IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 558 OF 2016

JACOB MAYANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Shinyanga)

(Makani, J.)

dated the 28th day of October, 2016
in
DC Criminal Appeal No. 79 of 2015

JUDGMENT OF THE COURT

11th & 24th August, 2020

KEREFU, J.A.:

This is a second appeal by JACOB MAYANI, the appellant, who was before the District Court of Shinyanga at Shinyanga, charged with and convicted of rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code, [Cap. 16 R.E. 2002] (the Code). He was then sentenced to life imprisonment with ten (10) strokes of the cane and ordered to pay a compensation of TZS 300,000.00. It is noteworthy that the alleged victim was a child aged seven (7) years old and in order to disguise her identity, we shall henceforth refer to her by the pseudonyms of 'XYZ' or simply 'PW1'.

It was alleged that on 25th day of April, 2013 at Mwasele area within Shinyanga Municipality in Shinyanga Region the appellant had carnal knowledge of XYZ a girl of seven (7) years of age.

In a nutshell, the prosecution case as obtained from the record of the appeal indicate that, on 25th April, 2013 Lucia Marcel (PW5) the mother of PW1 left home early in the morning and went to *shamba* to harvest rice. She left PW1 and her young brother at home playing. In her unsworn evidence, PW1 testified that, at about noon, the appellant, a street hawker, who she described as *'Chinga'* came to their home with his bicycle carrying cosmetics/decorations, convinced PW1 to accompany him to a certain lady who wanted to buy an under garment commonly called skintight. PW1 agreed, but instead of going to where she was promised, they stopped at the *shamba* owned by one Dr. Kunze. The appellant gave PW1 a skintight and started to decorate her nails. A moments later, he undressed her starting with her skirt and then the pants. He then unzipped his trouser and raped her. Thereafter, PW1 managed to escape and ran to a nearby house which belonged to Skolastica Shabani (PW2). PW1 narrated the incident to PW2 and told her that Chinga had raped her. PW2 accompanied PW1 to the scene of crime where they found the

appellant leaving the *shamba*. PW2 confronted the appellant, seized his bicycle and raised an alarm, as a result a number of villagers responded. According to her evidence, PW2 sent her daughter to call Tabu Shija (PW3) a member of the village council. After being informed of the incident, PW3 called Neema Seseja (PW4) the street chairperson. PW4 testified that when she arrived, she interrogated the appellant and directed that the victim be taken to the nearest dispensary. PW4 testified further that she called James Petro (PW5) the Millia Commender who came and joined them. PW4 said, when she was in the process to call the police, the appellant asked for apology. The record indicates what he said in Kiswahili, thus *"Mama naomba unisamehe tu kwa kuwa huyu mtoto nilikuwa bado hata sijamtoboa macho."* Literary translated in English to mean, *'Mother please forgive me as I was even yet to pierce the eyes of this child".*

PW4 testified further that, she asked the appellant if he had raped other girls. In response, the appellant said, he had raped other three girls and if he could have TZS 5,000.00 he would have given them to let him free. Again, the record indicated that the appellant stated in Kiswahili that, *"Nilishawahi kubaka wengine watatu ambao in Watoto. Tena kama*

ningekuwa na shillingi elfu tano ningewapa ili mnisamehe tu. Huyo alikuwa ni shetani. Jamani naombeni tu mnisamehe kwani nikifikishwa Mahakamani nitafungwa miaka thelathini." The appellant's words can be literary translated in English to mean, "*I have raped three other children. If I could have five thousand shillings, I would have given it to you to forgive me. I was tempted by the devil, please forgive me, because if you take me to court, I will be imprisoned to thirty years".*

PW4 went on to state that she declined to accept the appellant's apology and instead she called the police officer who came and arrested the appellant and took PW1 to hospital for medical examination after they had obtained a PF3. At the hospital, PW1 was examined by Dr. Fredrick Malwilo Mlekwa (PW7). PW6 among others, testified that, on the following day after the incident, that is on 26th April, 2013, she saw PW1 walking with some difficulties.

In his defence, the appellant did not agree or deny the charge levelled against him. He basically gave a narration on how he was arrested. He challenged the evidence of PW1 that she gave untrue story and he also said, PW2, PW3 PW4, PW5 and PW6 gave hearsay evidence because they did not witness the incident.

After a full trial, the trial court accepted the version of the prosecution's case and the appellant was found guilty, convicted and sentenced as indicated above.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Still aggrieved, the appellant has preferred the present appeal. In the Memorandum of Appeal, the appellant raised seven (7) grounds of appeal which can be conveniently paraphrased as follows: -

1. *That, the trial court and the first appellate court erred in law to admit the appellant's cautioned statement and relied upon it to convict the appellant while it was not supported by an extra judicial statement and was recorded out of the prescribed time;*

2. *That, the unsworn testimony of PW1 was wrongly relied upon as it was not corroborated, hence unreliable and incapable of sustaining the appellant's conviction;*

3. *That, the testimonies of PW2, PW3, PW4, PW5 and PW6 were wrongly relied upon as were hearsay thus cannot corroborate the testimony of PW1;*

4. *That, there was no valid confession of guilt by the appellant as the same was not recorded anywhere thus hearsay evidence;*

5. *That, on the material date the victim claimed to be given a skintight by the appellant but the same was not tendered before the court as an exhibit;*

6. *That, the prosecution's evidence relied upon by the trial court did not sufficiently establish positive identification of the appellant; and*

7. *The Exhibit P1 (PF3) and the testimony of PW7 were contradictory, hence unreliable.*

At the hearing of the appeal, the appellant appeared in person without legal representation through a video facility linked to Shinyanga District Prison. The respondent Republic had the services of Mr. Nassoro Katuga and Ms. Salome Mbughuni, both learned Senior State Attorneys assisted by Mr. Nestory Mwenda, learned State Attorney.

When given an opportunity to amplify on his grounds of appeal, the appellant adopted his grounds of appeal and preferred to let the learned Senior State Attorney to respond first but he reserved his right to rejoin, if need to do so would arise. We respected his choice and we thus invited Mr. Katuga to commence his submission.

On taking the stage, Mr. Katuga from the outset, declared their stance that they are opposing the appeal. He then proposed to begin with the first, fourth, fifth, sixth and seventh grounds of appeal. The second and third grounds were argued jointly by Ms. Mbughuni.

In response to the first ground of appeal, Mr. Katuga, though conceded that the cautioned statement (Exh P3) by the appellant was recorded out of the prescribed time he argued that there were exceptional circumstances and plausible reasons which justified the delay as provided under section 50 (2) of the Criminal Procedure Act [Cap. 20 R.E 2019 (the CPA). To elaborate on this point, he referred us to pages 54 to 55 of the record of appeal and argued that the appellant had other criminal cases related to rape and piercing of the eyes of the victims which cases were also being investigated. Thus, he said, it was impracticable for the appellant's cautioned statement to be recorded within four hours. To bolster his argument, he referred us to the cases of **The DPP v. James Msumule @ Jembe and 4 Others,** Criminal Appeal No. 397 of 2018 and **Chacha Jeremiah Murimi and 3 Others v. Republic,** Criminal Appeal No. 551 of 2015 (both unreported).

Upon being probed by the Court as to whether or otherwise the Exhibit P3 was properly tendered and admitted in court, Mr. Katuga conceded that the record shows that the same was un-procedurally tendered for admission because it was tendered by the prosecutor and not the witness. He however, argued that the said irregularity was not fatal and the appellant was not prejudiced.

Arguing on the fourth ground related to the appellant's oral confession, Mr. Katuga referred us to section 3 (1) of the Evidence Act, [Cap. 6 R.E. 2019] which defines confession as words or conduct or combination of both. He thus disputed the appellant's claim to have no merit because the law does not prescribe that a confession should be recorded. He argued that the appellant made an oral confession to PW4 in the presence of PW2, PW3 and PW5. That, during the trial when PW2 and PW4 were testifying on the said confession the appellant did not cross examine them on that aspect. For this proposition, Mr. Katuga cited and supplied to us the cases of **Gozbert Henerico v. Republic,** Criminal Appeal No. 114 of 2015 and **Posolo Wilson @ Mwalyego v. Republic,** Criminal Appeal No. 613 of 2015 (both unreported).

As regards the fifth and sixth grounds of the appeal, Mr. Katuga referred us to the appellant's grounds of appeal at the High Court as reflected in the Petition of Appeal found at page 105 of the record of appeal and contended that the said grounds were not part of the grounds canvassed and determined by the High Court on first appeal. On that account, he implored us to disregard them.

Responding to the seventh ground, Mr. Katuga argued that Exh P1 (PF3) has no evidential value because after its admission it was not read over in court for the appellant to understand its contents. He thus urged us to expunge it from the record, but was quick to submit that, even if it is expunged, the testimony of PW7 is still sufficient to corroborate the evidence of PW1 as it explained in detail what was contained in the PF3. He relied on the case of **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017 (unreported).

In responding to the second and third grounds of appeal, Ms. Mbughuni contended that the two grounds of appeal are baseless because, PW1's testimony was taken after a *voire dire* test was conducted and found not to understand the nature of oath but knows the duty of speaking the truth. Ms. Mbughuni argued that PW1 clearly testified how

she was abused and managed to escape to PW2's house where she told PW2 that the appellant had raped her. Ms. Mbughuni forcefully argued that, the fact that PW1 mentioned the appellant immediately after the incident proved that she was a truthful and credible witness. She argued further that, the testimony of PW1 was corroborated by PW2, PW3, PW4 and PW5 who were in the team of people who arrested the appellant thus they did not give a hearsay testimony. To bolster her proposition, she cited the case of **Hassan Kamunyu v. Republic,** Criminal Appeal No. 277 of 2016 (unreported). Based on their submissions, Ms. Mbughuni prayed for the entire appeal to be dismissed for lack of merit.

In rejoinder submission, the appellant did not have much to say other than praying the Court to consider his grounds of appeal, allow the appeal and set him free as he said, he had been in prison for eight (8) years.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we wish to start by reiterating a settled principle that, this being a second appeal, the Court should rarely interfere with the concurrent findings of the lower courts on the facts unless there has been a misapprehension of

evidence occasioning a miscarriage of justice or violation of a principle of law or procedure. See **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda v. The Republic**, [2006] TLR 387 and **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 (unreported). Specifically, in **Wankuru Mwita** (supra) the Court stated that: -

> *"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

We shall be guided by the above principle in disposing this appeal.

Moving to the merit of the appeal, we wish to begin with the point raised by Mr. Katuga pertaining to the fifth and sixth grounds of appeal urging us to disregard them because they are new and were not canvassed by the first appellate court. Having examined the said grounds, we are in agreement with Mr. Katuga that the said grounds are new and

should not have been raised at this stage. There is a long list of authorities on this point, some of them include, **Abdul Athuman v. Republic** [2004] TLR 151, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 and **Yusuph Masalu @ Jiduvi v. Republic,** Criminal Appeal No. 163 of 2017 (both unreported). In **Sadick Marwa Kisase** (supra) the Court emphasized that: -

> *"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appellate court."*

In this regard, this Court will not entertain the fifth and sixth grounds of appeal for lack of jurisdiction as per the dictates of the provisions of section 6 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] which specifically empowers this Court to deal with appeals from the High Court. See also **George Maili Kemboge v. Republic,** Criminal Appeal No. 327 of 2013 and **Abedi Mponzi v. Republic,** Criminal Appeal No. 476 of 2016 (both unreported). Therefore, we will only consider the first, second, third, fourth and seventh grounds of appeal.

The first ground is straightforward and should not detain us. Mr. Katuga had since conceded that as per the record of the appeal, Exh P3

was un-procedurally tendered for admission because it was tendered by the prosecutor and not the witness. We are mindful of the submission by Mr. Katuga that the said irregularity was not fatal. With respect, we are unable to agree with his position because a person who is competent to tender an exhibit is a witness to whom the document was in his possession, custody or authored it or had knowledge of its existence. In other words, it is the witness who had dealt with it in one way or another. Therefore, since Exh P3 was tendered by an incompetent witness the same deserves to be expunged from the record as we hereby do. Having done so, the need of considering the first ground of appeal and the point raised by the Mr. Katuga concerning exception as regards the time of recording such an exhibit does not arise.

As regards the second and third grounds, it is clear that the appellant's complaint is on the testimonies of PW1, PW2, PW3, PW4, PW5 and PW6 that they were not credible witnesses. To ascertain this complaint, we have revisited the testimonies of these witnesses and found that, PW1, the victim being a child of tender age, gave unsworn evidence after the trial court had properly conducted a a *voire dire* test in terms of sections 127 (2) and (7) of the Evidence Act before being

amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016. The court found that PW1 did not understand the nature of oath but she knew the duty of speaking the truth. (See pages 12 – 14 of the record of appeal). Thus, she properly testified without oath.

As for corroboration, we wish to emphasize that, it is settled law that corroboration is not mandatory in cases involving sexual offences, so long as the trial court is satisfied that the witness is telling nothing but the truth. This is provided under section 127 (7) of the Evidence Act which states that: -

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that, such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of a tender years or the victim of sexual offence is telling nothing but the truth".*

See also the cases of **Kimbute Otiniel v. Republic,** Criminal Appeal No. 300 of 2011 and **Yusufu Mgendi v, Republic**, Criminal Appeal No. 148 of 2017 (both unreported).

Therefore, pursuant to section 127 (7) and as correctly submitted by Ms. Mbughuni, in cases involving sexual offences the best evidence is that of the victim. The sole evidence of the victim can be safely relied upon by the court to sustain a conviction.

In the instant appeal, both the trial and first appellate courts properly applied the above principle and found PW1 to be a reliable, credible and truthful witness. For instance, the trial court at pages 98 – 99 of the record held that: -

> *"I am of the firm view that PW1 proved penetration of the accused's male sexual organ into her female sexual organ. She also proved that the accused procured sexual intercourse with her without her consent. The accused lured PW1 to give her a skintight and decorated on her nails with coloured cosmetics (rangi za kupaka kucha). Though there are ample evidence to corroborate PW1's testimonies, but I am of the opinion that the evidence of PW1 alone suffices to convince this court to rely on as the same I find it safe to bank*

thereon to convict the accused person without, in my opinion, even requiring corroboration."

In addition, and as argued by Ms. Mbughuni that PW1 was a credible witness as she mentioned the appellant immediately after the incident. On this point, we wish to refer to our earlier decision in **Marwa Wangiti Mwita & Another v. Republic** [2002] T.L.R 39, where we observed that: -

"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry."

In any case, the testimony of PW1 was well corroborated by the testimony of PW7 who medically examined her private parts and found that there was an evidence of phallus penetration and torn hymen. PW6 also testified that, on the following day, after the incident, she noted that PW1 was walking with difficulties. It is also on record that testimonies of PW2, PW3, PW4 and PW5 gave a detailed account on how they arrested the appellant at the scene of crime after he confessed and asked for an

apology. All these witnesses, in our view, proved the prosecution case and thus, the second and third grounds of appeal are devoid of merit.

As regards the fourth ground of appeal, upon our perusal of section 3 (1) of the Evidence Act on the definition of confession relied upon by Mr. Katuga, we find the said ground to have no legal basis as in terms of that section, it is not mandatory for a confession to be deduced into writing. As argued by Mr. Katuga, it is on record that, in the course of being arrested, the appellant made an oral confession to PW4 in the presence of PW2, PW3 and PW5.

It is on record that, the appellant did not cross examine PW4 on that aspect. It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. We find support in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 (both unreported). In the circumstances, we see no reason to differ with the lower courts'

concurrent findings in respect of the evidence of PW2 and PW4 which were so descriptive and coherent on the appellant's oral confession.

On the last ground, we are alive to the fact that, after observing that Exh P1 (PF3) has no evidential value, Mr. Katuga urged us to expunge the same from the record, which we hereby do. However, we need to observe that, as eloquently argued by Mr. Katuga, even without Exh P1, the testimony of PW7 is quite sufficient to cover the contents of the PF3 as it explained in detail what was contained in that document. Likewise, the evidence adduced by other witnesses such as, PW1, PW2, PW3, PW4, PW5 and PW6 is sufficient to sustain the conviction against the appellant. This is so because, in rape cases, a PF3 is not the only evidence to prove rape, other evidence on the record can as well do so. In **Ally Mohamed Mkupa v. Republic,** Criminal Appeal No. 2 of 2008 (unreported), we stated that: -

> *"It is true that PF3 (Exh.P1) would have supported the commission of the offence but rape is not proved by medical evidence alone. Some other evidence may also prove it.*

In totality, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair and impartial decision.

For the foregoing reasons, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

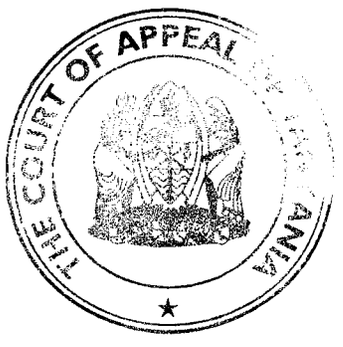
DATED at **SHINYANGA this** 19th day of August, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2020 in presence of the Appellant via Video link and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL