IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 442 OF 2019

KHALIDI MLYUKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kente, J.)

dated the 1st day of November, 2019
in
DC. Criminal Appeal No. 43 of 2018

JUDGMENT OF THE COURT

17th & 29th September, 2021

MWARIJA, J.A.:

In the Resident Magistrate's Court of Njombe, the appellant, Khalidi Mlyuka was charged with the offence of rape contrary to ss. 130 (1) & (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019] (the Penal Code). It was alleged that on divers dates in November, 2016 at Ramadhani area within the District and Region of Njombe, the appellant did have carnal knowledge of "H.M" (real name withheld for the purpose of protecting her dignity), a girl aged sixteen years (hereinafter the *"victim").*

The appellant denied the charge. However, after a full trial at which five witnesses testified for the prosecution while the appellant was the only witness for the defence, the trial court found that the prosecution had proved its case beyond reasonable doubt. Having been found guilty, the appellant was sentenced to thirty years imprisonment. Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court hence this second appeal.

The background facts giving rise to the appeal may be briefly stated as follows: The victim was until the material date living with her mother, Mary Mwepelwa (PW1) and the appellant who is the victim's step father. On 21/5/2017, PW1 became suspicious that the victim might have been pregnant. When she was asked about her condition, the victim replied that the appellant had on several occasions, been raping her. PW1 reported the matter to the police whereupon the victim was issued with a PF3 to take it to Kibena District Hospital for medical examination. She took the victim to hospital on 23/5/2017 and after having been examined by Dr. Evaristo Mtitu (PW5), she was found to be eight months pregnant. The PF3 on which PW5's report was posted was tendered and admitted in evidence as exhibit P3.

The appellant was arrested and on 25/5/2017, he was interrogated by No. G.8386 D/C Andrew (PW2). In his evidence he stated that the appellant admitted the offence and thus recorded his cautioned statement. He tendered the statement which was not objected to by the appellant and the same was admitted in evidence as exhibit P1.

Later on 26/5/2017, the appellant was taken before the Justice of the Peace, Cyprian Joseph Mwananzuni, a Primary Court Magistrate (PW4). In his evidence, PW4 stated that after he had questioned and physically examined the appellant whom he said, had volunteered to confess, he proceeded to record his confession. He tendered in court the appellant's extra-judicial statement (exhibit P2) which was admitted in evidence without any objection from the appellant.

The victim who testified as PW3 told the trial court that sometime in November, the appellant asked her to draw water and take it in the house. Having entered in the house, the appellant got hold of her and took her to the bed, undressed her clothes and had carnal knowledge of her while covering her mouth. After that act, PW3 went on to state, the appellant released her but warned her not to disclose to anybody what he had done to her. It was her further evidence that in the same month, the appellant repeated to molest her while she was on the way returning

home after buying cooking oil from a shop at Kijiweni area in the village. She testified that it was at about 19:00 hrs when she met him and the appellant took that opportunity to pull her into the grass and rape her.

In his defence, the appellant denied the charge, stating in one sentence that the prosecution witnesses were not credible because they lied in their testimonies. When he was cross examined, he admitted that he was staying with PW3, the daughter of PW1 who is for that reason, his step daughter. He also admitted that PW3 was at the material time aged 16 years.

In his judgment, the learned trial Resident Magistrate found that the prosecution evidence had proved the case against the appellant beyond reasonable doubt. He was of the view that in his cautioned and extra-judicial statements, the appellant admitted that he committed the offence. He also relied on the evidence of PW3 and found it to have proved the offence, although he misdirected himself by referring to the old position of the law that her evidence required to be corroborated.

As stated above, the decision of the trial court was upheld by the High Court. Like the trial court, the first appellate court was of the view that the evidence of PW3 and the appellant's confessions made to the police and the Justice of the Peace, sufficiently proved that the appellant

did have carnal knowledge of PW3. The learned Judge found that the appellant's conviction was well founded.

In his memorandum of appeal filed in this Court on 11/5/2020, the appellant raised five grounds as paraphrased hereunder.

1. That the learned first appellate Judge erred in law and fact in failing to consider and decide all the grounds of appeal raised by the appellant.
2. That the learned first appellate Judge erred in law and fact in upholding the decision of the trial court which was erroneous for having been arrived at using the victim's pregnancy as corroborative evidence while the pregnancy was conceived before the alleged date of the offence.
3. That the learned first appellate Judge erred in law and fact in failing to find that the appellant's conviction was based on the evidence of PW3 taken contrary to the law.
4. That the learned first appellate Judge erred in law and fact in upholding the appellant's conviction which was wrongly based on the weakness of his defence and the confession statements which were not recorded in accordance to the law.
5. That the learned first appellate Judge erred in law and fact in failing to find that the decision of the trial court was erroneous for having been based on contradictory evidence of the prosecution witnesses.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Alex Mwita, learned Senior State Attorney assisted by Ms. Radhia Njovu, learned State Attorney. In arguing his appeal, the appellant opted to hear first, the respondent's reply to the contents of his grounds of appeal and thereafter make his rejoinder submission, if he would find it necessary to do so.

Submitting in reply to the 1st ground of appeal, Mr. Mwita conceded that the learned first appellate Judge did not consider each of the appellant's grounds separately or jointly. It was the learned Senior State Attorney's argument however, that the grounds which were considered and determined by the learned Judge had the effect of disposing of the appeal and therefore, the omission to determine every ground raised by the appellant did not prejudice him. In any case, Mr. Mwita went on to argue, this Court is vested with the power of dealing with the grounds which were not determined by the High Court, particularly those which involve points of law.

On the 2nd ground, it was Mr. Mwita's reply that the evidence to the effect that PW3 was pregnant, was led through the PF3 (exhibit P3) which, he said, was wrongly acted upon because its contents were not read out

in court after its admission. He thus prayed that the same be expunged from the record. We respectfully agree with the learned Senior State Attorney and we thus expunge that document from the record. Notwithstanding the invalidity of that medical evidence, the learned Senior State Attorney argued, there is oral evidence of PW1, PW5 and PW3 proving that the victim was pregnant.

With regard to the 3rd ground of appeal, Mr. Mwita argued that although the learned trial Resident Magistrate had mistakenly referred PW3 as a child of tender age despite being aged 18 years thus not below the apparent age of 14 years, the mistake did not have any effect on her evidence because she testified under oath.

On the 4th ground of appeal, Mr. Mwita conceded that both the trial court and the High Court erred in acting on the evidence of the cautioned statement because the same was recorded out of the period prescribed under s. 50 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA). He went on to argue that, since that document was recorded out of time, the same should be expunged from the record. It is indeed true that the statement was recorded out of the required period of four hours from the time at which the appellant was put under restraint. From the document itself, the appellant was arrested on 24/5/2017 and

taken to police station. His statement was later recorded on 25/5/2017 from 9:42 hrs. We thus agree with Mr. Mwita that the cautioned statement deserves to be expunged. The same is hereby expunged from the record.

Despite the expungement of the cautioned statement, Mr. Mwita argued, the finding of the two courts below is supported by the appellant's extra-judicial statement. This, he said, is because the statement was admitted in evidence without any objection from the appellant. In any case, the learned Senior State Attorney went on to argue, PW3's evidence is in itself sufficient to found the appellant's conviction. To bolster his argument, he cited the case of **Joseph Leko v. Republic,** Criminal Appeal No. 124 of 2013 (unreported).

Finally, as regards the 5th ground of appeal, Mr. Mwita argued in reply that, although in his appeal before the High Court, the appellant did not raise the point that the prosecution evidence has contradictions, according to the record, there is no any material contradictions in the evidence of the five prosecutions witnesses.

In rejoinder, the appellant insisted that the charge was not proved against him beyond reasonable doubt. He argued that, whereas according to the evidence, the offence was committed in 2016, he came

to be arrested in 2017 for the only reason that PW3 had been found to be pregnant. He submitted further that, although after having been medically examined, PW3 was found to be pregnant, in his evidence, PW5 did not disclose the person who impregnated her.

We have duly considered the submissions made by the parties in this appeal. To begin with the 1st ground of appeal, the appellant faults the learned first appellate Judge for failing to fully consider the grounds raised in the petition of appeal. We think it is instructive at this moment to outline the substance of the grounds raised by the appellant in the High Court. According to his petition of appeal, he raised a total of six grounds. In ground one, he disputed the contention by PW2 and PW4 that he confessed before them while in ground two, he contended that, because the offence is triable by the District Court or the Resident Magistrates Court, his extra-judicial statement ought to have been record by a District or Resident Magistrate, not a Primary Court Magistrate.

As for ground three, it was his complaint that the evidence of PW3 should not have been acted upon because it was not corroborated. In ground four, he challenged the evidence of PW1 contending that she lied when she said that after the doctor (PW5) had examined PW3, he found her to be eight months pregnant.

On ground five, the appellant challenged the evidence of PW3 contending that, in the absence of a DNA report, that evidence should not have been found credible. Finally on grounds six, he complained that his defence was not considered while in ground seven, he contended that the prosecution did not prove its case beyond reasonable doubt.

It is clear from the petition of appeal that the appellant's complaint was mostly against the evidence which was acted upon to convict him. This is in view of grounds three, four, five and seven. In his judgment, after having re-evaluated the evidence, the learned first appellate Judge held that the evidence was sufficient. He particularly relied on the evidence of PW3 and the confession statements. The appellant's grounds of appeal thus centred also on challenging the confession statements. He denied that he made a statement before PW2. Since however, that statement has now been expunged, the issue arising from it is no longer relevant. On sufficiency or otherwise of the evidence, the learned Judge held as follows:

> *"Both the oral and documentary evidence established beyond reasonable doubt that the appellant had forced PW3 to have sexual intercourse with him more than once within the period as particularized in the charge sheet. The said evidence came from none other than PW3*

and the appellant himself who made confessional statements to the police and the Justice of the Peace admitting to have carnally known the complaint"

Given that excerpt from the judgment of the High Court, it is obvious that the learned first appellate Judge did not consider the points of law raised in grounds one, two and six of the petition of appeal. Nevertheless, we agree with the learned Senior State Attorney that the omission did not prejudice the appellant. Starting with the complaint in ground six, his defence was merely that of denial of the charge. He defended himself in one sentence as follows:

"I totally deny the charge and the prosecution evidence and the prosecution witnesses testified lies to the Court."

When he was cross-examined, he admitted the facts concerning his relationship with PW1 and PW3. He conceded further that due to the time lapses, it was normal for PW3 to forget the dates on which the alleged incidences of rape took place. Since, apart from denying the charge, the appellant did not challenge the prosecution evidence which the two courts had found to be cogent, we are certain that the omission to analyze that kind of the appellant's defence did not prejudice him.

Reverting to grounds one and two, it is obvious that the complaints were raised out of misconception. This is because, with regard to ground two, the function of recording a suspect's confession by a Justice of the Peace who is a Primary Court Magistrate is not limited to the cases triable by his court. Concerning ground one, as will be discussed in the 2nd and 3rd grounds of the appellant's grounds of appeal, by virtue of the provisions of s. 127 (6) of the Evidence Act [Cap. 6 R.E. 2002, now R.E. 2019] (the Evidence Act) it was not necessary for the evidence of PW3 to be corroborated.

On the basis of the reasons stated above and since the learned first appellate Judge had agreed with the trial court's findings that the evidence of the prosecution witnesses, particularly PW3 had sufficiently proved the case against the appellant, the omission to consider each of the grounds separately and the appellant's defence, which was basically that of a mere denial, did not occasion a miscarriage of justice on the part of the appellant. For these reasons, this ground of appeal is devoid of merit. We thus hereby dismiss it.

With regard to the 2nd and 3rd grounds of appeal, having gone through the record and after having considered the submissions of the parties, we agree with the learned Senior State Attorney that the two

grounds are also devoid of merit. From the record, PW3's pregnancy was not used as crucial evidence upon which the appellant's conviction was founded. In the above quoted part of the judgment of the High Court, the learned first appellate Judge held that the appellant was properly convicted on the basis of the evidence of PW3 and his confession before *inter alia,* the Justice of the Peace.

It is trite law that in a sexual offence, the evidence of a victim does not necessarily require corroboration to found an accused person's conviction: - See the case of **Selemani Makumba v. Republic** [2006] T.L.R 379. Secondly, PW3 was aged 16 years hence not a child of tender age. She thus properly testified under oath. The appellant's argument that the evidence of the victim was taken contrary to the procedure is therefore misconceived.

On the 4th ground, since the cautioned statement has been expunged, the complaint based on that document has, for that reason, disposed of. However, as for the extra-judicial statement, we have found above that the appellant did not object to its admission in evidence. He did not also cross-examine PW4 who recorded the statement. When he was given that opportunity, he replied as follows: *"I have no question to the witness."* The effect is that he admitted what was testified to by the

witness. See for instance, the cases of **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 8 of 1992, **Nyerere Nyangue v. Republic,** Criminal Appeal No. 67 of 2010 and **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (all unreported). In the last case, the Court observed as follows:

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."*

As for the 5th ground of appeal in which the appellant complains that his conviction was based on contradictory evidence of the prosecution witnesses, having scrutinized the record, we could not find any material contradictions in the witnesses evidence. In fact, apart from raising that complaint, the appellant did not state the nature of the contradictions in the prosecution witnesses' evidence.

On the basis of our findings above, we are satisfied that the two courts below had properly found that the available evidence on record sufficiently established the appellant's guilty beyond reasonable doubt.

In the event and for the foregoing reasons, we are settled in our mind that the appeal is devoid of merit. It is thus hereby dismissed in its entirety.

DATED at **IRINGA** this 28th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of September, 2021 in the presence of the Appellant in person and Ms. Radhia Njovu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL