IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 467 OF 2019

RASHIDI SARUFU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Matogolo, J.)

dated the 16th day of September, 2019
in
DC. Criminal Appeal No. 29 of 2018

JUDGMENT OF THE COURT

20th September & 1st October, 2021

MWARIJA, J.A.:

In the District Court of Iringa, the appellant, Rashidi Sarufu was charged together with another person, Stanley James Moshi. The appellant was charged with three counts under the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019] (the Penal Code), armed robbery contrary to ss. 287 A and 258 (1), rape contrary to ss.130 (1) (a) & (2) and 131 (1) as well as grievous harm contrary to s. 225 all of the Penal Code (the 1st – 3rd counts). According to the substituted charge, it was alleged in the 1st count that on 19/1/2017 at Gangilonga area within the District and

Region of Iringa, the appellant stole one mobile phone, make iPhone 4S and its charger, cash TZS 17,000.00 and one adaptor, all total valued at TZS 810,000.00 the properties of one "H.K." (For the reason of being the victim in the 2nd count, her real name is withheld for the purpose of protecting her dignity) and at the time of such stealing, he threatened her with a machete in order to obtain and retain the said properties. In the 2nd count, it was alleged that on the same date and place, the appellant did have carnal knowledge of the said H.K without her consent. It was alleged further in the 3rd count that during the same incidences, the appellant caused grievous harm to H.K. (the victim) by inflicting injuries on her hand using a machete.

On his part, Stanley James Moshi (the appellant's co-accused) was charged in the 4th count with the offence of being found in possession of goods suspected of having been stolen or unlawfully acquired contrary to s.312 (1) (b) of the Penal Code. It was alleged that on 28/1/2017 at Mkwawa University College of Education area within the District and Region of Iringa, the said person was found in possession of one mobile phone, make iPhone 4S and its charger, the properties which were suspected to have been stolen or otherwise unlawfully obtained.

Both the appellant and his co-accused person denied their respective counts. As a result, the case had to proceed to a full trial. Evidence on the part of the prosecution was tendered by six witnesses while on the defence side, three witnesses including the appellant and his co-accused person testified.

The background facts giving rise to the appeal may be briefly stated as follows: On 19/1/2017 at about 14:00 hrs, "H.K." was on the way going to attend a meeting at Gangilonga area in Iringa Municipality. While walking and after having arrived at Gangilonga round about, she met a person who had a machete. That person, who turned out to be a culprit, forced her into a bushy area. At that area, he robbed her a mobile phone, its charger and cash. He also undressed her and forcefully had carnal knowledge of her.

In her evidence, the victim who testified as PW1, told the trial court that the culprit threatened her with a machete, dragged her into a bushy area where he took her mobile phone and its charger. In the process, she said, he injured her hand by use of the machete. Thereafter, he strangled her, covered her mouth so that she could not raise alarm and proceeded to undress her clothes and raped her. She described the mobile phone stolen from her to be an iPhone 4S, white in colour. She

added that the mobile phone had scratches on it. It was PW1's further evidence that after the incident, the culprit ran away. She then sought assistance at a neighbouring house and from there, she was taken to Haven Hotel where the meeting which she was going to attend, was to be held. It was her evidence further that on 30/1/2017 she was called to the police station where she identified the culprit in the identification parade conducted by the police. She said that she identified the appellant who was in the same clothes he had put on the date of the incident.

The person with whom PW1 had to hold a meeting at Heaven Club, Edgar Josephat Mgembe (PW5) testified that on that date, PW1 could not make it for the meeting at 14:00 hrs as planned. He decided to call her and replied that she was on the way but could not arrive until at about 15:30 hrs when she appeared while crying and having wounds on her hand. He learnt from her that she was raped, injured and robbed of her mobile phone.

The incident was reported to the police and arrangements were made from Haven Hotel to take the victim to hospital. She was taken to Iringa Government Hospital for medical examination and treatment. At the hospital, she was attended by Dr. Francis Nyabusani (PW4). In his evidence, PW4 stated that after having examined the victim's private

parts, he found that her vagina had bruises and blood stains. He found further that her underwear had also some blood stains. He concluded that the bruises were caused by a blunt object suggesting that she was raped. It was his evidence further that the victim had injuries on her hand which appeared to have been caused by a sharp object. The witness tendered a PF3 containing his examination report and the document was admitted in evidence as exhibit P5.

On 28/1/2017 at about 06:10 hrs, the appellant was arrested at Miyomboni bus stand within Iringa Municipality. He was arrested by No. F 5481 D/Cpl Rashid PW2) after he had received information that the person who committed the offence against PW1 had been seen at that place. He took the appellant to the police station where, according to PW2's further evidence, upon being interviewed by the OC/CID, the appellant admitted to have committed the offences and promised to lead the police to the person to whom he had sold the stolen mobile phone, describing that person to be a Bhajaj driver. PW2 went on to state that, the appellant led the police officers to the bus stand and later to Mkwawa University College where the mobile phone was retrieved from one Joseph Kessy (PW6). It was his evidence also that he recorded the cautioned statement of the appellant. The statement was tendered in court without

any objection from the appellant and the same was admitted in evidence as exhibit P3.

In his evidence, PW6 stated that sometime in January, 2017 he was visited by the appellant who was in the company of Stanley James Moshi (his co-accused person). The appellant's co-accused who was PW6's friend, wanted to buy a mobile phone which was being sold by the appellant at the price of TZS 80,000.00. After negotiations, the appellant agreed to sell it at TZS 40,000.00. It was PW6's further evidence that, after two weeks from the date of the agreement, he was given the amount of TZS 40,000.00 by the appellant's co-accused and paid it to the appellant. Later on, PW6 went on to state, he was arrested on suspicion that he bought the stolen mobile phone. He denied the allegation disclosing to the police that the phone was sold by the appellant to his co-accused person.

When the case reached the defence stage, after the appellant had been informed of his rights under s. 231 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA), he indicated that in his defence, he would testify under oath. After being affirmed however, he did not adduce any evidence. He asked the trial court to decide the case as it may deem appropriate. He complained that his trial was delayed

explaining that, although he was charged in February and remanded in custody, his case could not be heard until on 6/4/2017 on account that investigation was not complete. He complained also that he was not given a copy of the proceedings of the preliminary hearing.

In its decision, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. It found first, that the appellant was identified by the victim and secondly, relying on *inter alia,* the Court's decision in the case of **Joseph John v. Republic,** Criminal Appeal No. 267 of 2012 (unreported), it found that the evidence of PW1 as supported by that of PW4 sufficiently proved that the appellant raped the victim. It found also that there was cogent evidence proving that the appellant used a machete to threaten PW1's and stole her mobile phone. The trial court found further that, in the course of stealing PW1 was injured on her hand. The appellant was thus convicted of all the three counts and consequently sentence to thirty years imprisonment on the first and second counts and three years imprisonment on the third count. The sentences were ordered to run concurrently.

On the part of the appellant's co-accused person, the trial court found that the prosecution had failed to prove the charge against him. It observed that there was no cogent evidence establishing that he had

knowledge that the mobile phone which was found in his possession, was stolen or unlawfully obtained. He was thus acquitted.

The appellant was aggrieved by the decision of the trial court and therefore, appealed to the High Court. His appeal was however, unsuccessful. The learned first appellate Judge found that the prosecution evidence had proved all the counts with which the appellant was charged. Apart from the oral evidence of PW1, PW2, PW3, PW4 and PW6 whose evidence he found to be cogent, the learned Judge relied also on the documentary evidence tendered by the prosecution. He found that according to the identification parade register, the appellant was identified by PW1 and the extra judicial statement which established that the appellant had admitted to have committed the offences charged.

The two documents were admitted at the preliminary hearing stage and marked exhibit P1 collectively. The learned Judge acted also on the PF3 (exhibit P5) to find that the 3rd count was proved. He was of the view that, although after admission in evidence of the mentioned documents, their contents were not read out in court, the omission did not shake the prosecution case. He went on to observe that, even if these documents were to be expunged, the remaining evidence is sufficient to sustain the appellant's conviction on all the three counts.

As stated above, the appellant was further aggrieved by the decision of the High Court hence this second appeal. In his memorandum of appeal, the appellant has raised seven grounds as paraphrased hereunder:

1. That the learned first appellate Judge erred in law and fact in upholding the conviction of the appellant which was based on weak identification evidence.
2. That the learned first appellate Judge erred in law and fact in dismissing the appellant's appeal while the evidence in respect of the offences of rape and grievous harm was insufficient for want of detailed account by PW1 on the circumstances under which the offences were committed.
3. That the learned first appellate Judge erred in law and fact in upholding the decision of the trial court which was wrongly based on the evidence of the cautioned statement and the PF3 whose contents were not read out in court.
4. That the learned first appellate Judge erred in law and fact in upholding the finding of the trial court that PW1

had properly identified the mobile phone while apart from the colour, she did not describe any special marks which enabled her to identify the property.

5. That the learned first appellate Judge erred in law and fact in upholding the appellant's conviction on the offence of armed robbery while the evidence of PW1 did not prove the ingredients of that offence.
6. That the learned first appellate Judge erred in law and fact in upholding the decision of the trial court while the appellant's conviction was wrongly based on contradictory evidence of PW1 and DW2.
7. That the learned first appellate Judge erred in law and fact in failing to find that the prosecution did not prove the charges laid against the appellant beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Magreth Mahundi assisted by Ms. Edina Mwangulumba, learned State Attorneys. When the appellant was called upon to argue his appeal, he opted to hear first, the respondent's replies to his grounds of appeal and

thereafter would make his rejoinder submission if the need to do so would arise.

Submitting in reply to the appellant's 1st ground of appeal, Ms. Mahundi argued that the appellant was properly identified by PW1. According to the learned State Attorney, the offence was committed in broad day light and the incident took between 15 and 20 minutes and therefore, since the conditions for identification and the period of time at which the appellant was under observation by PW1 was sufficient, the identification evidence was properly acted upon to convict the appellant. Ms. Mahundi cited the case of **Hamisi Yazidi v. Republic**, Criminal Appeal No. 381 of 2015 (unreported) to support her argument. She went on to argue that, although the identification parade register was not read out and therefore, an invalid piece of evidence thus deserving to be expunged from the record, the oral evidence of the witnesses as regards identification of the appellant is watertight.

With regard to the 2nd ground, Ms. Mahundi disputed the appellant's contention that, in her evidence, PW1 did not give the details of how the offences of rape and grievous harm were committed. According to the learned State Attorney, PW1 described how the appellant raped her and that in the process of robbing her the mobile phone, he injured her hand

with a machete. Ms. Mahundi added that, apart from the details of PW1's evidence on how the two offences were committed, the appellant did not cross-examine her when he was afforded that opportunity.

On the 3rd ground, Ms. Mahundi argued that the complaint by the appellant on this ground is devoid of merit because the evidence of the PF3 was not acted upon but rather, it was the appellant's cautioned statement which was relied upon by both courts below. She argued however, citing the case of **Bashiru Salum Sudi v. Republic,** Criminal Appeal No. 379 of 2018 (unreported), that as was the case with exhibit P1, the cautioned statement was wrongly acted upon because its contents were read out before admission and therefore, the same should also be expunged from the record. It was the learned State Attorney's submission however, that even without the evidence of the PF3, the oral evidence of the doctor, PW4 is sufficient to establish the penetration which is a crucial ingredient of the offence of rape.

As for the appellant's complaint on the 4th ground that, the mobile phone was not properly identified, Ms. Mahundi submitted that, although PW1 identified it only by its colour and the scratches, the appellant did not claim that the property belonged to him and did not as well object when the same was sought to be tendered as an exhibit. The learned

State Attorney went on to argue that, the appellant did not also deny that he was the person who sold the mobile phone to the appellant's co-accused person (DW2).

On the 5th ground, the learned State Attorney submitted that, there is sufficient evidence proving the offence of armed robbery. She argued that the appellant's act of threatening PW1 with a machete before he stole the mobile phone and its actual stealing, constituted the offence of armed robbery. She cited the case of **Atufigwege Danken Mwangomale v. Republic,** Criminal Appeal No. 168 of 2009 (unreported) to bolster her argument. As for the 6th ground, it was her argument that the evidence of PW1 and DW2 did not contradict because PW1's testimony that the mobile phone had scratches does not mean that the same is not in good order as stated by DW2 who meant that the mobile phone was in good working condition.

Finally, as to the 7th ground, the learned State Attorney submitted that from her arguments in reply to the 1st – 6th grounds of appeal, the charges laid against the appellant were proved beyond reasonable doubt. She thus prayed that the appeal be dismissed.

In rejoinder, the appellant started by arguing that since the learned State Attorney had conceded that the identification register (exhibit P1)

and the PF3 (exhibit P5) were improperly acted upon by the two courts below, his conviction was for that reason, based on insufficient evidence. He argued further that the evidence to the effect that he was identified by PW1 on the basis of the clothes which he had put on and the identification by PW1 of the mobile phone, was unsatisfactory because she did not describe any special marks so as to distinguish it from other iphones. He added that, PW1 did not further, describe on what part of the phone were the alleged scratch marks.

Submitting further in rejoinder, the appellant argued that the armed robbery count has not been proved because the machete, which PW1 alleged that he used it to threaten her, was not tendered in evidence. On the rape charge, he submitted that although PW1 testified that at the time of the incident, the appellant undressed her and proceeded to rape her, that does not suffice to establish the offence of rape. He urged us to agree with his submission and hold that, the prosecution did not prove the offences against him beyond reasonable doubt. He prayed that his appeal be allowed and he be set free.

Having considered the submissions of the learned State Attorney and the appellant, we wish to begin by agreeing with both parties that both courts below erred in acting on exhibits P1 collectively, P3 and P5.

This is because whereas exhibit P1 was read out without having been admitted in evidence, the other two documents were not read out in court so that the appellant could understand their contents. Failure to read out the contents of a document after its admission in evidence is an incurable irregularity. In the case of **Robinson Mwanjisi and 3 Others v. Republic** [2003] T.L.R 218, the Court had this to say on the conditions which must be observed during the admission of documentary evidence:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted before it can be read out otherwise it is difficult for the court to be seen not to have been influenced by the same."*

On the effect of a failure to read out a document after its admission in evidence, in the case of **Ally Said @ Tox v. Republic,** Criminal Appeal No. 308 of 2018 (unreported), the Court stated as follows:

> *"Mindful of our previous decisions stressing on the duty to read the contents of documentary exhibits after being cleared for admission, we are satisfied that the omission to have the contents of exhibit P1 read out by the witness who tendered after it was cleared for admission was fatal."*

Having so observed, the Court proceeded to expunge the exhibit from the record.

In the case at hand, the three documentary exhibits including exhibit P1 collectively which were tendered at the preliminary hearing should have been read out after their admission. On the basis of the position of the law stated above, the omission is fatal. In the circumstances, exhibits P1, P3 and P5 are hereby expunged from the record.

That said and done, we now proceed to consider the grounds of appeal on the basis of the remaining evidence after expungement of the said documentary evidence. Starting with the 1st and 3rd grounds of appeal, after having expunged exhibits P3 and P5, these grounds have in effect been answered in the affirmative. Since however, as stated above the appellant's conviction was not based on the evidence of those documentary exhibits alone, the determination of the appeal will depend on the strength or otherwise of the evidence in its totality.

To begin with the 4th ground of appeal, the appellant is challenging PW1's evidence of identification of the mobile phone. Both courts below found that the mobile phone which was retrieved from DW2 belonged to PW1. This being a second appeal, we may only interfere with that finding

of fact if we are satisfied that there was misapprehension of the evidence or if there is violation of some principles of law or procedure. See for instance, the cases of **Wankuru Mwita v. Republic,** Criminal Appeal No. 19 of 2012, **Emmanuel Mwaluko Kanyusi and 4 Others,** Consolidated Criminal Appeals No. 110 of 2019 (both unreported) and **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.LR 149. In the first case, the Court stated as follows:

> *"The law is well settled that on second appeal, the Court will not readily disturb concurrent findings by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

We have scrutinized the evidence pertaining to the identification of exhibit P2. Although it is true that PW1 identified it by colour and the scratch marks, its ownership by her was not in dispute at all. In his evidence, PW2 averred that after he had arrested the appellant, he led him (PW2) to the person who bought the mobile phone. In his evidence,

PW6 agreed that the phone was sold to DW2 and payment to the appellant was made through him. The appellant did not cross examine PW2 on that crucial evidence. He is therefore deemed to have agreed with all that which was stated by the said witness. It is trite principle that failure to cross examine a witness on an important matter amounts to acceptance of the truth of evidence of that witness – See for example the cases of **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992, **Damian Luhehe v. Republic**, Criminal Appeal No. 501 of 2007 and **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (all unreported). In the last case, the Court stated as follows:

> *"As a matter of principle, a party who fail to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

From the foregoing exposition, we agree with the learned State Attorney that exhibit P2 was properly identified by PW1 to be her property. That finding on the 4th ground of appeal suffices to dispose of the 6th ground in which the appellant contended that the evidence of PW1 and DW2 is contradictory. That ground is, in the circumstances, devoid of merit.

Having found that exhibit P2 is the property of PW1 stolen from her on the date of the incident, it is this evidence which links the appellant with three offences committed against PW1. From the evidence of PW2 which was not disputed by the appellant, he was the one who led that witness to DW2, the person from whom the mobile phone was retrieved. As found by the two courts below therefore, the mobile phone was stolen from PW1 by none other but the appellant.

In the 2nd and 5th grounds in which the appellant challenges the evidence of PW1 contending that the same is insufficient to prove the offences of rape, grievous harm an armed robbery, after having gone through the evidence on record and the parties submissions, we are unable to agree with him. With regard to the offence of armed robbery, PW1 described how the appellant threatened her and that in the course of stealing, her mobile phone, she was injured by the machete on her hand. Her evidence was supported by the oral evidence of PW4 who testified to the effect that, she had injuries on her hand which showed that they were caused by a sharp object. The witness (PW4) supported also the evidence of rape tendered by PW1. As pointed out above, in his evidence, PW4 said that his examination of PW1's private parts revealed that she had bruises and blood stains which also appeared on her underwear.

With regard to whether or not the ingredients of the offence of armed robbery were established, we agree with the learned State Attorney that the same were proved. The appellant had a machete and used it not only to threaten PW1 but injured her hand in the course of stealing her mobile phone and money. The acts constituted armed robbery.

On the basis of the reasons stated above, there is no gainsaying that the charges against the appellant were proved beyond reasonable doubt. The 7th ground of appeal is thus lacking in merit. In the event, this appeal is devoid of merit. It is hereby dismissed in its entirety.

DATED at **IRINGA** this 30th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 1st day of October, 2021 in the presence of the Appellant in person and Hope Charles Massambo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL