IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 207 OF 2018

ALEX NDENDYA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Iringa)

(Shangali, J.)

dated the 16th day of March, 2018
in
DC. Criminal Appeal No. 93 of 2018

JUDGMENT OF THE COURT

27th April & 6th May, 2020

MWAMBEGELE, J.A.:

This appeal stems from the decision of the District Court of Njombe at Njombe where the appellant, Alex Ndendya, was charged with and convicted of the offence of rape c/ss 130 (1) & (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now Revised Edition, 2019). It was alleged that on 24.03.2015 at Usita Primary School in Wanging'ombe District within Njombe Region, the

appellant had carnal knowledge of a ten-year-old girl who, to hide her identity, we shall simply refer to her as the victim or PW1; as she so testified in the trial court.

The facts leading to the appellant's conviction by the trial District Court, as they can be gleaned from the record of appeal, are simple. They go thus: the appellant was a cook at Usita Primary School at which PW1; a child of ten years of age, was a Standard V pupil. On 24.03.2015, at about 12:00 hours, PW1 was together with her colleagues washing dishes. The appellant asked one Tasiana, also a pupil there, to call PW1 so that she could see him in the store. PW1 and Tasiana went to the store where they found the appellant who, after a short while, told Tasiana to go back where she was, leaving behind the appellant and PW1 in the store. After Tasiana left, the appellant closed the door, took a polythene bag, spread it down and forced PW1 to lie there in a supine position, undressed her underpants and skirt and ravished her. The appellant was wielding a knife in that process. The appellant released her after he was done but that was not until he

warned her not to tell anyone as to what had transpired, otherwise he would stab her with the knife he wielded.

Indeed, the victim did not tell anybody for fear that the appellant would stab her with a knife as threatened at the scene of crime. Not even after her aunt; Oliva Kawogo (who testified as PW2) asked her why she was walking abnormally to which question she simply replied she was walking normally. At a later stage her aunt was persistent; she again asked her what had gone amiss as she was not walking normally. It was at that point in time when she let the cat out of the bag; she told her aunt that the appellant had raped her. PW2 then went to report to Santina Emmanuel Ngeniuko (PW4); the Head Teacher of Usita Primary School who also reported the matter to Abraham Mgaya (PW6); the Usita village chairman. PW6, together with the Hamlet Chairman of Kibena whose name could not be disclosed, went to arrest the appellant. They took him to the office of PW4 where, upon interrogation, the appellant confessed to have had sexual intercourse with the victim. After the confession, PW6 called for a militiaman who took him to Makoga Police Post at which No. G. DC Ambrose took his cautioned

statement in which he also confessed to have had sexual intercourse with PW1. The appellant was arraigned in the District Court and, after a full trial which comprised six prosecution witnesses and the appellant in defence, he was found guilty, convicted and sentenced to a prison term of thirty years and four strokes of the cane. He was also ordered to pay the victim compensation of Tshs. 500,000/=.

The appellant's first appeal to the High Court was not successful. Still aggrieved, he has preferred this appeal on five grounds of grievance, paraphrased as follows: **one**, the first appellate Court erred in law in dismissing the appeal while the trial was conducted without a social welfare officer; **two**, the testimonies of PW1 and PW2 were contradictory; **three**, the appellant was convicted on circumstantial evidence which was not watertight; **four**, the appellant was convicted on the weakness of his defence; and, **five**, the prosecution did not prove the case against the appellant beyond reasonable doubt.

The appeal was argued before us on 27.04 2020 by video conference; a facility of the Court. The appellant was in person at Iringa Prison while the respondent Republic appeared through Ms.

Magreth Mahundi, learned State Attorney who was in the premises of the Court together with us.

When we called upon the appellant to argue his appeal, he simply adopted the five-ground memorandum of appeal and asked the learned State Attorney to respond to them. Need arising, he reserved his right to rejoin.

Responding, Ms. Mahundi prefaced her response by expressing her stance at the very outset that the Republic supported the appellant's conviction and sentence by the two courts below. She responded to the memorandum of appeal through the fifth ground which is a general one; that the prosecution did not prove the case against the appellant beyond reasonable doubt.

The learned State Attorney started her onslaught by submitting that in rape cases, the best evidence is that of the victim. For this standpoint of the law, the learned State Attorney referred us to our decision in **Joseph Leko v. Republic**, Criminal Appeal No. 124 of 2013 (unreported) in which we relied on our previous decision in **Selemani**

Makumba v. Republic [2006] TLR 379 to state that true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and, in case of any other woman where consent is irrelevant, there was no consent.

In the case at hand, she submitted, the victim adduced sufficient evidence that on the material date, she was at school with her fellow pupils when the appellant called her through Tasiana to the store where he threatened her with a knife and raped her. The appellant himself corroborated the victim's testimony through his cautioned statement as well as his oral confession before PW2, PW4 and PW6. The learned State Attorney added that he was aware, as held by the Court in **Geofrey Sichizya v. D.P.P**, Criminal Appeal No. 176 of 2017 – [2020] TZCA 159 at www.Tanzlii.org, that a cautioned statement which has been objected by the maker must be corroborated so as to rely on it to convict an accused person. In the case at hand, she went on, there was enough corroboration from PW2 (at p. 18 of the record of appeal), PW4 (at p. 40) and PW6 (at p. 52).

With regard to oral confession, the learned State Attorney, again, cited our decision in **Geofrey Sichizya** (supra) in which we held that such kind of evidence may be sufficient by itself to found a conviction against a suspect. In the circumstances, she argued, the appellant's oral confession before PW2, PW4 and PW6, was quite sufficient to found a conviction against him.

The learned State Attorney did not stop there. She referred us to p. 60 of the record of appeal where the appellant testified that his relatives went to the parents of the victim so that she could be taken to the Hospital for treatment but that they refused to receive the money. That, she submitted, is yet another corroboration to the victim's testimony.

On the complaint regarding discrepancy in the testimonies of PW1 and PW2, the learned State Attorney submitted that the gist of the complaint by the appellant hinges on the dates on which the former told the latter what had befallen her. While PW1 testified that it was on 24.03.2015 when PW2 asked her why she was walking abnormally and replied that she was walking normally and that it was on 25.03.2015

when she revealed that she was raped, PW2 (at pp. 18 - 19) testified that it was on 31.03.2015 when she said she was walking normally and that it was on 08.04.2015 when he was told by her son Alpha Wawa that the victim had a "fiancé" at school. Upon a fierce interrogation, PW1 told her she was raped by the appellant. The learned State Attorney conceded that, surely, that was a discrepancy in evidence. However, she was quick to state that the discrepancy can be glossed over as it is trivial; it did not go to the root of the matter. If anything, she submitted, what was relevant was whether the victim was raped by the appellant. To buttress this proposition, the learned State Attorney referred us to our decision in **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported).

Regarding the complaint that a social welfare officer should have been present at the trial, the learned State Attorney contended that the appellant has misconceived the law. She submitted that the Law of the Child Act, Cap. 13 of the Revised Edition, 2019 (hereinafter the Law of the Child) establishes the Juvenile Court under section 97 (1) and under section 99 (1) (d) of the same Act, a social welfare officer must be

present in the proceedings. She clarified that the law protects a child who is in conflict with the law; not a child witness. In view of the fact that the appellant was not a child and in further view of the fact that the proceedings were not in the Juvenile Court, the presence of a social welfare officer was not required.

Having submitted as above, the learned State Attorney prayed that the appeal should be dismissed in its entirety.

The appellant, in rejoinder, fending for himself, brought to the fore several complaints before rebutting the arguments raised by the learned State Attorney. He complained: **one**; that he was in bad blood with PW2 who engineered the manufacturing of the case against him so that he could be jailed, **two**; that he was tortured and forced to jot down what appears in the cautioned statement; **three**, that the police refused him to call a relative to be present when making the cautioned statement and that he complained so in the District Court but that it did not record it under the pretext that the police officer who recorded the statement was a public servant who could not lie; and, **four**, that he complained on first appeal but the High Court did not say anything.

Against Ms. Mahundi's response, the appellant challenged the prosecution for not procuring Tasiana to come and testify. Neither did it call anyone who was present at school on the material date, he charged. He also was emphatic that there was a discrepancy in the testimonies of witnesses especially PW1 and PW2 on when the latter asked her about walking abnormally and when she told her the appellant raped her. He also submitted on the discrepancy as to the date when the victim was taken to the hospital for examination. The appellant also challenged Nicolaus Sayona (PW5); the Doctor who filled the PF3 and his evidence that the exhibit he tendered did not prove that he was the one who raped the victim. He added that the white fluid seen by PW2 in the victim's vagina as not being the spermatozoa mentioned in the PF3, let alone being from his body.

Having submitted as above, the appellant prayed that his appeal be allowed and that he be released from prison custody.

We propose to confront the grounds of appeal in the order they appear above. However, before we do that, we find it appropriate to address, first, the complaints raised by the appellant. The first

complaint was that he was in bad blood with PW2 who fabricated the case against him so that he could be jailed. We think this complaint is not backed by evidence. The appellant never stated so in the courts below. The complaint has just surfaced in the Court on second appeal. We are convinced that it was but an afterthought.

With regard to the complaint that he was tortured and told the police officer who took his cautioned statement that he raped the victim, we admit that the appellant complained so in both courts below. However, at the trial, having so complained, the trial court conducted an inquiry after which the trial court ruled that the statement was voluntarily made. We are satisfied that the trial court rightly dealt with the complaint.

As for the complaint that the police refused him to call a relative to be present when making the cautioned statement, again this is not backed by evidence. Like the first complaint, the appellant did not do so at the trial. Neither did he do so that on first appeal. We are of the considered view that this complaint is but an afterthought.

The appellant also complained before us that the trial magistrate did not record his complaints under the pretext that the police officer could not have lied. We are positive that the appellant is trying to impeach the court record. It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record. In **Halfani Sudi v. Abieza Chichili** [1998] T.L.R. 527 the Court followed its previous decision in **Shabir F. A. Jessa v. Rajkumar Deogra**, Civil Reference No. 12 of 1994 (unreported) to hold that:

> *"A court record is a serious document; it should not be lightly impeached."*

We also subscribed, in that case, to the decision of HM High Court of Uganda by Bennett Ag. CJ in **Paulo Osinya v. R.** [1959] EA.353, to hold that:

> *"There is always a presumption that a court record accurately represents what happened."*

In the case at hand, the appellant, having not raised such a complaint in the first appellate court, we are certain that, it is but an afterthought. In the premises, we are not prepared to accept the impeachment of the court record so lightly. The appellant has certainly failed to rebut the presumption that the court record accurately represents what happened in the trial court.

We find and hold that the appellant's complaints are baseless. We dismiss them.

Having addressed the appellant's preliminary complaints, we now turn to determine the grounds of appeal.

The first ground is a complaint that the trial court conducted the case without the social welfare officer in the accord of the law. This ground will not detain us. As rightly put by the learned State Attorney, a social welfare officer is required in proceedings in the Juvenile Courts established under section 97 (1) the Law of the Child. The provisions of section 99 (1) (d) of the same Act mandatorily require a social welfare officer to be present during the proceedings in the Juvenile Courts. The

presence of the social welfare officer does not envisage situations when the child is a witness; it envisages situations when the child is in conflict with the law; that is, when the child is an accused person. Sections 97 and 99 (1) (d) are under Pat IX of the Law of the Child which is titled "A Child in Conflict with Law" and therefore the provisions under that head serves that purpose. In the case at hand, the proceedings were in the District Court whose composition is provided for under section 6 (1) (b) of the Magistrates' Courts Act, Cap. 11 of the Revised Edition, 2019. Under this provision, a District Court is properly constituted if presided over by a District Magistrate or Resident Magistrate; a social welfare officer is not listed to constitute the District Court. We find this complaint in the first ground of appeal wanting in substance and dismiss it.

The second ground of appeal seeks to fault the first appellate court for dismissing the appeal while the evidence of PW1 and PW2 was contradictory. The law on the point is as put by the learned State Attorney; the Court will only take into consideration contradictions which are not minor and go to the root of the matter – see: **Mohamed Said**

Matula v. Republic [1995] T.L.R. 3 and **Dickson Elia Nsamba Shapwata** (supra), **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), **Mohamed Haji Ali v. Director of Public Prosecutions**, Criminal Appeal No. 225 of 2018 – [2018] TZCA 332 at www.tanzlii.org, to mention but a few. But, we ask ourselves, what are material discrepancies or contradictions which go to the root of the matter and what are minor which do not? As good luck would have it, this is not the first time the Court is asking itself this question. The Court traversed on the point in **Elia Nsamba Shapwata** (supra). In that case, in answering the question, the Court quoted an excerpt from the learned authors of **Sarkar, the Law of Evidence**, 16th Edition, at p. 48 which excerpt we find it worth recitation here:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal*

person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

In **Issa Hassan Uki** (supra) we subscribed to the observation by the High Court (Mnzavas, J. – as he then was) in **Evarist Kachembeho & Others v. Republic**, 1978 LRT n. 70 wherein, at p. 351, it was observed:

"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story".

In that case - **Issa Hassan Uki** (supra) - we also relied on our decision in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported) to underline that due to the frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies.

In the case at hand the contradiction in the evidence of PW1 and PW2 complained of by the appellant is the dates on which PW1 refuted

that she was not walking abnormally and when she told PW2 that she was raped. Indeed, the account by the two witnesses differ. While PW1 testified that she refuted on 24.03.2015 and said she was raped on the following day, PW2 testified that it was on 31.03.2015 and 08.04.2015, respectively. In the light of the cited authorities above, we do not think this inconsistence was such that it could corrode the prosecution's case. What was relevant here, as rightly submitted by the learned State Attorney was proof that PW1 was raped. If that is proved, the appellant cannot be left scot free by the mere fact that the dates on which she narrated her ordeal differed with what her aunt narrated. We are at one with the first appellate court that the contradictions in the evidence of PW1 and PW2 were minor and negligible as there was evidence to sufficiently prove that the victim was ravished. We are of the same standpoint regarding the date on which was taken to the Hospital. We find the second ground of appeal arid of merits as well.

Next for consideration is the third ground which seeks to challenge the first appellate court that it upheld the decision of the trial court which based on circumstantial evidence which was not watertight. We

have had more than ample time to peruse the entire record of appeal. Having so done, we do not go along with the appellant's contention. The trial court did not convict him on the strength of circumstantial evidence. Neither did the first appellate court uphold that point. The record has it that the appellant was convicted on the strength of the testimony of witnesses as well as his oral confession and cautioned statement. We will let the record paint the picture. At p. 79 of the record the trial court stated:

> *"... I have no good and cogent reasons for not believing PW1, PW2, PW3, PW4, PW5 and PW6. Again, the omission to call Tasiana and Alpha Wawa cannot affect the weight of the prosecution evidence because the accused admitted in the presence of PW2, PW4 and PW6 and confessed before PW3 that he had sexual intercourse with PW1. That evaluated, I find that the accused person had sexual intercourse with the prosecutrix (victim)."*

And the first appellate court had this to say at p. 130 of the record of appeal:

"In all [the] circumstances of the case, I am convinced that the cautioned statement of the appellant was corroborated by the appellant's own confession before PW2, PW4 and PW6 while the evidence of PW1 was corroborated by the evidence of PW2, PW4 and PW6."

In view of the foregoing two excerpts from the two courts below, we are certain that the appellant was not convicted on the strength of circumstantial evidence but, rather, on the strength of the testimony of the prosecution witnesses as well as on the strength of his oral confession and cautioned statement. The third ground of appeal crumbles as well.

The fourth ground of appeal is a complaint that the appellant was not convicted not on the strength of the prosecution case but on the weakness of his defence. In determining this ground we will address on the testimony of witnesses and the appellant's oral confession and cautioned statement. As stated when determining the first ground, the evidence of the victim was corroborated by the testimonies of PW2, PW4 and PW6 as well as the appellant's oral and written confessions.

We do not find it necessary to repeat here in detail how the same was corroborated. However, PW2, PW4 and PW6 testified that the appellant confessed before them that he had sexual intercourse with the victim and begged for forgiveness. The learned first appellate judge relied on **Muriuki v. Republic** [1975] 1 EA 223 (the decision of the High Court of Kenya) and **Mabala Masasi Mongwe v. Republic**, Criminal Appeal No. 161 of 2010 (unreported decision of the Court) to observe that an oral confession is admissible and may be used to convict an accused person. We endorse that the High Court's observation depicts the correct position of the law in this jurisdiction. There is a plethora of authorities on the point – see: **Director of Public Prosecutions v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82 and **Patrick Sanga v. Republic**, Criminal No. 213 of 2008 (unreported), **Rashid Roman Nyerere v. Republic**, Criminal Appeal No. 105 of 2014, **Posolo Wilson @ Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015, **Martin Manguku v. Republic**, Criminal Appeal No. 194 of 2004 and **Melkiad Christopher Manumbu & 2 Others v. Republic,** Criminal Appeal No. 355 of 2015 (all unreported), to mention only a few. In **Patrick Sanga** (supra), we observed at p. 7 of the typed judgment:

> *"Under section 3 (1) (a), (b), (c) and (d) of the Evidence Act, Cap. 6, a confession to a crime may be oral, written, by conduct, and/or a combination of all of these or some of these. In short, a confession need not be in writing and can be made to anybody provided it is voluntarily made".*

In **Mohamed Manguku** (supra) the Court sounded a caution that such oral confession would be valid as long as the suspect was a free agent when the words imputed to him were said. Likewise, in **Posolo Wilson @ Mwalyego** (supra), we observed:

> *"... it is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found a conviction against the suspect".*

We are bound by the above standpoint of the settled law in this jurisdiction. In the case at hand, the appellant confessed before PW2, PW4 and PW6 to have had sexual intercourse and asked for forgiveness. That confession was made in the office of PW4 when the appellant was

a free agent. It is shown nowhere in the evidence of PW2, PW4 and PW6 as well as in the evidence of the appellant himself that would suggest the appellant not being a free agent when he made the said confession. That oral confession, therefore, was rightly relied upon the trial court to mount the conviction against the appellant. In the same token, the first appellate court rightly upheld that finding by the trial court.

With regard to the cautioned statement, we go along with the learned State Attorney that because it was retracted, as a matter of prudence, it needed corroboration to rely on it to convict the appellant. We are fortified in this view by the decision of the Court in **Bombo Tomola v. Republic** [1980] TLR 254, in which it held:

> *"Generally it is dangerous to act upon a repudiated [or retracted] confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied of its truth".*

We also agree with the learned State Attorney that there was enough evidence to corroborate it. As we held in **Hemed Abdallah v. Republic** [1995] T.L.R. 172:

> *"Once the trial court warns itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado".*

In the case at hand, the first appellate court rightly addressed its mind to the foregoing positions of the law and relied on **Tuwamoi v. Uganda** [1967] 1 EA 84 to hold that the cautioned statement was corroborated in the manner already alluded to above.

For the avoidance of doubt, we are alive to the fact that the appellant challenged the prosecution why it did not field Tasiana and Alpha Wawa and the pupils present at the scene of crime during the commission of the offence. However, in the excerpts from both lower courts reproduced above, we are certain in our mind, that failure to field those witnesses did not water down the prosecution's case.

With regard to Ms. Mahundi's submission that the appellant testified that his relatives went to parents of the victim so that they could reconcile the matter but that they refused to receive the money, we do not think the learned State Attorney has appreciated the evidence. We have read p. 60 of the record and what we could gather from that piece of evidence by the appellant is that his parents went to the victim's parents so that she could be taken to the hospital to verify if she was raped. The mission was not to settle the matter out of court. That piece of evidence, therefore, cannot corroborate the testimony of the victim.

The above said, we are satisfied that the fourth ground of appeal has no merits as well. It must fail.

Last for determination is a general ground of complaint that the prosecution did not prove this case beyond reasonable doubt. In view of what we have stated above; finding and holding all the four grounds of appeal as wanting in merits, this ground must also fail.

In the final analysis, like the two courts below, we entertain no flicker of doubt that the guilt of the appellant was established to the hilt. Eventually, we find the appeal wanting in merits and dismiss it entirely.

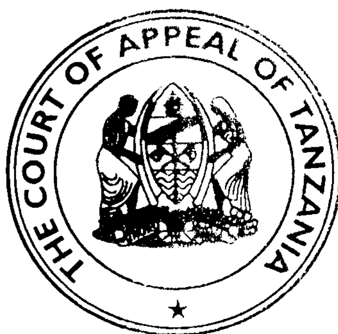
DATED at **IRINGA** this 5th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 6th day of May, 2020 in the presence of the Appellant appeared in person through video conference and Mr. Adolf Maganda, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL