IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

(HC) CRIMINAL APPEAL No. 113 OF 2021

LUCAS ROBERT ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

24/2/2022 & 19/4/2022

ROBERT, J:-

The appellant, Lucas Robert, was charged at the Resident Magistrates' Court of Mwanza with the offence of rape contrary to section 130(1), (2)(e) and 131(1) of the Penal Code, Cap. 16 (R.E. 2019). After the hearing, he was convicted and sentenced to thirty years imprisonment. Aggrieved, he preferred this appeal challenging the trial court judgment.

It was alleged that, between the month of December, 2019 and 18th January, 2020 at Bugarika area within the District of Nyamagana, the appellant did have unlawful sexual intercourse with one Caren d/o Meshack, a girl aged 14 years old.

The prosecution led evidence to the effect that, on 17/1/2020 the victim in this case went back home late in the evening and her mother wanted to beat her for being late. Scared of being beaten, she fled and went to the appellant's house where she spent the night. The appellant had sexual intercourse with her that night. In the morning of the following day, the victim's mother found her at the appellant's house. The appellant escaped and ran away. While she was still at the appellant's house, her father went there together with the Ward Executive Officer. Later, the matter was reported to Pemba Police station. The victim was given PF3 (exhibit P1) and went to Sekou Toure hospital. The following day she was examined and the remarks of the Medical Practitioner indicated that there were no bruises, no tear, no watery discharge and the hymen was old perforated. The appellant was later apprehended and his cautioned statement (exhibit P2) was recorded where he allegedly admitted to have committed the charged offence. However, he later testified as DW1 and denied to know the victim or to have committed the alleged offence. After the hearing, the trial Court convicted and sentenced him to serve 30 years in jail. Aggrieved, he lodged this appeal armed with two grounds of appeal which I take the liberty to reproduce as follows:-

(1) *That the evidence on records is too insufficient to ground conviction of rape.*

(2) *That the learned trial magistrate erred in law by admitting in evidence relying on an illegally procured caution statement to convict the appellant.*

At the hearing of this appeal, the appellant was represented by Mr. Anthony Nasimire, learned counsel whereas the Respondent was represented by Gisela Alex, Senior State Attorney. Parties proceeded to argue the appeal orally.

Mr. Nasimire opted to argue the two grounds of appeal together. Highlighting on the two grounds, he submitted that, there was no sufficient evidence to ground conviction of rape. Starting with the cautioned statement of the appellant (exhibit P2), he maintained that evidence adduced by PW6 indicates that the appellant was arrested on 20/1/2020 but his cautioned statement was recorded on 22/1/2020. He argued that the said statement was required to be taken within four hours commencing at the time when he was taken under restraint in respect of the offence as per section 50(1)(a) of the Criminal Procedure Act, Cap. 20 R.E. (2019).

He maintained that, where the statement could not be recorded within the period available for interviewing a person, PW6 was supposed to seek extension of time in order to continue to record the statement

out of the time prescribed by the law. However, in the present case there is no any evidence to establish if that was done apart from the explanation given in the testimony of PW6 that the appellant was brought to him on the night of 21/1/2020 and that is why he didn't record his statement until 22/1/2020.

He maintained further that, although the impugned judgment considered the appellant's cautioned statement as a confession because it was not objected by the appellant when it was being tendered as exhibit P2, the said statement need to be expunged from the court record because the law does not legalize what was recorded illegally.

Responding to this argument, Ms. Alex submitted that, although the appellant's statement was recorded on 22/1/2020 as submitted, PW6 indicated the reasons for the delayed interrogation of the appellant at page 50 of the proceedings. She maintained that, although PW6 did not apply for extension of time as required under section 51 of the Criminal Procedure Act, the appellant did not object to the tendering of the cautioned statement as exhibit. On that basis she maintained that the appellant and the trial court had agreed with the reasons given for delayed recording of the cautioned statement.

She cited the case of **Nyerere Nyague vs Republic, Criminal Appeal No. 67 of 2010** (unreported) which made reference to the case of **Selemani Hassan vs R, Criminal Appeal No. 364 of 2008** (unreported) where the Court of Appeal of Tanzania decided that if an accused intends to object to the admissibility of a statement or confession he must do so before it is admitted.

In his rejoinder, Mr. Nasimire resisted the argument made by the learned State Attorney and maintained that the decision in the cited case of Nyerere Nyague establishes a position in respect of voluntariness of statements and not recording of statements beyond the prescribed time. It is therefore distinguishable from this matter.

Moving to the other issue, Mr. Nasimire faulted the trial court's findings that the testimony of PW5 (victim) was corroborated by that of PW1, PW2 and PW3. He clarified that PW1 is the one who conducted medical examination of the victim of crime. At page 27 of the typed proceedings (3rd paragraph), PW1 stated that he examined the private parts of the victim and noted that there were no bruises or blood and her hymen was already removed previously. He also noted that there was no semen in her private area (see exhibit P1). Thus, he argued that, PW1's evidence does not corroborate that of PW5.

Coming to the testimony of PW2 who is the victim's mother, he maintained that her testimony does not corroborate the victim's (PW5's) testimony as she didn't witness the alleged rape. He argued further that, the testimony of PW3, a child of tender years, could not be used to corroborate the testimony of PW5 because PW3's evidence also needed corroboration.

The learned counsel argued that, to arrive at a safe conviction for rape cases corroboration is required. Since there was no evidence to corroborate the testimony of PW5 it was unsafe to convict the appellant.

In response, Ms. Alex denied the argument that PW5's testimony was not corroborated. She maintained that, PW1's testimony that the victim's hymen was raptured in the past corroborates the testimony of PW5. With regards to the testimony of PW2, she argued that, it corroborated PW5'S evidence by indicating that on the morning of 18th January, 2020 she found the victim at the appellant's house after spending the night with the appellant. She also insisted that although PW3 was eight years old the Court had satisfied itself that she knew the importance of speaking the truth. Therefore her testimony could corroborate that of PW5.

In his rejoinder, Mr. Nasimire reiterated that PW1's evidence cannot corroborate PW5 because it shows that there were no signs of rape which means PW5 was not raped. As for PW2 he maintained that the fact that she found the victim at the house of the appellant does not prove that the victim was raped. With regards to PW3, he argued that the fact that PW3 promised to say the truth does not remove the requirement of corroboration. Since PW3 was a child her testimony needed corroboration and could not corroborate the testimony of PW5.

Lastly, Mr. Nasimire submitted that, evidence adduced by prosecution do not support the charge filed against the appellant. He argued that there is a discrepancy between the testimony of witnesses and what is alleged in the charge. He submitted that PW5 testified that she was raped on 17/1/2020 as indicated at page 42 of the proceedings and further that they were lovers with the appellant since February, 2019. However, the charge sheet indicates that she was raped on 18/1/2020. He maintained that the prosecution did not prove the charge against the appellant. On that basis he prayed for the appeal to be allowed.

In response, Ms. Alex maintained that the discrepancy of dates in the charge sheet is a minor irregularity which can be cured by the testimony of witnesses and therefore not fatal.

In a rejoinder, Mr. Nasimire maintained that the difference between the charge sheet and the testimony of witnesses is not minor as it goes to the root of the case.

Having heard submissions from both parties and examined the records of this matter, I will now pose here and make a determination of this appeal in light of the issues raised in the argued grounds of appeal.

Starting with the appellant's cautioned statement (exhibit P2), it is not disputed that the appellant's cautioned statement was recorded past the prescribed time of four hours after his arrest contrary to the requirements of sections 50 and 51 of the Criminal Procedure Act, Cap. 20 (R.E. 2019). That irregularity could not be salvaged by the testimony of PW6 that the appellant was brought to him for interrogation at night or the fact that the appellant did not object to the tendering of the said statement. PW6 was required to seek extension of time as required by the law. The trial Magistrate was required to consider and address that irregularity.

With regard to the relief for non-compliance with sections 50 and 51 of the Criminal Procedure Act, I wish to seek guidance from the case of **Anorld Kagoma & Another Vs R ,Consolidated Criminal Appeals No. 31 & 32 of 2016, CAT** (unreported) where the Court of Appeal decided that:-

> *"It is now settled that a cautioned statement taken in defiance of SS.50 and 51 of the CPA is not admissible in evidence (see Janta Joseph Komba &. Three others V. Republic Criminal Appeal No. 95 of 2006 (unreported). The said statements are expunged from the record. The issue of reading them, therefore, to the appellants does not arise."*

Steered by the principle in the cited case, this Court proceeds to expunge the appellant's cautioned statement from the records of this matter for violation of the law.

Coming to the issue of corroboration, Counsel for appellant argued that the testimony of PW1, PW2 and PW3 did not have corroborative effect to the evidence of PW5 (the victim) in establishing the offence of rape. Before looking at that, it is important to note that, according to section 127 (6) of the Evidence Act, Cap. 6 (R.E. 2019) and section 115 (3) of the Law of the Child Act, Cap. 13 (R.E.2019), the court can act upon evidence of a child of tender age (not more than 14 years) or a

victim of sexual offence to convict a person in proceedings involving sexual offence without corroboration if, after assessing credibility of that evidence, the court is satisfied that the said child or victim is telling the truth. That is to say, conviction for sexual offence may be grounded solely on the uncorroborated evidence of the child or victim of sexual offence but the Court must assess the credibility of the child or victim of sexual offence to see if it passes the test of truthfulness.

Having examined the proceedings of the trial Court, this court has observed that there are no reasons recorded in the proceedings of the trial Court which could have been used by the trial court to satisfy itself that the victim of sexual offence (PW5) was telling the truth as required under section 127(6) of the Evidence Act, Cap. 6 (R.E.2019).

It is also significant to bear in mind that, for the evidence to warrant conviction for the offence of rape, including the evidence of the victim of sexual offence, such evidence must prove the ingredients of the offence of rape. On that basis, this court will now proceed to make a determination on the last issue, whether evidence adduced by prosecution proved the offence of rape under section 130(1), 130(2)(e) and section 131(1) of the Penal Code, Cap. 16 (R.E.2019).

To establish the offence of rape under the cited provisions, the prosecution had to prove that, the accused person penetrated his male organ (penis) into the female organ (vagina) of the victim (PW5) with or without consent of PW5, if PW5 was less than 18 years old.

This Court having expunged the appellant's cautioned statement for reasons stated herein, the only evidence remaining is the PF3 (exhibit P1) and that of the witnesses including the victim of the alleged offence.

I have examined the Medical Examination Report (exhibit P1) with a view to determine if there is any incriminating evidence against the appellant for the offence of rape. The Medical Practitioner who testified as PW1 gave his remarks in that report to the effect that, *"No Bruises No Tear No watery Discharge Hymen old perforated"*. In his testimony PW1 testified at page 27 of the typed proceedings and informed the Court that:

> *"I examined her private parts vagina and anus then I took samples for lab tests. Upon examining the private parts I have found that she had no bruises and blood. But the hymen/virginity was not there, it appears that it was removed long time ago, it shows that she was already penetrated for some time..."*

From the contents of the PF3 (exhibit P1) and the evidence of PW1 alluded to above, it is obvious that there is no incriminating substance for the offence of rape. There is nothing to indicate that the victim's

vagina was penetrated at the time when the victim was found in the appellant's house. Further to this, evidence does not establish the previous time when the alleged sexual intercourse took place between the two individuals prior to the day in question.

I have also revisited the testimony of PW2, the victim's mother who testified at page 32 of the typed proceedings that:

> *On our way Kemi told me that, Karen normally goes to the youth's room (chumba cha wale vijana). I told her to take me to the said room. When we got there I knocked the door, then a certain boy opened. I then asked the said boy whether he knew Karen. He told me that he didn't know her; he then got out and left.... The boy that I found standing was the accused person.... The accused had sex with Karen at night. It is Karen who told me that they had sex at night"*

The substance in the PW2's evidence is that she found PW5, the victim, at the appellant's house and further that PW5 told her that she had sexual intercourse with the appellant. However, as noted in the excerpt above, the house in question is described as the youths' room (chumba cha wale vijana). Evidence is silent on who are the said youths. Evidence adduced by PW3 indicates that there were two boys who were sleeping in that room. Apart from what PW2 claimed to have been told by PW5, the testimony of PW2 do not have any incriminating element

for the offence rape. PW3's evidence is the same as that of PW2 in substance.

Apart from PW5, the remaining witnesses (PW4 and PW6) testified on the events which followed after the alleged offence which do not establish the ingredients of the offence of rape. As a matter of fact PW4 was the executive officer of the relevant area whereas PW6 is the one who recorded the appellant's cautioned statement which has been expunged in this judgment.

That said, the only evidence remaining in this case is that of PW5, the victim. As alluded to earlier in this judgment, conviction for sexual offence may be grounded solely on the uncorroborated evidence of the victim of sexual offence if it passes the test of truthfulness. However, this court has observed that there are no reasons recorded in the proceedings of the trial Court which could have been used by the trial court to satisfy itself that the victim of sexual offence (PW5) was telling the truth as required under section 127(6) of the Evidence Act, Cap. 6 (R.E.2019). In the circumstances, it was unsafe for the trial Court to rely on the testimony of PW5 to enter a conviction of rape against the appellant.

As a consequence, this Court finds and holds that evidence adduced by the prosecution failed to establish the offence of rape against the appellant to the required standard. I therefore proceed to allow this appeal, quash the conviction and set aside the sentence imposed by the trial Court. I hereby order for the immediate release of the appellant from custody unless he is held for other lawful cause.

It is ordered.

K.N. ROBERT
JUDGE
19/4/2022