IN THE COURT OF APPEAL OF TANZANIA
AT SUMBAWANGA

(CORAM: JUMA, C.J., WAMBALI, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 71 OF 2019

RICHARD SICHONE .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Sambo, J.)

Dated the 7th day of May, 2014
in
DC. Criminal Appeal No. 34 of 2012

JUDGMENT OF THE COURT

19th & 21st September, 2023

WAMBALI, J.A.:

The appellant, Richard Sichone was arraigned before the District Court of Sumbawanga at Sumbawanga where he was charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16. It was alleged in the particulars that on 3rd March, 2008 at night time at Sopa Village within Sumbawanga District in Rukwa Region, the appellant had carnal knowledge of a boy aged seven years against the order of nature. For convenience, we will refer to the boy as "the victim".

The prosecution case was supported by the evidence of four witnesses; namely, D. 5286 D/CPL Sitiel (PW1), Richard Jacob (PW2), Charles Msangawale (PW3) father of the victim, Richard Mafunda (PW4) a doctor, together with the cautioned statement of the appellant and the PF3 which were admitted as exhibits P1 and P2 respectively.

It is unfortunate that the victim was not among the witnesses who testified for the prosecution at the trial because he was disqualified by the trial magistrate on the ground that he did not know the meaning of an oath nor possessed sufficient intelligence to speak the truth.

Basically, the substance of the prosecution was from the evidence of PW1, PW3 and PW4 together with the exhibits stated above. PW1 testified that the appellant approached him on 3rd March, 2008 at his pork shop in Sopa Village and wanted to buy roasted pork meat, a request which was compiled with by him. Later, the appellant asked PW3 for accommodation because he had no relative in that village. After a brief dialogue, PW3 allowed him to spend a night in the sitting room of his house with the victim. At 5:00 hours in the morning, PW3 heard the victim crying and complained that he had been pierced with hard object. When he woke up and entered the place where the appellant and the victim slept, he found the appellant naked and shivering while the victim was crying and stated that he was bleeding. It was further the evidence of

PW3 that the appellant confessed that he dreamt that he slept with his wife at Kasitu. PW3 then sent the appellant to the village office and later he was sent to Matai Police Station. The victim was sent to hospital for examination after he was issued with a PF3.

The evidence of PW1, a police officer, was that after the appellant was arrested, he recorded a cautioned statement in which he confessed to have committed the offence charged with in the presence of PW2 who he called to witness the incident. PW1 tendered the cautioned statement which was admitted as exhibit P1.

PW4, a doctor at Matai Health Centre examined the victim on 4th March, 2023 and found dark clotted blood on the external orifice with some few bruises and that a little finger was easily admitted in the anal canal. He thus formed an opinion that something had pushed through the anus of the victim. PW4 tendered the PF3 which was admitted as exhibit P2.

The appellant strongly denied the allegation. In his defence, though he admitted to have spent a night at PW3's sitting room on the material date, he maintained that he slept alone and the victim slept in the room with PW3, his wife and other children. He testified that in the morning he woke up and went to a cafe for breakfast. On return to PW3's house, he

was surprised to be told that the victim had been injured and he was the prime suspect. He testified that following the allegation, he was sent to the Village Executive Officer (VEO) and later to Matai Police Station where he was beaten and forced to speak the truth and admit the offence.

At the height of the trial, the trial magistrate believed the prosecution story and disbelieved that of the appellant. He thus found the appellant guilty, convicted and sentenced him to imprisonment for thirty-five years.

The appellant's first appeal to the High Court was dismissed in its entirety and the sentence of imprisonment for thirty-five years was substituted with life imprisonment, hence this second appeal.

The appellant's complaints against the decision of the High Court are expressed through the memorandum of appeal comprising four grounds of appeal.

At the hearing of the appeal before us, the appellant urged the Court to consider his grounds of appeal and opted to let the counsel for the respondent Republic to respond to his grievances. In the end, he prayed that his appeal be allowed leading to his acquittal.

The respondent Republic was represented by Mr. Paschal Marungu, learned Principal State Attorney assisted by Mr. Gregory Muhangwa,

learned State Attorney. Mr. Marungu outrightly supported the appellant's appeal on two grounds together with another ground which he sought was important though it was not raised in the memorandum of appeal. The respective three grounds are thus compressed as follows:

1. *That the cautioned statement of the appellant was wrongly admitted and relied in evidence while the requirement of the law was not complied with.*
2. *That the PF3 was wrongly relied in evidence while its contents were not explained after it was cleared for admission.*
3. *That the prosecution case was not proved beyond reasonable doubt.*

Submitting in respect of the first ground, Mr. Marungu stated that according to the record of appeal after PW1 prayed to tender the cautioned statement the appellant objected on the contention that it was not voluntarily made. To this end, he argued that since the appellant objected to the admission of the cautioned statement, the trial magistrate had the obligation to conduct an inquiry to determine whether the same was voluntarily made. To support his contention, he made reference to the decision in **Nyerere Nyague v. The Republic,** (Criminal Appeal No. 67 of 2010) [2012] TZCA 103 (21 May 2012, TANZLII). In the circumstances, he submitted that the omission by the trial court occasioned injustice to the appellant as the cautioned statement was

wrongly admitted in evidence and ultimately formed the basis of conviction. He thus prayed that the cautioned statement be expunged from the record.

According to the record of appeal, it is plain that though the appellant objected to the admission of the cautioned statement on the contention that he was tortured and therefore it was not voluntarily made, the trial magistrate simply overruled the objection and admitted it as exhibit P1 even before he sought the response from the prosecution side. Indeed, it is a requirement of the law that once there is an objection on the voluntariness of the confession statement, the trial court must stop the proceedings and conduct an inquiry in the case of subordinate courts. In **Nyerere Nyague v. The Republic** (supra) the Court stated as follows, among others:

> *"...Fourthly, if objection is made at the right time, the trial court must stop everything and proceed to conduct a trial within trial (in a trial with assessors) or an inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted in evidence (see **TWAHA ALLY AND 5 OTHERS V. R.** Criminal Appeal No. 78 of 2004 (unreported).... And **lastly**, everything being equal the best evidence in a criminal trial is a voluntary confession from the accused*

himself (see ***PAULO MASUKA AND 4 OTHERS V.R.*** *Criminal Appeal No. 110 of 2007 (unreported)."*

It is in this regard that in **Seleman Hassan v. The Republic**, Criminal Appeal No. 364 of 2008 (unreported), the Court stated that it is also true that a statement will be presumed to have been voluntarily made until objection is made to its admissibility by the defence.

In the case at hand, we entirely agree with the submission of Mr. Marungu that since an inquiry into the voluntariness of the cautioned statement of the appellant was not conducted by the trial court after the objection was raised, it was wrongly admitted and relied in evidence in grounding the conviction. Consequently, we discount exhibit P1 from consideration in determining this appeal. Ultimately, we allow the first ground of appeal.

With regard to the second ground of appeal, Mr. Marungu submitted that though the PF3 was properly admitted as exhibit P2, its contents were not read over and explained to the appellant. The omission, he argued, prevented the appellant to know what was contained in the report of PW4 and it was contrary to the requirement of the law. In this regard, relying in the decision in **Sospeter John v. The Republic**, (Criminal Appeal No. 237 of 2020) [2021] TZCA 329 (28 July, 2021, TANZLII), he urged the Court to discount the PF3.

According to the record of appeal, we entertain no doubt that the contents of the PF3 was not read over and explained after it was admitted as exhibit P2. In **Robinson Mwanjisi and Three Others v. The Republic** [2003] T.L.R. 218, the Court emphasized that the exhibit must be cleared for admission and then be admitted before being read out.

Moreover, in **Jumanne Mohamed and 2 Others v. The Republic**, Criminal Appeal No. 534 of 2015 (unreported), the Court held that:

> *"It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court. In* ***Thomas Pius*** *the documents under discussion were Post Mortem Report, cautioned statement and sketch map. We relied on our previous unreported decision of SUMNIAMMA AWEDA v. THE REPUBLIC, Criminal Appeal No. 393 of 2013 to hold that the omission to read out was a fatal irregularity as it deprived the parties to hear what they were all about."*

On the other hand, in **Dotto Salum Butwa v. The Republic**, Criminal Appeal No. 536 of 2015 (unreported), the Court stated:

> *"The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained in order to make an*

informed defence. Failure to read the contents of the cautioned statement after it is admitted is a fatal irregularity."

From the foregoing settled position of law, we agree with Mr. Marungu that the PF3 which was admitted as exhibit P2 has to be discounted, as we hereby do. In the result, we allow the second ground of appeal.

In support of the third ground of appeal, Mr. Marungu submitted that the prosecution evidence was based on four witnesses. However, he stated, if the Court finds that the cautioned statement (exhibit P1) was wrongly admitted and relied in evidence and discounts it, as we have found and held, the evidence of PW1, a police officer, who recorded it and PW2 who was present when it was recorded, will not be useful to support the story that the appellant confessed to have committed the offence.

He argued further that even the evidence of PW4 will be of less weight if the Court discounts the PF3 (exhibit P2), as we have done, because its contents were not read over and explained after it was admitted. With regard to the evidence of PW3, he submitted that though he immediately responded to the scene of crime, he did not sufficiently disclose whether there was penetration into the anus of victim. This is because, he stated, PW3 simply stated that the victim told him that he

was pierced by hard object and that he was bleeding without stating which part of the body had been affected. In his view, in the absence of the evidence of the victim, PW3 cannot be a reliable witness to prove penetration. Besides, he added, PW4 oral evidence on penetration cannot be considered alone without linking with that of PW3. He therefore, urged the Court to allow the third ground of appeal because based on the remaining evidence of the prosecution on record the case was not proved to the required standard.

We are alive to the position of law that conviction can be sustained even without the evidence of the victim of crime. For this stance, see for instance the decision in **Haji Omary v. The Republic,** (Criminal Appeal No. 307 of 2009) [2015] TZCA 313 (30 September 2015, TANZLII) and **Fuku Lusamila v. The Republic**, (Criminal Appeal No. 12 of 2014) [2015] TZCA 117 (4 December 2015, TANZLII). Particularly, in **Haji Omary v. The Republic** (supra), the Court stated among others that:

> *"The law recognizes that there are instances where the charges may be proved without victims of crime testifying in court. Take for example murder, where the victims are deceased, senility, tender age or decease of mind may present a victim from testifying in court (see section 127 of the Evidence Act) but this does not*

mean that a charge cannot be proved in the absence of the victim's testimony...."

Nevertheless, in the case under consideration, we are of the settled view that after discounting the cautioned statement (exhibit P1) which was substantially relied upon by the trial court and the High Court to ground and confirm the conviction of the appellant, the evidence of PW1 and PW2 which was based on the alleged confession cannot be of assistance to the prosecution case. Moreover, having discounted exhibit P2 (the PF3), what remains is the oral evidence of PW4, the doctor who examined the victim. However, PW4's evidence cannot be solely relied upon to ground conviction as it has to be supported by other evidence on record, more so in the circumstances of this case where the victim did not testify (see for instance, **Ally Mohamed Makupa v. The Republic**, Criminal Appeal No. 2 of 2008 (unreported). It is in this regard that in **Lazaro Kalonga v. The Republic**, Criminal Appeal No. 348 of 2008 (unreported), the Court stated:

> *"We are mindful of the fact that lack of medical evidence does not necessarily, in every case, mean that rape is not established where all other evidence points to the fact that it was committed (see for example* ***Prosper Mjoera Kisa v. The Republic****, Criminal Appeal No. 73 of 2003 and* ***Salu Sosoma v.***

***The Republic**, Criminal Appeal No. 31 of 2006 both unreported)."*

Though the decision in **Lazaro Kalonga** (supra) concerned the offence of rape, we are settled that it equally applies to unnatural offence in which medical evidence may also be important.

Before concluding our deliberation on the fate of PW4's oral evidence on record, we now turn to consider the evidence of PW3. It is noteworthy that PW3's evidence on the matter is fairly brief. To appreciate our deliberation, we deem it appropriate to reproduce the most relevant part of PW3's testimony at the trial court as depicted in the record of appeal thus:

> *"I asked him that you will sleep with my son. At 5:00 morning we heard our son crying that he is dying because he has been pierced with hard object. We wake up to the sitting room. I took the touch, when I light at him, I saw him naked and he was shivering. When I asked the son, he said that he is bleeding. I asked Richard, he confessed that he dreamt that he slept with his wife at Kasitu. We decided to call our neighbour. I asked him to interrogate him, he asked our neighbour to seek pardon from us. I then took Richard to Village Office. At the office we were ordered to take him to Matai Police Station, then we took the victim to hospital..."*

From the reproduced part of the testimony, there is no indication that the victim told PW3 that the appellant penetrated his penis into the anus. What PW3 stated is that the victim told him that he was bleeding. Unfortunately, as per PW3's evidence, he was not told which part of the victim's body was pierced by hard object that resulted in the said bleeding. More importantly, there is no indication from the evidence of PW3 that he inspected the victim's anus to see what had transpired before he sent him to hospital. Moreover, though PW3 testified that he slept in the room with his wife on the material date and consistently implied that they were together at the scene of crime, there is no indication that she was involved in any way during the interrogation of the appellant in which the neigbour was also involved. The wife could have been a material witness to support the evidence of PW3 in the absence of that of the victim. Besides, the prosecution did not also summon the neighbour who was called by PW3 and asked to interrogate the appellant and that he allegedly asked pardon through him.

In the circumstances of this case, we must emphasis that though in terms of section 143 of the Evidence Act, Cap. 6 no number of witnesses is required to prove a fact (see **Yohanis Msigwa v. The Republic** (1990) T.L.R. 148), it is also the law that the court may draw adverse inference in certain circumstances where no sufficient reasons are given

for non-summoning of material witnesses as held by the Court in **Aziz Abdalla v. The Republic** (1991) T.L.R. 71.

In the case at hand, we are of the view that the evidence of the wife of PW3 and a neighbour would have assisted the prosecution to clarify some missing links in the evidence of PW3 and indeed support it in the absence of evidence the victim. It is clear from the evidence on record that the issue of penetration was not proved by PW3. In the result, the oral medical evidence of PW4 could not solely be relied upon to support the unreliable evidence of PW3 to prove the issue of penetration as required by law.

At this juncture, we wish to associate ourselves with the observation of the Court in **Mathayo Ngalya @ Shaban v. The Republic**, Criminal Appeal No. 170 of 2006 (unreported) that since the essence of the offence of this nature is penetration, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that the offence was committed without elaborating what actually took place. It is therefore the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence with which the accused is charged.

On the other hand, we are of the view that since the cautioned statement has been discounted, the evidence of PW3 that the appellant orally confessed to have committed the offence cannot be taken wholesale. This is because in the absence of the supporting evidence of the wife and a neighbour who was allegedly asked to communicate to him the request to be pardoned by PW3 and his wife, there is no other evidence on record to support the fact that the appellant orally confessed to have committed the offence. In the circumstances of this case, the alleged confession cannot be backed by other evidence in absence of the cautioned statement. Black Law Dictionary 8th Edition defines confession to mean:

> *"An acknowledgment in express words by the accused in a criminal case of the truth of the main fact charged or of some essential part of it."*

To this end, in **Anyungu and Others v. Republic** (1968) EA 239 the defunct East African Court of Appeal stated that:

> *"A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried."*

In the circumstances, had the first appellate judge properly analyzed the evidence of the prosecution and considered the appellant's defence on record, he would not have come to the concurrent finding with the trial

court that the appellant was guilty of the offence charged. We thus agree with Mr. Marungu that the prosecution case was not proved beyond reasonable doubt. Consequently, we allow the third ground of appeal.

In the result, we allow the appeal in its entirety, quash conviction and set aside the sentence. We further order that the appellant be released from custody unless held for other lawful causes.

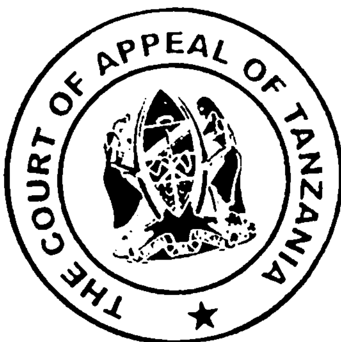
DATED at **SUMBAWANGA** this 21st day of September, 2023.

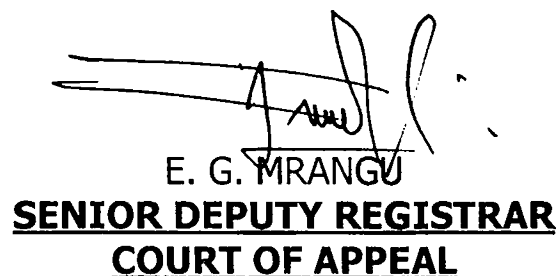
I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 21st day of September, 2023 via video conference from Sumbawanga Remand Prison in the presence of appellant in person and Mr. Gregory Muhangwa, learned State Attorney for the respondent is hereby certified as a true copy of the original.





E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL