IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 93 OF 2019

(Appeal from the decision of the District Court of Mbarali at Rujewa in Criminal Case No. 135 of 2017)

MAPINDUZI MGALLA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Hearing : 24/03/2020
Date of Judgement: 12/05/2020

MONGELLA, J.

Mapinduzi son of Mgalla, the appellant herein was charged with rape contrary to section 130 (2) (b) and 131 (1) of the Penal Code, Cap 16 R.E. 2002. In the trial court it was alleged that on 24th day of May 2016 at about 01:00hours at Urunda Village within Mbarali District in Mbeya region, the appellant unlawfully had carnal knowledge of one D daughter of K (being initials of the victim's names) a girl aged 19 years, without her consent. He was found guilty of the offence and sentenced to serve thirty years imprisonment. Aggrieved by this decision, he has appealed to this Court on the following grounds:

1. *That the trial Magistrate erred in law and fact in convicting the appellant by believing the evidence of PW4 and PW5 which was hearsay.*

2. *That the trial Magistrate erred in law and fact in convicting the appellant by relying on the evidence of PW2, a police officer, and exhibit P.E. 1, caution statement, while the appellant was not given the chance to object to the said caution statement.*

3. *That the trial Magistrate erred in law and fact in convicting the appellant by believing the evidence of PW2, that the appellant confessed in the caution statement while the appellant was not taken to the justice of peace for an extra judicial statement to be recorded and tendered in court to corroborate the evidence of PW2.*

4. *That the trial Magistrate erred in law and fact in convicting the appellant by believing the evidence of PW3, a medical doctor and exhibit P.E2, the PF3 without giving the appellant the chance to object on the exhibit.*

5. *That the trial Magistrate erred in law and fact in convicting the appellant by believing the evidence of PW1 who stated that she was raped by the appellant in his house for two days, while PW1 did not state if the appellant prohibited to raise an alarm calling for assistance.*

6. *That the trial Magistrate erred in law and fact in convicting the appellant while disregarding his evidence.*

7. *That the charge against the appellant was not proved beyond reasonable doubt.*

The appellant fended for himself, while the respondent was represented by Ms. Sara Anesius, learned State Attorney. During the hearing of the appeal, the appellant prayed for his grounds of appeal to be adopted as his submission. He as well opted to hear first from the State Attorney, but retained his right to rejoin. Ms. Anesius thus had to reply to the grounds of appeal.

Arguing on the first ground, Ms. Anesius submitted that the trial court did not only rely on the evidence of PW4 and PW5. She contended that these two witnesses only corroborated the evidence of PW1 and the court took into account the whole evidence including the documentary evidence which were the PF3 and the appellant's caution statement.

On the second ground, Ms. Anesius argued that at page 9 of the proceedings it is shown that while PW2 was testifying, the court asked the appellant if he objected exhibit PE1, the caution statement, and the appellant replied that he had no objection. The court thus proceeded to admit the exhibit.

On the third ground Ms. Anesius argued that the law does not make it mandatory for an accused person to be taken to the justice of peace

after taking the caution statement. She contended that the appellant ought to have objected the caution statement if he had issues with it.

On the fourth ground, Ms. Anesius argued that the record reveals that he was asked if he objects to the admission of the PF3 and he stated that he had no objection, but only that he was not examined as well. The court overruled his objection and proceeded to admit the exhibit.

On the fifth ground, Ms. Anesius argued that the testimony of PW1 as seen at page 7 of the proceedings is to the effect that the appellant used to lock her inside until the day she managed to escape and ran to PW4.

On the sixth ground, Ms. Anesius referred to page 3 of the judgment of the trial court and argued that the trial court summarised the evidence and proceeded to deliberate on the issues. She further argued that this court, being the first appellate court can as well consider the evidence as guided in the case of ***Prince Charles Junior v. The Republic***, Criminal Appeal No. 250 of 2014.

On the last ground, Ms. Anesius argued that the prosecution mounted five witnesses and two exhibits. PW1 explained on how the incident occurred while PW2 to PW5 corroborated the evidence of PW1. She added that the PF3 indicated that the victim was carnally known. She concluded that the evidence was thus sufficient to convict the appellant and the offence was thus proved beyond reasonable doubt.

In rejoinder, the appellant argued that his grounds of appeal are sound and deserve to be upheld by this Court. On the first ground he said that the 4th and 5th witnesses live in another village and not in his village. On the third ground he maintained that he objected to the PF3 being admitted because it showed that it was filled on 28th May while the Dr. stated that it was filled on 30th May.

On ground five he argued that the victim could shout and call for help while inside the house if she was held for two days, but she did not. On ground six and seven he argued that his evidence was not considered and the trial Magistrate did not record all that he said and did not consider all that he said.

I have considered the arguments by both parties and proceed to observe as follows:

In the first ground, the appellant claims that the evidence of PW4 and PW5 was hearsay. I have gone through the proceedings and found that PW4 and PW5 as regards to the rape by the appellant, narrated what they were told by PW1, the victim. Their evidence as such is thus hearsay and ought to be discredited for lacking evidential value. See: ***Vumiliapenda Mushi v. The Republic***, Criminal Appeal No. 327 of 2016 (CAT at Arusha, unreported). However, as argued by the learned State Attorney and as it can be evidenced in the trial court judgment, the learned trial Magistrate did not base his decision on the testimony of PW4 and PW5. He in fact highly relied on the evidence of PW1, the victim

which was corroborated by exhibit PE1, the appellant's caution statement and exhibit PE2, the PF3.

In ground two and four, the appellant claims that exhibit PE1, caution statement and exhibit PE2, PF3 respectively, were wrongly admitted as he was not given a chance to object on the same. The trial court record, at page 9 and 13 respectively, clearly shows that the appellant was invited by the trial court to object to the caution statement and the PF3 respectively. The record shows that the appellant categorically stated that he had no objection on each of the exhibits. It is only on admission of the PF3 where he stated that he had no objection but he was not called by the police or doctor to be examined if he had raped the victim. The trial court rejected this supposedly objection. I also find that the trial court rightly rejected the "objection" because objections are supposed to be on point of law and it is not mandatory under the law that the accused should as well be examined. The main purpose of the PF3 is to establish if the victim has been penetrated. It is not conclusive evidence in linking the accused to the rape. It only corroborates other pieces of evidence given in court during trial.

In rejoinder, the appellant submitted that he objected to the PF3 being admitted because the same provides that the victim was taken to hospital on 28th May while the doctor testified that he examined her on 30th May. In deed the victim was taken to hospital on 28th May 2016, but was examined on 30th May 2016. As testified by PW3, the victim was admitted in hospital for three days from 28th May 2016 and it is on 30th May 2016 when he examined her. I in fact see no fault in this information.

However, on the other hand, the record does not show if the contents of the two exhibits were read over to the accused person after being cleared for admission. This is a mandatory requirement under the law(see: ***Lack Kilingani v. Republic***, Criminal Appeal No. 402 of 2015 (unreported); ***Sumni Amma Awenda v. Republic***, Criminal Appeal No. 393 of 2013 (unreported); ***Robinson Mwanjisi & Others v. Republic*** [2003] TLR 218, just to mention a few) except in few circumstances like where the witness's testimony capitalizes on the exhibit. In ***Chrizant John v. Republic***, Criminal Appeal No. 313 of 2015 The Court of Appeal (CAT) ruled that if the evidence of the witness capitalizes on the exhibit then the accused is not prejudiced. Specifically the Court held:

> *"In the circumstances of the instant case however, we rush to agree with Mr. Ngole that since the Republic called PW4 Florence Kayungi, the doctor who conducted deceased's autopsy, and because the evidence of that witness capitalized on exhibit P1 and he explained in detail the deceased's cause of death, also as his advocate was given chance to cross-examine her, it cannot be accepted that the appellant was denied opportunity to know the contents of exhibit P1."*

Considering the two exhibits, I find that PW3 gave testimony that capitalized on exhibit PE2, the PF3 and therefore the appellant was not prejudiced as he understood what charges were being laid against him. In ***Bashiru Salum Sudi v. The Republic***, Criminal Appeal No. 379 of 2018, the CAT also held that "*oral evidence of a medical personnel survives the obliteration of any medical document.*" See also: ***Director of Public Prosecutions v. Erasto Kibwana and 2 Others***, Criminal Appeal No. 576 of

2016; and ***Thomas Robert Shayo v. The Republic***, Criminal Appeal No. 409 of 2016 (both unreported).

I, however expunge the caution statement because the testimony of PW2 did not capitalize on it. The contents in the caution statement directly implicate the appellant and thus he ought to have known what was exactly contained therein. The omission to read it over therefore prejudiced the appellant in knowing its contents for him to prepare his defence. See also: ***Erneo Kidilo & Another v. The Republic***, Criminal Appeal No. 206 of 2017 (CAT at Iringa, unreported).

In ground three the appellant claims that he was wrongly convicted as he was not taken to the justice of peace. I agree with the learned State Attorney that it is not mandatory under the law that the accused must be taken to the justice of peace. The accused was arrested and taken to police station and that sufficed to put him in the legal process.

In ground six the appellant claims that his evidence was disregarded by the trial Magistrate thus landed at an erroneous decision. I have read the trial court's judgment and found from page 5 to 6 the appellant's evidence being considered. The trial Magistrate gave reasons for not being convinced by the appellant's evidence. The trial magistrate took into consideration that the appellant never brought any of its family members whom he claimed to live with to testify in court. He also took into consideration the fact that the appellant never cross examined PW1 on her testimony that he was alone with the appellant, with no family member of his, for three days at his house. The law is settled to the effect,

that failure to cross examine on an important matter ordinarily implies the acceptance of the truth of witness's evidence on that aspect. See: ***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (unreported) and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017.

In ground five and seven, the appellant claims that the offence of rape was not proved beyond reasonable doubt. He also claimed the trial Magistrate erred in convicting him by believing the evidence of PW1 who stated that she was raped by the appellant in his house for two days, while PW1 did not state if the appellant prohibited her from raising an alarm calling for assistance. Even though the caution statement has been expunged, I still find the evidence of PW1 corroborated by that of PW3 and exhibit PE2, the PF3 being sufficient to prove the offence. This is because the position of the law is settled to the effect that the best evidence in rape cases comes from the victim. See: ***Selemani Makumba v. Republic*** [2006] TLR 379; ***Hamis Mkumbo v. Republic***, Criminal Appeal No. 124 of 2007 (unreported) and ***Rashidi Abdallah Mtungwa v. Republic***, Criminal Appeal No. 91 of 2011 (unreported).

PW1 explained how the appellant took advantage of the situation she was in and manipulated her into following him to his house. She explained how the appellant used to lock her inside his house while raping her till the day she managed to escape. Under the circumstances I find the appellant's argument that she should have raised an alarm immaterial.

The trial court found the evidence of PW1 being credible and this Court as an appellate Court cannot interfere with that finding in the absence of compelling reasons. In ***Goodluck Kyando v. The Republic***, Criminal Appeal No. 118 of 2003 (CAT, unreported) it was held:

> *"...it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

As I said earlier, an appellate court cannot interfere with the assessment of credibility of witnesses or findings of the trial court unless where there are compelling circumstances. These are such as where there are serious mis-directions, non-directions, mis-apprehensions, or miscarriage of justice. See: ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017 (unreported); ***Ally Mpalagana v. Republic***, Criminal Appeal No. 213 of 2016 (unreported); ***Jaffari Mfaume Kawawa v. Republic*** [1981] TLR 149; ***Mussa Mwaikunda v. Republic***, Criminal Appeal No. 174 of 2006 (unreported) and ***Michael Alias v. Republic***, Criminal Appeal No. 243 of 2009 (unreported). In the case at hand I do not see such mis-directions, non-directions, mis-apprehensions or miscarriage of justice to warrant interference on the findings of the trial court.

Considering the observations I have made above, I find the appellant's appeal devoid of merits. I uphold the conviction and sentence of the trial court accordingly. Appeal dismissed.

Dated at Mbeya on this 12th day of May 2020

L. M. MONGELLA
JUDGE

Court: Judgment delivered at Mbeya through video conference on this 12th day of May 2020 in the presence of the appellant, and Mr. Shindai Michael, learned State Attorney for the respondent.

L. M. MONGELLA
JUDGE