IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL CASE NO. 75 OF 2022

(Originating from Mpanda District Court in Criminal Case No. 39 of 2021)

1. KULWA PAUL @MWILA

2. EDWARD RICHARD ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

JUDGMENT

30th November, 2023 & 26th February, 2024

MRISHA, J.

The appellants **Kulwa Paul @Mwila** and **Edward Richard** together with other persons who are not parties to this appeal, were arraigned before the District Court of Mpanda at Mpanda with three counts namely Armed Robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2019 [Now R.E 2022] henceforth the Penal Code, Gang Rape contrary to section 130 (1) and 131 A (1), (2) and (3) of the Penal Code while the third count was Unnatural Offence contrary to section 154 (1)(a) of the Penal Code, the first, second and third counts respectively.

The particulars of the first count were that on the 11th day of February, 2021 at Songambele Village within Mpanda District in Katavi Region, the first and second appellant in corroboration with their co accused, stole one Cell phone make Tecno Spark 5 with Imei No: 352386098894448 and 352386078894430, one Laptop make HP worth 1,000,000/= and Cash money Tshs. 218,000/= both properties valued at Tshs. 1,518,000/= being the properties of Mariam d/o Richika and immediately before and after such stealing, cut her by using a machete in order to retain the stolen properties.

In the second count, it was alleged that on the date and place as stated in the first count, the said appellants together with other two persons not part to the instant appeal, had sexual intercourse with MM a woman aged thirty-one (31) years without her consent.

In regards to the third count, it was alleged that on the date and place as mentioned in the first count above, the appellants together with other persons who are not part to the instant appeal, did have carnal knowledge against the order of nature of one SS, a girl aged thirteen (13) years old. They all pleaded not guilty to the charged offence; a full trial took off.

In a bid to prove their case against the appellant and their fellow accused persons, the prosecution side successfully paraded a total of seven (7) witnesses, including MM and SS who testified as PW1 and PW2 respectively.

In addition to the above witnesses' oral evidence, the prosecution Republic also managed to tender nine (9) exhibits including a PF3 of PW2, one mobile phone of PW1, two cautioned statements of the first and second appellants as well as the PF3 of PW1, all of which were tendered and admitted without any objection as Exhibits P2, P4, P7, P8 and P9 respectively.

After hearing evidence from both sides, the other accused persons were found not guilty of the said three counts and acquitted while the appellants were found guilty of all the abovenamed counts, convicted and sentence to serve a term of twenty (20) years in jail in respect of the first count, thirty (30) years in jail in respect of the second count and in the third count, each of them was sentenced to serve a term of thirty (30) years in jail, then the trial court ordered the above sentences to run concurrently.

Being aggrieved by the said convictions and sentences, the appellant filed with the court a Petition of appeal containing seven (7) grounds of

appeal in order to challenge the decision of the trial court and urged the court to give judgment in their favour and order for their immediate release from the prison custody.

When the appeal was called on for hearing, only the second appellant appeared in person before the court and the court was informed that the first appellant had escaped from the lawful custody of prison officers.

Following such information which was also certified by the Prison Officer In charge of Sumbawanga Prison vide an official letter with *Reference No. 76/RUK/2/V/126* dated the 3rd day of October, 2023 , Mr. Mathias Joseph, learned State Attorney, submitted a prayer that since the records show that the first appellant was present in previous dates hence aware of the hearing of the present appeal, but had decided to absentee himself, then his appeal be dismissed under the provisions of section 383(1) of the Criminal Procedure Act, Cap 20 R.E. 2022 so that the court can proceed with the appeal against the second appellant who was present.

The second appellant had no objection against that prayer and he agreed with what was submitted by the counsel for the respondent Republic. Consequently, the court granted the prayer under the above cited provisions of the law, dismissed the first appellant's appeal and

proceeded with the hearing of an appeal against the second appellant who appeared in person and unrepresented, while Mr. Joseph appeared for the respondent Republic.

The grounds of grievances by the second appellant were that:

1. That, the trial court erred in law to convict the second appellant depending on conflicting and contradictory evidence produced by the prosecution.
2. That, the trial court erred in law to convict the second appellant with the offences of rape and gang rape respectively which were not proved beyond reasonable doubt.
3. That, the trial court erred at law to convict the second appellant with the offence of armed robbery which was not proved as required by the law.
4. That, the trial court erred at law to admit the phone as exhibit without production of a receipt issued on its seizure as required at law neither was it properly identified.
5. That, the trial court erred at law to convict the second appellant who was not properly identified as the offences were committed at night.

6. That, the trial court erred at law to admit and work upon the caution statements which were procured contrary to law.
7. That, the trial court erred at law to convict the second appellant on the weakness of his defence instead of depending on the strength of the prosecution's case.

In his submission, the second appellant who will hereinafter be referred to as the appellant, prayed to adopt his grounds of appeal in order to form part of his submission in chief. He also prayed to the court to consider his grounds of appeal, allow his appeal and order that he be set free.

To Mr. Joseph, the trial court was right to convict and sentence the appellant as stated above; hence it was his submission that as the respondent Republic, they support both the convictions and sentences meted out to the appellant. Before going far, the learned counsel proposed to merge some grounds of appeal.

In respect of the sixth ground of appeal, the counsel for the respondent Republic submitted that he opposes that ground because the caution statement of the appellant was admitted without any objection from the said appellant, as it is shown at pages 63 to 64 of the trial court typed proceedings.

He added that what was to be considered by the trial court in relation to the alleged caution statement, was the voluntariness of the statement and compliance with the law relating to recording of caution statement, but none of the two issues was questioned by the appellant during trial.

He supported his stance by citing the case of **Chande Zuberi Ngayaga vs Republic**, Criminal Appeal No. 258 of 2020 where it was held that:

> *"A confession or statement will be presumed to have been voluntary made until objection to it is made by the defence on the ground that either it was involuntary made or not made at all."*

The learned counsel went on submitting that the above cited case suits the circumstance of the present case where it is obvious that when his caution statement was sought to be tendered before the trial court as an exhibit, the appellant did not object the same to be admitted as an exhibit which indicates that the said cautioned statement was made by him voluntary and in accordance with the law.

With the foregoing reasons, the counsel for the respondent Republic urged the court to find that the sixth ground of appeal has no merit and proceed to dismiss it. Having submitted on the former ground of appeal, the learned counsel began addressing the court in respect of the fourth.

It was his submission that that ground of appeal too has no merit because PW1 managed to identify her mobile phone by its colour, model which is Tecno Spark 5 and she went on tendering the receipt of the such mobile phone without any objection from the appellant. The counsel referred the court to page 28 of the trial court typed proceedings in order to show how PW1 managed to identify her stolen mobile phone.

As if that was not enough, Mr. Joseph submitted before the court that the appellant did not cross examine PW1 on the issue of ownership of the said mobile phone. He also argued that the issuance of receipt to the accused after seizure certificate is filled, is not a legal requirement nowadays and failure to issue a receipt to the suspect is not fatal. In supporting that position, he cited the case of **Gitabeka Giyaya vs Republic**, Criminal Appeal No. 44 of 2020 (unreported) and concluded his submission on that ground by praying to the court to dismiss the appellant's appeal stating that even when the certificate of seizure was tendered, the appellant did not raise any objection.

Mr. Joseph prayed to merge and argue together grounds of appeal number two, three and four stating that they all deal with the issue of the standard of proof in criminal cases. He conceded that it is true that

the three offence the appellant was charged with were committed on 11.02.2021 during night hours and that the important thing needed to be proved by the prosecution side, was the identification of the accused.

However, the counsel submitted that it is their position that the identification of the appellant was watertight as it is shown at pages 26, 43 and 44 of the trial court typed proceedings which reveal that PW1 managed to identify the appellant because she used to know him previously, but even when the incidents occurred, she managed to identify him by using the electricity and solar lights for there was enough light at the crime scene.

The learned counsel further submitted that according to the testimony of PW1 the incidents took place for almost two hours and the appellant together with his fellow culprits were not wearing masks. She also testified that the appellant had worn a black T-shirt on that fateful day and had hold a bush knife. Her evidence was corroborated by that of PW2 as it is shown at pages 33 to 34 of the trial court typed proceedings.

Based on the above reasons, the counsel for the respondent Republic submitted that the identification of the appellant was properly made and

the appellant was properly identified both at the crime scene and during trial.

The case of **Waziri Amani vs Republic**, Criminal Appeal No. 55 of 1979 was cited to bolster the above proposition and the learned counsel added that the appellant was well known by the victims prior to the occurrence of incidents which took two hours, there was sources of light and the distance between the appellant and the victims was not far that is why they managed to identify the appellants which shows that the trial court properly convicted the appellant as charged.

In relation to the proof of a count of Armed Robbery, Mr. Joseph referred the court to the case of **Kisandu and Mboje vs Republic**, Criminal Appeal No. 353 of 2018 (CAT at Shinyanga, unreported) where the Court set out the ingredients of that offence which need to be proved by the prosecution side as being; **one**, there must be an act of stealing; **two**, the accused must be armed with a dangerous or offensive weapon and **three**; the accused must have used that weapon or threatened to use actual violence in order to obtain or retain the stolen property.

In connection to the present case, the counsel for the respondent Republic submitted that his position is that the offence of armed robbery was committed by the appellant, as it is shown at page 27 of the trial

court typed proceedings because the appellant had held a bush knife, threatened the victim and took the mobile phone and a laptop.

Also, the learned counsel submitted that during cross examination, PW1 stated that she was threatened by the appellant which all shows that the ingredients constituting the offence of armed robbery were proved by the prosecution side.

Turning to the allegation that the offence of gang rape was not prove, Mr. Joseph emphasized that the same was proved by the prosecution side which came for the victim of a sexual offence who was PW1. He argued that the best evidence in sexual offences is that of a victim of that offence. He backed up that proposition by citing the case of **Mawazo Anyandwile Mwaikwaja vs D.P.P**, Criminal Appeal No. 455 of 2017 and submitted that in our case the evidence of PW1 proved the ingredients of a gang rape, as it is shown at page 30 of the trial court typed proceedings.

He also submitted that the said victim managed to mention the name of the names of the first appellant, Frank and Elias which proves that gang rape was committed. Also, the evidence about commission of gang rape was corroborated by the evidence of PW7, as it is shown at page 63 of the trial court typed proceedings.

The learned counsel added that for a victim of a sexual offence who is an adult, two ingredients need be proved; the first one is penetration and the second is lack of consent. According to him, all those ingredients were proved by the evidence of PW1 who is an adult and a victim of an offence of gang rape, beyond any reasonable doubts.

On the first ground of appeal, Mr. Joseph submitted that the prosecution evidence was not contradictory and if there was any, the same do not go to the root of the prosecution's case; that position was stated in the case of **Deus Josias Kilala @Deo vs The Republic**, Criminal Appeal No. 191 of 2018(CAT at Dar es Salaam, unreported).

He therefore, submitted that a minor contradiction which the court may discover, the resort will be to resort to the guidance of the Court as stated in the case of **Deus Josias Kilala @Deo vs Republic** (supra). He concluded by praying to the court to sustain the convictions and sentences imposed against the appellant and dismiss the instant appeal.

On his part, the appellant had nothing to rejoin after hearing the submission from the counsel for the respondent Republic.

The issue for my determination after considering the presented grounds of appeal and gone through the rival submissions of the parties as well as the cited authorities, is whether or not the appeal has merit. The

appellant has blamed the trial court for convicting him depending on conflicting and contradictory evidence adduced by the prosecution Republic.

It is unfortunately that despite parting ways on that ground of appeal, none of the parties to this case has explained to me how and why the prosecution evidence before the trial court was conflicting and contradictory.

In my careful perusal on the evidence adduced by all the seven prosecution witnesses, I have found no contradiction or confliction of evidence from those witnesses in respect of the offences of armed robbery and gang rape as each of them prayed his role of telling the trial court what had transpired with the victims of the incidents of armed robbery, gang rape and unnatural offence. In the circumstance, I do not see any merit on the first ground of appeal and I dismiss it for being devoid of merit.

In the second ground of appeal, the trial court has been faulted for convicting the appellant with the offences of rape and gang rape respectively which according to the appellant, were not proved beyond any reasonable doubt. I will merge that ground with the third one because they all point on the standard of proof in criminal cases.

As rightly submitted by the counsel for the respondent Republic, since it is undisputed that the said three offences were committed at night, it was incumbent upon the prosecution to lead evidence that would prove identification of the appellants.

The records of the trial court are glaring that the appellant and some of his fellow accused persons were well known by the PW1 and PW2 prior to the commission of the alleged criminal offences and the appellant confessed to have committed those offences through his caution statement which was tendered by PW8 before the trial court and admitted without any objection as Exhibit P8.

The relevant part of the said statement which contain the appellant's confession to have committed those offences reads as follows: -

> *"Baada ya hapo tulienda Nsimbo Station na kukaa huko hadi usiku kama saa 22.00 hours na kurejea Songambele tukabana kwenye vichaka hadi saa 00.00 hours tulipoenda na kuvamia nyumba ile ambapo Kulwa s/o Paulo alipitia dirishani na kuingina ndani ya nyumba na kufungua mlango na tukaingia wote na tukaanza kukusanya vitu mbalimbali kama laptop, simu, nguo na Pius s/o Boniphace aliingia chumbani alimokuwa amelala mdada mtu*

mzima na kuanza kumtomba kwa nguvu na wengine walifuata na mimi nilimtomba nikiwa wa mwisho.

Baadae Kulwa s/o Paulo aliingia chumba kingine na kukuta binti amelala akamtomba kwa nguvu maana kalikuwa kanalia. Baada ya hapo tuliondoka na kuelekea mjini Mpanda kupitia njia ya Mtapenda. Baada ya kufika Mpanda tuligawana vitu na nakumbuka mimi na Kulwa s/o Paulo tulipewa simu moja kubwa aina ya touch..."

The above excerpt clearly reveals that the appellant confessed through his cautioned statement to have carnal knowledge of PW1 and PW2 with his fellow culprits and that they left with the phone of PW1 and other items including the laptop. The same is corroborated by the evidence of PW1 and PW2 whose evidence shows that it was the appellant and his co accused persons who raped them on the fateful day.

Again, there is evidence of PW3 and PW7, the medical doctors whose evidence depicts that after examining PW1 and PW2 on different occasions, PW3 noted that PW2 had been penetrated on her anus by a blunt object whilst PW7 noted that PW1 had been assaulted on the left side of her head. These pieces of evidence indicate that the offences of

armed robbery, gang rape and unnatural offences were committed against those two victims of sexual offences.

PW1 was the owner of the mobile phone and other items including the laptop; the fact that she was assaulted on the left side of her head means that the offenders used a weapon to cause actual violence in order to retain the stolen items.

Her evidence together with that of PW2 implicated the appellant as one of the persons who stole the mobile phones and other items and participated in raping PW1 and having carnal knowledge with PW2 against the order of nature.

That crucial evidence is corroborated by the caution statement of the appellant (Exhibit P8) which shows that the appellant took part in committing the offences of armed robbery, gang rape and unnatural offences, just as indicated above. Hence, in totality of the foregoing reasons, I am certain that the second and third grounds of appeal are without merit.

The above takes me to the fourth and sixth grounds of appeal which I propose to deal with them all together because they relate to admission of exhibits. In the first place, the appellant has complained that the trial court erred in law by admitting a mobile phone without production of a

receipt on its seizure as required by the law and for failure to consider that the said mobile phone was not properly identified.

Again, the appellant has complained that the trial court erred in law to admit and work upon the caution statement of the appellant which was procured contrary to the law. Admittedly, it is a requirement of the law that the police officer seizing the item (s) from the suspect of crime, must issue a receipt to acknowledge the seizure of such item from the suspect. This is provided under section 38 (3) of the CPA.

However, the circumstances of the present case shows that despite the fact that after PW4 Godfrey Ndangala had seized the mobile phone from the suspect one Suzana John Modestian by using a certificate of seizure and recorded it in that document, the said suspect and the independent witness one Jackline Florence Kombo signed on that document.

Also, when PW4 prayed to tender that seizure certificate as an exhibit, the said suspect, the appellant and other accused persons did not object its admission which tells that the said mobile phone was actually in control and possession of the abovenamed suspect before its seizure. In the circumstances, the omission to issue a receipt is not fatal.

Concerning the complaint that the said mobile phone was not properly identified, I find that the same has no legs to stage because as correctly

submitted by the counsel for the respondent Republic, when adducing her evidence before the trial court, PW1 managed to identify that phone by colour and model as being Tecno Spark 5.

She also tendered a purchasing receipt of that phone which was admitted by the trial court without any objection neither the appellant, nor the fifth accused whom it was seized from. Not only that, but also I have noted that even when PW4 prayed to tender that mobile phone as an exhibit, neither the appellant nor the fifth accused person raised any objection against that prosecution witness's prayer.

All these indicates that the said mobile phone was actually the property of PW1 and it was stolen by the appellant and his co accused persons. This is why I have failed to find any merit on those complaints from the appellant.

The other complaint is based on the cautioned statement. According to the appellant it was wrong for the trial court to admit and work upon that document due to the fact that the same was procured contrary to law. I have carefully gone through the trial court typed proceedings and noticed that before recording of the said statement PW6 Assistant Inspector, informed the appellant all his rights including the right to

make his statement freely and to call his relative or advocate, but the appellant elected to make his statement alone.

He also confessed to have committed the offences with his fellow accused persons. It is also on record that when PW6 prayed to tender the said document for it to be admitted by the trial court as an exhibit, the appellant did not object its admission; the same was admitted as Exhibit P8 and PW8 read its contents loudly before the court and presumably before the appellant because he was present, as it can be reflected at page 69 of the trial court typed proceedings.

Up to that stage, there is nowhere in those proceedings it is shown that the cautioned statement of the appellant was procured contrary to the law. The truth is the procedure of admitting the documentary exhibits which requires a document to be cleared for admissions, its contents being read aloud and be admitted as an exhibit, as stipulated in various cases including the case of **Robinson Mwanjisi and Three Others v. The Republic** [2003] T.L.R. 218 as well as **John Mghandi @ Ndovo v. The Republic**, Criminal Appeal No. 352 of 2018 (unreported), was complied with by the trial court.

Thus, due to those reasons, I am inclined to agree with the invitation of the counsel for the respondent Republic that the fourth and sixth grounds of appeal too have no merit and I proceed to dismiss them.

Next is the fifth ground of appeal in which the appellant has challenged the trial court for convicting him while he was not properly identified as the alleged offences were committed at night. Basically, it is a trite law that before relying on visual identification court should not act on such evidence unless all the possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight; see **Chokera Mwita vs. Republic**, Criminal Appeal No. 17 of 2010 (unreported).

Given the circumstances of the case before the trial court, it was actually incumbent upon the trial court to satisfy itself that the possibilities of mistaken identify were eliminated and that the evidence of visual identification adduced by PW1 and PW2 before it, was absolutely watertight.

In his judgment, the hon. Trial magistrate wrote the following at pages 18 to 19 of the typed judgment: -

> *"On the 1st and 4th accused evidence has shown as said above that the first accused person sold the phone to the 2nd accused, he was*

seen and identified at the scene him together with the 4th accused person who when he was arrested for the first time he escaped the police...The 1st and 4th accused persons together with the said MAIGE and FRANK were well known by the complainants as they used to work in the outside farms of the complainants and were well identified during that fateful night."

From the above excerpt, it is apparent that the trial magistrate was satisfied that the appellant who was the fourth accused person before the trial court, was properly identified by PW1 and PW2 as he was well known by the said two victims of offences before the incidents.

In the case of **Waziri Aman vs Republic** (supra) the Court of Appeal had the following to say regarding factors to be considered by the trial court when dealing with evidence of visual identification: -

"We would, for example, expect to find on record questions such as the following posed and resolved by him; the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen accused before or not."

I have gone through the typed judgment of the trial court and found that that the trial magistrate considered the fact that the appellant was properly identified by PW1 and PW2 who used to see him before the incidents of armed robbery, gang rape and unnatural offence as he used to come to their farm and work for them with his colleagues. This evidence was not challenged by the appellant during defence hearing, as it appears at page 91 of the typed records.

The trial magistrate also considered the fact that the appellant had confessed to have committed those offences with his co accused persons through his cautioned statement which was admitted without any objection from him.

I have also reviewed the evidence of PW1 and PW2 which clearly reveals that they managed to identify the appellant and other culprits due to availability of electricity and solar lights. Their evidence also show that the incidents took about too hours' time. Not only that, but also the evidence of those prosecution witnesses depicts that the appellant and his fellows exchanged some words with them at the scene of crime. All that indicates that there were no possibilities of mistaken identity by those prosecution witnesses (the victims of crimes) and their evidence was absolutely watertight.

Owing to the reasons which I have provided above; it is my settled view that the appellant was properly identified despite the circumstances that prevailed at the scene of crime. Hence, I am constrained to find that the fifth ground of appeal is devoid of merit and therefore, it crumbles as well.

The last complaint by the appellant is that the trial court convicted him based on his weak evidence instead of depending on the strength of the prosecution's case. This ground need not detain me much. It is apparent from the typed judgment of the trial court that the trial magistrate first considered evidence of both parties including the appellant's and secondly, the trial magistrate found the appellant guilty of the charged offences and convicted him based on the strength of the prosecution evidence including visual identification, the medical examination of PW1 and PW2 together with confession of the appellant through his cautioned statement. In the premise, I also find no merit in the seventh ground of appeal and I dismiss it as well.

The above being said and done, I find that the present appeal is not meritorious. In consequence thereof, the same is dismissed on its entirety.

It is so ordered.

A.A. MRISHA
JUDGE
26.02.2024

DATED at **SUMBAWANGA** this 26th day of February, 2024.

A.A. MRISHA
JUDGE
26.02.2024