IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MOROGORO SUB-REGISTRY[

AT MOROGORO

CRIMINAL APPEAL NO. 38839 OF 2023

(Originating from the decision of the District Court of Ulanga dated 8th December 2020 in Criminal Case No 86 of 2020)

AGRIPINUS MADEGE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

15/04/2024 & 29/04/2024

KINYAKA, J.:

In criminal case No. 86 of 2020 of the District Court of Ulanga herein after "the trial court", the appellant herein was prosecuted and convicted for the offence of Rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code, Cap. 16 R.E. 2019. He was sentenced to serve a term of 30 years imprisonment in jail.

For a better appreciation of what transpired at the trial court, I find it apposite to summarize the facts that led to the appellant's sentence and conviction as gleaned from the trial court's records. On the night of 24/05/2020 at about 23 hours, PW1, the victim hired the appellant who was

a motorcycle transport rider commonly known as "bodaboda" to take her to a place known as Mwaya Village. On the way, upon reaching at Mbangayao Village, the appellant attempted to seduce the victim to have sexual intercourse with him but she refused. Thereafter, he took the motorcycle to the bush, took off the victim out of the same, grabbed her down, took off her clothes and managed to have sexual intercourse with her. Upon finishing the act, the appellant took the victim back to the motorcycle and proceeded with the journey. However, instead of taking the victim to Mwaya Village, he drove her to Libenanga Village and thereat ran away upon noticing that the victim's relatives wanted to arrest him. The victim reported the incident to the police and on 25/05/2020 at 10:00 hours, the appellant was arrested.

In his defence, the appellant denied to have committed the offence he was accused of. He said he safely drove the victim from Ulanga bus stand to Libenaga were he dropped her and proceeded with the journey to Mwaya Village. He told the trial court that on the next day, he was arrested and taken to Mahenge Police Station.

Contrary to his evidence in chief, and upon being cross examined by the prosecution, he admitted to have sexual intercourse with the victim with her consent. It was on the basis of the above narrated facts, that the appellant

was convicted of rape and sentenced by the trial court to 30 years imprisonment in jail.

Dissatisfied, the appellant through his petition appeal, raised five grounds of appeal as hereunder: -

1. That, the caution statements were not properly taken and I didn't know what was contained in it. Despite my objection for admission, the trial Magistrate erroneously admitted it and such admission affected not only the trial process but also the judgement. I ask for such document to be expunged from records;
2. That, G2405 DIC Humphrey improperly and in the detriment of appellant wrote whatever known to him in the caution statement and asked me to sign. I requested my relative to be present when he took such statements but he refused. Your Honour, the testimony of PW3 is not true and I informed the trial Magistrate but because he had already had his judgement before hearing the case, he ignored my objection;
3. That, the trial Magistrate erred in law for ignoring the testimony of PW2 one Dr. Caroline Mwembera who clearly stated at page 12 of the proceedings that no sperms no braises were found at the private part

of the victim and due to her age *of 40 years perforation of hymen is obvious*. Your Lordship, the doctor did not mention anything that connects appellant with the case at hand;

4. That, there existed errors on face of record that prompted to the conviction and sentence against appellant. The contents at page 23 of the proceeding are not mine and I wonder when read over to me; and
5. That, Your Honourable Judge, my defence statement were not correctly taken and what has been recorded are not what I stated that affected the Judgement and prompted conviction.

At the hearing of the appeal the appellant appeared in person and unrepresented remotely through the video conference facility linked from Ukonga Central prison. On the other hand, Mr. Josberth Kitale, learned State Attorney entered appearance for the respondent.

The appeal was argued orally. Being a lay person, the appellant commenced by narrating a factual background to his arrest similar to his evidence given before the trial court. He submitted briefly in respect of his first and second ground of appeal that the caution statement was taken without the presence of any of his relatives and that as he does not know how to read and write he was not conversant with what was written in the said caution

statement. On the third ground, he asserted that the medical doctor (PW2) informed the Court there was no bruises or sperms and that the victim had already taken bath.

As for the fourth and fifth grounds, the appellant complained that what was written in the proceedings were not what he stated and that he doesn't remember if his testimony was read over to him as time has passed.

On his part, Mr. Kitale strongly resisted the appeal. In his submissions, he opted to consolidate and argue jointly the first and second grounds of appeal as well as the fourth and fifth grounds of appeal. He argued the third ground of appeal separately.

On the first and second grounds of appeal relating to the caution statement admitted in court as Exhibit P2, the learned state counsel refuted the appellant's complaint that he didn't know the contents of Exhibit P2 and submitted that when the statement was about to be tendered, the appellant objected only to the extent that none of his relative was called during the interrogation. In his views therefore the appellant's complaint that he did not know what was written in the caution statement was an afterthought.

Fortified by the holding of the Court of Appeal in the case of **Ally Hassan Abdallah v. R., Criminal Appeal No. 303 of 2021**, Mr. Kitale contended that the appellant understood what was written in the caution statement. He added that, after all the argument that the appellant did not understand the content of the caution statement was not raised at the trial.

Elaborating on the point, Mr. Kitale substantiated that when the trial court conducted trial within a trial as reflected on page 20 of the typed proceedings, there was nowhere the appellant asked PW3 on the procurement of Exhibit P2 including that he did not understand its contents. According to him, the failure by the appellant to ask questions on how the caution statement was procured, prove that what was testified by PW3 on page 20 of the proceedings that he recorded and read out the caution statement and that the appellant understood, and signed the same, are correct. The learned state attorney referred the court to the cases of **Frank Kinambo v. DPP, Criminal Appeal No. 47 of 2019** and that of **Nyerere Nyague v. R., Criminal Appeal No. 67 of 2010** (all unreported), to add weight to his proposition.

As for the third ground, Mr. Kitale submitted that in sexual offences, there are three important elements that needs to be proved to wit; a carnal knowledge of a woman, absence of a consent of a victim and a proof that the accused person is the one who raped the victim. Manifesting on how the three elements were proved by the prosecution at the trial, he highlighted that, on the element of carnal knowledge, PW1 testified how she was raped by the appellant. He added that, the appellant, on page 32 of the typed proceedings, admitted to have sexual intercourse with the victim but claimed that there was an agreement. Regarding consent, he averred that PW1 testified that she was raped and that the appellant took the advantage of the existence of a forest on the way to rape her. Mr. Kitale averred further that, the appellant testified that he had sex with the victim upon an agreement for the victim not to pay fare to him, a payment in kind. He concluded that the ingredient as to whether the appellant and victim had sexual intercourse has been answered by PW1 and DW1 testimonies.

He however submitted that the sexual intercourse was done without the consent of the victim proven by the demeanour of PW1 before the trial court where on page 5 of the judgement of the trial court, it was clearly held that the demeanour of the victim was that she did not consent to the act.

As to the reliability of the victim, the learned state attorney relying on the case of **Marwa Wangiti Mwita v. R. [2002] TLR 39** where it was held the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability and submitted that PW1 reported the incident to her relatives on the same day and on the same day, the incident was reported to the police hence she was a credible witness.

Flowing from the above, the learned counsel maintained that the presence of bruises and sperms are not the only indicators of rape because not all sexual intercourse results to sperms, bruises or hymen or perforation. According to him, what the prosecution was required to prove was sexual intercourse or penetration without consent of the victim, the element which was in his view, sufficiently proved.

On the complaint that what the appellant stated at the trial tribunal was not recorded in the proceedings as reflected in the fourth and fifth grounds of appeal, the state attorney guided by the holding of the Court of Appeal in the case of **Oscar John Bosco & Another v. R., Criminal Appeal No. 140 of 2018** substantiated that the proceedings of the trial court before this Court reflect the true affairs of what transpired in the trial court. He

prayed for the Court to find that the fourth and fifth grounds of appeal to have no merit.

In the end, Mr. Kitale urged the court to accord the evidence of the victim a deserved weight and consider the caution statement where it will find that the prosecution proved the offence against the appellant beyond reasonable doubt.

In his brief rejoinder, the appellant insisted that he did not rape the victim but he was fixed.

Having summarized the parties' rivalry submissions, the crucial issue calling for my determination is whether the appellant's appeal has merit. In my deliberation of the same, I will consider and determine the grounds of appeal as presented by the parties.

On the first and second grounds of appeal relating to the caution statement admitted in court as Exhibit P2, the appellant's grievance is predicated on the complaint that he didn't know the contents of Exhibit P2 and that his relatives were not called during the interrogation.

I have carefully examined the proceedings of the trial court. As correctly argued by Mr. Kitale, the learned state attorney, the appellant's complaints that he didn't know the contents of the caution statement are not reflected anywhere in the trial court's records. His complaints in relation to the caution statement was mainly on the failure of PW3 to call the appellant's relatives. The records of the trial court speak for themselves on page 17 of the typed proceedings where upon being called to comment on the caution statement, the appellant responded as follows:

> *"PP: Do you recognize this document?*
>
> *PW3; YES, this is accused caution statement i am talking about. I pray to tender it as an exhibit.*
>
> *Accused: i have an objection to that. The witness PW3 fail to call any relative. Thats all"*

Similarly, on 19th October 2020 in his defence case at the inquiry as to the admission of the caution statement on page 23 of the proceedings, the appellant stated:

> *"i admit the said cautioned statement is mine though the police did not give me my basic rights. I was recorded the said*

cautioned statement without the presence of my relative. I did not even taken to a justice of peace."

From what has been highlighted above, it is apparent that the appellant's claim that he didn't know the content of the caution statement is an afterthought. That issue was neither raised nor argued at the trial court or determined by the same. I therefore refrain from determining the complaint as it is now a well-established principle that courts are only bound to look into matters which came up at the lower courts and decided upon. [See the case of **Godfrey Wilson v. Republic, Criminal Appeal No. 168 of 2018** on page 6]

Turning to the appellant's complaint that his relatives were not called when he was making the caution statement, I am alive to the legal requirement spelled out under sections 53 and 54(1) of the Criminal Procedure Act, Cap. 20 R.E. 2022 which reads: -

" S53; Where any person is under restraint, the police officer shall not ask him any questions, or ask him to do anything, for a purpose connected with the investigation of an offence, unless-

(a) N/A

(b) N/A

(c) the person has been cautioned by a police officer in the following manner, namely, by informing him, or causing him to be informed, in a language in which he is fluent, in writing in accordance with the prescribed form and, if practicable, orally-

(i) N/A

(ii) that, subject to this Act, he may communicate with a lawyer, relative or friend."

Equally, section 54 (1) reads:-

"Subject to subsection (2), a police officer shall, upon request by a person who is under restraint, cause reasonable facilities to be provided to enable the person to communicate with a lawyer, a relative or friend of his choice."

As plain as they are, the above provisions provide for a mandatory requirement for the accused person to not only be accorded with the right to be informed that he might communicate with his relatives while under restraint, but also reasonable facilities should be provided to him so that he can communicate with his relatives if he so request.

In the instant matter, having read the records, I have found nowhere the accused complained that he was not afforded with such rights. What he complained of was that he was not given his basic rights as PW3 did not call his relatives and hence the caution statement was recorded without their

presence. However, the appellant did not adduce evidence that he made such a request of requiring their presence to such effect. I wish to point out here that the appellant's allegation is a factual matter that had to be established by evidence during the inquiry.

All the same, I have read the impugned caution statement dated 25/5/2020 which was admitted by the trial court as Exhibit P2. The same clearly indicate that the appellant was asked if he needed any witness during the recording of the statement but he declined. The extract of the caution statement to that effect is as shown below:-

> *"**SWALI**: Je uko tayari kutoa maelezo yako?*
>
> ***JIBU**: Ndiyo nipo tayari kutoa maelezo yangu*
>
> ***SWALI**: Je ungependa nani awepo kushuhudia ukitoa maelezo yako?*
>
> ***JIBU**: Mimi mwenyewe tu nimetosha*
>
> *..(appended his thumb print)..* .....
>
> *Saini ya Mtuhumiwa* *Saini ya Shahidi*
>
> ..... *G2405 D/C HUMPHREY.....*
>
> *Saini ya Afisa wa Polisi "*

From the foregoing illustration, I am satisfied that the caution statement was properly taken. As such the first and second grounds of appeal fail.

On the third ground, the appellant complained that the testimony of PW2's that there were neither sperms nor bruises found at the private part of the victim, was ignored by the trial court. Without much ado, I find the complaint immaterial as at the trial court, there was undeniably no contention as to whether the appellant had sexual intercourse with the victim. In his evidence, the appellant admitted to have had sex with PW1. On page 32 of the proceedings, when the appellant was cross examined, he said:-

> *" i had intercourse with her and she will not pay fair she agreed. Thus why i and her we had sexual intercourse at Mbangayao plateau. It is true that i and the victim had sexual intercourse but with her consent.... It is true that the area that we have sexual intercourse is a forest area and there is no huts or house."*

From the extract above, before moving a step ahead, I find it worthy to highlight on the appellant's assertion that the victim had consented to the act, a crucial ingredient to be proved when a victim of the alleged rape is above 18 years of age as well elucidated by the Court of Appeal in the case

of **Masanyiwa Msolwa v. Republic, Criminal Appeal No. 280 of 2018 (unreported)** on 16 page that:-

> *"Admittedly, for the offence of rape of any kind to be established, the prosecution or whoever is seeking the trial court to believe his or her version of the facts on trial, must positively prove that a sexual organ of the male human being penetrated that of a female Victim of the sexual offence,* ***and if the victim is an adult of over 18 years of age, a further condition is needed, proof that the victim did not consent to the sexual act*** *See Athanas Ngomai v. R, Criminal Appeal No. 57 of 2018 (unreported) and Selemani Makumba v. R, [2006] T.L.R. 379."* [Emphasis added].

In the matter at hand, I have undoubtedly found that the victim did not consent to the sexual act with the appellant due to the nature of the environment within which the two had the alleged sexual intercourse. The place where the appellant and the victim had sexual intercourse was clearly testified by both the victim and the appellant on pages 9 and 33 of the typed

proceedings, respectively, to be in a bush/forest area where there were no houses.

As such, I have asked myself, if the victim had agreed to have sexual intercourse so that she could not pay fare, why would it not be done in the environment that demonstrates agreement by the parties or consent of the victim such as at the appellant's house, or at a guest house? Why did it happen in the forest in the middle of nowhere where there were no huts, residences or people around, and in the course of the appellant's carrying the victim to the latter's destination? The evidence of both the victim and the appellant demonstrate that the two did not know each other before the date when the victim hired the appellant. In those circumstances, it is unlikely that they would have agreed to have sexual intercourse on the way and at the forest. It is my considered position, that the evidence at the trial clearly established lack of the victim's consent to have sexual intercourse with the appellant.

Even by assuming that the appellant didn't admit to have had sex with the victim, still his concern that there were no bruises and sperms as proof of penetration is unfounded. It is now settled that the presence of the sperms

and bruises on the victim's private is not the only conclusive proof of penetration. Upon being confronted with a much similar scenario in the case of **Daniel Nguru and 4 others v. The Republic, Criminal Appeal No. 178 of 2004**, the Court of Appeal underlined as follows:-

> *"Another ground of complaint is that there was no proof of penetration in respect of the rape offence for the reasons already stated. This too is arid of merit. Penetration is not proved by presence of semen on the body of the prosecutrix or bruises on her vaginal region. If bruises were such a natural consequence then many women would have opted for total abstinence. The best proof was provided by PW2 herself who categorically stated that all the appellants carnally knew her in turns"*

From the above analysis, I hold that the element of penetration was proved as against the appellant even in the absence of the bruises and sperms on the victim's private parts. In that regard, the third ground of appeal is dismissed.

Last for determination is the fourth and fifth grounds, in which the appellant attacked the trial court for associating him with the contents on page 23 of the typed proceedings which were not his. He further attacked the court for not properly recording his defence statement. In other words the appellant

is challenging the sanctity of the trial court's proceedings for not depicting what had actually transpired during the trial.

The principle governing the sanctity of court's record has been articulated in a range of decisions of this Court and the Court of Appeal. See the cases of **Halfani Sudi v. Abieza Chichifi (1998) T.L.R. 557**, **Frank Godfrey Mshana and Another v. Republic (Misc. Criminal Application 1 of 2023**, **Iddy Salum @ Fredy v. Republic, Criminal Appeal No. 192 of 2018** (unreported) and **Alex Ndendya v. Republic**, **Criminal Appeal 207 of 2018.** For in instance in the later case, the Court of Appeal on page 12 had the following to state:

> *"We are positive that the appellant is trying to impeach the court record. It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record. In Halfani Sudi v. Abieza Chichili [1998] T.L.R. 527 the Court followed its previous decision in Shabir F. A. Jessa v. Rajkumar Deogra, Civil Reference No. 12 of 1994 (unreported) to hold that: "A court record is a serious document; it should not be lightly impeached." We also subscribed, in that case, to the decision of HM High Court of Uganda by Bennett Ag. CJ in Paulo Osinya v. R. [1959] EA.353,*

to hold that: "There is always a presumption that a court record accurately represents what happen"...."

What I have gathered from my literal interpretation of the above authority is that there is a rebuttable presumption as to the sanctity of court's records which discourage the impeachment of the same. It follows that a party to the case who claims that the record has been tempered with, must rebut the same through cogent evidence as it is a general rule that the records are the mirror of what actually took place at the trial. In the case of **Samwel Sylivester v. R., Criminal Appeal No. 36 of 2023,** on page 21, this Court in resolving the appellant's allegations that the honourable trial magistrate did not comply with the requirement of section 210(3) of the CPA contrary to what the magistrate recorded in the proceedings, had the following to state:-

"The appellant's advocate may be permitted to impeach the court record if, and only if he has evidence to that effect or else if we assured the court record to be easily impeached the result will be cause anarchy. This is not to say the court record cannot be tendered with but a person alleging breach must adduce evidence. The appellants advocate has not adduced any."

I have had ample time to read the typed proceedings on page 23 relating to the appellant's defence at the inquiry and on page 32 on his defence in the main case. There is clearly a similarity between what the appellant submitted before this Court in his submissions in chief, and his testimony before the trial court. It means that the trial court recorded what exactly was testified by the appellant. It follows that the appellant failed to rebut the presumption on the sanctity of the court's record. Based on the observations above, I find the fourth and fifth grounds of appeal unmerited.

Under the circumstances, I find no reason to fault the findings of the trial court on both the conviction and sentence of the appellant in Criminal Case No. 86 of 2020. With that said, the appellant's appeal is dismissed in its entirety for being devoid of merit.

It is so ordered.

SGD: H.A. KINYAKA

JUDGE

29/04/2024

Court

Judgment delivered in the presence of **Ms. Edina Aloyce, Learned state Attorney** for the Respondent and the Appellant who appeared in Court remotely linked through Video Conference facility from Ukonga Central prison.

F.Y Mbelwa

DEPUTY REGISTRAR

29/04/2024

Right of Appeal Explained to the parties.

F.Y Mbelwa

DEPUTY REGISTRAR

29/04/2024

THE HIGH COURT OF TANZANIA
MOROGORO