

TANZANIA / JUDGMENT

jacob mayan vs republic 2020

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IN THE COURT OF APPEAL OF TANZANIA AT SHINYANGA fCORAM: MWARIJA, 3.A., MWAMBEGELE, 3.A.. And KEREFU. 3.A.) CRIMINAL APPEAL NO. 566 OF 2016 JACOB MAYANI @ BOYI..... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Judgment of the High Court of Tanzania, at Shinyanga) (Makani. J, ^ dated the 18th day of November, 2016 in DC. Criminal Appeal No. 132 of 2015 JUDGMENT OF THE COURT 18th & 27th August, 2020

MWARIJA, J.A.: In the District Court of Shinyanga, the appellant, Jacob Mayani @ Boyi was charged with and convicted of the offence of rape contrary to ss. 130 (1), (2) (e) and 131 (3) of the Penal Code [Cap. 16 R.E. 2002]. He was found to have had carnal knowledge of a girl aged 10 years who, for the purpose of disguising her identity will be referred to Geras "SM" or simply "the victim". Following his conviction, the appellant was sentenced to life imprisonment. Aggrieved by the conviction and sentence, he appealed to the High Court. In its decision, the High Court upheld the conviction but reduced the sentence of life imprisonment to thirty years imprisonment. Aggrieved further, he has preferred this second appeal. The background facts giving rise to the appellant's trial and consequently, his conviction, can be briefly stated as follows: The victim was until the material time of the incident living with her mother, Anjela James (PW2). On 12/2/2013 at about 15:00 hrs, her maternal aunt Clementina Martin who had visited them, sent her to buy buns at a nearby shop owned by one Maheke. While on the way going to the said shop, she met a certain man riding a bicycle. The man asked her to accompany him to where he would fetch and give her tomatoes to take to her grandmother who was also living with the victim and her mother. The victim agreed and that person, who turned out to be a culprit, carried her on his bicycle to a village known as Mwamashele. 2 At the time when they arrived at that village, there was rainfall and thus he took the victim to an unfinished house. While in that house, the culprit turned hostile against her. He got hold of the victim and stragled her to the extent that she fainted, only to regain consciousness on the next day. Meanwhile, since the victim did not return home on 12/2/2013, her mother reported to her area's leader and Mtaa chairman that her child had gone missing. On 13/2/2013 she also reported the incident to the police. When the victim regained consciousness on the next day in the morning, she found herself having severe pains on her eyes and private parts. She noticed also that her underpant had been torn and thrown aside. She however managed to walk out of the unfinished house and

fortunately, Anna Luhende (PW9) woman who was cultivating her farm near that area saw the victim. The looks of the victim and the act of coming from that unfinished and unoccupied house at that time of the day, astonished her. Upon closer observation, PW9 noticed that the victim's eyes were swollen. She narrated the incident to PW9 whereupon, PW9 took the victim to her home where she provided her with porridge. Later, PW9 took the victim to the Hamlet chairperson, Kabelele Mwika (PW3). 3 Coincidentally, two policemen who were on their duties arrived at the village and PW3 informed them of the incident. Both PW3, PW9 and the two policemen went into the unfinished house and found there the victim's underpant. They took it and went with the victim to the police station and from there, PW2 was informed that the victim had been found. PW2 went to the police station and upon inspecting the victim's private parts, she noticed that she had been raped. The police issued the victim with a PF3 and sent her to Shinyanga Government Hospital where she was medically examined by Dr. Fredrick Mlekwa (PW8). Having examined the victim, PW8 found that her hymen had been ruptured and her vagina had sperms. He also found that her eyes were injured by use of blunt object and thus refereed her to Bugando Hospital for further examination and treatment. He tendered the medical report dated 30/4/2013 which was admitted in evidence as Exh. P4. Two days later, on 25/4/2013 the appellant was apprehended at Mwasele area on suspicion that he had raped another girl child in the farm belonging to one Dr. Kunze. The child ran away from that farm and went to the neighbouring house and complained that she was raped by the appellant. It was then that the owner of the house informed the Mtaa chairperson, one Neema Seseja (PW7) about the incident. In the company of other persons, PW7 went to the scene and found the appellant's bicycle outside the said farm. Shortly thereafter, as the appellant was coming out of the farm, he was arrested. According to PW7, the appellant orally confessed to have raped the child and asked to be pardoned. He confessed further that he had raped other three children. He asked PW7 and those who had gathered at the scene to pardon him because, apart from raping the child, he did not pierce her eyes as he did to the other three girls whom he said, he had also raped. The incident was reported to the police where PW7 reported also about the appellant's confession. The police carried out investigation and after being satisfied that the appellant had raped the victim, charged him with the present offence. In her evidence, the victim who testified as PW1 told the court that he identified the appellant at the police station in the identification parade. The parade was conducted by A/Insp. Deodatus Rutta (PW4) who testified that, it was conducted on 26/4/2013 in accordance with the laid down rules whereby the appellant was accorded all his right before the witness (PW1) was taken to identify him. PW4 tendered the parade register which was admitted in evidence as exhibit P2. One of the persons who were lined up in the parade, Athumani Khalid Hasan (PW5) also gave evidence to the effect that the appellant was identified by PW1. At the police station, WP 3678 CpI Cecilia (PW6) recorded the appellant's cautioned statement on 26/4/2013. She testified that the appellant admitted to have committed the offence against PW1. The witness tendered the appellant's cautioned statement which was admitted in evidence without any objection from the appellant. The same was marked as exhibit P3. In his defence, the appellant denied the charge. He testified that, on 25/4/2013 while undertaking his hawking business at Mwamasele area, he met a certain woman who was his customer. She stopped him and accused him of having raped a girl. He denied the allegation but the woman raised an alarm

to which a number of people responded to and gathered at the area. He said that the group assaulted him and took his goods. It was his evidence further that in the process, one person arrived and called the police who went to the area and arrested him. At the police station, he said, he was informed that he had raped three girls and pierced their eyes. He denied the allegation but the police proceeded to charge him. He challenged the evidence of PW1 contending that she did not identify him. He also disputed the cautioned statement complaining that he was forced to sign it. He added that he was denied the right to call his relatives or friends before the statement was recorded. He also challenged the conduct of the identification parade stating that it was unfairly done because he was taken from lock-up and lined up without being afforded the opportunity of changing his clothes and without being allowed to wash his face before he was taken to the parade. In its decision, the trial court found that the evidence of PW1, PW8 and PW9 sufficiently proved that PW1 was raped. It found also that from the evidence of PW6 who recorded the appellant's cautioned statement, PW4 who conducted identification parade and PW5, one of the persons who were lined-up in the parade, proved that the appellant was identified by PW1. The trial court acted also on the evidence of PW7 to the effect that the appellant orally confessed that he raped not only the child who caused his arrest on 25/4/2013 but also did so to other three girls. As alluded to above, the High Court upheld the decision of the trial court. It was of the view that PW1 properly identified the appellant in the identification parade because on the date of the incident, she was with him from 15:00 hrs when he picked her at Ngokolo area until when they reached Mwanashele village where he strangled and molested her. It found the appellant's contention in his defence; that the cautioned statement was not recorded voluntarily, to be an afterthought, the statement having been admitted in evidence at the trial without any objection. On that finding, the High Court relied on the case of *Ally Rashid @ Mndolwa v. Republic*, Criminal Appeal No. 23 of 2006 (unreported). In this appeal, the appellant has raised five grounds upon which he seeks to fault the decision of the first appellate court. The grounds as herein paraphrased contend as follows:-

1. That, the first appellate court erred in law in upholding the decision of the trial court while the appellant's conviction was based on the 8 cautioned statement which was not corroborated by an extra-judicial statement and which was recorded contrary to the law.
2. That, the first appellate court erred in law in upholding the decision of the trial court which is erroneous for having been based on the evidence obtained from unprocedurally conducted identification parade.
3. That, the first appellate Judge erred in law in failing to find that the appellant's conviction was based on the evidence of PW1 which was contradictory hence unreliable.
4. That, the learned first appellate Judge erred in law and fact in failing to find that in convicting the appellant, the trial court acted on the evidence of PW7 which was hearsay and thus uncreditworthy.

5. That, the learned first appellate Judge erred in law and fact in failing to find that the trial court had wrongly based the appellant's conviction on the evidence of dock identification. During the hearing of the appeal on 18/8/2020, the appellant appeared in person, unrepresented through video conferencing, linked to Shinyanga District Prison. On its part, the respondent Republic was represented by Mr. Nassoro Katuga, learned Senior State Attorney assisted by Ms. Edith Tuka, learned State Attorney. When he was called upon to argue his appeal, the appellant opted to let the respondent submit in reply to the grounds of appeal but reserved his right to make a rejoinder if it would be necessary. Mr. Katuga prefaced his submission by stating the respondent's stance that, it was resisting the appeal. On the 1st ground of appeal, the learned Senior State Attorney argued, first that it is not a legal requirement for a cautioned statement to be corroborated by an extra-judicial statement. On that argument, he relied on s. 27 of the Evidence Act [Cap. 6 R.E. 2019]. Secondly, as regards the requisite period for recording a cautioned statement as provided under s. 50 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA), he argued that the statement of the appellant who was under restraint in connection with the same offence committed against other victims, was recorded on 26/4/2013. That, he said, was done immediately after investigation in respect of the offence for which he was arrested on 24/4/2013, revealed that he also committed the offence against PW1. Mr. Katuga went on to argue that, the time at which PW4 started to record the statement and the time of finishing it is shown in the statement as required by s. 57 (2) (e) of the CPA. He submitted further that, the interview was not interrupted and therefore, the requirement of complying with s. 57 (2) (f) of the CPA did not arise. With regard to the 2nd and 5th grounds, Mr. Katuga submitted that, according to the record of appeal, the appellant was identified at the identification parade. He went on to state that the parade was conducted in accordance with s. 60 of the CPA and the Police General Order No. 232. He contended further that, the evidence of identification parade is valid under s. 11 of the Evidence Act. It was his submission therefore, that the appellant was properly identified by PW1 and as a result, these grounds of appeal are without any merit. As for the 3rd ground, the learned Senior State Attorney opposed the appellant's contention that the evidence of PW1 was contradictory of itself. According to his submission, PW1 did not contradict herself. He stressed that her evidence was consistent as regards the person who took her to the place where she was strangled, raped and an attempt to pierce her eyes was made. ii On the 4th ground, Mr. Katuga submitted that the evidence of PW7 was relevant because the appellant's conduct after his arrest on 25/4/2013 on suspicion of having committed offences against other children was relevant because, from her evidence, the police conducted investigation which revealed that PW1 was one of those three children whom the appellant confessed to have raped and pierced their eyes. On the basis of his submission, Mr. Katuga beseeched us to find that the grounds of appeal raised by the appellant are devoid of merit and thus urged us to disallow them and dismiss the appeal. In his rejoinder submission, the appellant reiterated the contents of his grounds of appeal and implored upon us to allow his appeal. He essentially recapitulated the arguments which he made in the High Court. With regard to the conduct of the identification parade, he argued that the same was not fair because he

was taken from the lock-up and lined up in the parade with persons who were not of similar appearance with him. He complained also that his oral confession before PW7, if any, was not reduced in writing so that the same could have been tendered in evidence during the trial. He denied to have given such oral confession, arguing that if that was the case, he should have also confessed in court. 12 He also disputed the cautioned statement (Exhibit P3) contending that the same was not read over to him at the police station after PW6 had finished recording it. Having duly considered the parties' rival arguments, in determining the appeal, we intend to begin with the 3rd and 4th grounds of appeal. From the available evidence on record, the two grounds will not detain us much. The appellant's contention that the evidence of PW1 is contradictory is, in our view, without merit. The appellant based that contention on PW1's evidence at page 18 of the record of appeal. On that page, PW1 narrates on how, on 12/2/2013 a person who had a bicycle lured and took her on his bicycle to Mwamashele village under the pretext that he was going to fetch her grandmother's tomatoes. We do not find any contradiction in that piece of evidence. On the contrary, her evidence was consistent on that aspect. On the argument that the evidence of PW7 was hearsay, we similarly find that the same is devoid of merit. The witness testified on the facts she personally saw and heard on 25/4/2013 after her arrival at the place where the appellant was arrested following allegation of having committed the offence of rape against other children. As submitted by Mr. Katuga, 13 the relevance of PW7's evidence is about the confession which was orally made by the appellant; that he had raped and pierced the eyes of other three girls. Acting on that evidence, in its investigation, the police interrogated the appellant who, according to PW4 confessed that he committed the same offence against PW1. With regard to the 2nd and 5th grounds of appeal, after having carefully scrutinized the evidence of PW4, we agree with Mr. Katuga that the complaint raised by the appellant on the two grounds under consideration, are without merit. It is not a correct position that PW1 identified the appellant in the dock. What she did during the hearing, was only to recognize the appellant by pointing him out in the dock. That was however, after she had identified him in the identification parade on 26/4/2013. It is instructive to state here that, dock identification refers to identification by a witness of an accused person for the first time in court. When an accused person has been identified in an identification parade, dock identification does not lose evidential value. As observed in the case of *Musa Elias and 2 others v. Republic*, Criminal Appeal No. 172 of 1993 (unreported). 14 "It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial. " Going by that trite position, the contention that the dock identification was made without prior description of the appellant and that the same was not made after identification parade, is untenable. The last ground for our consideration is ground No. 1 of the appeal. The issue which arises from the parties' submission on that ground is whether the recording of the appellant's cautioned statement was made contrary to s. 50 (1) (a) of the CPA. That provision states as follows:- "50. (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is -

- (a) Subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence." 15 From the evidence on record, we agree with Mr. Katuga that the appellant's cautioned statement was not taken out of the period prescribed by the section of law which has been reproduced above. It is not disputed that the appellant was put under restraint on 25/4/2013. His arrest was however, in connection with offences which related to other children, not PW1. As stated above, it was after his arrest on suspicion of having committed an offence against a different girl that it subsequently turned out that he also committed the offence against PW1. That information came to the notice of the police on 26/4/2013 and it was then, at about 15:00 hrs that his cautioned statement was recorded. The statement was not therefore, recorded in contravention of s. 50 (1) (a) of the CPA as contended by the appellant. In the circumstances, the requirement of complying with s. 51 (1) (a) and (b) of the CPA did not arise because, there was no need of extending the period of interviewing the appellant. As for s. 57 (2) (e) of the CPA which the appellant contends that it was also breached, it is shown in the statement that the interview commenced at 15:00 and ended at 15:40 hrs. Since the time at which the interview started and the time of its completion was recorded, it is obvious 16 that the said provision was not breached. With regard to s. 57 (2) (f) of the CPA, there is no gainsaying that, since s. 50 (1) (a) of the CPA was complied with and because the interview was not interrupted, the contention based on paragraph (f) of s. 57 (2) of the CPA, being flouted, is equally without merit. In conclusion, we agree with the learned High Court Judge that the appellant was rightly convicted. In his cautioned statement which was admitted in evidence without any objection, the appellant admitted that he strangled, raped and injured PW1's eyes in an attempt to pierce them so that she would not identify him. It is apposite to reproduce herein below, part of his statement which is at page 74 of the record of appeal "Mnamo tarehe 12/3/2013 majira ya saa 1.50 hrs nikiwa Ngokoto maeneo ya mtumbani nilikutana na binti njiani nikamsemesha unaenda wapi akanijibu anaenda kununua mandazi dukani ametumwa na mama yake mdogo ndipo nilipomweleza twende tukachukue nyanya shambani kwangu na alikubali nikampakiza kwenye baiskeli hadi Kijiji cha Mwamashele kata ya kizumbi na kumfikishia kwenye nyumba ambayo haijaisha yaani pagale ambalo hakuna mtu ambaye anaishi ikanibidi nimlaze kwa nguvu na kumkaba shingoni na kumvua chupi aliyokuwa amevaa nikafanya nae mapenzi kwa nguvu na alipopiga ke/e/e nilimziba mdomo baada ya kufanya nae mapenzi ni/ihisi kuwa huyu mtoto anaweza kunitambua hivyo nilimchoma na miiba machoni Hi asiweze kunitambua ni/iondoka na kumwacha pale kwenye pagale akiwa hajitambui" Literally translated, the appellant states that on 12/3/2013 he met PW1 and lured her to accompany him to his farm to fetch tomatoes for her grandmother. He states further that after having carried her on his bicycle, he took her to Mwamashele Village, Kizubi Ward, in an unfinished house. He then fell her down, strangled her and removed her underpant. Thereafter, he started to rape her and when she raised an alarm, he covered her mouth. He states further that, fearing that she might later identify him, he pierced her eyes. Although, both in his defence and in this appeal, the appellant contended that he did not make the statement voluntarily, we agree with the findings of the two courts below that such

defence did not raise reasonable doubt against the prosecution case. In any case, as found by both the trial court and the High Court, the evidence of the appellant's cautioned statement is corroborated by the evidence of PW1 and his oral confession as testified to by PW7. In the event, this appeal which is devoid of merit is hereby dismissed in its entirety. DATED at SHINYANGA this 27th day of August, 2020. A. G. MWARIJA JUSTICE OF APPEAL J. C. M. MWAMBEGELE JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL The judgment delivered this 27th day of August 2020, in the Presence of the Appellant in person via video link and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent, is hereby certified as a true copy of the

- / E. G. MRANGU DEPUTY REGISTRAR COURT OF APPEAL 19

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