**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)**

**CRIMINAL APPEAL NO. 97 OF 2020**

**DAUD RASHID.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**[Appeal from the Decision of the Court of Resident Magistrate of Morogoro at Morogoro]**
**(Nkya, SRM Ext. Jur.)**

**dated the 2nd day of January, 2020**
**in**

**Extended Jurisdiction Criminal Appeal No. 41 of 2019**

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# JUDGMENT OF THE COURT

*15th& 25th February, 2022*

**KWARIKO, J.A.:**

This appeal challenges the decision of the Court of Resident Magistrate of Morogoro at Morogoro exercising extended Jurisdiction which dismissed the appellant's appeal in Extended Jurisdiction Criminal Appeal No. 41 of 2019 dated 2nd January, 2020.

Initially, the appellant was arraigned before the District Court of Morogoro with two counts, namely; rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2019]; and impregnating a school girl contrary to Regulation 5 of the Education (Imposition of Penalties to Persons who Marry or Impregnate School Girl) Regulations, 2003, GN. No. 265 of 2003 read together with section

60A (3) of the Education Act [CAP 353 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016. The prosecution alleged that on diverse dates between March and 9th November, 2017 at Kilakala area within the District of Morogoro in the Region of Morogoro, the appellant had carnal knowledge of 'EG' a primary school girl aged 14 years and impregnated her (name withheld to disguise her identity).

The appellant denied the charge but at the end of the trial, he was convicted and sentenced to imprisonment of thirty years for each count and was also ordered to pay compensation of TZS 1,000,000.00 to the victim of the offences. The terms of imprisonment were ordered to run concurrently.

Aggrieved by the trial court's decision, the appellant appealed to the High Court of Tanzania at Dar es Salaam District Registry. However, according to the record, that court transferred the appeal to the Court of Resident Magistrate of Morogoro at Morogoro by an order dated 10th July, 2019 in terms of section 256A (1) of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA) to be heard and determined by Nkya, Senior Resident Magistrate with Extended Jurisdiction who dismissed the appeal.

Undaunted, the appellant has come before the Court on a second appeal with the following five paraphrased grounds of appeal:

1. That, the first appellate court failed in its duty to assess the evidence that there was delay to mention the appellant as a suspect; the effect on the absence of Mama Issani as a witness; and hearsay evidence by PW2 and PW4 thus arrived at an erroneous decision.
2. That, the first appellate court erred in law and fact by upholding the appellant's conviction in a case where section 231 of the CPA was not fully complied with as the substance of the charge was not explained to the appellant.
3. That, the first appellate court erred in law and fact by holding that the victim (PW1) was a student while there was no proof for the same.
4. That, the first appellate court erred in law and fact by upholding the appellant's conviction relying upon exhibits P1 and P2 while the same were improperly admitted in evidence.
5. That, the first appellate court erred in law and fact by upholding the appellant's conviction in a case whereby the prosecution failed to prove it beyond reasonable doubt.

Before going into the determination of the grounds of appeal, we find it deserving to narrate the background of the case which led to this appeal. The victim, PW1 was a standard VII student at Mkambarani Primary School in 2017. One day at night in March, 2017, she was coming from Kilakala area towards her home at Mkambarani when she met the appellant whom she knew before. She had missed transport and the appellant offered a place at his home to spend the night in. At his house, the appellant removed her underwear before he undressed and made sexual intercourse with her; she felt pain but the appellant warned her to keep quiet. When she got home the following day, she lied to her parents that she had spent the night at Mama Issani's home. According to PW1, the sexual intercourse with the appellant was repeated in June and on 7th September, 2017 after completion of her Standard VII studies where she spent three days with the appellant. On the fourth day, the appellant took her to work as a domestic servant at a certain woman's house.

Meanwhile, PW1's parents were looking for her whereabouts and reported to the police station. On 10th September, 2017, PW2 Gilbert Fume, the victim's father, found PW1 working as a house girl at the said woman's house. PW1 narrated that when she was found, she mentioned the appellant as the one who had lured and ultimately raped her. The

appellant, PW1 and the said woman were apprehended and sent to police. PW1 was taken to hospital for examination and thereafter went to stay with her aunt.

Further, in October, 2017, the victim's mother Suzana Msuya (PW3) was informed by the said aunt that PW1 was pregnant. She took her to hospital and upon examination, she was found to be nine weeks pregnant. The PF3 where the results were posted, was admitted in evidence as exhibit P2. PW3 also said that the victim was born on 18th March, 2003 and tendered her birth certificate which was admitted in evidence as exhibit P1. Honorine Albert Kaloli (PW4) who was the appellant's landlady, testified that she used to see PW1 staying with the appellant during the alleged period. She testified further that during all that time, the appellant used to tell her that the victim was his relative. She went on stating that, in September, 2017 after she had stayed there for two days, the victim was taken to work as a house girl somewhere else.

The appellant was the sole witness in his defence. He testified that between March and September, 2017, he was at Kilakala area going about his daily activities of selling water by a bicycle. One day he was apprehended and taken to Mikese Police Station. That, whilst there, despite being tortured by the police, he denied the present allegations.

According to him, PW1 equally denied before the police that she had ever had sexual relation with him. The appellant complained that the victim was not found at his home. On cross-examination, the appellant said he had known the victim as well as her father before they moved to Mkambarani area.

At the end of the trial, the trial court found that it was proved beyond reasonable doubt that the appellant was the one who raped and impregnated PW1. He was convicted and sentenced as indicated earlier. These findings were upheld by the first appellate court.

Before us when the appeal was called on for hearing, the appellant appeared in person unrepresented; whilst Misses. Joyce Nyumayo and Kijja Luzunguna, both learned State Attorneys, appeared to represent the respondent Republic.

When we invited the appellant to argue his appeal, he adopted the grounds of appeal and preferred to let the respondent begin her address in respect of the appeal.

On her part, Ms. Nyumayo opposed the appeal. She submitted in respect of the first ground of appeal that, there was no delay to report the incident to the police since the victim's parents did so following the disappearance of the victim on 8th September, 2017 and that the victim

mentioned the appellant as the one who raped and impregnated her. She submitted further that, PW2's evidence was not hearsay but it was what he had perceived of the incident, while PW4 testified on what she saw. The learned counsel went on to contend that Mama Issani's evidence could not add any value since the prosecution witnesses sufficiently proved the charge.

With regard to the second ground of appeal, the learned State Attorney argued that the trial court fully complied with section 231 of the CPA as shown at page 27 of the record of appeal. On our part, we are in agreement with the learned counsel in respect of this ground that the trial court did comply with that provision of the law. That court noted at page 27 of the record of appeal that section 231 of the CPA had been complied with. It reveals thus:

> ***"COURT:*** *After I have gone through the evidence of the prosecution side and the exhibits tendered, I find the prima facie case has been established. The accused is addressed in respect of section 231 of CPA Cap. 20 R.E. 2002."*

Following that ruling, the appellant was noted to have replied thus:

> ***"ACCUSED:*** *I will testify under oath. I have no witness to call."*

Thereafter, the appellant gave his defence on 24th October, 2018 where he answered the allegations as levelled against him and prayed to close his defence case which prayer was granted. This scenario therefore, shows that the trial court sufficiently complied with section 231 of the CPA. We are therefore of the view that the second ground of appeal lacks merit.

In the third ground of appeal, Ms. Nyumayo contended that PW1 testified that she was a primary school student which evidence was supported by PW2. She thus argued that the prosecution proved that the victim was a school girl. For us, we agree with the learned State Attorney that the prosecution proved that the victim was a school going girl and the appellant did not controvert that evidence during the trial.

Coming to the fourth ground, the Court is also of the considered view as rightly complained by the appellant and conceded by the learned State Attorney that, the birth certificate (exhibit P1) and PF3 (exhibit P2) were not read over after admission as evidence to enable the appellant know its content. This was contrary to the well-established law which was enunciated in the Court's decision in the case of **Robinson Mwanjisi and Three Others v. R** [2003] T.L.R 218. See also the case of **Peter Sagadege Kashuma v. R,** Criminal Appeal No.

219 of 2019 (unreported), cited to us by Ms. Nyumayo. This omission vitiated those exhibits and we hereby expunge them from the record.

However, despite the birth certificate being expunged, as rightly submitted by the learned State Attorney, PW3, the victim's mother, testified that her child was born on 18th March, 2003 and therefore was aged 14 years at the material time in 2017. PW1 also said that on 18th July, 2018 when she was testifying, she was 15 years of age which means she was 14 years in 2017. With that, the age of PW1 was sufficiently proved.

Turning to the first ground of appeal, we would like to address the appellant's complaints as follows. **One,** contrary to the appellant's complaint, PW2 did not give hearsay evidence. He, instead, testified on the chronological events following the disappearance of the victim. Likewise, PW4 gave evidence in relation to what she saw at her home wherein the appellant was a tenant. **Two,** failure by the prosecution to call the alleged *Mama Issani* as a witness did not have any adverse effect because no one said that she witnessed the incident.

**Three,** although in her evidence PW1 named the appellant as a culprit of the offences, no any other prosecution witness testified that PW1 mentioned the appellant soon after she was found at the alleged

woman's house and that the appellant was arrested immediately thereafter in connection with the present case. Additionally, PW2's evidence was to the effect that following the disappearance of PW1 on 7th September, 2017 they reported the incident to the police station whereas on 10th September, 2017, the victim was found at a residence of a certain woman working as a house girl and was taken to the police station. However, PW2 did not say that immediately after he found her, PW1 mentioned the appellant as the one with whom she had sexual relation.

Further, PW3 said they were informed in October, 2017 by the victim's aunt with whom PW1 had gone to stay, that she was pregnant and that she had mentioned the appellant as the one responsible, but there is no evidence to show that the appellant was immediately traced for and arrested for these allegations. The trial court was not told when the appellant was arrested for these offences. The police did not come to testify as to when the matter was reported, who arrested the appellant and what he said thereafter. The police could have cleared the doubt as to whether the appellant had disappeared from his place following this incident. We are querying this matter because the appellant was arraigned in court on 8th June, 2018, which was about nine months after the alleged reporting of the incident.

It is trite law that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry. See for instance the Court's decisions in the cases of **Marwa Wangiti Mwita & Another v. R** [2002] T.L.R 39; **Yassin Hamisi Ally @ Big v. R,** Criminal Appeal No. 254 of 2013; **Lameck Bazil & Another v. R,** Criminal Appeal No. 479 of 2016; and **Akwino Malata v. R,** Criminal Appeal No. 438 of 2019 (all unreported).

Therefore, following the cited authorities, the Court is of the considered view that it is doubtful that the victim mentioned the appellant at an earliest opportunity as the one who raped and impregnated her. Further to that, since PW1 said she had already delivered a baby there could have been scientific proof that the appellant was the father and not any other. This evidence could have supported PW1's evidence that the appellant had raped and impregnated her. This ground of appeal passes.

The fifth and last ground is whether the prosecution proved its case beyond reasonable doubt. Following our holding in the preceding ground, it goes without saying that, the prosecution case was not proved beyond doubt as it was the duty of the prosecution to do so and it never shifted to the appellant. For example, see our earlier decision in

**George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016 (unreported).

In the event, we find the appeal meritorious and allow it, quash the conviction and set aside the sentence meted out against the appellant. We therefore order his immediate release from prison unless he is held there for a different lawful cause.

**DATED** at **DAR ES SALAAM** this 24th day of February, 2022.

M. A. KWARIKO
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

A. M. MWAMPASHI
**JUSTICE OF APPEAL**

This Judgment delivered on 25th day of February, 2022 in the presence of appellant in person through video link and Hellen Moshi, learned Senior State Attorney present through video link for the respondent/Republic, is hereby certified as a true copy of original.


A. L. KALEGEYA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**