IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MWAMPASHI, J.A.)
CRIMINAL APPEAL NO. 113 OF 2020

HERMAN MUHE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mbeya)
(Mongella, J.)
Dated the 23rd day of July, 2019
in
Criminal Appeal No. 129 of 2018
.....

JUDGMENT OF THE COURT

29th November & 7th December, 2022

WAMBALI, J.A.:

The appellant, Herman Muhe, appeared as an accused in Criminal Case No. 44 of 2018 before the District Court of Mbarali (the trial court) where he faced the charge of rape of a girl aged thirteen years old contrary to sections 130 (1)(2)(e) and 131 (1) of the Penal Code. To protect the identity of the said girl, we will refer to her in this judgment as "*the victim*" or "*PW1*".

It was alleged in the particulars of the offence that the appellant committed the offence of rape against the victim in divers dates of March, 2018 at Kapunga Village within Mbarali District in Mbeya Region.

It is not out of place to point out that, in the same charge, Paskalia Jackson @ Sakalala (the wife of the appellant), not a party to this appeal, was also charged with the offence of sexual exploitation of the said child contrary to section 138B (1)(a)(b) of the Penal Code. It was alleged in the particulars in support of the count that, on the same divers dates, time and place, she advanced and committed sexual exploitation of the victim.

As both denied the allegations levelled against them, a full trial was conducted by the trial court. To support its case, the prosecution relied on the following witnesses; namely, the victim (PW1), Juma Bakari (PW2), H. 3479 Peter Maganga (PW3), F. 175 Mwalioje (PW4), Sijaona Zabron (PW5) and Peter Seif Kigombola (PW6). In addition, the cautioned statements of the appellant and Paskalia Jackson @ Sakalala and the PF3 were tendered and admitted as exhibits PE1, PE2 and PE3 respectively. The appellant and his wife defended themselves and categorically denied the allegations.

As it were, at the conclusion of the trial, the trial Magistrate believed the prosecution story and disbelieved that of the appellant and his wife. Consequently, the appellant and his wife were found guilty, convicted of the offences charged and sentenced to thirty years and five years imprisonment respectively. Their joint appeal to the High Court in Criminal Appeal No. 129 of 2018 did not find favour with the first appellate judge. Nonetheless, it is only the appellant who has appealed to this Court to contest the decision of the first appellate court. The appellant's grievances

are expressed in the memorandum of appeal containing seven grounds of appeal. It is noteworthy that at the inception of the hearing, upon considering the submission of the respondent Republic's counsel, it was resolved that the seventh ground concerning the failure of the prosecution to send the appellant for medical examination to determine the DNA and existence of sexual transmitted disease which was raised for the first time before this Court, did not merit consideration as the same was not determined by the first appellate court. We thus strike it out. The remaining grounds can therefore, be re-arranged and paraphrased as follows:

1. *That, the first appellate court erred in fact and law for dismissing the appellant's appeal relying on the hearsay evidence, particularly, the cautioned statement (exhibit PE1) which was tendered by the police.*

2. *That the first appellate court erred in fact and law for relying on the cautioned statement recorded at the police station while the same was not repeated as required.*

3. *That the first appellate judge erred in fact and law to dismiss the appellant's appeal while the victim's age was not proved by credible evidence like the certificate of birth and clinic card.*

4. *That the first appellate court erred in fact and law to disregard the appellant's defence on the alleged failure to cross-examine the witnesses.*

5. *That the first appellate court erred in fact and law by believing the evidence of PW2, PW3, PW5 and PW6 on the contention that it corroborated that of PW1.*

6. *That the first appellate court erred in fact and law to uphold the decision of the trial court whereas the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, with no legal representation, whereas the respondent Republic had the services of Mr. Baraka Mgaya, learned State Attorney. The appellant adopted his grounds of appeal reproduced above and urged us to consider them and determine the appeal in his favour on the contention that the prosecution case was not proved to the hilt. He then requested us to let the learned State Attorney respond to the complaints in the grounds and retained the right to rejoin later.

Submitting with regard to the appellant's complaint in the first ground that the cautioned statement was wrongly relied upon in evidence because it was hearsay, Mr. Mgaya argued that the contention is an afterthought. This is because, he submitted, at the trial, the appellant did not contest the admission of the said confession statement when it was tendered by PW3 who recorded it upon his consent. Besides, he stated, the appellant did not dispute its contents when it was read over and explained to him after it was admitted in evidence. In the circumstances,

Mr. Mgaya submitted that the appellant cannot argue at this stage that the cautioned statement (exhibit PE1) is hearsay evidence.

In his submission, the appellant could have contested the admission and the contents of exhibit PE1 at the trial before it was admitted. To support his stance, he referred us to the decision of the Court in **Vicent Ilomo v. The Republic**, Criminal Appeal No. 337 of 2017 in which reference was made to the decision of **Emmanuel Lohay and Udagene Yatosha v. The Republic**, Criminal Appeal No. 278 of 2010 (both unreported) where it was said:

> *"It is trite law that if the 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 Seni and Another v. The Republic*** *(1992) T.L.R. 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".*

In this regard, the learned State Attorney submitted that as the appellant neither objected to the admission of exhibit PE1 nor cross-examined PW3 on its contents, he cannot be heard to complain at this stage of the second appeal.

On the other hand, Mr. Mgaya submitted that the complaint of the appellant in the second ground that exhibits PE1 was wrongly relied upon in evidence because it was not repeated after it was earlier on recorded at the police station has no basis. He argued that as the appellant did not allege, and indeed, he has not alleged that exhibit PE1 was not recorded voluntarily, he cannot dispute its contents which show that he admitted the commission of the offence. Besides, he submitted, it is not a requirement of the law that once a cautioned statement is recorded, it must be repeated as suggested by the appellant.

In the end, Mr. Mgaya urged us to dismiss the first and second grounds of appeal for lacking merits.

We entirely agree with the submission of the learned State Attorney that the appellant's complaints that exhibit PE1 was wrongly relied in evidence to ground his conviction because it is hearsay evidence and that it was not repeated after being recorded have no basis. The record of appeal bears testimony to the fact that when PW3 prayed to tender the cautioned statement during the trial, the appellant did not object, and it was thus admitted as exhibit PE1. More importantly, its contents were read over in court before the appellant was granted opportunity to cross-examine PW3.

We further gather from the cross-examination that in response to the appellant's questions with regard to the recording of exhibit PE1, PW3 responded that he was in good health and that he was not beaten though

he was sent to the Police Station by persons who formed the Peoples' Militia group from Magogoro Village. From the evidence on record, there is no suggestion that exhibit PE1 was not voluntarily made, and considering its contents, it cannot be said that it is hearsay evidence as the appellant would wish to suggest.

We equally agree that there was no need for PW3 to have repeated recording exhibit PE1 as the appellant submitted. Indeed, in his argument before us, the appellant did not even remotely suggest that he requested PW3 to repeat recording the said statement. Besides, as stated by Mr. Mgaya it is not a requirement of the law that the recording of the cautioned statement should be repeated as suggested by the appellant. In this regard, we wish to reiterate the position articulated in **Emmanuel Lohay and Udagene Yatosha** (supra) that, as the appellant neither objected to the admission of exhibit PE1 nor subjected PW3 to critical cross examination on its contents, he cannot be heard to complain at this stage. In **Seleman Hassan v. The Republic**, Criminal Appeal No. 364 of 2008 (unreported) the Court stated that:

> *"It is also true that a statement will be presumed to have been voluntarily made until objection is made to its admissibility by the defence".*

In the case at hand, as the appellant did not utilize the opportunity to object to the admission of exhibit PE1, he cannot therefore, validly

complain at this stage of the second appeal. Besides, this complaint did not also feature as a ground in the petition of appeal before the first appellate court during the hearing and determination of his appeal. In the result, we dismiss the first and second grounds of appeal.

Regarding the complaint in the third ground of appeal that the case was not proved because the victim's age was not substantiated by credible evidence, Mr. Mgaya submitted that the same has no basis. He argued that, according to the record of appeal, PW2, the father of the victim testified that she was born on 3rd April, 2005, and thus, in his view, there was no need of having any other proof of the victim's age by birth certificate or clinic card as contended by the appellant. He argued further that, the parents or guardians are better placed to prove the age of the victim. PW2, therefore, being the father of the victim, sufficiently established her age which is important ingredient to the offence with which the appellant was charged.

As correctly stated by Mr. Mgaya, the evidence of PW2 which was not discredited by the appellant was to the effect that the victim was aged thirteen years old at the time she was raped.

We further note that PW6, the doctor who examined the victim indicated in the PF3 (exhibit PE3) and testified at the trial that her age was thirteen years. In this regard, it cannot be disputed that both witnesses, that is, PW2 and PW6 proved the age of the victim. It is trite law that the

age of the child can be proved by, among others, the parent, guardian or medical evidence. For this stance, see the decision of the Court in **Isaya Renatus v. The Republic**, Criminal Appeal No. 542 of 2015 (unreported).

In this case, since PW2 and PW6 proved the age of the victim to be thirteen years, we entirely agree with Mr. Mgaya that the appellant's complaint in the third ground of appeal has no merit, and we accordingly dismiss it.

Next for consideration is the fourth ground of appeal in which the thrust of the appellant's complaint is that his defence was disregarded for the alleged failure to cross-examine prosecution witnesses. The appellant maintained that had the defence been considered as required, he would not have been found guilty of the offence of rape.

Mr. Mgaya, categorially disputed the appellant's argument on the argument that both the trial and first appellate courts considered his defence and in the end, it was found to have no substance as it did not raise doubt on the prosecution case. He argued that essentially, the appellant's defence was evasive denial of the commission of the offence as it did not address the matters raised by witnesses for the prosecution. In his opinion, considering the appellant's story during his defence and the prosecution evidence, the first appellate court rightly disregarded his defence as it did not pose doubt on the prosecution case. He therefore, prayed that this ground be dismissed.

We have perused the record of appeal with regard to this matter. We are satisfied that the evidence of the appellant during the defence did not raise doubt on the prosecution case. We unreservedly note that, despite the appellant's general denial, the cautioned statement (exhibit PE3) which he recorded before PW3 dismantled his defence. There is thus no doubt that upon consideration of the entire evidence on record, the trial court which considered and evaluated the appellant's defence against that of the prosecution correctly refrained to give much weight to his defence. Similarly, the first appellate court which reconsidered the appellant's defence because it was one of the complaints in the grounds of appeal justifiably disregarded it. The first appellate court was satisfied that the appellant's defence had nothing to persuade it to differ with the finding of the trial court on the weight which had to be attached against the prosecution evidence on record.

In the circumstances, considering the entire evidence on record, we equally do not find justification in the appellant's complaint in the fourth ground of appeal. It accordingly fails.

Lastly, we deem it appropriate to combine the complaints of the appellant in the fifth and sixth grounds of appeal in determining the appeal. The respective complaints respectively relate to the credibility of the evidence of PW2, PW3, PW5 and PW6 in corroborating the evidence of PW1 and that the case was not proved beyond reasonable doubt.

It is noteworthy that, though the issue regarding failure of the trial court to comply with the requirement of the law before it recorded the evidence of PW1 was not among the grounds of appeal by the appellant, upon prompting by the Court, Mr. Mgaya conceded that the evidence of PW1 (the victim), who was of tender age was recorded in contravention of section 127(2) of the Evidence Act. He argued that there is no indication in the record of appeal that the trial Magistrate followed the procedure laid by law to cause PW1 to promise to tell the truth and not lies. In the circumstances, he implored us to disregard the evidence of PW1 in considering the evidence of the prosecution.

As the appellant had nothing to comment, being a lay person, we accordingly disregard the evidence of PW1 in determining the appeal as we are satisfied that her evidence has no evidential value since it was recorded contrary to the requirement of the law. For similar position, see for example, the decision in **Masanja Makunga v. The Republic**, Criminal Appeal No. 378 of 2018 (unreported), among others.

Nevertheless, Mr. Mgaya submitted that the remaining evidence on record prove that the appellant committed the offence of rape. He argued that the evidence on the age of the victim was proved by PW2 and supported by PW6, and therefore there is no dispute with regard to it. On the other hand, Mr. Mgaya submitted that the evidence of PW6 proved that there was penetration on the vagina of the victim which is an essential

element of proving the offence of rape as provided under section 130 (4) (a) of the Penal Code.

Moreover, he submitted that, the appellant's confession as reflected in exhibit PE3 demonstrated without doubt that he committed the offence of rape. He maintained that as the confession was voluntary, the appellant cannot deny the allegation contained in the charge. He referred us to the decision of the Court in **Mohamed Haruna Mtupeni and Another v. The Republic**, Criminal Appeal No. 259 of 2007, which was cited in **Frank Kinambo v. The Republic**, Criminal Appeal No. 47 of 2019 (both unreported) and stated that the best witness in a criminal trial is the one, like the appellant in this case, who freely confesses his guilt.

In the circumstances, the learned State Attorney argued that, even, in the absence of the evidence of PW1 (the victim), the remaining evidence suffice to prove the case against the appellant as it was the case in **Emmanuel Massanja v. The Republic**, Criminal Appeal No. 394 of 2020 (unreported).

He thus concluded that as the evidence of PW2 and PW6 was not challenged by the appellant on the matter, and considering his confession contained in exhibit PW3, the prosecution case was proved beyond reasonable doubt.

In the end, the learned State Attorney pressed us to find the appellant's appeal to have no merit and dismiss it.

For our part, we entirely agree that even without considering the evidence of PW1, which we have disregarded, the remaining evidence on record demonstrates that the case for the prosecution was proved to the required standard. As correctly stated by Mr. Mgaya, the evidence of PW2 and PW6 proved respectively the age of the victim and penetration of her vagina. More importantly, the confession of the appellant before PW3 who recorded exhibit PE3 casts no doubt that he was the one who raped the victim on the alleged divers dates of March 2018. At this juncture, we better reproduce the relevant part of the appellant's statement on his involvement on the commission of the offence against the victim:

> *"... kweli nilianza kulala nae na kufanya nae mapenzi kitandani kwangu kwa kushirikiana na mke wangu na ridhaa ya kulala nae nilipewa na mke wangu kwani nilipokuwa nafanya nae mapenzi... na mke wangu alikuwa anaangalia na kusaidia.*
>
> *Nakumbuka hadi kufikia siku ya leo tarehe 22/3/2018 nimefanya mapenzi kama mara nne bila hata kutumia kondumu na muda wote tulikuwa tunafanyia kitandani kwangu...*
>
> *Nakili mimi mwenyewe kulala nae huyo binti..."*

Gauging from the reproduced part of the appellant's statement contained in exhibit PE3 which he voluntarily recorded before PW3, there can be no doubt that, he confessed that he was involved in sexual

intercourse with the victim on four occasions up to 22/3/2018. Therefore, rape occurred within the period of the divers dates stated in the charge sheet. The allegation in the charge therefore was fully proved by the admission of the appellant even without considering the evidence of PW1.

In the light of the Court's decision in **Mohamed Haruna Mtupeni and Another** (supra), we hold that the appellant, being a witness who confessed freely his guilt, is taken to have assisted the prosecution to advance its allegation on the commission of the offence of rape he was charged with.

As we have observed and held in the first ground of appeal above, the confession of the appellant in the circumstance of this case cannot be taken to be hearsay evidence as he had wished to suggest in his argument in support of the appeal. To this end, we hold that the evidence of PW2 and PW6 on penetration is credible even without considering that of PW1 as it was amply supported by the appellant's confession as reflected in exhibit PE1.

In the circumstances, the complaint of the appellant with regard to the credibility of PW2, PW3 and PW6 which established and proved the victim's age, penetration and the admission of the appellant of committing the offence of rape is unfounded. We accordingly dismiss the fifth and sixth grounds of appeal as we are satisfied that the prosecution case was

proved beyond reasonable doubt by credible evidence on record as per the concurrent findings by the two courts below.

In the result, we do not find justification to interfere with the decision of the first appellate court which confirmed that of the trial court.

Ultimately, we dismiss the appeal for lacking merit.

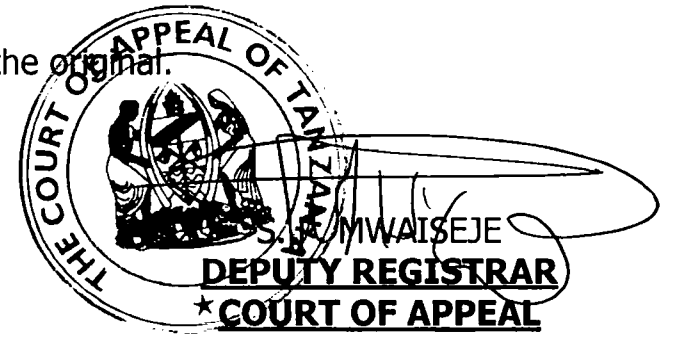
DATED at **MBEYA** this 6th day of December, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2022 in the presence of the appellant in person and Ms. Xaveria Makombe, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. J. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL