IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 146 OF 2020

(Appeal from the decision of the Resident Magistrates' Court of Mbeya at Mbeya in Criminal Case No. 06 of 2017)

AYUBU S/O MICHAEL @ ALELA.....1ST APPELLANT

JOHN S/O BUTTON.....2ND APPELLANT

YONA S/O JULIUS @ MWAKASITU.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Hearing : 08/12/2020
Date of Judgement: 23/02/2021

MONGELLA, J.

The appellants were arraigned in the Resident Magistrates' court on two counts. The first count was armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002. The second count was gang rape contrary to section 130(1) and (2)(a) and section 131A (1) and (2) of the Penal Code. In the end the 1st and 2nd appellants were convicted on the offence of armed robbery and sentenced to serve 30 years imprisonment. With regard to the second count on gang rape, all three appellants were

convicted and sentenced to serve 30 years imprisonment. The sentences were to run concurrently with respect to the 1st and 2nd appellants.

Dissatisfied with the conviction and sentence, they have preferred this appeal. Their petition of appeal presents eight grounds, however I shall only deal with seven grounds as the eighth ground is not a ground of appeal as such. In this ground the appellants state that they expect the court to do justice in consideration of the evidence adduced by the prosecution and the defence sides.

During the hearing the appellants fended for themselves. In their submissions they basically prayed for the court to adopt their grounds of appeal as part of their submission while reserving their right to rejoin. The 1st and third appellants made brief submissions but in essence they reiterated what is stated in their grounds of appeal.

On the first ground the appellants claim that the Hon. Magistrate grossly erred in law and fact by convicting and sentencing the appellants without considering that the prosecution side failed completely to prove the charges against them beyond reasonable doubt as required under the law.

On the 2nd ground, the appellants claim that the Hon. Magistrate erred in law and fact in convicting the 1st and 2nd appellants of armed robbery relying on the evidence of PW1, the victim, who stated that on the material date, that is, on 7th January 2016 at 21:00 hours at Mkapa primary school, near tarmac road, she was invaded and robbed her phone make

Techno worth 45,000/- and cash amounting T.shs. 160,000/-. They argue that the court relied on mere statement of PW1 as the 1st and 2nd appellant were never found in possession of the said phone or money. They also challenge PW1's testimony on the ground that she did not tender in court any receipt to prove that she owned the said phone.

With regard to the third ground, the appellants argue that the Hon. Magistrate erred in law and fact in convicting them on the offence of gang rape relying on the evidence of PW1. They argue that the prosecution failed to prove the case as there was no any doctor summoned in court or any PF3 tendered to prove that PW1 was raped.

On the fourth ground, the appellants fault the conviction and sentence arguing that the Hon. Magistrate erred by relying on the testimonies of PW2, PW3, PW6 and PW7 which was hearsay. They contend that the said evidence was adduced contrary to the provisions of section 62 (1) (b) of the Evidence Act, Cap 6 as the said witnesses testified on what they were told by PW1.

Under the fifth ground, the appellants argue that the Hon. Magistrate erred in law and fact by convicting them basing on the machete tendered in court as exhibit PB while the prosecution did not tender and certificate of seizure in court. They contend that the failure to tender the certificate of seizure on the machete tendered proves that the machete did not belong to the appellants. They added that the same contravenes the provisions of section 38 (3) and 41 of the Criminal Procedure Act, Cap 20 R.E. 2019, thus illegally admitted.

Under ground six, the appellants argue that the Hon. Magistrate erred in law and fact in convicting and sentencing them relying on the evidence of PW4, one WP 3029 D/CPL Marry Barnabas, who testified to have visited the scenes of crime on 13th December 2016. They contended that PW4 did not tender any sketch map of the said area so as to prove her allegations. They added that no identification parade was conducted for PW1 to identify the appellants as among the assailants who robbed and raped her.

Lastly, under ground seven, the appellants contend that the Hon. trial Magistrate erred in law and fact for failure to adequately analyse the evidence as a whole and for failure to consider the defence evidence.

The respondent was represented by Ms. Bernadetha Thomas, learned State Attorney, who opposed the entire appeal. In reply to the grounds of appeal, she started with the second ground. On this, she argued that the offence was committed on 7th December 2016 and the appellants left immediately after commission of the offence. The appellants were arrested on other days and one by one thus they could not be found in possession of the phone and the money. She argued further that not being found in possession of the phone or money does not exonerate the appellants from liability on the crimes committed. She contended that these items are not the only items that can prove the offence of armed robbery. Referring to the testimony of PW1, as seen at page 3 to 5 of the typed proceedings, Ms. Thomas argued that PW1 narrated clearly the events that occurred to her on the material date in the hands of the appellants and other people not arraigned before the court. She

concluded that the trial Magistrate believed the testimony of PW1 and found her to be credible witness.

In reply to the third ground, Ms. Thomas contended that in rape cases, the true and reliable evidence is that of the victim. She reiterated the testimony of PW1 to the effect that the 1st and 2nd appellants together with other people not arrested raped her on that night. After finishing they took her to a room at Sinde area where they found the 3rd appellant. Then the three of them continued to rape her till morning on 08th December 2016. The three let go of her on that date at 13 hours threatening her not to reveal the incident. PW1 stated that at night there was candle light in the room, but in the morning to the afternoon there was enough light enabling her to see her assailants clearly. Referring to the case of ***Edward Nzabuga v. Republic***, Criminal Appeal No. 136 of 2008 (CAT at Mbeya, unreported) she challenged the appellant's contention that no PF3 was tendered in court. She argued that the PF3 carries expert opinion and in accordance with the ruling in ***Edward Nzabuga*** (supra) the court is not bound by expert opinion in reaching its decision.

Replying on the fourth ground, Ms. Thomas disputed the assertion that the evidence of PW2, PW3, PW6 and PW7 was hearsay. She argued that each of these witnesses explained what he/she saw and done after getting information from PW1. Referring to the testimony of PW2, Ms. Thomas stated that PW2 testified that PW1 went to her house after the incident and she saw her clothes stained with mud and her hair being rough. PW2 stated that PW1 mentioned the culprits including the 1st appellant thereby mentioning the suspect at the earliest opportunity. PW2 then advised PW1

to obtain PF3 and go to hospital whereby she escorted her. PW2 also testified to have been present when the appellants were arrested and interrogated whereby they confessed into committing the crime.

With regard to the evidence of PW3, Ms. Thomas argued that it was not hearsay as PW3 testified to have arrested the 2nd appellant who upon being arrested pleaded for forgiveness for the acts he had done. She argued further that PW6 is the one who took the machete at the 1st appellant's house and arrested him.

Ms. Thomas further argued that the evidence of PW7 is not hearsay either. She argued so saying that PW7 was a leader in the street and after he got information on the incident he arrested the appellants in collaboration with other residents. PW7 also stated that the 1st appellant told them that the machete used in the offence was at his grandmother's house and he sent one Baraka (PW6) to get the said machete. Baraka went with the 1st appellant to get the machete. PW7 then stated that he was the one who took the appellants to Mwanjelwa police post and handed the machete to the police as well. He was able to identify the machete in court.

Considering the testimonies of these witnesses as narrated above, Ms. Thomas was of the stance that they do not contain any hearsay as claimed by the appellants.

With regard to the fifth ground, Ms. Thomas urged the court to dismiss the ground as it lacked merit. She argued that the law requires the police officer seizing properties to write the certificate and provide receipt. She

said that in the case at hand, the machete was seized by normal citizen, that is, PW6, who handed it to PW7, the Mtaa chairperson. PW7 then handed the same to Mwanjelwa police post. She referred the court to page 30 of the typed proceedings whereby PW7 explained how the machete was obtained and handed to the police at Mwanjelwa police post. On these bases she concluded that even if the certificate of seizure was not issued, PW6 and PW7 explained how the same was obtained and seized.

Replying to ground 6, Ms. Thomas first disputed the appellants' assertion that PW4 went to the crime scene without the victim. She argued that the trial court record shows that PW4 who investigated the offence went to the crime scene with PW1. It was PW1 who directed her to both crime scenes, that is, at the road and the room at Sinde area.

Regarding non-drawing of sketch map, Ms. Thomas argued that the same is not a major error prejudicing the rights of the appellants. She argued that PW1 explained well the environment of the crime scene. She concluded on this point arguing that there is no provision under the law mandating the drawing of sketch map.

She as well addressed the claim that there was no identification parade done for PW1 to identify the appellants. On this point she argued that the ground lacks merit as PW1, the victim, knew the appellants, especially the first appellant from her childhood. She was of the view that under the circumstances identification parade was not necessary.

Ms. Thomas also disputed the seventh ground under which it was alleged that the defence evidence was not considered. She briefly invited the court to go through page 2 to 5 and page 8 of the trial court judgment where she said the defence evidence has been considered.

Lastly she reverted to the first ground whereby she contended that the prosecution proved its case beyond reasonable doubt through its witnesses and exhibits. She said that PW1 being the best witness identified the appellants at both crime scenes. She prayed that the appeal be dismissed and the conviction and sentence upheld.

In rejoinder, the 1st appellant maintained that the offences were not proved as there was nothing presented to prove that the victim was robbed and raped. He also said that there is no evidence that they confessed to committing the crime. He insisted that the PF3 was not provided while the witnesses claimed that the victim was taken to hospital.

The 2nd appellant rejoined to the effect that the evidence of PW1 was doubtful. He argued so saying that PW1 testified that she was taken to a room and raped the whole night, but failed to even raise an alarm. He also insisted that there was no evidence adduced to prove the offences.

The 3rd appellant rejoined by also addressing the question of PF3. He also claimed that the victim testified to have gone to hospital whereby she paid T.shs. 15,000/-, but the PF3 was not brought to court.

I have considered the grounds of appeal and arguments by both parties. I have as well read thoroughly the trial court record. I shall start with the second ground as well. The first ground shall be dealt with last.

On the second ground, the appellants claim that the trial court erred to convict and sentence the 1st and 2nd appellants on the offence of armed robbery while the items taken to wit, mobile phone make Techo and T.shs 160,000/- were not brought to court. In my settled opinion, in cases of armed robbery what is required to be proved by the prosecution is the use of force/threat of violence in obtaining property. The prosecution has to prove that a dangerous or offensive weapon was used. See: ***Michael Joseph vs. Republic (1995) TLR 278.***

In the matter at hand, PW1 who is the victim proved that the 1st, 2nd appellants and another person named Justine, who escaped used a machete to threaten her during the robbery. Her testimony was corroborated with that of PW2, PW3, PW6 and PW7 who testified that the said machete was obtained from the 1st appellant's grandmother's house with the assistance of the 1st appellant himself. As argued by Ms. Thomas, the law does not make it mandatory for the robbed items to be brought in court. They can only be brought if they are available. However, in the matter at hand, as argued by Ms. Thomas, the argument I subscribe to, the appellants were arrested on another date different from the one the offence was committed. Given the nature of the items robbed, which can easily change hands, one cannot expect the appellants to have been found in possession of the said items. I thus find this argument lacking merit and dismiss it accordingly.

On the third ground, the appellants claim that the trial court erred in convicting them of gang rape relying on the evidence of PW1. In their rejoinder submission they argued that PW1 claimed to have gone to the hospital but no medical doctor was brought to testify and no PF3 was tendered in evidence. The records indicate that PW1 stated that she obtained PF3 and went to Mwanjelwa Dispensary but was told to go to the referral hospital. At the referral hospital she did not get medical attention and she went back after some days where she was attended as a normal patient and given some medicines.

Under the circumstances the PF3 was not available. However, it is settled under the law that a medical report is an expert opinion which is not binding to the court. As such where a medical report is not tendered it does not render the whole case defeated. This was decided in the case of ***Edward Nzabuga v. Republic***, Criminal Appeal No. 136 of 2008 (CAT at Mbeya, unreported). The offence of rape can be proved by other evidences than the medical report, particularly the testimony of the victim which is regarded as the best evidence. See also: ***Mawazo Anyandwile Mwaikwaja v. Director of Public Prosecutions***, Criminal Appeal No. 455 of 2017 (CAT at Mbeya, unreported).

With regard to the fourth ground, the appellants claim that the evidence of PW2, PW3, PW6, and PW7 was hearsay. I have gone through the testimonies of these witnesses and found them not hearsay as alleged. As argued by Ms. Thomas, the witnesses testified on the actions they took after obtaining information regarding the incident. Most important, the

witnesses participated in one way or the other in arresting the appellants who also confessed in their presence.

PW2 stated that PW1 went to her house after the incident and she saw her clothes soiled and her hair rough. She stated that PW1 mentioned the culprits including the 1st appellant. PW2 then advised PW1 to obtain PF3 and go to hospital whereby she escorted her, but she could not be examined on that material day. PW2 also testified to have been present when the appellants were arrested and interrogated whereby they confessed into committing the crime.

PW3 testified to have arrested the 2nd appellant who upon being arrested pleaded for forgiveness for the acts he had done. PW6 testified to have taken the machete at the 1st appellant's grandmother's house and arrested him.

PW7 who was the Mtaa chairperson stated that after he got information on the incident he arrested the appellants in collaboration with other residents. He also stated that the 1st appellant told them that the machete used in the offence was at his grandmother's house and he sent one Baraka (PW6) to get the said machete. Baraka went with the 1st appellant to get the machete. PW7 further stated that he was the one who took the appellants to Mwanjelwa police post and handed them and the machete to the police. Clearly, the evidence of these witnesses is no hearsay. This ground of appeal is as well dismissed.

On ground five, the appellants challenge the conviction based on the machete while there was no certificate of seizure issued. They argued that the machete was admitted in evidence contrary to the provisions of section 38 (3) and 41 of the Criminal Procedure Act. I do not find merit on this ground on two reasons. First, as seen in the trial court judgment, the conviction did not solely base on exhibit PB, the machete, which was presented in court. Second, as argued by Ms. Thomas which I subscribe, section 38 (3) and section 41 requires a certificate of seizure and receipt to be issued where a police officer has been involved in the search and seizure. In the case at hand the machete was taken by PW6 and handed over to PW7 who handed it to the police at Mwanjelwa police post. The two are not police officers. All appellants objected to the admission of the machete, but the court rightly overruled the objections as they were based on facts and not law. This ground crumbles down as well.

On the sixth ground the appellants challenged the conviction on the ground that PW4 who investigated the crime scenes did not tender any sketch map and did not conduct identification parade. Starting with the argument on sketch map, I agree with Ms. Thomas that a case cannot be defeated because a sketch map of the crime scene was not tendered. The aim of the sketch map is to show the environment of the scene of crime. In the case at hand PW1, the victim clearly, as seen at page 4 and 5 of the typed proceedings, explained the environment of both crime scenes. There was no any dispute regarding the environment of the crime scenes as all appellants never cross examined PW1 on the same.

The law is very clear that failure to cross examine on a particular fact entails acceptance of the truth of the fact presented. See: ***Martin Misara v. Republic***, Criminal Appeal No. 428 of 2016 (CAT at Mbeya, unreported); ***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (CAT, unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (CAT, unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (CAT, unreported); and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017 (CAT, unreported).

With regard to non-conducting of the identification parade, I agree with Ms. Thomas that the same was not necessary. Identification parades are done where the witness is not familiar with the culprits. PW1 clearly testified to have known the 1st appellant from his childhood. This fact was also admitted during the preliminary hearing thus undisputed. PW2 further explained how she managed to identify the 2nd and 3rd appellant in the room whereby the appellants had kept her till next day in the afternoon. She thus got ample time to get familiarized with their faces. The 2nd and 3rd appellants also stated in their defence evidence that it was the 1st appellant who mentioned them. Under the circumstances, identification parade becomes unnecessary. I find the ground lacking merit and dismiss it as well.

With regard to the sixth ground, the appellants claim that the trial evidence failed to analyse the evidence and to consider the defence case. I have gone through the trial court judgement and found that the trial court analysed well the evidence of both sides and considered the defence case. The Hon. Magistrate explained her reasons for finding the

prosecution case proved. However, despite these findings, I shall re-evaluate the evidence and consider the defence case for interest of justice. This court being the first appellate court it is empowered to do so. See: ***Prince Charles Junior v. Republic***, Criminal Appeal No. 250 of 2014 (CAT at Mbeya, unreported). I shall however re-analyse and consider the evidence while deliberating on the first ground of appeal.

On the first ground of appeal, the appellants claim that the prosecution did not prove its case beyond reasonable doubt as required under the law.

The appellants' main line of defence is that the case is fabricated against them as they never committed the offence. They contended that there was no evidence presented to prove their case as no PF3 was tendered or doctor summoned to adduce evidence. They all denied knowing each other and to have confessed on the crime saying that the prosecution witnesses adduced false evidence. The first appellant denied the machete being his saying that there were no finger prints on it to prove that it was his. The 3rd appellant challenged the prosecution evidence on the ground that he was not medically examined to prove that he committed the offence of rape.

With respect to the offence of armed robbery, the prosecution witnesses explained how the machete used in the threat of violence was obtained. The defence by the appellants to the effect that there were no finger prints on it lacks merit. The circumstances clearly show that the machete was already touched by a number of people. PW6 and PW7 stated

clearly that after being interrogated, the 1st appellant stated that he kept the machete at his grandmother's house. He went with PW6 to his grandmother's house where the machete was seized. The trial court found the evidence of the prosecution witnesses credible.

It is a settled position of the law that an appellate court is not to interfere with the trial court's assessment on credibility of the witnesses. This is because the trial court is always better placed in assessing the credibility of witnesses than an appellate court. An appellate court cannot interfere with the assessment on credibility of witnesses unless where there are compelling circumstances to do so, such as where there are irregularities in recording the evidence or where there are material contradictions among the witnesses' testimonies. The Court of Appeal (CAT) in ***Alex Wilfred v. The Republic***, Criminal Appeal No. 44 of 2015 ruled that:

> *"The trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a re-assessment of their credibility."*

In the case at hand PW1 gave clear evidence on how the 1st, 2nd, and another person who escaped used a machete in robbing her T.shs. 160,000/- and a mobile phone. The rest of the prosecution witnesses testified clearly and with no contradiction on how the machete was seized with the help of the 1st appellant. I thus find no reason to interfere with the trial court's finding in convicting the 1st and 2nd appellants on the offence of armed robbery.

With regard to the offence of gang rape, the appellant's first denied knowing each other. However, this defence is contradicted by their own testimony particularly that of DW2 and DW3 who testified that they were joined in the case after the 1st appellant mentioned them. I therefore wonder how the 1st appellant could mention the 2nd and 3rd appellants if he did not know them.

They all challenged the conviction on the ground that no medical report (PF3) was tendered or doctor testified to prove the offence. I think I have already discussed this point at length when deliberating on the third ground. PW1 explained the circumstances that prevented her from getting medical attention on time. Besides, I reiterate my position and that of the law that medical report is an expert opinion having no binding effect to the court. The offence of rape can be proved even in the absence of medical report. This position of the law also answers the argument raised in defence by the 3rd appellant that he was not medically examined to prove that he raped the victim.

The trial court found the evidence of PW1 credible taking into consideration, among other things, that being a married woman whose marriage was at stake, she had no reason to fabricate or brag about being gang raped. I have also gone through her testimony and find it credible. PW1 gave clear evidence with no contradictions on the ordeal she went through in the hands of the appellants. She testified to be able to identify the appellants as they took her into their room and stayed with her till afternoon the next day. She specifically stated that she was able to clearly identify them on the next day as there was enough light.

I find nothing to fault the findings of the trial court in assessing the credibility of PW1. Apart from her testimony being corroborated by that of the rest of prosecution witnesses, the law is very clear on the testimony of the victim of rape. It specifically provides that true evidence in rape cases comes from the victim. See: ***Patrick Lazaro & Another v. Republic***, Criminal Appeal No. 229 of 2014 (CAT at Bukoba, unreported); and ***Selemani Makumba v. Republic*** [2006] TLR 379. The testimony of the victim can only be disqualified if found not credible, which is not the case in this matter.

Given the observation I have made above, I find the entire appeal devoid of merits. I uphold the conviction and sentence of the trial court on the offence of armed robbery. With respect to the offence of gang rape, I uphold the conviction but vary the sentence. The Hon. trial Magistrate sentenced the appellants for 30 years imprisonment. The minimum sentence for gang rape however, as provided under section 131A (2) is life imprisonment. The provision states:

> *"Every person who is convicted of gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape."*

In consideration of the above provision, I therefore hereby sentence all three appellants to life imprisonment with respect to the offence of gang rape. Appeal dismissed in its entirety.

Dated at Mbeya on this 23rd day of February 2021

L. M. MONGELLA
JUDGE

Court: Right of appeal to the Court of Appeal duly explained.

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya through video conference on this 23rd day of February 2021 in the presence of the appellants, and Ms. Bernadetha Thomas, learned State Attorney for the respondent.

L. M. MONGELLA

JUDGE