Njoloyota Mwashubila assisted by Ms. Marietha Maguta, both learned Senior State Attorneys.

When the appellant was called on to elaborate his grounds of appeal, he sought to adopt the grounds without more, allowing the learned State Attorney to respond to his grounds, and he reserved his right to rejoin if need arose.

At the outset, Mr. Mwashubila made it clear that the respondent Republic was not supporting the appeal for the reason that the charge against the appellant was proved beyond reasonable doubt. Responding to the first ground of appeal he maintained that the cautioned statement the appellant

made before PW4 DC Luhasha, as clearly shown at page 18 of the record of appeal, was free and voluntary. He submitted that before the statement was tendered as exhibit, the trial court asked the appellant if he had any objection to its admissibility but he did not raise any and as a result the same was admitted as exhibit. Citing the case of **Selemani Makumba v. R** [2006] TLR 379, the learned State Attorney reminded us that true evidence in sexual offences is that of the victim. He further argued that, apart from this evidence, there is also evidence of extra – judicial statement (exhibit P2) and cautioned statement (exhibit P3) whereby the appellant confessed to have committed the offence. He cited the case of **Kashindye Meli v. R** [2002] TLR 374 to bolster his argument.

When we prompted him to address us on the issue of identification, in reply, he explained that, the victim identified the appellant but only that she did not know him by name as stated at page 15 – 16 of the record of appeal.

In his rejoinder, the appellant stated that he did neither confess nor make any statement to police and the Justice of the Peace as submitted by the learned Senior State Attorney. He lamented that he was tortured. Also

that he did not follow the proceedings in the trial court due to language barrier and he failed to raise this issue because it was his first time to appear in court, hence he was not conversant with court procedures. In short, he prayed to be released from prison.

We should start by making it abundantly clear that we have objectively gone through the grounds of appeal, the submissions by both parties and the entire record of appeal. Having so done, in confronting the first ground of appeal we immediately agree with the learned State Attorney that when the cautioned statement and the extra – judicial statements were tendered in court, the appellant did not raise any eyebrow to object their admissibility, which apparently tended to incriminate him with the charged offence. Had he raised an objection, obviously the court would have resorted to an inquiry before deciding to admit or refuse to admit the statements. In **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010 we stated that:

> *"The relevant law regarding admission of accused's confession under this head is this first 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 it was not voluntarily made or not made at all."

In the case at hand, as clearly seen at page 18 of the record of appeal, the appellant did not object to the tendering of the cautioned statement. In the absence of an objection, as per the authority in **Nyerere Nyague** (supra), the statement will be presumed to have been voluntarily made. Similar views have been expressed in the case of **Selemani Hassani v. R,** Criminal Appeal No. 364 of 2008 (unreported). In that case, the appellant was afforded an opportunity to challenge the voluntariness of a cautioned statement but he did not object the tendering of it and finally the same was admitted as exhibit. On appeal, the Court emphasized that in the absence of any objection to the admission of statement when the prosecution sought to have it admitted, the trial court cannot hold inquiry *suo mutto* to test its voluntariness. (see also **Stephen Jason and Another v. R.,** Criminal Appeal No. 79 of 1999 (unreported). Based on the above authorities, we are therefore in full agreement with the learned State Attorney that this ground has no merit.

Moving to the second ground, on which the appellant complains that he was not conversant with Kiswahili language, it should not detain us, as we are in full agreement with the learned State Attorney that this is an afterthought. We have reasons to support his argument. We think that the appellant was required to raise this concern during his trial. We are fortified by that position in our decision in **Said Mswale @ Mwanalushi v. R,** Criminal Appeal No. 464 of 2007 (unreported) where we stated that:

> *"The Appellant's contention that he did not understand Kiswahili but only Kisukuma is an afterthought. Had he told the trial magistrate he had language difficulty and needed a Kisukuma/Kiswahili interpreter, the record, would have reflected the same."*

Further to that in the cautioned statement at page 40 of the record of appeal, the appellant was asked to which language he preferred to use, he replied that he was ready to give his statement in Kiswahili. This means that he was conversant with Kiswahili language. In the same page, he confessed that he attended Matanga Primary school though he did not complete Primary Education. All these factors convince us that he understood Kiswahili

language. We therefore share the same view with the learned State Attorney that this ground of appeal is an afterthought.

On the last ground of appeal that the prosecution did not prove the charge beyond reasonable doubt, we agree with Mr. Mwashubila that in sexual offences cases the best evidence is from the victim (See **Omary Kijuu v. R.,** Criminal Appeal No. 39 of 2005; **Selemani Makumba v. R**. (supra); **John Martin @ Marwa v. R;** Criminal Appeal No. 22 of 2008 and **Mussa Mohamed v. R.,** Criminal Appeal No. 216 of 2005 (both unreported).

In the evidence of the victim at page 12 of the record, she explained how the appellant grabbed, dragged her into a ditch, stripped off her underpant, and forcefully had carnal knowledge of her amidst protests in agony. The trial court believed this evidence and such findings were affirmed by the High Court. This evidence was sufficient to ground a conviction. However, in addition to the above evidence, there was evidence of the cautioned statement and the extra-judicial statement which reinforced the evidence of the victim. Even without the evidence of the victim, the two confessions were sufficient to ground a conviction. (See **Kashindye Meli** (supra)).

In the event, we think that the offence of rape was proved beyond reasonable doubt. In fine, we dismiss the appeal in its entirely.

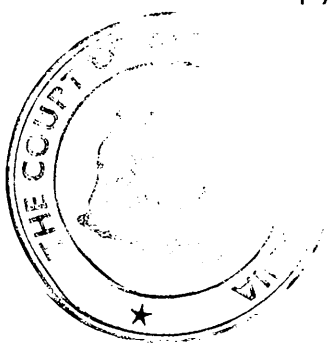
DATED at **MBEYA** this 2nd day of November, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2019 in the presence of Sabas Kalua @ Majawala, the Appellant appeared in person and Mr. John Kabengula, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL