IN THE COURT OF APPEAL OF TANZANIA

AT SONGEA

(CORAM: NDIKA, J.A., KEREFU, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 655 OF 2020

PHILIPO WILLIAM LIPILINGA.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Songea)

(Arufani, J.)

dated the 9th day of November, 2020

in

DC Criminal Appeal No. 16 of 2020

JUDGMENT OF THE COURT

22nd & 24th August, 2023

KEREFU, J.A.:

In the District Court of Mbinga at Mbinga, the appellant, Philipo William Lipilinga was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 (the Penal Code). It was alleged that in January, 2019 at Furaha Store Street in Mbinga Township within Mbinga District in Ruvuma Region, the appellant had carnal knowledge of 'DK' (name withheld to protect her modesty) a girl aged sixteen years. The appellant denied the charge laid against him hence, the case proceeded to a full trial.

To establish its case, the prosecution relied on the evidence of six witnesses augmented by four exhibits to wit, the victim's clothes found in the appellant's room (exhibit P1), the appellant's cautioned statement (exhibit P2), certificate of seizure (exhibit P3) and the Police Form No. 3 (exhibit P4). The appellant relied on his own evidence as he did not call any witness nor tendered any exhibit.

The prosecution case, as obtained from the record of the appeal, can be briefly stated as follows: Tissian Castory Komba (PW1), the father of the victim (PW4) testified that, her daughter PW4 who was aged 15 years was a Form II student at Mbambi Secondary School in Mbinga Town where she was living with her aunt. That, on 28th January, 2019, PW1 was informed by his brother-in-law one Camilla Aidan Mbepera who was also living at Mbinga Town that PW4 was missing. In a bid to locate his daughter, PW1 informed his relatives who assisted him to trace PW4 without any success. PW1 decided to report the matter to the police. On 8th March, 2019, PW1 was informed by his younger daughter who was playing outside that PW4 showed up but disappeared again. Upon receiving such information, PW1 sought assistance from the Chairperson of Longa Village. Moments later, the said Chairperson informed PW1 that his daughter was seen at Ndembe Village. PW1 rushed there and met her. Upon inquiry, PW4 told PW1 that

she was living with the appellant who was her fiancée. PW1 was taken to the police station and then to the hospital for medical examination. At the hospital, the medical examination was conducted by Emilian Ernest Ndunguru (PW6), a medical practitioner, who remarked that, there was no indication of rape in the PW1's vagina but she found that, PW1 had no hymen. The PF3 to that effect was admitted in evidence as exhibit P4. In her testimony, PW4 stated that she decided to quit studies and went to live with the appellant as she loved him and they had sexual intercourse several times. She further testified that she left her clothes at the appellant's room.

WP 9982 DC Amina (PW2) investigated on the matter. On 11th March, 2019 she interrogated PW4 who informed her that she was living with the appellant who is her fiancé and they had sexual intercourse. Subsequently, PW4 lead PW2 and PW1 to where she was living with the appellant, unfortunately the appellant was not there. Later, that same night at 20:00 hours, PW2 together with ASP. Syvanus Matemu (PW5) went back to the appellant's room where they arrested him. They called Thomas Mapunda (PW3) the ten-cell leader to witness the search of the appellant's room. During the said search they found woman clothes and upon inquiry, the appellant told them that the clothes belong to his wife, PW4. They seized the said clothes and PW5 prepared a certificate of seizure. The clothes and

the certificate of seizure were admitted in evidence as exhibits P1 and P3 respectively. In addition, PW2 interviewed the appellant and recorded his cautioned statement (exhibit P2).

In his defence, the appellant (DW1), admitted that he was living with PW4 as his fiancée since 8th February, 2019 to 11th March, 2019 when he was arrested. DW1 stated further that he had planned to go to the PW4's parents to tender his proposal of marrying her. It was his defence that he was not aware that PW4 was a student.

At the end of it all, the trial court relied on the testimony of PW4 whose evidence was corroborated by PW1, PW2, PW3, PW5, PW6 and the appellant himself. It thus found that the charge against the appellant was proved to the hilt. Hence, the appellant was found guilty, convicted and sentenced to thirty (30) years imprisonment.

The appellant's appeal before the High Court hit a snag, as the court dismissed the appeal and upheld the decision of the trial court. Undaunted, the appellant has preferred this second appeal predicated on three grounds which can conveniently be paraphrased as follows: **one**, that the trial was a nullity for non-compliance with section 186 (3) of the Criminal Procedure Act, Cap. 20 (the CPA); **two**, that the appellant's cautioned statement was

recorded contrary to the requirement of section 57 (2) of the CPA; and **three**, that the first appellate court erred in law and fact to uphold the sentence of thirty years imprisonment imposed on the appellant without taking into account that at that time he was aged fifteen years.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by Mr. Edgar H. Luoga, learned Principal State Attorney assisted by Mses. Sabina Silayo and Ngiluka Ngiluka, learned Senior State Attorneys.

When given an opportunity to amplify on his grounds of appeal, the appellant adopted the grounds of appeal and indicated that he would start with the third ground, followed by the second and conclude with the first ground. Elaborating on the third ground, the appellant faulted the first appellate court to uphold the sentence of thirty years imprisonment imposed on him without taking into account that at that time he was aged fifteen years.

Upon being probed as to whether he raised that concern during the trial or even at the first appellate court, the appellant admitted that he did not do so. He however attributed that failure to the conduct of his advocate who represented him then. He thus urged us to allow this ground.

As regards the second ground, the appellant faulted the decision of the first appellate court for upholding the decision of the trial court which was based on the cautioned statement that was recorded contrary to section 57 (2) of the CPA. He clarified that questions put forward to him during the interview together with his responses (answers) were not recorded and reflected in that statement. It was his argument that, the said omission had rendered the said statement invalid.

On the first ground, the appellant faulted the first appellate court for failure to find that the trial was vitiated on account of failure by the learned trial Magistrate to comply with the requirement of section 186 (3) of the CPA and conduct the same in camera. He thus urged us to find that since the trial was not conducted in camera, there was a miscarriage of justice on his part. In conclusion and based on his submission, the appellant urged us to allow the appeal, quash the conviction and set aside the sentence imposed on him and set him free.

Upon taking the stage, Mr. Luoga, who addressed us first, declared their stance of opposing the appeal. He however, intimated that Ms. Ngiluka would respond to the first ground, while Ms. Silayo would respond to the second and third grounds.

Responding to the first ground, although Ms. Ngiluka readily conceded that the trial was not held in camera as prescribed by the law, she was quick to argue that the appellant was not prejudiced in any way because he was not denied a fair trial. She clarified that, the rationale for holding trials concerning sexual offences in camera is to protect the victim's modesty and not the accused. She asserted that, if a party had to complain, it should have been the victim and not the appellant. She further implored us to find that since, according to the record, the appellant did not raise that concern during the trial and he managed to cross-examine all six prosecution witnesses and entered his defence without any hesitation, his complaint, at this stage, is nothing but an afterthought. To buttress her proposition, she referred us to the case of **Edmund John @ Shayo v Republic**, Criminal Appeal No. 336 of 2019 [2023] TZCA 17386 [11 July 2023; TanzLII]. She then urged us to find that the first ground is without merit.

On the second ground, Ms. Silayo refuted the appellant's complaints by referring us to page 91 to 92 of the record of appeal and argued that the appellant's cautioned statement was recorded properly and in accordance with the requirement of sections 57 (2) and 58 of the CPA. That, all questions put forward to him and his responses were well reflected in that statement. She added that, since during the trial when PW2 testified and

tendered the said statement, the appellant did not object to its admissibility and did not even cross examine PW2 on that aspect, his complaint has no basis. As such, Ms. Silayo invited us to find that the appellant's complaint before the Court is an afterthought. She thus also urged us to find that the appellant's complaint under the second ground is unfounded.

As regards the third ground, Ms. Silayo referred us to the appellant's grounds of appeal at the first appellate court as reflected in the petition of appeal found at page 54 of the record of appeal and contended that the said ground is new as it was not part of the grounds canvassed and determined by the High Court on first appeal. She further referred us to pages 2 to 6 of the record of appeal where the appellant, during the preliminary hearing, he admitted his personal particulars which indicated clearly that he was aged twenty-two years. She added further that, even throughout the trial the appellant did not raise that issue and in his own testimony found at page 26 of the record of appeal, he as well testified that he was aged twenty-two years. On that account, she implored us to disregard the appellant's third ground. She supported her proposition with our previous decisions in **Haruna Mtasiwa v. Republic**, Criminal Appeal No. 206 of 2018 [2020] TZCA 230 [15 May 2020; TanzLII] and **Mng'ao Yohana Chacha v. Republic**, Criminal Appeal No. 244 of 2020 [2022]

TZCA 327 [10 June 2022; TanzLII]. Finally, the learned Senior State Attorney urged us to dismiss the entire appeal for lack of merit.

In a brief rejoinder, the appellant reiterated his earlier submission and insisted for the appeal to be allowed.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we wish to start by reiterating a settled principle that, this being a second appeal, the Court should rarely interfere with the concurrent findings of the lower courts on the facts unless there has been a misapprehension of evidence occasioning a miscarriage of justice or violation of a principle of law or procedure. See **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda v. The Republic**, [2006] TLR 387 and **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 (unreported). We shall be guided by the above principle in the determination of this appeal.

Moving to the merit of the appeal, we wish to begin with the point raised by Ms. Silayo pertaining to the third ground of appeal urging us to disregard it because it is new as it was not canvassed by the first appellate court. Having examined the said ground, we agree with her that the said

ground being new and on factual issues should not have been raised at this stage. There is a long list of authorities on this point, some of them include, **Abdul Athuman v. Republic** [2004] TLR 151, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 and **Yusuph Masalu @ Jiduvi v. Republic,** Criminal Appeal No. 163 of 2017 (both unreported). In **Sadick Marwa Kisase** (supra) the Court emphasized that:

> *"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appellate court."*

In this regard, this Court will not entertain the said ground of appeal and we will only consider the remaining grounds.

Starting with the first ground on the appellant's complaint on the irregularity in the proceedings of the trial court having contravened the provisions of section 186 (3) of the CPA, it is pertinent to understand the contents of the said provision. Section 186 (3) of the CPA provides that:

> *"Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a*

newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions."

The above provision essentially imposes the requirement that the evidence of all persons in all trials involving sexual offences shall be received by the court in camera. There is also a prohibition on publication of such proceedings in the media. Certainly, having revisited the record of appeal, there is no evidence that the trial was held in camera in compliance with the said provision and this was conceded by Ms. Ngiluka. That notwithstanding, the issue for our determination is whether that anomaly vitiated the trial proceedings and or caused a miscarriage of justice on the part of the appellant.

Having perused the record of appeal and considered the rationale and purpose of holding trials concerning sexual offences in camera, we share similar views with Ms. Ngiluka that the appellant was not prejudiced by the said omission in any way. As eloquently submitted by Ms. Ngiluka, the said provision was essentially intended to protect the victims of sexual offences rather than the alleged perpetrators. We made corresponding remarks in **Leonard Salim Kimweri v. Republic**, Criminal Appeal No. 453 of 2015 [2016] TZCA 626 [5 August 2016; TanzLII], the Court when stated that:

"Section 186 (3) of the CPA requirement is intended to protect the victim of any sexual offence and not the accused person and that non-compliance with the said requirement by a trial magistrate would invariably occasion no miscarriage of justice."

Again, in **Godlove Azael @ Mbise v. Republic,** Criminal Appeal No. 312 of 2007 (unreported), the Court stated that:

"In what way was the appellant prejudiced under section 186(3) of the CPA? Even at the late stage when he made his defence as DW1, he did not protest that since he was charged with sexual offence, his evidence should be received in camera."

Likewise, since in the instant appeal, there is no evidence that at any stage of the trial, the appellant did complain for non-compliance of the said section and having cross-examined all the six prosecution witnesses and properly entered his defence, it does not seem to us that the appellant was in any way hindered to enjoy his rights as he claimed before us. For the said reasons, we are satisfied that the appellant has failed to demonstrate that non-compliance with section 186 (3) of the CPA had any adverse effect for him to exercise his rights or that he was in any way prejudiced. We thus find the first ground of appeal devoid of merit.

As for the second ground of appeal, having perused the contents of the appellant's cautioned statement found at pages 91 to 92 of the record of appeal, with respect, we agree with Ms. Silayo that the requirements stipulated under section 57 (2) of the CPA were duly complied with. For easy of reference, the said section provides that: -

> *"57 (2) Where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes, during the interview, either orally or in writing, a confession relating to an offence, the police officer shall make, or cause to be made, while the interview is being held or as soon as practicable after the interview is completed, a record in writing, setting out-*
>
> *(a)* ***so far as it is practicable to do so, the questions asked of the person during the interview and the answers given by the person to those questions;***
>
> *(b) particulars of any statement made by the person orally during the interview otherwise than in answer to a question;*
>
> *(c) whether the person wrote out any statement during the interview and, if so, the times when he commenced to write out the statement;*
>
> *(d) whether a caution was given to the person before he made the confession and, if so, the terms in*

which the caution was given, the time when it was given and any response made by the person to the caution;

(e) the times when the interview was commenced and completed; and

(f) if the interview was interrupted, the time when it was interrupted and recommenced." [Emphasis added].

The above provision requires the questions directed to the appellant and his responses to be recorded in the appellant's cautioned statement. Since this was properly done, we find the appellant's complaint under this ground, misplaced and not supported by the record. 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. Silayo that the act of him challenging the said statement at this stage of an appeal, is nothing but an afterthought. As such, we equally find the second ground devoid of merit.

We wish to state that having perused the entire record, we are satisfied that the prosecution managed to prove the offence against the appellant through the evidence of PW1, PW2, PW3, PW4, PW5 and PW6. Specifically, the testimony of PW4, the best evidence in this case, clearly

narrated on how she met with the appellant, decided to quit her studies and started living with him as husband and wife. That, they had sexual intercourse on different dates and at several locations. The evidence of PW4 was corroborated by the testimony of PW6 who medically examined PW4's private parts and found that she had no hymen. In the circumstances, we wish to restate the well-established principle by this Court that the best evidence in sexual offences, like the one at hand, comes from the victim - see **Selemani Makumba v. Republic** [2006] T.L.R. 379 and **Hamis Mkumbo v Republic,** Criminal Appeal No. 124 of 2007 (unreported), among others.

It is also on record that the trial court and even the first appellate court sustained the appellant's conviction after being satisfied that the offence the appellant was proved by the evidence of PW4 which was corroborated by the evidence of PW1, PW2, PW3, PW5, PW6 and that of the appellant's himself who admitted that he started living together with PW4 his fiancé from 8th February, 2019 to 11th March, 2019 when he was arrested. That, he was in the plan of approaching the PW4's parents to tender his proposal of marrying her.

In totality, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair and impartial

decisions which we do not find any cogent reasons to disturb, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt.

In the event, we find the appeal devoid of merit and hereby dismiss it in its entirety.

DATED at **SONGEA** this 23rd day of August, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEA

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2023 in the presence of Mr. Philipo William Lipilinga, Appellant in person, and Ms. Hellen Chuma, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL