IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 227 OF 2021

ESSAU SAMWEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

Dated the 20th day of April, 2021

in

DC. Criminal Appeal No. 7 of 2021

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JUDGMENT OF THE COURT

30th May & 16th June, 2022

WAMBALI, J.A.:

The appellant, Essau Samwel appeared before the District Court of Kibondo where he faced two counts. The first count concerned the offence of rape contrary to sections 130(1)(2)(e) and 131 (1) of the Penal Code [Cap 16 R.E 2019] (the Penal Code). It was alleged in the particulars of the charge that on 28th March, 2020 during afternoon hours at Minyinya Village within Kibondo District in Kigoma Region the appellant had carnal knowledge of a girl aged 16 years old. The second

count was preferred in respect of the offence of impregnating a school girl contrary to section 60A (3) of the Education Act, [Cap 353 R.E 2002] as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act, No. 4 of 2016. It was similarly indicated in the particulars that, on the same date, time and place the appellant impregnated a school girl aged 16 years old of Minyinya Primary School. For the purpose of this judgement, we will conveniently refer to the girl as "BM" or "victim" or "PW1" to disguise her identity.

The appellant denied the allegation by pleading not guilty; hence a full trial was conducted in which the prosecution marshalled five witnesses. These are, the victim (PW1), Jesca Razaro (PW2), Festo Gayagula (PW3), Dr Emily Malako (PW4) and G.7801 D/C John (PW5). In addition, the affidavit of the age of the victim, attendance register and PF3 of the victim were tendered and admitted as exhibits P1, P2, and P3 respectively.

In short, the substance of the prosecution evidence at the trial was that the appellant being a teacher had sexual intercourse with the victim on 28th March, 2020 at noon when she was grazing goats. It was testified by PW1 that on that date the appellant called her in his home in a room near the school where a mattress was on the floor and forcefully

inserted his penis into her vagina. PW1 later went to her home but did not tell anybody until early April 2020 when she told the appellant that she was pregnant after she was told by her neighbours as her mother (PW2) had travelled to Bukoba. During that period the schools were closed due to the covid-19 pandemic and resumed in 29th June, 2020. PW1 was taken to hospital on 8th September, 2020 where she was examined by PW4 who revealed that there was evidence of old penetration into her vagina and that she was in her 21st weeks of pregnancy. PW4 prepared and filled the PF3.

In his defence, the appellant disassociated himself from the allegation and testified that he lived in Kibondo town and not in school quarters and that there was no grazing grounds for goats at the school. He categorically contended that the case was framed up as there was no impeccable testimony to show the exact date and where sexual intercourse between him and the victim was done. He testified that on the alleged date of the incident, he was at a gospel meeting and that he could not have called the victim from her home as it is about two kilometers to the school.

As it were, at the height of the trial, the trial Resident Magistrate acquitted the appellant on the second count in respect of impregnating a

school girl for lack of evidence but convicted him in respect of the first count of rape. Eventually, the appellant was sentenced to 30 years imprisonment and ordered to pay the victim TZS 1,000,000.00 as compensation. The appellant's desire to contest the trial court's findings, conviction, sentenced and compensation order was in vain as his appeal to the High Court of Tanzania at Kigoma was dismissed in its entirety. The appellant was also ordered to pay TZS 5,000,000.00 as compensation to the victim. That decision did not make the appellant lose interest in his pursuit of justice as subsequently, he lodged the instant appeal, advancing four grounds of appeal.

The hearing of the appeal proceeded in the presence of the appellant in person and Mr. Method Raymond Gabriel Kabuguzi who represented him. The respondent Republic had the services of Mr. Riziki Hamis Matitu and Mr. Robert Simon Magige learned Senior State Attorney and State Attorney, respectively.

At the inception of the hearing of the appeal, Mr. Kabuguzi compressed the four grounds of appeal into two; one that the first appellate judge, wrongly confirmed the decision of the trial court to the effect that the prosecution proved its case beyond reasonable doubts. Two, that, the first appellate judge wrongly varied and enhanced the

compensation to the victim from TZS 1,000,000.00 imposed by the trial court to TZS 5,000,000.00 without justification.

Submitting in respect of the first ground, it was Mr. Kabuguzi's argument that since according to the evidence on record the trial court undisputedly found that the alleged rape committed by the appellant to the victim could not have led to the alleged pregnancy due to the contradiction in the evidence of PW1, PW2 and PW4 with regard to the period from the date of conception to the date of examination, the first appellate judge ought to have held that similarly the offence of rape alleged to have been committed on 28th March, 2020 was not proved by the prosecution beyond reasonable doubt.

The learned advocate argued further that though the first appellate judge evaluated the evidence on record, he did not subject it to proper scrutiny. Had the first appellate judge done so, he submitted, he would have found that the defence of the appellant that he did not participate in committing the offence of rape, had raised reasonable doubt to the prosecution case and thus the evidence of PW1 which was greatly relied into in finding the conviction uncredible.

In the circumstances, Mr. Kabuguzi strongly contended that the prosecution evidence on record cannot prove beyond reasonable doubt that the appellant raped the victim on 28th March, 2020 as it is not clear why PW1 remained silent concerning the commission of the offence for almost six months before she mentioned the appellant in September, 2020. He added that PW1 did not also inform her mother (PW2) about the incident until she was arrested together with her for absconding from the school. In his view, this created doubt on PW1's credibility and thus the trial court could not have believed her evidence and relied on it to ground the appellant's conviction.

On the other hand, Mr. Kabuguzi submitted that even the investigator (PW5) did not corroborate the evidence of PW1 that she was raped on that fateful date. He argued that PW5 failed to disclose whether in his investigation he discovered that there was an open space at Minyinya Primary School which could have enabled PW1 to graze goats since the appellant raised doubt on this matter maintaining that he lived in Kibondo township and not in school quarters. Similarly, he stated, the Doctor (PW4) who examined PW1 did not show that there was penetration, which is an essential element for proving the offence of rape. On the contrary, he submitted that the report of PW4 was more

concerned with the finding that PW1 was in her 21st week of pregnancy. Unfortunately, he submitted, this is contrary to what PW1 stated in that she was on her 23rd weeks of pregnancy. In his view, this was a serious contradiction which fundamentally dented the prosecution case. It was thus Mr. Kabuguzi's submission that, what would have connected the appellant with the offence of rape would have been the successful allegations of impregnating PW1, which unfortunately was not proved leading to his acquittal on that charge by the trial court.

Ultimately, summing up his submission, Mr. Kabuguzi concluded that in view of the evidence on record and amid doubts raised by the defence case, the prosecution did not prove the case beyond reasonable doubts. He therefore prayed that the appeal be allowed leading to the acquittal of the appellant.

On the adversary side, Mr Matitu who addressed us on behalf of the respondent, spiritedly defended the first appellate judge in upholding the conviction of the appellant. He argued that the evidence on record left no doubt that the offence of rape against PW1 was committed by no other than the appellant on 28th March, 2020. The learned Senior State Attorney emphasized that the essence of the offence of rape is penetration as provided under Section 130 (4)(a) of the Penal Code,

which in his submission was fully established by the evidence of PW1 as she clearly testified on what transpired at the scene of crime on the fateful date in which the appellant raped her. He argued further that, PW1's evidence of penetration was supported by PW4 who, in the report he prepared (exhibit P2- the PF3) indicated that there was evidence of old penetration into her vagina. This is contrary to the appellant's counsel submission that PW4 did not find the evidence of penetration, he argued. To this end he supported the two courts below in grounding the conviction of the appellant relying on the evidence of PW1 as the best evidence in the offence of rape comes from the victim, citing the decision of the Court in **Seleman Makumba v. The Republic** [2006] T.L.R 384.

It was also strongly submitted by Mr. Matitu that contrary to the arguments of the appellant's counsel, according to the record, the first appellate judge thoroughly scrutinized the evidence of both sides of the appeal before him, and ultimately, he properly came to the finding that the prosecution proved that the appellant raped PW1 on 28th March, 2020. In this regard he was of the firm view that the appellant was legally convicted as charged.

On the credibility of PW1, Mr. Matitu submitted that according to the evidence on record, there is no justification to impeach PW1's

credibility since being the victim, she stated what exactly transpired on the material day and her evidence was not seriously shaken by the appellant during cross examination. Relying on the decision of the Court in **Goodluck Kyando v. The Republic** [2006] T.L.R 367, he submitted that PW1 was entitled to credence as she stated what she saw and experienced at the scene of crime, and therefore, the two courts below had no reason to doubt her credibility. In the circumstances, he pointed out that the alleged contradictions which were raised by Mr. Kabuguzi in his submission pertaining to the offence of impregnating a school girl cannot apply to the offence of rape as the ingredients of proving each offence are quite distinct. Accordingly, he argued that the appellant was dully convicted and sentenced in connection with the offence of rape.

With regard to the delay in reporting the incident to anybody, the learned Senior State attorney submitted that firstly, it is on record that PW1 informed the appellant in April 2020 after the sexual intercourse that she was pregnant and this was not contested by the appellant during cross examination. Secondly, when PW1 was arrested for not attending to school, she mentioned the appellant to PW2 who she explained that she could not have told her about the incident as she had gone to Bukoba from March before the offence was committed and

returned in July, 2020. PW2 also confirmed PW1's testimony that in her absence she was taking care of goats during corona pandemic School break. In this regard, Mr. Matitu argued that, the delay in reporting the incident could not have dented the prosecution case and according to the record of appeal, the trial court magistrate found the explanation by PW1 plausible.

Moreover, on the defence of alibi, Mr. Matitu argued that according to the evidence on record, the trial and first appellate courts properly found that it was not substantiated as PW1 proved that it is on the alleged date, that is 28th March, 2020 when the appellant raped her. He disputed the appellants allegation that he had gone to attend the gospel meeting and returned to Kibondo later. He also contested the appellant's testimony that he did not go to the school compound on that date.

Eventually, Mr. Matitu submitted that on the streghth of the prosecution evidence on record, the first appellate judge correctly confirmed the trial courts finding that the appellant is guilty of the offence of rape and therefore the conviction is proper. To this end, he implored us to find that this ground of appeal is devoid of merit and reject it.

We have carefully revisited the evidence on record amid the counsel submissions for and against the appeal. There is no doubt, in our view, that the evidence of PW1 is crucial in determining this appeal on the question whether the prosecution case was proved beyond reasonable doubt. What is apparent as per the record of appeal is that the evidence of the appellant in his defence did not raise any serious doubt on the credibility of PW1 with regard to the finding that she was raped by the appellant on 28th March, 2020.

For clarity, we think it is pertinent to start our deliberation in respect of the complaint in the first ground with recitation of the relevant part of PW1's evidence as found in the record of appeal:-

> *"Essau Samwel, the accused is my teacher at Minyinya Primary School. On 28/3/2020 at noon I was at home. I was keeping goats (nachunga mbuzi). My teacher Essau called me to his home at school quarters. He told me to make love with him I denied.*
>
> *He removed his clothes first and removed my clothes. He put me on a mattress, his room does have only a mattress on the floor. He then put his penis into my vagina. I then went home. I did not tell anyone at home. I told the teacher Essau that I am pregnant on April. I was told by my neighbour that I am pregnant.*

He didn't say anything. I stayed home without telling anyone. ...On March 2020, I already saw my menstrual period. ...I never entered into my period after March 28."

During cross examination, PW1 affirmed that she had sexual intercourse with the appellant at the house around school grounds. It is apparent from cross examination that the appellant did not cross examine PW1 on important question like being told that she was pregnant after sexual intercourse on that date. Indeed PW1 emphasized that she had been in a relationship with the appellant for some time before that date.

Going by the evidence of PW1 on record, there can be no doubt that considering the defence of the appellant, which was dully considered by both courts below, there was penetration into her vagina on 28th March, 2020, and that no other than the appellant who was the perpetrator. We entirely agree with the finding of the trial court magistrate as submitted by Mr. Matitu that PW1 gave plausible explanation of why she delayed to report the incident to anyone until when she was arrested for absconding from school as it seems she was afraid of being spotted on the situation she was experiencing.

We must emphasize that the essence of the offence of rape is penetration and this is what should be proved by the prosecution as required under section 130 (4) of the Penal Code. In **Mathayo Ngalya @ Shabani v. The Republic,** Criminal Appeal No. 170 of 2006 (unreported) the Court stated that:-

> *"The essence of the offence of rape is penetration of the male organ into the vagina. Subsection (a) of Section 130A of the Penal Code provides...*
>
> *'For the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute intercourse necessary to the offence of rape.'*
>
> *For offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence."*

Reverting to the appeal at hand, considering the evidence on record, we agree with the finding of the two courts below finding that PW1 proved beyond a shadow of doubt that the appellant penetrated her

vagina on the fateful date. We are satisfied that as submitted by the learned State Attorney, PW1 gave a detailed account of what transpired on that date concerning the involvement of the appellant in committing the offence of rape. PW1's evidence as the victim of crime sufficed to ground the conviction of the appellant of the offence of rape since as correctly found by the two courts below, her evidence was not greatly impeached by the appellant during cross examination. Her evidence demonstrates the settled position that the proof of rape comes from the prosecutrix herself (see **Godi Kasenegela v. The Republic,** Criminal Appeal No. 10 of 2008 (unreported). Moreover, in **Selemani Makumba v. The Republic** [2006] T.L.R 379, the Court emphatically stated that:-

> *"A medical report or the evidence of a doctor, may help to show that there was sexual intercourse but it does not prove that there was rape, that is non consented sex, even if bruises are observed in the female sexual organ. True evidence of rape has to come from the victim, if an adult that, there was penetration and no consent, and in case of any other woman consent is irrelevant, that there was penetration."*

It follows that the court can still determine the case of rape based on the available evidence on record even in the absence of medical

evidence (see **Issa Hamis Likamalila v. The Republic**, Criminal Appeal No. 48 of 2003(unreported).

We are mindful of the argument of the appellant's counsel that the evidence of PW4 who examined the victim and filled a report in the PF3 showing that she was pregnant did not indicate that there was penetration into her vagina. Thus, in his view, as the appellant was acquitted of the first count of impregnating a school girl, the evidence of PW4 and exhibit P2 (the PF3) is useless because there is no nexus between that evidence with regard to the proof of the offence of rape.

We think, the counsel argument is not founded. Though in the PF3 ended up with the conclusion that the victim was pregnant, in the body of the same report, PW4 indicated that there was evidence of old penetration though there was no tear in the vagina. That in our view demonstrates that as the examination was done on 8th September, 2020 and the offence was alleged to have been committed on 28th March, 2020, PW4 was perfectly entitled to state what he found during the examination, that is the virgina of the victim had been penetrated some considerable days before the examination. Certainly, considering the evidence on record, it could not have been expected for PW4 to find signs of bruises or presence of spermatozoa in the victim's virgina as the

appellant's counsel would have wished the report to contain. Such facts as could not be readily available if the allegation did not concern the commission of the offence of rape one or two days before the examination of the victim.

Nontheless even in the absence of medical evidence in the circumstances at hand, the offence of rape could have been proved by other evidence on record, particularly of PW1 which in our respectful opinion was not shaken by the appellant during cross examination. PW1 demonstrated that she knew the appellant for sometime and they had sexual relation before the date of the incident. Indeed, it is on record that the victim approached the appellant after the date of rape that she had missed her menstrual cycle, but she remained silent. In **Lazaro Kalonga v. The Republic**, Criminal Appeal No. 348 of 2008 (unreported) the Court observed as follows with regard to the effect of lack of medical evidence in proving the offence of rape:

> *"We are mindful of the fact that lack of medical evidence does not necessarily, in every case, mean that is not established where all other evidence points to the fact that it was committed. (See for example* ***Prosper Mjoela Kisa v. The Republic,*** *Criminal Appeal No. 73 of 2003 and* ***Salu Sosoma***

v. The Republic, Criminal Appeal No. 31 of 2006 (both unreported)."

Similarly, in the case at hand, as we have amply substantiated above, we are settled that despite the fact that the conclusion on the PF3 was with regard to pregnancy of the victim, which was in connection to the offence under the second count that ended into the acquittal of the appellant, this being a distinctive offence, did not affect the proof of rape by relying on the evidence of PW1. In addition, as we have stated above, the evidence of PW4 and PF3 also corroborated the evidence of PW1 that there was penetration into her virgina. The offence of rape was thus proved as required under section 130(4)(a) of the Penal Code. We accordingly dismiss the first ground of appeal.

Next for consideration is the complaint in the second ground of appeal that the first appellate judge wrongly enhanced the compensation granted to the victim by the trial court. We are settled that this ground can be easily determined as counsel for the parties are in agreement that it was improper for the first appellate judge to impose a compensation of TZS 5,000,000.00 in place of TZS 1,000,000.00 imposed by the trial court without hearing the parties. We entirely agree with learned counsel for the parties that though the first appellate judge did not require

parties to submit on the matter before he made the decision, as if the trial court had not dealt with the matter. We gather from the record of appeal that, this was not an enhancement as the amount was imposed as if the High Court judge was sitting as the trial court. It is apparent in the record of appeal that after he made reference to the relevant provision of section 131 (1) of the Penal Code regarding the punishment he proceeded and stated thus:-

> *"I hereby order that the appellant to compensate the victim PW1 Tshs. 5,000,000/= for the injuries she sustained leading her to drop out from school taking into consideration that as a teacher he ought to have positioned himself as a guardian to pupils and assist them to attain their education goals. The compensation order should be immediately recovered from attachment and sell of any of his immovable property or from his pension contribution, whichever easier."*

Regrettably, though the order of compensation and observation may seem necessary and attractive, the bottom line is that, firstly it was made without affording the parties opportunity to be heard as required by law; and secondly, it was reached as if nothing had happened at the

trial court with regard to the compensation of the victim. We respectfully find that this was legally wrong.

Considering the omission of the first appellate court to adhere to the well-established right of hearing before an adverse decision is made by a court, we find it pertinent to reiterate what the Court gstated in **Independent Power Tanzania Limited (IPTL) v. Standard Chattered Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009 (unreported) that:-

> *"... no decision must be made by any court of justice, body, or authority entrusted with power to determine rights and duties so as to adversely affect the interest of any person without first giving him a hearing according to the principles of natural justice..."*

In the event, we allow this ground of appeal in so far as the order of compensation made by the first appellate judge is concerned. However, considering the decision we have reached in the first ground of appeal that the prosecution case regarding rape was proved beyond reasonable doubt, we uphold the order of compensation of TZS 1,000,000.00 made by the trial court as it was not seriously contested by the appellant's counsel in his submission before us.

In the upshot, considering our deliberation above, we join hands with the concurrent finding of the two courts below that the prosecution case against the appellant was proved beyond reasonable doubts. Consequently, save for what we have decided regarding the order of compensation, we find that this appeal is devoid of merit. We accordingly dismiss it.

DATED at **KIGOMA** this 15th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June, 2022 in the presence of the Appellant in person, unrepresented and Mr. Raymond Kimbe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL