IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 218 OF 2022

TUMAIN YARED MTORO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the Resident Magistrate's Court of Dodoma, at Dodoma)

(Dudu, PRM-Ext. Jur.)

dated the 28th day of April, 2022
in
Extended Jurisdiction Criminal Appeal No. 02 of 2022

JUDGMENT OF THE COURT

5th & 9th February, 2024

KEREFU, J.A.:

This is a second appeal by Tumain Yared Mtoro, the appellant, who was before the District Court of Mpwapwa at Mpwapwa, charged with and convicted of rape contrary to sections 130 (1), (2) (a) and 131 (1) of the Penal Code, Cap. 16 (the Penal Code). He was then sentenced to thirty (30) years imprisonment. It is noteworthy at the outset that the alleged victim was a woman aged seventy (70) years and in order to disguise her identity, we shall henceforth refer to her as 'LM' or simply 'PW1', the codename by which she testified before the trial court.

It was alleged that, on 7th December, 2020 at about 18:00 hours at Lufusi Village within Mpwapwa District in Dodoma Region, the appellant, unlawfully, had carnal knowledge of one LM, a female aged seventy (70) years.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. The prosecution case was built on the evidence adduced by three witnesses augmented by two documentary exhibits namely, the Police Form No. 3 (exhibit P1) and the appellant's cautioned statement (exhibit P2). On his side, the appellant testified alone, as he did not summon any witness.

The prosecution case, as obtained from the record of the appeal, can be briefly stated as follows: LM, the victim who testified as PW1 stated that, in the evening hours of 7th December, 2020, while on her way back home from hospital, she met the appellant at Lufusi River. The appellant asked her where she was coming from and PW1 responded that she was from hospital where she went to see a patient. The appellant told her in Kiswahili that *'nitakupa dawa.'* Literary translated in English to mean, 'I will give you medicine.'

It was PW1's testimony that, the appellant pulled her off the road to the nearby bush and forcefully undressed her and then, raped her.

PW1 screamed for help. Having heard the alarm, Agusto Kianga (PW2) appeared, rescued her and took the appellant to Lufusi Village Office. The matter was reported to Pwaga Police Station. The appellant was arrested and PW1 went to the hospital for medical examination after she had obtained a PF3 (exhibit P1).

In his testimony, PW2 supported the narration by PW1 and added that, while on his way to Lufusi Village, he saw two people lying down and assumed that they were making love. Suddenly, he heard a woman shouting for help saying in Kiswahili, '*Mjukuu wangu naomba unisaidie.*' Literary translated in English to mean, 'My grandson please help me.' PW2 stated that, he went there and arrested the man, who at first, resisted, but PW2 managed to arrest and escorted him to Lufusi Village Office and to Pwaga Police Station where they were interrogated on the incident.

It was the testimony of No. H.3959 Constable Japhet (PW3) that, he interviewed the appellant and recorded his cautioned statement. In the said statement, the appellant confessed to have committed the offence. At the trial, the said statement was admitted in evidence as exhibit P2.

In his defence, apart from admitting that he knew PW1 and on the material date he met her on the said road, the appellant (DW1) denied to have committed the offence. He contended that, on the fateful date, PW1 was drunk, insulted him and shouted that he raped her. As such, he disowned his cautioned statement by alleging that he was forced to sign it. In particular, the appellant challenged the evidence of PW1 and PW2, contending that they gave an untrue story before the trial court. He asserted that, the case was framed up against him due to the existing grudges between him and PW1 on the farm dispute after PW1's goats entered into his farm and destroyed his crops.

After a full trial, the trial court was convinced that the prosecution had proved the case against the appellant to the required standard. Specifically, the trial court placed much reliance on the direct evidence of PW1, the victim and best witness in this case, whose evidence was found to have been corroborated by the evidence of PW2 who stated that he found the appellant *flagrante delicto* committing the offence. It was the further finding of the trial court that, the evidence of PW1 and PW2 was supported by the appellant's cautioned statement (exhibit P2) in which the appellant confessed to have committed the offence. Thus,

the appellant was found guilty, convicted and sentenced as indicated above.

The appellant's first appeal was unsuccessful, as the learned Principal Resident Magistrate with Extended Jurisdiction dismissed it and upheld the decision of the trial court. Undaunted, the appellant preferred this second appeal. In the memorandum of appeal, the appellant raised seven (7) grounds of appeal which can be conveniently paraphrased as follows; **first**, that, the prosecution case was not proved beyond reasonable doubt; **second,** the PF3 (exhibit P1) was unprocedurally admitted in evidence contrary to the mandatory provisions of the law; **third,** failure by the lower courts to evaluate the evidence on record and find that the case against the appellant was fabricated; **fourth,** that, the conviction was based on a defective charge; **fifth**, the proceedings before the trial court were unprocedurally conducted for failure by the trial court to comply with the provisions of section 231 (1) (a) and (b) of the Criminal Procedure Act, Cap 20 (the CPA); **sixth**, the appellant's cautioned statement (exhibit P2) was recorded contrary to the requirement of the law; and **seventh**, the appellant's defence was not considered.

At the hearing of the appeal, the appellant appeared in person. On the other side, the respondent Republic was represented by Ms. Lina

Magoma, learned Senior State Attorney assisted by Mses. Patricia Mkina and Rose Ishabakaki, both learned State Attorneys.

When given the opportunity to amplify on his grounds of appeal, the appellant adopted the same and preferred to let the learned State Attorneys respond first but he reserved his right to rejoin, if the need to do so would arise.

At the outset, Ms. Mkina declared the respondent's stance of opposing the appeal and intimated that she will start to argue the second, fourth, fifth, sixth and seventh grounds, then conclude with the first and third grounds. We shall therefore determine the grounds of appeal, in the same manner as indicated by the learned State Attorney.

However, before doing so, it is crucial to state that, this being a second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there were no mis-directions or non-directions on evidence. Where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149, **Salum Mhando v. Republic** [1993] T.L.R. 170 and

Mussa Mwaikunda v. The Republic [2006] T.L.R. 387. We shall be guided by the above principle in disposing this appeal.

Starting with the second and fifth grounds of appeal, Ms. Mkina contended that the said grounds are new as they were not part of the grounds canvassed and determined by the first appellate court. It was her argument that, since the said grounds were not deliberated and decided upon by the first appellate court, they were improperly before the Court. On that basis, she implored us not to entertain them, unless they involve points of law.

Having examined the said grounds in respect of the appellant's petition of appeal to the first appellate court as found at page 49 of the record of appeal, we agree with Ms. Mkina that the said grounds are new and should not have been raised at this stage as this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal. The said position has been restated in a number of decisions of the Court - see for instance the cases of **Abdul Athuman v. Republic** [2004] TLR 15, **The Director of Public Prosecutions v. Bernard Mpangala & 2 Others**, Criminal Appeal No. 29 of 2002 and **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 (both unreported). As such,

we will not entertain the second and fifth grounds of appeal because they raise new issues of facts which were not canvassed and decided upon by the first appellate court.

As for the remaining grounds, we find it appropriate to start with the fourth ground on the propriety or otherwise of the charge preferred against the appellant, which is the foundation of the appellant's trial. It was the appellant's complaint that his conviction was based on a defective charge.

Responding to the said ground, although, Ms. Mkina readily conceded that the particulars of the offence stated in the charge did not indicate the words '*without her consent*', she was quick to cite sections 132 and 135 of the CPA and argued that the said omission has not occasioned any injustice to the appellant, as the said particulars were well detailed to enable him to understand the nature of the offence facing him. She insisted that, since the appellant was aware of the charged offence from the particulars of the offence which were clearly stated, and he properly marshalled his defence, there was no any prejudice occasioned against him. She thus urged us to note that, the said omission is curable under section 388 of the CPA.

We wish to start by stating that, the process of framing a charge is governed by sections 132 and 135 (a) (ii) of the CPA. The said provisions

prescribe the mode and the format to be adopted in framing the charge or on the manner in which the offences are to be charged. For the sake of clarity, section 132 of the CPA provides that:

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"*

Similarly, section 135 (a) (ii) of the CPA requires the statement of the offence to cite a correct reference of the section of the law which sets out or creates a particular offence alleged to have been committed.

This Court had, on several occasions pronounced itself on the applicability of the above provisions that, whenever a complaint is raised at the appellate court on the defect in the charge preferred against the appellant during the trial, the test is whether the said defect(s) prejudiced the appellant. Certainly, in order to arrive at that conclusion, the Court must consider particulars of the offence laid in the charge and assess whether the alleged defects have prejudiced the appellant substantially. In doing so, the Court should inquire whether the appellant understood the offence which faced him and the consequences that had to follow. See for instance the cases of **Jamali**

Ally @ Salum v. Republic, Criminal Appeal No. 52 of 2017 [2019] TZCA 52: [28 February 2019: TanzLII] and **Omary Abdallah @ Mbwangwa v. Republic,** Criminal Appeal No. 127 of 2017 [2019] TZCA 528: [5 March 2019: TanzLII]. Specifically, in **Omari Abdalla @ Mbwangwa** (supra), this Court stated that:

> *"...we are of the considered opinion that the test to be applicable by an appellate court is first to determine the existence of the said defects in the charge and secondly to assess its effect on the appellant's conviction. The major question being whether conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant."*

In the instant appeal, it is evident at page 1 of the record of appeal that the appellant was charged with the offence of rape of a woman aged 70 under section 130 (1) and (2) of the Penal Code and, as conceded by Ms. Mkina, the words '*without her consent*' do not feature in the particulars of the offence. For clarity, it is instructive at this stage to bring forth the said particulars of the offence as reflected at page 1 of the record of appeal:

> *"**PARTICULARS OF THE OFFENCE**: That, TUMAINI S/O YARED MTORO charged on 7th day of December, 2020 at about 18:00 hrs at Lufusi Village within Mpwapwa District*

in Dodoma Region. Unlawfully did have carnal knowledge with one LM, female aged seventy (70) years, Christian, Hehe, a peasant of Lufusi Village."

Having closely examined the contents of the charge and the above particulars together with the key requirements for framing charges stipulated under sections 132 and 135 of the CPA, we agree with the learned State Attorney that the said particulars enabled the appellant to understand the nature of the charge facing him, as he properly pleaded and fully participated during the trial by cross-examining the prosecution's witnesses and finally marshalled his defence. We are therefore satisfied and have no hesitation to conclude that there was no any miscarriage of justice occasioned on the part of the appellant and the pointed-out anomaly is curable under section 388 (1) of the CPA. We thus find the fourth ground is devoid of merit.

On the sixth ground, the appellant stated in general terms that his cautioned statement, (exhibit P2) was not recorded in accordance with the requirement of the law without specifying the said defect (s). In her response on this ground, Ms. Mkina referred us to page 35 of the record of appeal and argued that, although the said statement was not recorded in the form of questions and answers as required under section 57 (2) (a) of the CPA, it was properly recorded in a narrative form in

terms of section 58 of the same law. She also added that, the said statement was recorded within time, as the appellant was arrested on 7th December, 2020 around 18:00hours and his cautioned statement was recorded at 21:00 hours which was within the four (4) hours prescribed under section 50(1)(a) of CPA. To support her proposition, she referred us to the case of **Francis Paul v. Republic**, Criminal Appeal No. 251 of 2017 [2021] TZCA 12: [11 February 2021: TanzLII] and urged us to find that the sixth ground is devoid of merit.

It is common ground that the recording of interviews and statements by police is governed by sections 57 and 58 of the CPA. What differentiates the statements recorded under the said provisions, is the mode in which they are taken and or made. That, a statement taken under section 57 should be in questions and answers form while the one taken under section 58 has to be in a narrative form. In the case of **Ramadhani Salum v. Republic**, Criminal Appeal No. 5 of 2004 [2007] TZCA 178: [16 March 2007: TanzLII], the Court, while considering the caution statements taken under the said provisions, stated that:

> *"Caution statements, therefore, are not made exclusively under section 58 and exhibit P5 in this case is not any less a caution statement merely because it was taken under section 57 and not section 58. The circumstances in which the two kinds of caution statements are taken are different. The one*

taken under section 57 may be as a result either of answers to questions asked by the police investigating officer or partly as answers to questions asked and partly volunteered statements. The statement under section 58 is a result of a wholly volunteered and unsolicited statement by the suspect."

-See also the cases of **Festo Mwanyangila v. Republic**, Criminal Appeal No. 255 of 2012 [2014] TZCA 159: [25 June 2014: TanzLII] and **Francis Paulo** (supra).

From the above authorities, it is clear to us that, the accused statements whether taken under sections 57 or 58 of the CPA are both cautioned statements. Similarly, in the instant appeal, having perused the contents of exhibit P2, we agree with Ms. Mkina that the appellant's statement was properly taken and recorded in a narrative format in terms of section 58 of the CPA. In addition, and as rightly argued by Ms. Mkina, the said statement was recorded within four (4) hours prescribed under section 50(1)(a) of CPA and it is well verified and signed.

It is also apparent, at page 21 of the record of appeal that during the trial, when PW3 tendered the said statement for admission, the appellant did not object to its admission in evidence and/or raise an issue that the same was unprocedurally recorded and/or involuntarily made. In the case of **Emmanuel Lohay & Another v. Republic,**

Criminal Appeal No. 278 of 2010 [2013] TZCA 292: [4 March 2013: TanzLII], when faced with an akin situation, the Court held that:

> ***"It is trite law that if an accused person intends to object to the admissibility of a statement/confession, he must do so before it is admitted*** *and not during cross-examination or during defence -* ***Shihoze Semi and Another v. Republic*** *(1992) TLR 330. In this case, the appellants 'missed the boat' by trying to disown the statements at the defence stage. That was already too late.* ***Objections, if any, ought to have been taken before they were admitted in evidence."*** *[Emphasis added].*

Being guided by the above authority, it is our considered view that, even in this appeal, the appellant has missed the boat long before he came before us. We therefore find the appellant's complaint of challenging the validity and/or admissibility of his statement at this eleventh hour, offends the above stated principle. In the event, we find the sixth ground with no merit.

The appellant's complaint on the seventh ground hinges on the failure by the lower courts to consider his defence evidence. Responding to this ground, Ms. Mkina was very brief and to the point that both lower courts sufficiently considered the appellant's defence and rejected it for being incapable of weakening the prosecution case. To clarify her

argument, she referred us to pages 43 and 68 of the record of appeal respectively. To support her argument, she cited the case of **Shihoze Semi & Another v. Republic** [1992] T.L.R. 330 and urged us to dismiss the seventh ground for lack of merit.

Having perused the record of appeal, we agree with the learned State Attorney that the appellant's complaint under this ground is not supported by the record, as it is vivid at pages 43 and 68 of the record of appeal that both lower courts adequately considered and weighed the appellant's defence against the prosecution case but rejected it. We take the view that, it is one thing to consider the defence case and it is quite another to accept it. It cannot be argued that the defence was not considered merely because its version was not accepted by the court. See the case of **David Gamata and Another v. Republic**, Criminal Appeal No. 216 of 2014 [2015] TZCA 362: [7 December 2015: TanzLII]. As such, we equally find the seventh ground devoid of merit.

Lastly, on the first and third grounds, Ms. Mkina challenged the appellant's claim that the prosecution case was not proved to the required standard. It was her argument that both, the trial court and the first appellate court properly analyzed and re-evaluated the evidence on record and found that the prosecution had managed to prove the case

beyond reasonable doubt. She asserted that, in convicting the appellant, the trial court relied on the testimony of PW1, the victim who clearly testified on how she was raped by the appellant and rescued by PW2. That, the testimony of PW1 was corroborated by PW2 who narrated on how he caught the appellant *fragrante delicto* committing the offence. Relying on the principle established by this Court in proving sexual offences in **Selemani Makumba v. Republic** [2006] T.L.R 379, she argued that, the evidence of PW1 was the best evidence which could have been relied upon by the trial court to mount the appellant's conviction even without any corroboration, as long as the court was satisfied that the witness was telling the truth.

She argued that, in the instant case, PW1 and PW2 were truthful and credible witnesses and their testimonies were supported by exhibit P2 in which the appellant admitted to have committed the offence. She thus urged us to find that the claim by the appellant that the incident was framed by PW1 is nothing but an afterthought. Based on her submission, she prayed for the entire appeal to be dismissed for lack of merit.

In his brief rejoinder, the appellant did not have much to say other than insisting that the incident was framed by PW1 due to the existing

grudges between them associated with the dispute over the farm he inherited from his late father. He also added that, PW1 is his aunt, the sister of her mother and PW2 is his cousin, the son of PW1. In the circumstances, he urged us to allow the appeal and set him free as he said, he had been in prison for a period of almost four (4) years.

To ascertain the appellant's complaint under these grounds, we have revisited the testimonies of PW1 and PW2. It is on record that PW1, the key witness in this case, at pages 10 to 11 of the record of appeal clearly explained on how the appellant found her on the road on her way from hospital, pulled her to the nearby bush, forcefully undressed her and then raped her. Likewise, PW2 at page 14 of the same record, testified on how he heard PW1 shouting for help, went at the scene of crime where he found the appellant *flagrante delicto* committing the offence. PW2 arrested the appellant and took him to the village office and then, to the Police Station. The Court has always considered the evidence of finding somebody red handed committing an offence to be conclusive. For instance, in **Abdallah Ramadhani v. Republic**, Criminal Appeal No. 141 of 2013 (unreported), when faced with an akin situation, the Court stated that:

> *"When he responded to the call and went to the scene of crime, he found the appellant in 'flagrante delicto' raping*

the complainant. The evidence to prove the offence of rape was therefore more than sufficient."

It is also on record that the evidence of PW1 and PW2 was supported by the appellant's cautioned statement (exhibit P2) in which in his own words he confessed to have committed the offence. In the circumstances and taking into account that the appellant did not challenge the admissibility of the said statement during the trial, we agree with Ms. Mkina that challenging it at this stage of an appeal, is nothing but an afterthought. In the case of **Mohamed Haruna @ Mtupeni and Another v. Republic,** Criminal Appeal No. 259 of 2007 [2010] TZCA 141: [4 June 2010: TanzLII], the Court observed that: *"The very best of the witnesses in any criminal trial is an accused person who freely confesses his guilt."* Likewise, in the instant appeal, it is our settled view that, what is contained in the appellant's statement is the best evidence, we can have on what happened on that fateful date.

We are mindful of the fact that, before the lower courts and even this Court the appellant contended that the case against him was framed by PW1 due to the existing grudges between them associated with the dispute over the farm he claimed to have inherited from his late father.

We find the appellant's claim to have no basis, as during the entire trial, he did not cross examine PW1 on that aspect.

It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. We find solace in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 (both unreported). In the circumstances, we see no reason to differ with the lower courts' concurrent findings in respect of that aspect.

It is also on record that in convicting the appellant, the trial court relied mostly on the evidence of PW1 which was corroborated by PW2 and the appellant's cautioned statement. As such, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair conclusion. It is therefore, our settled view that there are no sufficient reasons for the Court to fault the findings of the two courts below on these grounds. In the circumstances, we also find the first and third grounds with no merit.

For the foregoing reasons, we are satisfied that the evidence, taken as a whole, establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

DATED at **DODOMA** this 8th day of February, 2024.

A.G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 9th day of February, 2024 in the presence of Appellant appeared in person and Ms. Patricia Mkina, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL