IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 318 OF 2019

JUMA JEMBU @ ISSA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Arufani, J.)

dated the 13th day of August, 2019
in
(DC) Criminal Appeal No. 23 of 2019

JUDGMENT OF THE COURT

27th September, & 1st October, 2021

MWAMPASHI, J.A.:

Before the District Court of Tunduru, in Ruvuma Region, the appellant, Juma s/o Jembu @ Issa was charged and convicted of unnatural offence contrary to section 154 (1)(a) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019] (the Penal Code). It was alleged that on 22.09.2018 at about 11.00 am at Mlingoti Primary School area within the District of Tunduru in Ruvuma Region, the appellant did have carnal knowledge of 'H.A" a ten years old girl against the order of nature. To conceal her identity, we shall hereinafter refer to the girl simply as PW1 or the victim.

After the conviction, the appellant was sentenced to thirty years imprisonment. We however, note that the sentence imposed by the trial court is illegal. Where conviction is properly grounded on the offence of unnatural offence against a child under the age of eighteen, the punishment, under section 154 (2) of the Penal Code, is life imprisonment. Since in the instant case PW1 was ten years old then the proper sentence which ought to have been imposed is life imprisonment.

The conviction and sentence imposed by the trial court aggrieved the appellant. He appealed to the High Court but his appeal was dismissed. Still protesting his innocence, the appellant has now come to this Court on a second appeal.

Briefly, the evidence upon which the appellant's conviction was founded is as follows: On 22.09.2018 at about 11.00 am, PW1 with her two brothers Swalehe Said (PW2) and Muslim Said (PW3) were on their way home from tuition classes. At Mlingoti Primary Scholl area they met a person who they later claimed to be the appellant. According to them that person who introduced himself as the school watchman, directed the two boys to clean the surroundings while asking PW1 to go and fetch a broom from a nearby abandoned dilapidated building. When PW1 was in the building the person followed her, undressed her, lowered her

underpants to the knees, bent her and inserted his penis in her anus. PW1 cried out in pains and the young man ran away.

After that person had fled, PW1 got out of the building while crying and reported to her two brothers (PW2 and PW3) that she had been raped by that person. Thereafter, PW1, PW2 and PW3 reported the incident to their father, Said Ally (PW4) who together with PW2 and PW3 went back to Mlingoti Primary School looking for the person but they could not find him. Thereafter, still looking for the person, PW4 and the two boys went at Mbesa bus stand where they met the appellant who the two boys identified to be the one who had committed the offence against PW1.

When asked by PW4 as to who had employed him as a school watchman, the appellant claimed to have been employed by one Juma. PW4 decided to take the appellant to Juma but on their way he ran away. Juma denied to have employed the appellant but he agreed to know him as his relative. He then volunteered to take PW4 to the appellant's parents. According to PW4, the appellant's parents proposed for a settlement but he refused and reported the case to the police. PW1 was sent to the hospital where she was medically examined by African Salla (PW6) a clinical officer who observed that PW1 had bruises in her anus. PW6's observations were posted in a PF3 which was tendered in evidence

as Exhibit P2. PW4 also testified that he apprehended the appellant later in the evening and took him to the Police Satation.

WP 6378 D/C Mujo testified as PW5 telling the trial court that the appellant was handed over to her on 23.09.2018 at about 10.00 am. She then recorded his cautioned statement in which he confessed to have carnally known PW1 against the order of nature. PW5 sought to tender the cautioned statement in evidence but it was objected to by the appellant on the ground that the same was procured by force. However, after an inquiry, the cautioned statement was received in evidence as Exhibit P1.

In his defence, the appellant who testified as DW1 also called his two parents as his witnesses. He distanced himself from the charged offence and told the trial court that on 22.09.2018 at about 11.00 am he was at Mbesa bus stand when one man approached him and accused him of attempting to sodomise two boys. He denied the accusations and later in the evening when he got home, he was informed by his parents that the man had gone there raising the same accusations against him. Thereafter, at 17.00 pm the man came again with the two boys and took him to the police station. As on the cautioned statement, DW1 told the trial court that he was forced to make it on 24.09.2018. The appellant's

parents, Jembu Issa Mkwanda (DW2) and Rehema Ndumba (DW3) simply told the trial court that PW4 got at their home twice looking for the appellant on accusation that the appellant had punished his three children.

In its judgment, the trial court found that the appellant was positively identified by PW1, PW2 and PW3 as the person who committed the offence against PW1 mainly because the offence was committed in broad daylight. It was also found by the trial court that the appellant was again identified by PW2 and PW3 before PW4 at Mbesa bus stand. On the basis of the evidence from PW1, PW2 and PW3 which the trial court found to have been corroborated by the cautioned statement (Exhibit P1), the case against the appellant was found proved beyond reasonable doubt.

On appeal, the High Court agreed with the trial court that from the evidence on record it was the appellant who committed the offence in question. It was found by the High Court that the appellant was properly convicted and sentenced by the trial court and the appeal was therefore, dismissed in its entirety, hence, as we have alluded to earlier, this second appeal.

In his memorandum of appeal the appellant has raised the following three grounds of appeal:

1. *That the trial court erred in law and fact in convicting and sentencing the appellant relying only on the prosecution evidence.*
2. *That the prosecution side failed to prove the case beyond reasonable doubts.*
3. *That the Hon. Judge and the trial court erred in law and fact in not adhering to section 192 of the Criminal Procedure Act, Cap 20 R.E. 2002.*

At the hearing of the appeal, the appellant appeared in person, unrepresented whilst the respondent Republic was represented by Ms. Amina Mawoko, learned State Attorney.

When the appellant was called upon to argue his appeal, he opted to let the learned State Attorney begin by responding to the grounds of the appeal first. He however reserved his right of rejoinder, in case that need to do so would arise.

The learned State Attorney argued in respect of the 1st ground of appeal that while it is true that the defence evidence was not considered by the trial court, still this Court can step into the shoes of the lower courts and consider the defence. On the 2nd ground of appeal, the learned State Attorney agreed that the appellant's identification by PW1, PW2 and PW3 was not watertight. She explained that the said three key witnesses did

not give a prior description to PW4 of the person who had allegedly committed the offence in question. She further argued that since the appellant was not properly identified at the scene, there is a possibility of a mistaken identity.

Upon being probed by the Court in respect of the appellant's cautioned statement, the learned State Attorney agreed that the same appearing at page 49 of the record of appeal on which the conviction was also based, was procured contrary to section 50 (1) (a) of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA). She expounded that the appellant was arrested on 22.09.2018 but the statement was recorded on 23.09.2018 not within four hours as required by the law. She therefore urged the Court that the cautioned statement be expunged from the record.

Lastly, the learned State Attorney therefore agreed that the case against the appellant was not proved beyond reasonable doubts and urged the Court to allow the appeal and release the appellant from prison.

The appellant happily welcomed the concession of his appeal by the learned State Attorney. He had nothing to add rather than praying for his release.

We have dispassionately examined the record of appeal and considered the arguments from the learned State Attorney. We wish to begin with the cautioned statement which was received in evidence as Exhibit P1. It is true, as rightly argued by the learned State Attorney that the same was procured in contravention of section 50 (1) (a) of the CPA which provides that:

> "S.50 *(1) For the purpose of this Act, the period available for interviewing the person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence".*

In the instant case, the appellant was taken under restraint on 22.09.2018 at about 17.00 pm but he was not interviewed and his statement (Exhibit P1) was not recorded till on the next day (23.09.2018) at about 10.00 am. It is plainly clear that the statement was recorded well outside the prescribed period of four hours. The omission to record a cautioned statement within the prescribed period of time is fatal. In the circumstances, the cautioned statement in question (Exhibit P1) is hereby expunged from the record.

Next, we now turn to the 2nd ground of appeal where it is being complained that the prosecution failed to prove the case against appellant. From the circumstances of this case, we think that the most important question of which this ground raises, is whether PW1, PW2 and PW3 properly identified the person who allegedly stopped them at Mlingoti Primary School and ravished PW1. It is not in dispute that prior to the incident in question neither of the three children knew the said person. The person was therefore, a stranger to them. Very unfortunately, the said children, when reporting the incident to PW4, did not give any description of that person. The children did not tell, for instance, his complexion, whether he was tall or short, the kind of clothes he had worn or his appearance.

Because no description of that person who had ravished PW1 was given to PW4, it is not known how PW4 expected to identify that person when he and his two boys mounted a search for him. We are of a settled mind that under the circumstances of this case the possibilities of mistaken identity cannot be overlooked. We have also noted that while the children claimed that the person who ravished PW1 identified himself as the Mlingoti Primary School's watchman, there is no evidence on record on whether the school had a watchman or not. The prosecution did not

even lead evidence to establish that the appellant was the school watchman or not and if he was, whether there was only one watchman.

We are of a considered view that the failure by PW1, PW2 and PW3 to give the description of the person who had ravished PW1 to PW4 was not consistent with the purported identification of the appellant at Mbesa bus stand by PW2 and PW3. It is trite principle of law that in order to act on the evidence of identification of a stranger, the witness must have first given the description of identification of that person. This principle was stated by the defunct Eastern African Court of Appeal in the case of **R. Mohamed bin Allui** (1947) EACA 72 where it was stated that:

> *In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given, first of all, of course by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given".*

Likewise, in **Cosmas Chaula v. Republic**, Criminal Appeal No. 6 of 2010, the Court stated that:

> *"... it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such suspect to a person whom he first reports the matter to him/her before such a person is arrested. The description should be on attire, worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect".*

Further, in its recent decision in **Ambwene Lusajo v Republic**, Criminal Appeal No. 461 of 2018 (unreported) where this Court faced the same scenario, the Court stated that:

> *"In the record before us, it is glaring that the victim was not familiar to the appellant. In that regard, it is trite law in order to act on the evidence of identification of a stranger the witness must have first given the description of that person"*

See also **Njamba Kulamiwa v. Republic**, Criminal Appeal No. 460 of 2007, **Juma Mwanja v Republic**, Criminal Appeal No. 309 of 2007, **Yohana Chibwingu v. Republic,** Criminal Appeal No. 117 of 2015 and **Hamis Ally &Three Others v. Republic,** Criminal Appeal No. 596 of 2015 (all unreported).

Basing on the above stated law, we are of a settled mind that since PW1, PW2 and PW3 did not give description of the culprit to PW4 or to any other person, their purported identification of the appellant was not sufficient. Their identification was not free from mistaken identity. Therefore, the 2nd ground of appeal has merits and we allow it. The case against the appellant was not proved beyond reasonable doubts. As this ground is sufficient to dispose of the appeal, we find no need of considering the last ground of appeal.

Accordingly, the appeal is allowed, the conviction is quashed and the sentence is set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

DATED at **IRINGA** this 1st day of October, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 1st day of October, 2021 in the presence of the Appellant in person, and Ms. Hope Charles Massambu, 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