IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 55 OF 2019

(C/O Criminal Case No. 156 of 2018 Sumbawanga District Court)

(Y. Wilson, RM)

JAPHET S/O TITO @ MKOMAO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

29/10/2021 & 01/11/2021

JUDGMENT

Nkwabi, J.:

While most of the tourists who visit Tanzania have confessed that, *"Tanzania is unforgettable",* for its beautiful landscape, national parks, waterbodies, cultural heritage and the hospitality of its people, the appellant will not forget the 25th day of June, 2018 when he was arrested and his freedom was curtailed to date. His arrest was however, not without a reason. He was arrested as he was suspected of rape and unnatural offence committed against VK a girl aged 6. He was thus charged for both offences. On full trial, the trial court was satisfied beyond reasonable that the accused person committed the offences. He was found guilty of rape contrary to section

130(1)(2)(e) and 131(3) of the Penal Code and unnatural offence contrary to section 154(1) (a) of the Penal Code, Cap, 16 R.E. 2002. He was sentenced to life years imprisonment on the respective offences.

The appellant was evidently annoyed by the decision hence he tabled this appeal to this court to protest his virtuousness. He lodged with this court a petition of appeal comprising 5 justifications of appeal. He later, filed 5 additional grounds of appeal.

The offence was claimed to have happened between the 25th June 2018 to at Mazwi area within Sumbawanga District – Rukwa region. That the appellant had sexual intercourse with PW1 a girl aged 6 by inserting his penis into her vagina and having sex and then inserted his penis into her anus and had sex with her against the order of nauture. She had been sent an errand by her father to get milk from Leah, a teacher, in the morning. She met the appellant who assaulted her and took her to the bush. After the incidence she informed her mother who took her to the police station. PW2 Zacharia, her fathe,r confirmed he sent her the errand. He too confirmed that she came back crying and they inspected her and found blood on her vagina and

anus. The victim took them to the scene and met a motor cycle rider who said he rescued the victim. They found the accused arrested.

The victim was sent to hospital and attended by PW4 Colman, an assistant medical officer. PW4 attended the victim on 25/06/2018. On examining the victim, PW4 confirmed that rape and unnatural offence were committed against PW1 as she was bleeding and had sustained bruises in the said private parts of her body. The PF3 was admitted as exhibit P2.

Meanwhile, PW3 recorded the caution statement of the appellant on 25/06/2018 in which the appellant is allegedly voluntarily confessed committing the offences. The accused did not object the admission of the caution statement, which ultimately was admitted as exhibit P.1. In cross-examination, however, PW3 admitted forcing the appellant to have confessed and admitted that he sent the appellant to the Justice of Peace.

The caution statement appears to have been recorded from 16:05 hrs. to 17:00 hrs. Exhibit P2, the PF3 of the victim, shows the victim sustained *multiple bruises and tear on the anus and redish vagina ..., no hymen*

In his defence, the appellant denied having committed the offences. He claimed not to have been identified by the victim at the identification parade. The police obtained his confession by torture. He was brought to court on 04/07/2018. He lamented the prosecution evidence was hearsay. He too challenged the time he was interrogated and that he was not sent to the Justice of Peace. His arrest was carried out by garage co-workers.

One of the grounds of appeal tabled by the appellant is:

> *That the trial court erred in law and in fact by convicting the appellant on a case which was not proved beyond reasonable doubt.*

The hearing of this appeal was carried out by way of oral submissions. The appellant appeared in person while the Respondent was competently represented by Mr. John Kabengula, learned Senior State Attorney. In his submission, the appellant prayed his grounds of appeal be adopted as his submissions.

On his part, Mr. Kabengula resisted the appeal. He argued that the charge was proved beyond reasonable doubt. In rape cases, what is supposed to be proved is penetration under section 130 of the Penal Code. The doctor proved the age as per **Jaspini Daniel @ Sikazwe v D.P.P. Criminal Appeal No. 519/2019** (CAT) at page 14 (unreported.

He said, the victim's evidence was corroborated by the evidence of the medical doctor. He insisted that the prosecution evidence was not contradictory. That it is the trial court which is best placed to determine the credibility of the witness. He referred this court to the decision in Jaspin's case at page 15 (supra). The victim's evidence is heavy against the appellant, he stressed citing Selemani Makumba's case.

As to independent witnesses, he said there was the investigator and the medical doctor.

The complaint of the appellant about torture in obtaining the caution statement, Mr. Kabengula was quick to comment that the same is an afterthought as the appellant did not raise the same at the time of admission.

As to the ground of appeal about voire dire test, he said that is not a requirement but rather a promise to tell the court nothing but the truth, and the victim did promise to tell the truth. He therefore concluded that the appeal has no merits and it be dismissed. Conviction and sentence of the trial court be upheld, he prayed.

In rejoinder, the appellant insisted that he did not commit the offence and wondered why the witnesses told lies to the court.

Having heard the parties in this appeal, I will start addressing the caution statement which was admitted as exhibit P1. It is claimed that the appellant committed the offence at around 08:00 am. After the offences were committed, PW1 ran and informed her parents and they took her to the police. It would appear the suggestion of the prosecution that the appellant was arrested immediately by his garage co-work on suspicion of committing the offences. The arrest, therefore, should have had happened in the morning at around 08:30am to 09:00 am. Why then the appellant's caution statement was recorded at 16:05 hrs? Obviously, it was recorded outside the prescribed time, without extension of time to do so. It is also curious that though the caution statement was recorded on 25/06/2018, the charge sheet

was prepared on 03/07/2018, a week thereafter. No explanation is given, though it appears the victim was medically examined and probably recorded her statement on the very day. Further, if the appellant had given the statement voluntarily, and sent to repeat the confession before the justice of Peace, why the extra-judicial statement was not tendered in court? Guidance is supplied by **Samson Kadeya Kazeze v. Republic Criminal Appeal No.137 of 1993** (Unreported) (CAT) (Mbeya):

> *If the appellant had voluntarily made the confession contained in the cautioned statement, why did he decline to do so before the Justice of the Peace?*
>
> *The trial Judge gave a very curious reason for the appellant's refusal to make an extra judicial statement before the justice of the peace because an accused is freer before the Justice of the peace than before the police. In our view this is exactly the point. If the appellant felt he was not free to refuse to make the cautioned statement, then it was not freely made and it should not have been admitted.*

It is for the above reasons; I hold that the caution statement of the appellant was not voluntary and I expunged it from the record.

I turn next to discuss the testimony of PW1, the victim of the offence. It would appear that she was not acquainted with the appellant. There is also the claim by the appellant that PW1 failed to identify him at an identification parade. This is a huge anomaly on the part of the prosecution. Worse, still, the persons who arrested the appellant were not called to testify, including the investigator of the case, because PW3 merely recorded the alleged caution statement of the appellant. The evidence of PW1 is wanting in that she did not describe that attacker. Even the alleged bodaboda driver who assisted her did not turn-up to give evidence. Admittedly, the prosecution is not required to bring a certain number of witnesses to prove a fact, but if they do not call some material witnesses or a material witness, they are supposed to face the defence, see **Godson Hemed v Republic, [1993] TLR 241:**

> *According to PW1 he followed the direction taken by the deceased until he reached the police station and on his return home the children told him that they saw the appellant going away from his house. None of these children was called to testify on this point which was of crucial importance in assessing the*

veracity and accuracy of PW1 as a witness. The question is: why were these children not called?

and **R v. Gokaldas Kanji and another (1949) EACA 116.**

No obligation rests upon the prosecution to call every witness whose name appears on the back of the information and although it is the duty of the crown to see that every such witness attends the trial so that any not called by the prosecution are available to the defence nevertheless it is a matter in the discretion of the prosecution to tender such witnesses for cross-examination by the defence and not one that can be claimed by the defence as of right.

The evidence of PW1 is highly unreliable as to the identification of the attacker.

My re-evaluation of the evidence in this case in this first appellate court stage is not without bases. I seek admiration in the decision of my learned brother his Lordship Mushi, J. as he then was, in **C. 6237 P.C. Edwin and Another v R. [1985] TLR 31** (HC):

This court being the first appellate court, is duty bound to re-evaluate the evidence which was before the trial court and draw its own inferences and conclusions, where the circumstances demand as in this case, as would have been done by the trial court had it properly directed its mind to the evidence. For this proposition of law, I am guided by the decision in Dinkerrai Ramksishan Pandya v R. [1957] E.A. 336. This was a decision of the former Court of appeal for East Africa which is still sound. The same principle has been restated recently by Tanzania Court of Appeal in the case of Martha Michael Wejja v Hon. the Attorney General and Three Others, which is a Court of Appeal Civil Case No. 3 of 1982 (unreported) in which it quoted with approval the same principle in the case of Yuill v Yuill [1945] 1 ALL. E.R. 183.

I am of the view that had the trial Resident Magistrate deliberated the evidence in this case as I have endeavoured to consider above, he would have come to the conclusion that the prosecution did not prove its case beyond reasonable doubt. He would have acquitted the appellant. I would

proceed to observe that the trial Resident Magistrate did not adequately consider the defence of the appellant.

In fine, I allow the appeal. I quash the convictions on both offences and set aside the sentences. I order the appellant be set free from prison unless he is held therein for other lawful cause(s).

It is so ordered.

DATED at **SUMBAWANGA** this 1st day of November 2021.

J. F. Nkwabi

Judge

Court: Judgment delivered in chambers this 01st day of November, 2021 in the presence of the appellant in person and Mr. John Kabengula learned Senior State Attorney for the Respondent (the Republic).

J. F. Nkwabi

Judge

Court: Right of appeal is fully explained.

J. F. Nkwabi

Judge

01/11/2021