IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MKUYE, J.A., WAMBALI, J.A And SEHEL, J.A.)

CRIMINAL APPEAL NO. 146 "A" OF 2017

SHABANI S/O HAMISI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mallaba, J.)

dated the 24th day of April, 2017
in
Criminal Appeal No. 21 of 2016
.....

JUDGMENT OF THE COURT

14th & 17th December, 2020.

SEHEL, J.A.:

This second appeal originates from the judgment of the District Court of Igunga at Igunga (the trial court) in which the appellant was convicted with unnatural offence contrary to section 154 (1) (a) of the Penal Code, Cap. 16 R.E 2002. He was sentenced to thirty years

imprisonment and ordered to pay compensation to the victim TZS 300,000 upon completion of his sentence.

It suffices to state here that the charge which was laid before the appellant had two counts. First count was in respect of an offence of rape where it was alleged that on 24th November, 2015 at or about 12:00 hours at Igurubi village within Igunga District in Tabora Region, the appellant had sexual intercourse with one K.S (name withheld for the purposes of hiding her identity), a girl aged ten years.

The second count was in respect of an unnatural offence where it was alleged that on 24th November, 2015 at or about 12:00 hours at Igurubi village within Igunga District in Tabora Region, the appellant had carnal knowledge to one K.S against the order of nature.

The appellant denied the charges and in order to prove its case, the prosecution paraded a total of six witnesses and tendered two documentary evidence, namely: cautioned statement of the appellant (Exhibit P1) and Police Form No. 3, PF3 (Exhibit P2). On part of the appellant, he fended for himself and did not call any witness or tendered any documentary evidence.

A brief account of the evidence which led to the conviction of the appellant is as follows: on that fateful day K.S, the victim (PW1) was returning home from school. On her way, she encountered the appellant who suddenly grabbed her hand and pulled her into the bush. According to PW1, the appellant was a stranger to her and it was her first time to see him on that date. While in the bush, he ordered her to undress of which she did and carnally known her against the order of nature until he satisfied his desire. She said, she could not raise an alarm because she was threatened to be killed. From there, PW1 went to report to her mother, Hollo Chungu (PW5). The mother then relayed the information to Selegebu Nkuba (PW3), the father of PW1 and husband of PW5. On that same date, PW3 took the victim to Igurubi police post where she was issued with PF3 and then taken to Igurubi Health Centre for medical examination. Dr. Julius Mhoya (PW6) examined PW1 and filled his results in Exhibit P2. Exhibit P2 shows that the victim was found with bruises and sperms on her vagina and bruises in the anus. Meanwhile, Mayunga Mahembo (PW4) and other villagers heard the news that there was a person hiding in the bush for raping girls. They started a manhunt and on 25th November, 2015 they managed to arrest the appellant.

Inspector Amri Mohamed (PW2), a police officer working at Igurubi police out post said, on 24th November, 2015 while on duty received the appellant. He interrogated him and recorded the cautioned statement (Exhibit P1). He then took him to court to face the charges. The appellant in his sworn defence evidence totally denied any involvement in the allegations.

The trial court having heard the evidence from both sides, found that the offence of rape was not proved hence it acquitted the appellant on that count but convicted him on the unnatural offence upon being satisfied that the evidence of PW1 was substantially corroborated with the evidence of Exhibit P1. Accordingly, he was sentenced and ordered to pay compensation as stated herein above.

Aggrieved, the appellant unsuccessfully appealed to the High Court (the first appellate court) where his conviction was upheld on account of his confession. It is instructive to state here that the first appellate court found the evidence of visual identification of the appellant by PW1 was wanting hence unrealiable. In that regard, it did not act upon it.

Still aggrieved, the appellant has preferred this second appeal. In the memorandum of appeal, he has raised two grounds which we conveniently paraphrased as hereunder:

1. *That, the cautioned statement of the appellant, Exhibit P1 has two unresolved issues. One, the procedure for its admission was marred with irregularity as it was read out before it was admitted as exhibit. Two, it was recorded outside the time prescribed by section 50 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E 2002 (the Act).*
2. *That, the visual identification of the appellant by PW1 was highly unreliable.*

At the hearing of the appeal before us, the appellant appeared in person fending for himself; whereas Mr. Deusdedit Rwegira, learned Senior State Attorney appeared to represent the respondent Republic.

After adopting his memorandum of appeal, the appellant sought leave which was not objected to by Mr. Rwegira and granted to add one more additional ground of appeal. The additional ground raised an issue of contradiction on PW1's evidence and Exhibit P2. He expounded it by submitting that while PW1 told the trial court that she was not raped by

the appellant, Exhibit P2 shows that there was penetration at PW1's vagina and anus. Hence, with that brief submission, the appellant urged the Court to allow the appeal on account of his grounds and he be released from the prison custody.

On his part, Mr. Rwegira supported the appeal basically on three points. **One**, he said the Exhibit P1, appearing at pages 16 to 18 of the record of appeal, which was acted upon by the first appellate judge to uphold the conviction of the appellant, has apparent error. He argued that the exhibit shows that the appellant was not cautioned on the unnatural offence. He said, he was only cautioned on the offence of rape as it can be gleaned from first page of it.

Two, he argued that the procedure of admitting Exhibit P1 was flawed as it was read out in court by PW2 without first being admitted as evidence. He supported his argument by referring us to the case of **Jumanne Mohamed and 2 Others v. The Republic**, Criminal Appeal No. 534 of 2015 (unreported) at page 19 where it cited the case of **Robinson Mwanjisi and 3 Others v. The Republic** [2003] TLR 218.

Three, he submitted that the victim, PW1 did not explain in detail as to what was done to her by the appellant but instead, she made a swiping statement that she was injured in her anus. In fortifying his submission, he referred us to the holding of the Court in the case of **Ramadhani Hamisi Mwenda v. The Republic**, Criminal Appeal No. 116 of 2008 (unreported) at page 10 where it referred to the case of **Burton Mwipabilege v. The Republic**, Criminal Appeal No. 200 of 2009 (unreported) that it was not enough for the victim of rape to say that she was raped. Rather, she must go further and allege that there was penetration. In light of that submission he urged us to allow the appellant's appeal.

When probed by the Court to comment on the appellant's complaint that Exhibit P1 was recorded outside the prescribed period of four hours. The learned Senior State Attorney readily conceded that it was indeed obtained outside the period prescribed under section 50 (1) (a) of the CPA. Hence, he requested us to expunge it from the record.

As to the additional ground which the learned Senior State Attorney did not address it but when asked to comment on it, he also

conceded that there was a contradiction on PW1's evidence and Exhibit P2 which goes to the root of the matter. With that submission, he concluded by asking the Court to allow the appeal, quash the conviction and set aside the sentence and the order for payment of compensation.

The appellant happily welcomed the positive submission made by the learned Senior State Attorney and had nothing much to say apart from urging us to allow the appeal and set him free for him to continue schooling.

On our part, having gone through the grounds of appeal as contained in the memorandum of appeal and heard the additional ground and the submission by the learned Senior State Attorney we wish to state from the outset that we find merit in the appellant's appeal.

To start with the complaint on Exhibit P1 which was the only evidence relied upon by the first appellate court to uphold the conviction of the appellant, we entirely agree with the appellant and Mr. Rwegira that Exhibit P1 was recorded beyond the prescribed period of four hours for interviewing a suspect by the police officer as provided for under

section 50 (1) of the CPA. The evidence of PW2 shows that the appellant was brought to him on 24th November, 2015 while he was on duty at Igurubi police post. Although PW2 did not tell the trial court as to the exact date he recorded the appellant's cautioned statement but it is gathered from his evidence that he interviewed the appellant after he was brought to him. Exhibit P1 which is appearing at pages 16 to 18 of the record of appeal bears out that it was recorded on 26th November, 2015. This means that it was recorded two days after the appellant was put under restraint. Obviously, the recording of the appellant's cautioned statement outside the prescribed period of four hours is in contravention of section 50 (1) (a) of the CPA which requires a suspect to be interviewed within the basic period of four hours reckoned from the time he was taken under restraint unless the period is lawfully extended pursuant to section 51 of the CPA or the reckoning of such period is excluded according to circumstances falling under subsection (2) (a) (b) (c) and (d) of section 50 of the Act. It is now settled law that cautioned statement taken without adhering to the procedure laid down in sections 48 to 51 of the CPA has an effect of being expunged.

For instance, in the case of **Sia Mgusi @ Wambura and 2 Others v. The Republic**, Criminal Appeal No. 125 of 2015 (unreported) the Court had this to say:

> *"Time and again, this Court has emphasized the necessity of complying with the provisions of section 50 and 51 of the Criminal Procedure Act and has reached to a conclusion that non-compliance with those provisions of the law has the effect of expunging the cautioned statement recorded out of the prescribed time."*

See also **Janta Joseph Komba & 3 Others v. The Republic**, Criminal Appeal No. 95 Of 2006; **Joseph Mkumbwa and Another v. The Republic**, Criminal Appeal No. 97 of 2007; and the **Director of Public Prosecutions v. Festo Emmanuel Msongaleli and Another**, Criminal Appeal No. 62 of 2017 (All unreported).

In the instant appeal, we have shown that Exhibit P1 was recorded after the lapse of two days and there was no explanation or apparent reason for such delay. In our considered view the two lower courts misdirected by failing to take into consideration that Exhibit P1 was recorded outside the period provided for by the law. Therefore, the

cautioned statement of the appellant should have not been admitted by the trial court as Exhibit P1 and it should not have been acted upon by both the trial court and the first appellate court. As the two courts below misapprehended the law, we are entitled to interfere with the concurrent findings of the lower courts and proceed to expunge it from the record of appeal as prayed for by the learned Senior State Attorney.

The appellant also complained that Exhibit P1 was wrongly admitted as it was read out before it was admitted as evidence. The record of appeal is clear that the cautioned statement was read out in court by PW2 before it was admitted as an exhibit. The procedure adopted by the trial court was totally wrong because it is a well-established practice that before the contents of the document are read out in court it must first be cleared for and actually be admitted to form part of the evidence in the court record (see the case of **Jumanne Mohamed and 2 Others v. The Republic** (supra)). It follows therefore, that Exhibit P1 was not properly admitted and the resultant effect is to expunge it from the record of which we have already done so.

In view of the above analysis, we do not see the necessity of considering the issue raised by the learned Senior State Attorney that the appellant was not cautioned on unnatural offence unless it is for academic purposes of which we are not ready to do so.

Now having expunged Exhibit P1, the question that follows is whether there is any cogent evidence to sustain the conviction of the appellant. We have stated herein that the prosecution case was built upon six witnesses, namely PW1, PW2, PW3, PW4, PW5 and PW6 and two exhibits, the cautioned statement which we have expunged and PF3. Here, we wish to express our concurrence with the trial court's findings that the evidence of PW2, PW3, PW4, PW5 and PW6 has very little value to the charged offences. As correctly observed by the trial court, the evidence of PW2 and PW4 basically deal with the appellant being arrested and taken to Igurubi police post while that of PW3 and PW6 deal with the victim being taken and attended by the Doctor. We also agree with the trial court that the evidence of PW5 is hearsay hence it has no evidential value. We are thus left with the evidence of PW1 and Exhibit P2 which we fully subscribe to the observations made by the appellant and conceded by the learned Senior State Attorney that

such evidence contradicts each other. PW1 told the trial court that she was not raped whereas Exhibit P2 depicts that she was raped. To us this is a material contradiction going to merit of the case that tainted the credibility of the evidence of PW1 and Exhibit P2 and that is why even the first appellate court did not act on it. We, like the first appellate court, also disregard the contradictory evidence of PW1 and Exhibit P2. Having disregarded those two pieces of evidence there is nothing left to link the appellant with the two offences he stood charged with. In the end, we find merit on this complaint.

Before we conclude, we wish to state briefly that the second ground of appeal was superfluous because the first appellate court considered it and adequately determined that the visual identification of PW1 was unreliable. Thus, it was not supposed to be raised again in this appeal.

In view of what we have endeavoured to discuss, we find merit in this appeal. We, accordingly, quash the conviction and set aside sentence and an order for payment of compensation. We order for

immediate release of the appellant, **Shabani Hamisi**, from prison unless he is otherwise lawfully held.

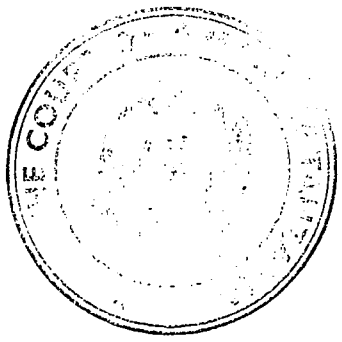
DATED at **TABORA** this 17th day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 17th day of December, 2020 in the presence of the appellant appeared in person and Mr. Tumain Pius Ocharo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL