IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 414 OF 2020

KASTULI CHARLES @ AKOONAY .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Court of the Resident Magistrate of Arusha at Arusha)

(Mahumbuga, Ext. Jur.)

dated the 23rd day of June, 2020

in

Criminal Appeal No. 26 of 2020

JUDGMENT OF THE COURT

18th & 26th September, 2023

MWARIJA, J.A.:

In the District Court of Karatu, the appellant, Kastuli Charles @ Akonaay was charged with the offence of rape contrary to ss. 130 (1), (2) (e) and 131 (3) of the Penal Code, Chapter 16 of the Revised Laws. It was the prosecution's case that, on 20th August, 2018 at about 12:00hrs at Endabash Village within Karatu District in Arusha Region, the appellant had carnal knowledge of "PD" (name abbreviated for the purpose of hiding her identity), a girl child aged seven (7) years.

The appellant denied the charge and therefore, charged with the task of proving its case, the prosecution called a total of seven witnesses to testify. On his part, the appellant depended on his own evidence in defence.

The facts of the case, the decision of which has given rise to this appeal, may be briefly stated as follows: Until the material time of the incident, PD (the victim) was a standard one pupil at Endabash Primary School. On the date of the incident, she was on the way from school going back home. She had left school with her friend and passed at the home of one Qamara where they ate food and thereafter, she left alone. While on the way, she met a young person (the culprit) who was not known to her. That person lured her to enter into the nearby maize farm. He told her to enter into that farm and cut up cornstalks for him. She refused on account that the farm did not belong to her family. Realizing that his trick had failed, the culprit decided to get hold of the victim and carried her into the farm where he undressed her underwear and proceeded to rape her.

After that traumatizing incident on her, the victim left and went back to the home of the said Qamara whereupon she reported the incident. Incidentally, at the victim's home, her mother had started to

get worried because it was already at 16:00 hrs and the victim had not returned home from school, which was not usual. She thus called the victim's father, Daniel Akoonay (PW1) who was attending a meeting at the school where the victim was studying. He informed his wife that she met the victim and her friend on the way from school while he was going for the meeting. Both parents started to inquire from the neighbours and relatives on the whereabouts of the victim. In the process, PW1 met one Yohana Stephano (PW3) who disclosed that the victim was at his grand parents' home and that his grandmother, Elizabeth Yakobo (PW2) had sent him to relay that information to him (PW1).

PW1 went there and after the victim and PW2 had narrated the incident, the search for the culprit began. According to PW2 the culprit was seen entering the house of one Nichodemus Joseph (PW5). He was seen by PW3 emerging from the scene of crime (the maize farm). PW1 contacted PW5 who was attending the meeting at the school and asked him to offer assistance so that the suspect could be apprehended. PW5 responded and went to his home together with PW1 but they did not find the suspect. It transpired to them however, that the suspect was the appellant who was the employee of PW5. According to PW5's wife,

the appellant had gone to take bath at the nearby river. PW1, PW5 and the search team proceed there and arrested the appellant. After his arrest, he was taken to police station and was later charged as shown above.

At the police station, WP 11777 D/C Sauda (PW7) recorded the appellant's cautioned statement. According to her evidence, she did so on 31/8/2018. The recording was done in the office in which there were other police officers who were interrogating other suspects. The cautioned statement was admitted in evidence as exhibit P2 after inquiry had been conducted following the objection raised by the appellant on its admissibility.

In her evidence, the victim who testified as PW4, told the trial court that, on the material date, when she met the appellant at the scene of crime, and after his attempts to trick her to enter into the maize farm had failed, he carried her into the farm, undressed her underwear and thereafter also undressed his trousers and shorts. He then forcefully inserted "kitu yake" into her "chururu", meaning that the appellant inserted his male organ into the victim's female organ. She said that, as a result, she bled and when she tried to shout, the appellant threatened her that she would be eaten by a lion. It was her

further evidence that, after having finished ravishing her, the appellant slept beside her and at that point in time, she left and went back to Qamara's home and reported the incident to PW2.

On the same date of the incident, the victim was taken to Karatu Health Centre where she was examined by Dr. Amaniel William Msemu (PW6). In his examination, the witness said, he found that the victim had bruises and blood on her *labia minora*. He found further that, her hymen was ruptured. His conclusion was that, the victim was penetrated with a blunt object. He tendered the medical report contained on the PF3 and the same was admitted in evidence as exhibit P1.

In his defence, the appellant distanced himself from the offence. He testified that, on 20/5/2018 he entered into employment contract with PW1 to work for him in his bricks making project. According to the appellant, he was to be paid TZS 100.00 for every brick which he made. It was his further evidence that, after having worked and produced a total of 7000 bricks, he demanded to be paid TZS 700,000.00 being the money due to him for the work. PW1 did not however, pay him, instead he allegedly required the appellant to continue working, the request which he refused and quitted the work done. It happened later on 29/8/2018 that he met PW1. The appellant reminded him of the money

but he asked the appellant to wait for him for a few minutes. When PW1 returned he was in the company of police officers and without being informed of the reasons, those police officers arrested him. When he was cross-examined, he admitted that he was staying with PW5 who had built a hut for him to stay in. He denied having recorded any statement at the police.

In his judgment, the learned trial Resident Magistrate found that the case against the appellant had been proved beyond reasonable doubt. He relied on the evidence of PW4 whom he found to be credible as well as the evidence of PW2 and PW3 to the effect that they saw the appellant getting out of the maize farm and went to the house of PW5 where the appellant was residing. The learned trial Resident Magistrate acted also on the appellant's cautioned statement.

With regard to the appellant's defence that the charge against him was a result of a grudge between him and PW1 following the former's demand for payment of the money owed to him by PW1, the trial court found that defence to be an afterthought, particularly so because, he did not cross-examine the prosecution witnesses on that aspect.

Having found the appellant guilty of the offence, the trial court proceeded to sentence him to life imprisonment. He was aggrieved by the decision of the trial court and thus appealed to the High Court. The appeal was however, transferred to the Resident Magistrate's Court of Arusha to be heard by Mahumbuga, Resident Magistrate with Extended Jurisdiction (RM-Ext.Jur.). The learned RM-Ext. Jur. upheld the decision of the trial court. She was satisfied that the case against the appellant was proved beyond reasonable doubt and thus dismissed the appeal.

The appellant was further aggrieved hence this second appeal which is predicted on ten grounds, seven of which were raised in the memorandum of appeal filed on 8th August, 2022 and the other three grounds which were raised in the supplementary memorandum filed on 15th September, 2023. The grounds may be paraphrased as hereunder:

1. That, the learned appellate Magistrate erred in law and fact in upholding the decision of the trial court while the appellant's conviction was based on a defective charge.

2. That, the learned appellate Magistrate erred in law and fact in sustaining the appellant's conviction

while the trial court had acted on the evidence of PW4 which was received in contravention of s. 127 (2) of the Evidence Act, chapter 6 of the Revised Laws.

3. That, the learned appellate Magistrate erred in law and fact in failing to find that the appellant was wrongly convicted because the trial court acted on the evidence of a dock identification.

4. That, the learned appellate Magistrate erred in law and fact by upholding the appellant's conviction while the trial court had acted on the evidence of a cautioned statement which was obtained contrary to the provisions of s. 50 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws.

5. That, the learned appellate Magistrate erred in law and fact in upholding the appellant's conviction while the trial court had acted on the evidence of PW3 which, instead of being received in accordance to s. 198 (1) of the Criminal Procedure

Act, chapter 20 of Revised Laws, it was received under s. 127 (2) and (4) of the Evidence Act, chapter 6 of the Revised Laws. Hence unsworn evidence while the witness was not a child of tender age.

6. That, the learned appellate Magistrate erred in law and fact in upholding the appellant's conviction while the case against him was not proved beyond reasonable doubt.

7. That, the learned appellate Magistrate erred in law and fact is upholding the conviction of the appellant while his conviction was based on the evidence of PW7 which was not valid because, being the investigator of the case, did not qualify to record the appellant's cautioned statement.

8. That, the learned appellate Magistrate erred in law and fact in failing to find that the appellant's cautioned statement was invalid because its certification was made under inapplicable provision

and further, because it was not re-admitted in evidence at the trial.

9. That, the learned appellate Magistrate erred in law and fact failing to find that, the appellant was not furnished with the information and the statement made by the person who gave the information leading to institution of the case against the appellant hence the breach of s. 9 (3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws.

10. That, the learned appellate Magistrate erred in law and fact in failing to find that, the appellant was deprived of his right to be taken to court within the period of 14 days from the time he was taken into police custody hence a breach of s. 32 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws.

At hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms.

Tarsila Asenga assisted by Ms. Upendo Shemkole, both learned Senior State Attorneys.

When he was called upon to argue his grounds of appeal, the appellant opted to hear first, the respondent's arguments in reply to his grounds of appeal and thereafter make a rejoinder. However, when he was given the opportunity to make his rejoinder after the learned Senior State Attorney's reply submission, the appellant did not have anything substantial in response thereto. He instead, made arguments clarifying his grounds of appeal.

In the course of hearing, the appellant conceded that contrary to the contents of his 5th ground of appeal, despite the shown irregularity, PW3 had testified on oath. He therefore, abandoned that ground of appeal.

On the 1st ground of appeal, the appellant argued that, there is variance between the charge and evidence as regards the place at which the offence was committed. The learned Senior State Attorney opposed that contention. She argued that, the same complies with the requirements stipulated under s. 132 of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA).

Having gone through the evidence and the charge, we could not find merit in the appellant's complaint. According to the charge sheet, the offence was committed at Endabash Village within Karatu District. None of the witnesses testified to the effect that the offence was committed elsewhere other than at the place stated in the charge sheet. We thus do not find any variance between the charge and evidence. This ground lacks merit. It is thus hereby dismissed.

In the 2nd ground, the appellant challenged the procedure used in recording the evidence of the victim (PW4). He argued that, her evidence was not taken in accordance to the provisions of s. 127 (2) of the Evidence Act, Chapter 6 of the Revised Laws (the Evidence Act). The gravamen of his complaint is that, the child was not asked simple questions to ascertain the manner in which her evidence would be taken. Citing the case of **John Mkorongo James v. R.,** Criminal Appeal No. 498 of 2020 and **Juma Hassan v. R.,** Criminal Appeal No. 458 of 2019 (both unreported), the appellant submitted that, the omission rendered PW4's evidence invalid.

Ms. Asenga's reply to the appellant's submission on that ground was that, under s. 127 (2) of the Evidence Act, that procedure is not necessary. She stressed that, since the witness promised to tell the

truth, that provision was complied with and therefore, PW4's evidence is valid. The learned Senior State Attorney cited the case of **Raphael Ideje @ Mwanahapa v. The Director of Public Prosecutions,** Criminal Appeal No. 230 of 2019 (unreported) to bolster her argument.

Having considered the submissions of the appellant and the learned Senior State Attorney, we hasten to observe that, since from the record, PW4 promised to tell the truth and not lies thus having complied with the provisions of s. 127 (2) of the Evidence Act, the fact that the trial court did not ask her questions to determine the manner in which she would give evidence does not have any effect as regards the validity of her evidence. This ground is thus equally devoid of merit.

As for the 4th ground in which the appellant complained that the cautioned statement was recorded in contravention of the law, Ms. Asenga conceded to that ground on account that, it was recorded by PW7 in the presence of other police officers. Indeed, the fact that exhibit P2 was recorded in the office in which there were other police officers taking the statements of other suspects was admitted by PW7 in his evidence. It cannot be said therefore, that the statement of the appellant was given voluntarily. See the case of **Bakari Ahmad @**

Nakamo and Another v. Republic, Criminal Appeal No. 74 of 2019 (unreported). In that case, the Court observed as follows; -

> *"...PW1 and PW2 who recorded the statements of the 1st and 2nd appellants did so while other police officers were also present in the same room.... It is our firm conviction that, the action of recording the appellants' statements in the presence of the other police officers has prejudiced the appellants in two ways; first;* ***it cannot be rules out that the appellants were not free agents when recording their statements.*** *Secondly, the appellants' right to privacy was infringed. The effect of both shortcomings is to have the respective statements expunged from the record."*

[Emphasis added].

In the circumstances, we agree with both the appellant and the learned Senior State Attorney that the appellant's cautioned statement was improperly recorded. The same is thus hereby expunged from the record. That finding suffices to dispose of the 7th and 8th grounds of appeal in which the appellant challenges the use of exhibit P2 to found his conviction. Having expunged that document, the two grounds become superfluous.

With regard to the 9th and 10th grounds of appeal in which the appellant complains of breach of the applicable procedures before institution of the case in court, Ms. Asenga submitted that, the breach did not prejudice the appellant and therefore, the effect of non-compliances are curable under s. 388 of the CPA. In support of her submission, she cited the case of **Ramadhan Idd Mchafu v. Republic,** Criminal Appeal No. 328 of 2019 (unreported).

We agree with the learned Senior State Attorney. The fact that the appellant was not supplied with the statement of the person who reported the information which caused the filing of the case, did not prejudice him. As argued by Ms. Asenga, the appellant understood the nature of the charge levelled against him and therefore, participated fully in the trial. He cross-examined the witnesses and gave his defence. As to the fact that he was not taken to court within the period of 14 days after having been put in police custody, that is indeed a breach for which he is entitled to seek a remedy but that did not have an effect on the matters relating to his trial. For these reasons, we do not again, find merit in these two grounds of appeal.

That said and done, we now turn to consider the 3rd and 6th grounds of appeal. The appellant's complaint in the 3rd ground is that,

he was not identified as the person who raped the victim. According to the appellant since the victim did not know him before the date of the incident and because an identification parade was not conducted, it was wrong for the trial court to rely only on dock identification to convict him because there was no sufficient proof that he was the one who committed the offence.

Responding to the appellant's submission, Ms. Asenga argued that the prosecution did not rely only on the evidence of dock identification. She contended that, from the record, there is sufficient evidence showing that the appellant was seen getting out of the farm where the offence was committed, went to the house of PW5 and later to the nearby river where he was apprehended. Furthermore, the learned Senior State Attorney argued that, not only did the victim identify him after his arrest but she had been crying whenever he saw him. That happened when she saw him at PW5's neighbour and while she was testifying in the trial court. Ms. Asenga submitted also that, the conduct of the appellant of escaping from Endabash Police Post as testified by PW1 is an act which is inconsistent with the appellant's innocence.

With respect, we agree with the learned Senior State Attorney, that, apart from expungement of the appellant's cautioned statement,

the oral evidence of PW1, PW2, PW3, and PW5 left no doubt that it was the appellant who raped the victim. It is not in dispute that, the appellant was seen getting out of the maize farm where the victim was raped. From the scene of crime, the same person went to PW5's home and from there, he went to the river where he was apprehended. When the victim saw him, she started to cry. These facts coupled with the appellant's conduct of fleeing from the police, proved beyond reasonable doubt that he was the one who raped the victim. In the circumstances of this case, the conduct of the appellant of escaping from the police signified his guilt mind. In the case of **Rashid Mtanga Ahamadi v. Republic**, Criminal Appeal No. 249 of 2008 (unreported), the Court stated as follows as regards the conduct of running away by a person suspected of having committed an offence:

> *"In the instant case, we are satisfied that the appellant's conduct of running away just after he saw PW1 and PW3, is related to his guilty conscience to the act he has committed to PW1. Such conduct is inconsistent with innocence."*

Since from the evidence of the victim as supported by that of PW6, a medical Doctor, it was established that the victim was carnally

known, we equally find the 3rd and 6th grounds of appeal meritless. The same are hereby dismissed.

In the event, we are settled in our mind that, this appeal has been brought without sufficient reasons. It is hereby dismissed in its entirety.

DATED at **ARUSHA** this 25th day of September, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The judgment delivered this 26th day of September, 2023 in the presence of the appellant in person and Ms. Upendo Shemkole, learned Senior State Attorney for the respondent Republic is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL