IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)
CRIMINAL APPEAL N0. 145 OF 2018

1. SEBASTIAN MICHAEL
2. MELELE DANIEL } **..... APPELLANTS**

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT
(Appeal from the decision of the High Court of Tanzania, at Mbeya)
(Levira, J.)
dated the 20th day of March, 2018
in
Criminal Appeal No. 102 of 2016

.....

JUDGMENT OF THE COURT

12th & 25th February, 2021

MWANDAMBO, J.A.:

This is a second appeal in which, Sebastian Michael and Melele Daniel, the first and second appellants are faulting the decision of the High Court sitting at Mbeya which dismissed their appeal against conviction and sentence on a charge of gang rape entered by the District Court of Momba.

Briefly, the appellants stood charged before the District Court on two counts of conspiracy to commit an offence and gang rape respectively contrary to sections 384 and 131 (1) and (2) of the Penal Code [Cap 16 R.E. 2002]. 'According to the charge sheet to which the

appellants pleaded not guilty, the prosecution alleged that on 26th January, 2016, during night hours, the appellants together with another person who is at large, conspired to commit an offence of rape. In the second count, the appellants were alleged to have had carnal knowledge of girl of 21 years without in her consent. The victim of the offence shall henceforth be referred to as EM or the victim to conceal her true identity.

In a bid to prove its case, the prosecution paraded seven witnesses including EM who testified as PW4 together with Macklina Simchimba (PW5), a friend of the victim who was said to have witnessed EM being forcefully grabbed by the appellants to leave to an unknown place during the material night. In addition, the prosecution tendered several documentary exhibits comprised of extra judicial statement of the first appellant (Exh. PE1) tendered by Leonard Kazimzuri (PW1) justice of the peace and through Pottne Paulo Massawe (PW2) the justice of the peace, the prosecution tendered an extra judicial statement of the second appellant which was admitted as Exhibit PE2. It also tendered a PF 3(Exhibit PE3) and cautioned statements of the appellants (Exh. PE4 and PE5).

The facts which resulted into the appellants' arraignment and later their conviction is to the following effect: On 26th January, 2016, at 21.00 hrs, EM and PW5 who were employees of a grocery christened as Masahani at Mwaka street, within Momba District went to a nearby place looking for food. On their way, the duo met three men who got hold of them. After some scuffle, they released PW5 who happened to be pregnant at the time. Instead, they forced PW4 to a room belonging to the second appellant where, after having a meal, they forcefully procured sexual intercourse from the victim with threat of hitting her leg with a spanner held by the first appellant if she raised an alarm. They then undressed her and had sexual intercourse with EM in turns until the following day at 09.00 hours when they released her. Apparently, PW5 had already relayed information of her friend's predicament to Gege Sichinga (PW6).

As EM had not yet resurfaced on the morning of 27th January, 2016, PW6 informed the Police of the missing of PW4 who, according to PW5, had been abducted by, amongst others, the first appellant who was popularly known as Mapesa and familiar to PW6. Upon her resurfacing at her place of work at/about 09.00 a.m., PW4 revealed to her colleague of the place which she was taken to the previous night being a 'ghetto'

belonging to Melele Daniel (second appellant). Upon that disclosure, the second appellant was arrested and, in the process, he mentioned his colleagues; Mapesa and one Daniel who eluded the police. Subsequently, PW4 was escorted to a police station from where she obtained a PF3 which she took to a hospital at Tunduma for medical examination. On 28th January, 2016 EM was examined at the hospital by Dr. Adrian Kundembye Biseko (PW3) who confirmed that she had bruises on her vagina which suggested forceful sexual intercourse. PW3 posted his findings in the PF3 which he tendered in evidence as Exhibit PE3.

Later on, the appellants were arraigned in the District Court where they denied all the accusations of conspiracy and gang rape levelled against them. The trial court found sufficient evidence to sustain both counts. It relied on the evidence of the victim (PW4) which it found to have been sufficiently corroborated by PW3 who examined her and found bruises on her private parts. It also relied on the extra judicial statements of the appellants admitted in evidence as exhibits PE1 and PE2. It also relied on the cautioned statements admitted in evidence as exhibit PE4 and PE5.

The appellants' appeal to the High Court sitting at Mbeya was partly successful to the extent it related to the conviction on conspiracy. The learned first appellate judge found no sufficient evidence to prove conspiracy. It quashed conviction on that count and set aside the corresponding sentence. However, it concurred with the trial court's findings on the charge of gangrape upon being satisfied that the prosecution had marshalled sufficient evidence to sustain the charge. The determination of the appeal before the first appellate court was made on the basis of four areas of complaint namely; irregular admission of cautioned and extra judicial statements and PF3, poor evidence of identification, non-consideration of the defence evidence and, inadequate evidence to prove the case on the required standard.

The appellants lodged separate memoranda of appeal before the Court faulting the first appellate court for dismissing their appeals. The grounds of complaint in both memoranda of appeal are largely identical except on specific aspects pertaining to their respective cautioned and extra judicial statements.

At the hearing of the appeal, the appellants fended for themselves being linked from Ruanda Prison through a video conference facility. For the respondent Republic, Mr. Innocent Njau, learned Senior State

Attorney appeared, resisting the appeal. The appellants adopted their grounds of appeal and opted to allow the learned Senior State Attorney to kickstart the hearing reserving their right to re-join if such need arose.

In resisting the appeal, Mr. Njau argued it generally on three main areas of complaint. **One**; whether the case against the appellants was proved to the standard required in criminal cases. **Two**; were the appellants properly identified as the culprits and three; validity of the extra judicial and cautioned statements. Thereafter, he tackled other grounds and generally urged us to hold that all are devoid of merit warranting an order dismissing the appeal.

We propose to advert to the main areas of complaint alluded to above later after disposing what we consider to be secondary grounds. The first relates to the complaint on the delayed medical examination of PW4. Mr. Njau argued that this complaint never featured before the High Court neither does it involve any issue of law. We respectfully agree with him guided by rule 72 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which requires the appellant in a second appeal such as this one to confine his grounds of appeal to points of law alleged to have been wrongly decided by the first appellate court.

Indeed, section 6(7)(a) of the Appellate Jurisdiction Act Cap. 141 R.E. 2019 vests right on appellants in second appeals on matters of law and not facts. The complaint on the delayed examination of PW4 by PW3 is one of fact and not law. At any rate, it never featured before the first appellate Court nor was it determined by that Court. We have refused such attempts in numerous cases, amongst others; **Thobias Michael Kitavi v. R**, Criminal Appeal No. 31 of 2017, **Asael Mwanga v. R,** Criminal Appeal No. 218 of 2007 and **Abdalah Ahamadi Likunja v. R,** Criminal Appeal No. 120 of 2018 (all unreported). We shall do alike in this appeal by rejecting this ground as we hereby do.

Next is on the alleged contradictions in PW6's evidence. As rightly submitted by Mr. Njau there is no merit in this complaint primarily because contradictions in witnesses' testimonies are not unusual; they are to be expected in every trial. However, it is trite that a contradiction can only be considered as fatal if it is material going to the root of the case. The so-called contradiction in this appeal relates to the date when PW6 employed PW4 that is, whether it was on 15/01/2016 or 18/01/2016. Clearly, that cannot be a material contradiction going to the root of the case for the prosecution. In any case, there is nothing to indicate that it was PW6's evidence which was relied upon by the trial

court and sustained by the first appellate court in convicting the appellants. This ground is dismissed accordingly.

For reasons which will become apparent later, the appellants' complaint faulting the High Court for relying on a cautioned statement recorded from the second appellant (Exh. PE5) by PW8; a police constable allegedly incompetent to do so is rendered superfluous. There will be no need discussing it here.

Lastly, on this category is the complaint on the failure to consider defence evidence. Yet again, Mr. Njau invited the Court to dismiss it because it is not supported by the record. We agree. The complaint was one of the grounds before the first appellate court which dismissed it upon being satisfied that the trial court had considered it in its judgment. We have no reason to differ with the learned first appellate judge although we think the trial court ought to have gone beyond rejecting the appellants' defence for being after thoughts. A statement such as: "*the accused's defence has not raised any reasonable doubt in the prosecution's case and it is thus rejected*" would be more desirable. We shall now turn our attention to the main grounds of appeal.

We shall begin with the complaint in relation to reliance on extra judicial and cautioned statements claimed to have been irregularly relied upon by the two courts below. This was the appellants' complaint in their grounds 3 and 7 preferred by the first appellant and ground 7 by the second appellant. Mr. Njau conceded that the contents of the extra judicial statements (Exh. PE1 and PE2) and the cautioned statement by the first appellant (Exh. PE4) were not read out after their admission and so they should not have been relied on by both courts below. He invited us to expunge them from the record. With regard to the second appellant's cautioned statement recorded by PW8, Mr. Njau argued that although its contents were read out after admission, the second appellant was not given an opportunity to cross-examine PW8 and so his evidence together with Exhibit PE5 should be discarded. All the same, the learned Senior State Attorney pointed out that despite the obliteration of exhibits PE1, PE2, PE4 and PE5, there will still be sufficient evidence to support the appellants' conviction on gang rape on which both courts below concurred in their findings.

Given the chance to re-join, the first appellant argued that upon discarding the extra and cautioned statements from the record, there will be no other evidence to connect the appellants with the offence.

The second appellant for his part stood to his grounds of appeal which he invited the Court to hold them to be strong enough to sustain his appeal resulting into his release.

The law on the requirement on witnesses to read the contents of documentary exhibits after their admission is long settled. It has been stressed in the Court's various decision in particular; **Robinson Mwanjisi & Others v. R** [2003] T.L.R. 218 and many others that followed which we need not cite here. Flowing from the above, it is settled law that failure to read out the contents of any documentary exhibit after its admission is fatal; such an exhibit ceases to have any evidential value and liable to be expunged from the record. We have done so in like cases and we will do likewise in this appeal by expunging exhibits PE1, PE2 and PE4 from the record as we hereby do. That means, we do not share the view taken by the first appellate judge that the appellants made any confession to the offence they stood charged and thereby concurring with the trial court on that aspect.

On the other hand, we agree with the learned Senior State Attorney on the validity of the second appellant's cautioned statement (Exhibit PE5) tendered by PW8. As the record will bear us out, following the inquiry into the voluntariness of the statement, the trial court made

a ruling holding that the second appellant made the statement voluntarily. Immediately thereafter, it admitted it as exhibit PE5. Although that was irregular, we do not think it was fatal considering the fact that unlike trials in the High Court conducted with the aid of assessors, here the trial was with the trial magistrate only. Nevertheless, the trial court strayed into an error in not affording the second appellant right to cross-examine PW8. That amounted to an unfair trial to the second appellant's prejudice. Under the circumstances, we have no hesitation in accepting Mr. Njau's invitation to expunge that evidence from the record together with exhibit PE5 as we hereby do. In the upshot, we find merit in the first appellant's ground 3 and 7 as well as ground 7 by the second appellant.

Next, we shall consider whether, after discarding the extra judicial and cautioned statements relied upon by the two courts below in their concurrent findings there will be any evidence to sustain the charge against the appellants. Mr. Njau was quick to invite the Court to answer that question affirmatively.

In support of the above proposition, Mr. Njau premised his arguments on the principle underscored in **Selemani Makumba v. R.** [2006] TLR 218 followed in many cases holding that the best evidence

in sexual offences must come from the victim. Similarly, he sought reliance from our decision in **Meshack Redson Mwasimba @ Mwazembe v. The DPP**, Criminal Appeal No. 467 of 2017 (unreported) on what the prosecution must establish to prove rape involving adult women that is to say; penetration of a male sexual organ into a female sexual organ and lack of consent. Mr. Njau invited us to accept the evidence of PW4, the victim of the offence appearing at pages 12 – 14 of the record to have sufficiently proved not only lack of consent but also penetration. Connected to this was the issue of identification which the appellants faulted the two courts below for relying on an unreliable evidence of visual identification.

Although Mr. Njau was sceptical on the quality of the evidence of visual identification on the night of 26th January, 2016 when PW4 and PW5 met the appellants, he urged us to accept PW4's evidence of her long stay with the appellants at the second appellant's room throughout the night till 09:00 a.m. the following day.

With respect, we agree with the learned Senior State Attorney. The record shows that PW1 gave an uncontroverted evidence showing how the appellants grabbed her during the night, threatened her and led her to the second appellant's room where they had forceful sexual

intercourse the whole night in turns. She (PW4) made a graphic account of what the first appellant said and did to her at first threatening her legs with a spanner and at times forcing her to suck his male organ followed by the second appellant and later Daniel who is at large.

PW4's evidence shows explicitly how the trio had sexual intercourse with her till 09:00 a.m. the following day when they released her. Apparently, the appellants did not assail PW4's testimony in cross-examination. It is trite law that failure to cross examine a witness on a material evidence amounts to acceptance of it. We have said so in many of our previous decisions including; **Bakari Abdalah Masudi v. R,** Criminal Appeal No. 126 of 2017 cited in **Karim Seif @ Islam v. R** Criminal Appeal No. 161 of 2017 and **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2010 (all unreported).

True to the above, none of the questions put to PW4 by the first appellant in cross-examination dented her testimony. Instead, they reinforced it showing that the first appellant was familiar to PW4 as a regular customer at the grocery she worked; that it was him who threatened PW4 with death if she raised an alarm when they met her and PW5 during the night and that he (the first appellant) was the first

to rape PW4. The second appellant's cross-examination was likewise not material to EM's testimony. We are thus satisfied that despite the expunging of the extra judicial and cautioned statements, PW4's evidence proved the offence to the required standard. She proved not only lack of consent but also penetration constituting the ingredients of the offence of rape under section 130 (1) and (2) (a) of the Penal Code. Much as the contents of the PF3 (exhibit PE3) were not read out after admission, PW3's oral evidence corroborated PW4's evidence on penetration. PW3 had it that upon examination of PW4's private parts, he found bruises which supported an assertion that there was a forced penetration into her vagina.

Linked to the foregoing is the complaint on the evidence of visual identification. In view of what we have endeavoured to discuss hereinabove, we need not belabour the point unnecessarily. We accept that the time spent by the assailants with the victim and her evidence describing the room containing a bed and two coaches in which she was held captive for the whole night till 09:00 a.m. the following day left no doubt that there was sufficient light which enabled PW4 to identify her assailants. On the whole, we dismiss both complaints by the appellants

that their conviction was against the weight of evidence and that they were not properly identified as the culprits.

That said, the appeal stands dismissed.

DATED at **MBEYA** this 25th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2021 in the presence of the Appellants in person and Mr. Baraka Mgaya, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL