IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 405 OF 2021

(CORAM: MKUYE, J.A., GALEBA, J.A., And MASOUD, J.A.)

OMAR RASHID @ KANGWIZA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of Resident Magistrates' Court of Tabora at Tabora)
(Kato, SRM-Ext. Jur.)

dated the 21st day of June, 2021

in

Criminal Appeal No. 42 of 2021

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JUDGMENT OF THE COURT

26th September & 3rd October, 2023

MASOUD, J.A.:

On 4th December, 2018 at night hours, Rehema Ireshi (PW1), a mother of the victim (PW1) in this case, saw an intruder entering into her house in which her daughter (the victim) was alone inside the house. Being curious as she was, PW1 peeped through the window as she approached the house to identify the intruder and see what he was up to. She saw the intruder unbuttoning and lowering his trouser, while her daughter was on the bed. PW1 saw the intruder because of

electricity light in the neighborhood and solar light which lighted inside her house.

In what appeared to be her best judgment in the circumstances, the victim's mother chose to lock the door of the house from outside so that the intruder and her daughter remained inside the house as she hurriedly rushed to get the Chairman for Masegeza Street and neighbours to witness the incident. In her best judgment that was the best way of getting hold of the intruder red-handed and identifying him. Indeed, the Street Chairman, one, Rashid Hassan Mahwela (PW3), along with some neighbours, made it to the place of the incident where they witnessed the door of the house being opened by the Street Chairman. They identified the intruder as the appellant. It was confirmed by all those who were there that the appellant and the victim were together alone inside the house. It was however only, Asha Linus (PW4), and Jamada Athuman (PW5) amongst the neighbours who eventually testified at the trial.

To cut the story short, the incident was, subsequently, reported to the police, the victim was taken to hospital and examined on 6th December, 2018, the appellant was arrested suspected to have raped

the victim, a girl of 13 years of age, and was eventually charged with the offence of rape contrary to sections 130(1) and (2) (e) and 131(1) of the Penal Code, [Cap. 16 R.E. 2002 now R.E. 2022]. The particulars of the charge read thus and we hereby quote:

> *"Omary s/o Rashid @ Kangwiza on diver dates of November and December, 2018 at Kiloleni ward within the Municipallty and region of Tabora did have carnal knowledge of one [name withheld] a girl of 13 years of age."*

The substance of the prosecution evidence was from various witnesses who testified at the trial as already pointed out above. Of significance, was the testimony of the victim (PW2) which had it that she was in a love affair with the appellant; and they have had sexual intercourse with him more than once at different time and places. There was also the evidence of the victim's mother (PW1) who testified as to how the appellant got into her house, lowered his trouser in his bid to rape the victim, how she locked the door from outside restraining the appellant from escaping, how the appellant was identified at the scene in the presence of the Street Chairman (PW3) and a whole array of neighbours, and how the appellant, upon being questioned, confessed to have had sexual intercourse with the victim several times.

There was also the evidence of Thobias Bollen, the medical doctor (PW6), about the results of the medical examination (Exhibit P1) conducted on 6th December, 2018 which was two days after the incident had occurred on 4th December, 2018. The same had it that the victim's vagina had neither bruises nor sperms although it was evident that the victim was used to having sexual intercourse. Equally crucial was the evidence of DC Meshack, a police officer (PW7), on the confessional cautioned statement that he recorded from the appellant on 17th December, 2018 and Exhibit P2 which he tendered in evidence.

The appellant (DW1) in his defence evidence denied in so many words to have raped the girl. He complained about being kept in the custody for so long before he was taken to court and explained how and where he was arrested and kept at Isevya police post before he was transferred to Central Police Station. He said that he went to PW1's residence to watch TV. On the other hand, the appellant called one witness (DW2) whose evidence materially contradicted the appellant's evidence.

The trial district court was satisfied that the evidence on the record proved the charge laid against the appellant beyond reasonable

doubt. It, therefore, convicted the appellant as charged and sentenced him to imprisonment for 30 years. Aggrieved by the decision of the trial district court, the appellant appealed against the decision. Hon. Kato, SRM with Extended Jurisdiction, dismissed the appeal as he was convinced that the prosecution proved the case beyond reasonable doubt.

In his appeal to this Court, the appellant raised six grounds of appeal as follows: **First**, the charge against him was not proved beyond reasonable doubt. **Second**, the victim did not promise to tell the truth but not to tell any lies. **Third**, the cautioned statement (Exhibit P2) was recorded contrary to the law. **Fourth**, there was no proof of penetration. **Fifth**, the medical examination report (Exhibit P1) was not read out in court. And **sixth**, the defence evidence was not considered by the two courts below.

At the hearing, the appellant appeared in person unrepresented. On the other hand, the respondent Republic was represented by Mr. Merito Ukongoji, learned Senior State Attorney. The appellant adopted his grounds of appeal. Having adopted the grounds, and upon being prompted by us, the appellant indicated that he would prefer the

learned State Attorney to respond on the grounds and he would rejoin if need be. In the end, however, the appellant did not have anything to rejoin.

Mr. Ukongoji addressed us on all grounds of appeal raised by the appellant. It was towards the end of his submission that, on reflection, he told us that he supports the appeal. In his submission, he argued as follows in support of the appeal.

One, the evidence of PW2 deserved to be expunged because her evidence at page 13 of the record of appeal was received without the victim promising in her own words that she undertakes to tell the truth but not to tell any lies. The learned Senior State Attorney, therefore implored us to expunged the evidence from the record.

Two, the medical report admitted in evidence as Exhibit P1, at page 23 of the record of appeal was, after being admitted, not read out. With such omission, the learned Senior State Attorney submitted that Exhibit P1 has to be expunged from the record.

And **three**, it was submitted, by the learned Senior State Attorey, that the cautioned statement of the appellant which was admitted in evidence as Exhibit P2 was not only recorded out of time prescribed by

section 50 of the Criminal Procedure Act [Cap 20 R.E. 2022], but it was also admitted in evidence, after being objected by the appellant on the reason that it was not his statement, but without the trial court, as is evident at page 25 of the record of appeal, conducting an inquiry to establish whether the statement was indeed his and was voluntarily recorded. In doing so, the learned Senior State Attorney asked us to expunge Exhibit P2 from the record.

The foregoing irregularity notwithstanding, the learned Senior State Attorney, when asked bout the sixth ground of appeal, was upon reflection contented, and rightly so in our view, that the two lower courts did not consider the defence evidence if we go by the record of appeal. Nonetheless, in view of the irregularities leading to expungement of PW2's evidence, Exhibit P1 and Exhibit P2, the learned Senior State Attorney urged us to find that the remaining evidence would not suffice to ground the conviction.

We recalled that this is a second appeal in which we are, as a matter of rule of practice, enjoined not to interfere with the concurrent findings of facts by the two courts below as is in the present appeal, unless we are satisfied that there is misapprehension of the evidence, or

where there were mis-directions or non-directions on the evidence, or where there had been a miscarriage of justice or violation of some principle of law or practice. See for instance, **Emmanuel Mwaluko Kanyusi and 4 Others v. Republic** (Consolidated Criminal Appeals 110 of 2019 and 553 of 2020) [2021] TZCA 215; **Noel Gurth aka Bainth and Another v. Republic**, Criminal Appeal No. 339 of 2013 (unreported), and **D.P.P. v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149.

In the light of the above rule of practice, we considered whether in view of the submission by the learned Senior State Attorney, there are pieces of the prosecution evidence which suffer from fundamental irregularity for violation of some principles of law or practice necessitating our interference with a view to expunging them from the record as alluded. In answering this issue, we considered the relevant part of the record referred to us by the learned Senior State Attorney.

We perused the record of appeal from page 13 to 14 where the testimony of the victim (PW2) is found. We were mindful that it was a testimony of a witness who was then of 13 years of age which ought to be given in accordance with section 127 (2) of the Evidence Act, [Cap. 6

R.E 2022]. We were, in our scrutiny, satisfied that there was no *promise to tell the truth and not to tell any lies* that was made by the victim which, on the record, is in her own words. In our finding also, PW2's purported promise was incomplete and was in the form of indirect or reported speech.

It was incomplete because while section 127 (2) of the Evidence Act, [Cap. 6 R.E. 2022] requires that the promise should be in telling the truth and not telling any lies, what is reported about the promise that PW2 is alleged to have made is only to tell the truth. As such, she was not reported to have promised not to tell any lies. See, **John Mkorongo James v. Republic** (Criminal Appeal No. 498 of 2020) [2022] TZCA 111. With such finding, we agree with the learned Senior State Attorney that such evidence is invalid. It had, therefore, no evidential value. We, accordingly, proceed right away to expunge the testimony of PW2 as we find merits in the second ground of appeal.

We further perused the record of appeal in relation to Exhibit P2 which is a cautioned statement of the appellant. We were quite clear that at page 25 of the record of appeal that Exhibit P2 was improperly admitted by the trial court without the trial court conducting an inquiry

although the appellant raised objection which by its nature required the trial court to clear the cautioned statement for admission by conducting the inquiry. Under the circumstances, the trial court ought to have conducted an inquiry to satisfy itself that the statement was voluntarily recorded.

It is, indeed, settled that if an objection is made after the trial court has informed an accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry into the voluntariness or not of the alleged confession. See **Daniel Matiku v. Republic** (Criminal Appeal No. 450 of 2016) [2019] TZCA 462; **Twaha Ali & 5 Others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported); **Peter Ephraim @ Wasambo v. D.P.P.** (Criminal Appeal No. 386 of 2018) [2021] TZCA 494; and **Rashid and Another v. Republic** [1969] E. A. 138. In the result, we are in agreement with the learned Senior State Attorney that Exhibit P2 was wrongly admitted. We accordingly expunge it from the record.

With regard to Exhibit P1, we looked at page 23 of the record of appeal referred to us by the learned Senior State Attorney. There was,

admittedly, a blatant omission to read out the said exhibit after it was admitted in evidence. Pursuant to our previous decision in **Robinson Mwanjisi v. Republic** [2003] T.L.R. 218 which we also applied in **Aneth Furaha and others v. D.P.P.** (Criminal Appeal No. 161 of 2018) [2019] TZCA 107, and our decision in **Saganda Saganda Kasanzu v. Republic** (Criminal Appeal No. 53 of 2019) [2020] TZCA 304, we hereby expunge Exhibit P1 from the record.

Having expunged Exhibit P1 from the record, it is only oral testimony of PW6, as is for the oral testimony of the other witness (PW7) in relation to whom we expunged Exhibit P2, which has to be considered along with the evidence of other witnesses as to the correctness or otherwise of the conviction. See, **Huang Qin & Xu Fujie v. Republic** (Criminal Appeal No. 173 of 2018) [2021] TZCA 210; and **Saganda Saganda Kasanzu v. Republic** (supra).

Consequent to expunging the testimony of the victim (PW2), the medical examination report (Exhibit P1) tendered by PW6 and the confessional cautioned statement (Exhibit P2) tendered by PW7, the evidence left on the record is just the oral testimony of PW2, PW3, PW4, PW5, PW6, and PW7. The learned Senior State Attorney submitted that

the remaining evidence cannot establish the accusation against the appellant. He therefore invited us to allow the appeal.

In our assessment, we recalled that the appellant was accused of raping the victim on diver dates of November and December, 2018. We started with the evidence of PW1 who was the mother of the victim. Her evidence alleged that the appellant confessed orally to have had sexual intercourse with the victim several times. This is at page 12 of the record of appeal. On the other hand, the evidence of PW3 and PW4 suggested that it is the victim who told them that she had sexual intercourse with the appellant several times.

It is the law that, oral confession made by a suspect before or in the presence of reliable witnesses, be they civilians or not, can be used to found conviction against the suspect, as long as the words imputed to him were said by the suspect as a free agent. See, **Posolo Wilson @ Mwalyengo v. Republic**, Criminal Appeal No 613 of 2015 (unreported); **Martin Manguku v. Republic** [2007] T.L.R. 63; and **D. P. P. v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82. In **Anna Jamaniste Mboye v. Republic** (Criminal Appeal No. 295 of 2018) [2021] TZCA 601, we among other things held that:

> *"An oral confession is tested its voluntariness by looking at the credibility and reliability of the witness testifying. If the appellant doubted the testimony of PW6 we expected her to challenge him by way of cross-examination. Failure to do that makes us hold that the complaint was but an afterthought. Similarly, the appellant did not state anything in defence to challenge PW6's testimony regarding her confession to her."*

Similarly, in **Ntobangi Kelya and Another v. Republic** (Criminal Appeal No. 256 of 2017) [2021] TZCA 393, where we encountered an issue as to oral confession, we observed at page 26 of our judgment:

> *"... the alleged oral confession would require corroboration as a matter of practice, more so considering the doubts that have emerged. With respect, we see no such corroboration in this case."*

Likewise, in **Geofrey Sichizya v. D.P.P.** (Criminal Appeal No. 176 of 2017) [2020] TZCA 159, we dealt with an issue as to reliability of alleged oral confession which was allegedly made before a person who was not called as a witness. We held at page 11 of our judgment thus:

"From PW1's evidence it is clear that the appellant did not confess directly to him. He confessed to his wife who later conveyed the massage to PW1. In this regard, we agree ..... that the alleged oral confession to PW1 cannot be valid due to the fact that it was not made directly to him. Worse enough, the wife of the appellant did not testify in court. It was hearsay evidence."

In **D.P.P. v. Nuru Mohamed Gulamrasul** (supra) where the respondent denied that he had ever admitted that the tusks were in his possession, this Court, in view of the evidence on the record regarding oral admission made by the respondent, reasoned as follows from page 84 to 85 of our judgment whilst having regard to the entire evidence of the prosecution and defence:

"On the prosecution side, ***P.W. 1 and P.W.2, both Police officers during the search stated that when questioned, after the tusks were discovered, the respondent told them the tusks were his. P.W.3 a civilian neighbour and P.W.4 a C.C.M. Branch Secretary of the D area, both heard the respondent so saying.*** *This, as pointed out earlier, was stated by the respondent before the respondent was charged or arrested. This was*

during an investigation searching for trophies. ***We have no doubt that these four prosecution witnesses were telling the truth, in fact their evidence stood clear and unshaken in court. This admission by the respondent, heard by four obviously reliable witnesses, was sufficient by itself to have founded a conviction of unlawfui possession, unless the respondent had authority to possess.....***

With great respect to the lay members, in our view the evidence adduced by the Republic against the respondent in this case is overwhelming. ***The respondent's admission that he was the possessor of the tusks was satisfactorily proved;*** *and so was the incriminatory cautioned statement.* ***The respondent's defence*** *that it must have been his driver who had hidden the tusks in the lorry without his knowledge, in the circumstances,* ***was pure fantasy. Both D.W.3 and D.W.4 were biased in his favour, being feilow-tribesman and a relative."***

[Emphasis added]

In the light of the statements of principle emerging from the above authorities as to oral confession, we put the testimony of PW1 into scrutiny in the light of what was said by other prosecution witnesses, namely, PW3, PW4 and PW5 who were also present at the scene. In doing so, we considered the defence of the appellant which was not considered by the two lower courts.

We did so with regard to the defence evidence as we consider failure to appraise such evidence as one of the exceptional circumstances warranting interference of this Court to the concurrent findings of the two lower courts to see whether the defence evidence raises any reasonable doubt in the prosecution case. See **Felix Kichele and Another v. Republic**, Criminal Appeal No. 159 of 2005 (unreported); **Joseph Leornard Manyota v. Republic** (Criminal Appeal No. 485 of 2015) [2017] TZCA 1873; **Oscar Justinian Burugu v. Republic** (Criminal Appeal No. 33 of 2017) [2020] TZCA 1873; **Julius Josephat v. Republic** (Criminal Appeal No. 3 of 2017) [2020] TZCA 1729; and **Joseph Safari Massay v. Republic** (Criminal Appeal No. 125 of 2012) [2013] TZCA 326; and **Shabani Haruna @ Dr. Mwagilo v. Republic** (Criminal Appeal No. 396B of 2017) [2021] TZCA 708.

It downed to us in our scrutiny that while PW1, PW3, PW4 and PW5 were the witnesses who testified to have witnessed the incident at PW1's house and identified the appellant, it was only PW1, the mother of the victim, who claimed that the appellant orally confessed before those who were present to have had sexual intercourse with the victim several times. Such evidence is neither forthcoming from PW3 who was the Street Chairman of the area in which the incident occurred, nor from the other two witness (PW4 and PW5) who were neighbours of PW1. We think that if the appellant made such oral confession, PW3 would have testified so in view of his position as the Chairman of the Street in which the incident occurred.

Considering the circumstances in which the appellant was locked inside the house of PW1, subsequently allowed to get out of the house confronted by a whole array of neighbours and the Street Chairman, and quizzed in front of all those who were at the scene; we do not think the appellant was a free agent when he made the alleged oral confession if at all. See, **Martin Manguku Vs. Republic** (supra). By the way, there is nothing from the evidence of PW1 indicating that caution was administered on the appellant before he made the incriminating oral confession. We could also not find any piece of evidence corroborating

the evidence of PW1 as to the alleged oral confession made by the appellant before those who were at the scene. We accordingly, find that there was no oral confession made at the scene.

Having considered the defence evidence of the appellant which was contradictory and in the nature of a mere general denial, we were of a decided opinion that the appellant did not lead any evidence worth of any serious consideration. It is perhaps for this reason, as was in **Twinogone Mwambela v. Republic** (Criminal Appeal No. 388 of 2018) [2021] TZCA 515, that the first appellate court, proceeded to determine the appeal before it, oblivious of the appellant's fragile defence. We are, however, alive to the position of the law that, an accused person in a criminal trial, can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence. See **Mwita and others v. Republic** [1977] L.R.T. 54.

In the light of our finding in the respective grounds of appeal and the pieces of evidence that we have expunged, we considered the remaining oral evidence from PW1, PW3, PW4, PW5, PW6, and PW7. In the absence of the evidence of PW2, the majority of the evidence is

mere hearsay and unreliable as is the testimony of PW1 with regard to oral confession.

The evidence of PW6 is of the medical doctor who examined the victim and came up with the finding suggesting that the victim was used to having sexual intercourse as her hymen was not intact. Again, in his examination which was conducted two days after the incident, PW6 found that there were no signs that the victim had sexual intercourse as no bruises or semen were found in the victim's vagina. In as much as the examination by PW6 shows that the victim was used to having sexual intercourse, there is no evidence establishing beyond reasonable doubt that it is the appellant that was having sexual intercourse with the victim.

We are settled and therefore in agreement with the learned Senior State Attorney, that the remaining prosecution evidence, pointed out herein above, cannot ground the conviction against the appellant. Our finding is notwithstanding the weakness of the appellant's defence. Accordingly, the prosecution case was not proved beyond reasonable doubt.

The above said, we allow the appeal, quash the conviction, and set aside the sentence. We order the appellant's immediate release, if he is not being held for another lawful cause.

DATED at **TABORA** this 2nd day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of October, 2023 in the presence of the appellant in person and Mr. Nurdin Mmary, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL