IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 50 OF 2020

MUSSA MOSES JOHN .....1ST APPELLANT
ELIBARIKI RICHARD @ DAVOO .....2ND APPELLANT
NOEL MARTINE @ SHINYANGA.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Gwae, J.)

dated the 11th day of November, 2019

in

DC Criminal Appeal No. 08 of 2019

JUDGMENT OF THE COURT

28th November & 5th December, 2022

KEREFU, J.A.:

The appellants, Mussa Moses John, Elibariki Richard @ Davoo and Noel Martine @ Shinyanga (the first, second and third appellants respectively) together with Pascally Paul (the fourth accused), who is not a party to this appeal, were before the District Court of Babati jointly charged with the offence of gang rape contrary to sections 130 (1) and 131A (1), (2) of the Penal Code, (the Penal Code). It was alleged that, on 3rd day of December, 2017 at Mwinkasi Village within Babati District in Manyara

Region, the appellants, jointly and together unlawfully had sexual intercourse with E.T (name withheld), a girl of 18 years old without her consent. The appellants denied the charge laid against them. Trial ensued and at its conclusion, the fourth accused was acquitted but the appellants, each of them was found guilty, convicted and sentenced to life imprisonment.

In a nutshell, the prosecution case as obtained from the record of appeal is that, E.T, the victim who testified as PW4 stated that, on 3rd December, 2017, while on her trip to Mamire from Waloa, she hired the first appellant to ride her on a motorcycle for a consideration of TZS 3,000.00. Upon arriving at a junction, the first appellant told her that the motorcycle's tyre was flat and had to be fixed. As such, the first appellant took PW4 to his room while waiting for the said motorcycle tyre to be fixed but instead, he raped her. Having finished raping her, the second and third appellants appeared and they also raped her.

It was the further testimony of PW4 that, a moment later, around 22:00hrs, the fourth accused appeared and took her to a football ground and started beating her but shortly, the first appellant appeared and inquired from the fourth accused as to why he was beating PW4.

Thereafter, the first appellant together with the fourth accused took her back to the same room and started raping her again, and so is the second and the third appellants. PW4 stated further that, she knew the appellants for a long time, prior to the incident, and she had no conflict with them.

PW4 went on to state that, after the awful incident, the appellants let her free, and she went straight to a house near the football ground, where she found one Gabriel Malcel (PW1) and informed him what had happened to her. PW1 decided to take PW4 to the chairperson of the Hamlet, Emmanuel Nade (PW2) who was later joined by the ten-cell leader of that area one Magreth Baso (PW3). PW4 narrated the ordeal to them and they all went to the scene; the first appellant's room and found him inside. Upon being asked as to whether he knows PW4, the first appellant admitted that he knew her and she was her passenger.

In their testimonies, PW1, PW2 and PW3 supported the narration by PW4 and PW2 added that, at the scene, they found the first and the second appellants and then, they arrested them. The first appellant informed them that the third appellant and fourth accused person were at the fourth accused's room. The Chairperson of the Centre Hamlet one Faustine Umbu together with PW1 went to the said place and arrested the

third appellant and the fourth accused and brought them to the scene. PW2 stated further that the incident was reported to the Village Executive Officer who also reported the matter to police who arrived and took the appellants and the fourth accused to the police station.

On 4th December, 2017, PW4, after obtaining a PF3 from the police, was taken to the hospital for medical examination, where Dr. Frank Simo (PW6) conducted an examination and found that PW4's vagina had no bruises and the hymen was not intact with an irritating foul smell. PW6 filled the P.F.3 to that effect and the same was tendered in evidence as exhibit P1. No. G. 2660 DC Frank investigated on the incident and interrogated the appellants and the victim.

In their respective defences, the appellants dissociated themselves from the accusations levelled against them by raising the defence of *alibi*. In particular, the first appellant who testified as DW1 testified that, on 3rd December, 2017 he travelled to Iroda to attend to his ill child. He then, travelled from Iroda to Mamire where he arrived at 22:00hrs. While asleep, PW3 together with other leaders arrested him and later, brought him to the police station. In their testimonies, Veronica Athanas (DW6) and Juma Salim (DW7) respectively, supported DW1's assertion.

On his part, the second appellant, who testified as DW2, stated that, on 3rd December, 2017 from 07:00 to 18:00hrs he was grazing cattle and at 19:00hrs, he injected the head of cattle. Thereafter, he took dinner and went to sleep and found the first appellant already asleep. Then, at 02:00hrs, PW2 arrived and arrested them and took them to the Police station where they were interrogated for the rape incident and later arraigned before the trial court. To support his testimony, he summoned one Joseph Silas (DW5). In his testimony, DW5 stated that, on the fateful date he was with DW2 from 19:00 to 20:00hrs, then, around 21:00hrs he left him at Majengo Centre watching TV.

The third appellant testified as DW3, he stated that, on the material date he was sowing seeds at Maweni Gallapo up to 19:30hrs and then went to sleep. Later, he received a call from the fourth accused, who asked for his money and he actually, went and slept over at his place. While there, they were arrested together with the first appellant and brought to the police station on allegation of the rape incident. To support his assertion, the third appellant summoned Samwel Aminiel (DW8).

In sentencing the appellants, the trial court relied on the testimony of PW4, the victim whose evidence was corroborated by PW1, PW2, PW3 and

PW6. It found that the charge against the appellants was proved to the hilt. Thus, the appellants were found guilty, convicted and sentenced as indicated above.

The appellants' appeal before the High Court hit a snag, as the court dismissed the appeal and upheld the trial court's conviction and sentence meted against them. Undaunted and still protesting their innocence, the appellants have preferred the instant appeal predicated on seven (7) grounds which can conveniently be paraphrased as follows: **one**, failure by the first appellate court to comply with the mandatory provisions of section 214 (1) of the Criminal Procedures Act (the CPA); **two**, the appellants' conviction was based on a defective charge as there was variance on the location between the charge and the evidence adduced before the trial court; **three**, the evidence adduced by prosecution witnesses was tainted with contradictions, inconsistencies and discrepancies; **four**, the preliminary hearing was conducted contrary to section 192 (2) and (3) of the CPA; **five,** the appellants' defence was not considered; **six,** failure by the trial court and the first appellate court to find that the case against the appellants was fabricated; and **finally,** that, the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellants appeared in person whereas Ms. Lilian Aloyce Mmassy, learned Senior State Attorney assisted by Ms. Upendo Shemkole and Mr. Charles Kagirwa, both learned State Attorneys represented the respondent Republic.

When given an opportunity to amplify on the grounds of appeal, the appellants adopted their grounds of appeal and preferred to let the first appellant to elaborate the same on their behalf. As such, the second and the third appellants intimated that they would associate themselves with their colleagues' submission and might add more information or make further clarifications where necessary.

Elaborating on the first ground, the first appellant contended that, section 214 (1) of the CPA was not complied with as the case was tried successively by two Magistrates without the successor Magistrate assigning reasons for taking over the case and did not address the appellants on that provision. To clarify on this point, the first appellant referred us to page 34 of the record of appeal and cited the case of **Jamali Ahmed v. CRDB Bank Ltd** [2016] TLS 106. The second and third appellants joined hand with the first appellant's submission.

In response to this ground, Mr. Kagirwa challenged the appellants' complaint by arguing that the said provision was complied with. To justify his proposition, he referred us to page 34 of the record of appeal where the successor Magistrate clearly indicated the reason for taking over the case from the predecessor Magistrate. He further referred us to page 35 of the same record where it is clearly indicated that the appellants were addressed in terms of section 214 of the CPA. He argued further that, even if the said omission could have been noted, still, the appellants' complaint would have been baseless, because they have failed to state how they were prejudiced. To bolster his argument, he cited the case of **Bwanga Rajabu v. Republic,** Criminal Appeal No. 87 of 2018 (unreported).

Having considered the submissions made by the parties in the light of the record of appeal before us, we find that this is a straight forward issue as, it is apparent at pages 34 and 35 of the record of appeal that section 214 (1) of the CPA was well complied with as the reason for taking over the case was clearly stated and also the appellants were properly addressed on that provision. With respect, we find the submission by the first appellant, on this ground, to be misconceived and not supported by the record. We even find the case of **Jamali Ahmed** (supra), he cited to

us, distinguishable and not applicable in the circumstances of this appeal. As such, we find the first ground of appeal devoid of merit.

On the second ground, the first appellant faulted the lower courts for failure to detect that the charge was defective for being at variance with the evidence on the location where the offence was committed. He argued that, while the charge indicated that the offence occurred at Mwikansi Village, PW1 at page 18 of the record of appeal testified that PW4 told them that she was travelling from Waloa to Mamire and PW4 herself at page 35 of the same record testified that, on her way to Mamire she was dropped at the junction of the centre. He also added that, PW5, at page 41 also testified that, PW4 told him that she hired the motorcycle from Waloa to Mamire. According to him, the pointed-out discrepancies were fatal irregularities that had rendered the charge incurably defective. To support his proposition, he referred us to the cases of **Godfrey Simon & Another v. Republic,** Criminal Appeal No. 296 of 2018 and **Killian Peter v. Republic**, Criminal Appeal No. 508 of 2016 (both unreported). The second and third appellants associate themselves with the submission of the first appellant.

In his response, Mr. Kagirwa challenged the submission by the first appellant by contending that the charge was not defective and it was not at variance with the evidence on the location where the offence occurred. To clarify on his argument, the learned counsel referred us to page 1 of the record of appeal and argued that the charge clearly indicated that the incident happened at Mwikansi Village and the same was corroborated by the evidence of PW1, who testified that he lives and conducts his business at Mwinkantsi Village and was the first person to have been approached by PW4 immediately after the incident for assistance. That, the evidence of PW1 was corroborated by PW2 and PW3, the Chairperson and ten-cell leader of that area, respectively, who handled the matter, as they all testified that they reside at Mwinkantsi Village. It was his argument that, the pointed-out variance is only a matter of pronunciation, thus curable under section 388 of the CPA. To support his proposition, he cited the case of **Shabani Haruna @ Dr. Mwagilo v. Republic,** Criminal Appeal No. 396B of 2017 (unreported).

In a brief rejoinder, the third appellant argued that, since the evidence adduced by the prosecution witnesses was at variance with the

charge, it is not clear as to whether the offence was committed at the junction of the centre or at Mwikansi Village.

On our part, having revisited the evidence on record and the particulars of the offence indicated at page 1 of the record of appeal, we agree with Mr. Kagirwa that the complaint by the appellants that there was variance between the charge and the evidence on the location where the offence was committed is baseless and not supported by the record. It is evident that the inconsistencies and variance they pointed-out in the evidence of PW1, PW4 and PW5, only indicated the intended route by PW4 that was from Waloa to Mamire and not the place where the offence was committed. We even find the submission by the third appellant that, it was not clear as to whether the offence was committed at the junction of the centre or Mwikansi Village to have no basis, because according to the evidence of PW4 found at page 33 to 34 of the record, the said junction is the place where the first appellant notified her that the motorcycle tyre was flat and need to be fixed, which again, not the place where the offence was committed. In the event, we find the second ground of appeal without merit.

On the third, sixth and seventh grounds, the first appellant argued that the case against them was not proved to the required standard because the evidence of the prosecution witnesses contains material contradictions, inconsistencies and discrepancies hence lack credibility to warrant any conviction. He clarified that, PW2 at page 23 of the record of appeal, upon being cross-examined by the fourth accused testified that, PW4 claimed that at the scene of crime, she screamed but the fourth accused held her mouth, while PW4 at page 39 of the same record, testified that she failed to shout because she had a low voice that could not go far.

Elaborating further on another set of contradictions and inconsistencies, the first appellant referred us to page 19 of the record of appeal where PW1 stated that when they interrogated him, as to whether he knew PW4 prior to the incident, he responded that he knew her, while PW2 at page 22 of the same record testified that, he (the first appellant) denied to have known PW4 prior to the incident. It was his further submission that at page 38 of the record of appeal, PW4 testified that the first person to rape her was him followed by the second appellant and then the third appellant, while at page 41 of the same record, PW5 testified that

PW4 told him that the first person to rape her was him followed by the second and third appellants and then, him again. It was his argument that, since what was testified by these witnesses raised serious doubts on the authenticity of the prosecution case, the same should be resolved in favour of the appellants. To bolster his position, he cited the cases of **Shabani Gervas v. Republic,** Criminal Appeal No. 457 of 2019 and **Mussa Mustapha Kusa & Beatus Shirima @ Mangi v. Republic,** Criminal Appeal No. 51 of 2010 (both unreported). The second and third appellants joined hand with the first appellant's submission.

In his response, Mr. Kagirwa argued that the pointed-out contradictions and inconsistencies are minor defects which do not go to the root of the matter, because they do not dispute the fact that PW4 was raped by the appellants. To support his proposition, he cited the case of **Shabani Haruna @ Dr. Mwagilo** (supra) and **Emmanuel Lyabonga** (supra). He then, forcefully and relying on the principle established by this Court in proving sexual offences, argued that the prosecution managed to prove the case against the appellants to the required standard through the evidence of PW4, the victim who was the best witness and an eye witness to the incident. That, the evidence of PW4 could be used by the trial court

to mount the appellants' conviction even without any corroboration, as long as the court was satisfied that the witness was telling the truth. He however added that, the evidence of PW4 was corroborated by PW1, PW2, and PW3. He insisted that all these witnesses were truthful and credible witnesses. He thus urged us to disregard the pointed-out contradictions, which he insisted that they are only minor defects which do not go to the root of the matter. He further argued that the appellants' complaint is an afterthought because during the trial they did not cross-examine PW1, PW2, PW3 and PW4 on those aspects. He finally concluded that the case against the appellants was proved to the required standard.

Having heard the contending arguments by the parties, we wish to state that, we are not losing sight that, this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis-directions or non-directions on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149, **Salum**

Mhando v. Republic [1993] TLR 170 and **Mussa Mwaikunda v. Republic** [2006] TLR 387.

In the instant appeal, having considered the contradictions, discrepancies or inconsistencies complained of, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW1, PW2, PW3 and PW4. For instance, the issues on whether PW4 screamed and/or who was the first to undress and rape her had no any bearing and does not water down the fact that PW4 was raped twice by all the appellants. By any means, we cannot expect PW1, PW2, PW3 and PW4 to match in their testimonies in all aspects. We have however noted that, the said discrepancies were addressed by the first appellate court and ruled out that they are minor contradictions and discrepancies which do not go to the root of the matter and dispute that PW4 was raped by the appellants. We, like the first appellate court, are of the considered view that the testimonies of PW1, PW2, PW3 and PW4 cannot be affected by the minor contradictions, discrepancies or inconsistencies complained of. In the case of **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported), when considering similar discrepancies in witnesses' testimonies the Court at page 7 quoted

with approval a passage of the learned authors of Sarkar, **The Law of Evidence** 16th Edition, 2007 that:

> *"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 normal and 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 parties' case, material discrepancies do."*

Therefore, since in this appeal we have already observed and labeled the pointed discrepancies to be trifling and minor, the same cannot corrode the evidence adduced and shake the version of the prosecution's case.

It is equally on record, and as correctly submitted by Mr. Kagirwa that, during the trial, the appellants did not cross examine PW1 on those aspects. It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted it 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 find the third, sixth and seventh grounds of appeal devoid of merit.

Reverting to the fourth ground of appeal, it was the appellants' complaint that during the preliminary hearing, the trial court did not comply with the provisions of section 192 (3) of the CPA as the memorandum of undisputed matters was not read out to them. To clarify on this point, the first appellant referred us to page 12 of the record of appeal. In his response, Mr. Kagirwa challenged the appellants submission by referring us to pages 14 to 16 of the same record of appeal and argued that the said complaint is not supported by the record, because the trial Magistrate complied with the said provisions and finally both appellants signed the memorandum of undisputed facts.

Having perused the record of appeal and considered the submissions advanced by the parties, we find no difficult to agree with Mr. Kagirwa that the appellants' complaint on this ground is baseless and not supported by the record. It is evident at pages 13 to 16 of the record of appeal that after the facts of the case were stated before the trial court, each one of the

appellants denied and admitted some of the facts; and finally, all appellants, the prosecution and the trial Magistrate signed the memorandum of undisputed matters. Then, the trial Magistrate, at page 16 of the same record, clearly indicated that section 192 (2) and (3) of the CPA was complied with. We equally find the fourth ground with no merit.

On the fifth ground, the first appellant contended that their defence was not properly considered as both lower courts only considered it in general terms and rejected it without assigning reasons for that rejection. The second and third appellants joined hand with the first appellant's submission.

Mr. Kagirwa, resisted this argument with some force and to our mind rightly so, by referring us to pages 76 and 77 of the record of appeal and argued that the appellants' defence was adequately considered. Having scanned the record of appeal in some considerable detail, we agree with the submission by the learned State Attorney that, indeed, the appellants' defence was adequately considered by both lower courts at pages 76 and 77 as well as 113 and 114 and found unable to cast doubt on the prosecution case. In the event, we also find the fifth ground with no merit.

In conclusion and 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 appellants was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and hereby dismiss it in its entirety.

DATED at **ARUSHA** this 2nd day of December, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Judgment delivered this 5th day of December, 2022 in the presence of the Appellants in person and Mr. Charles Kagirwa, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL