IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 251 OF 2019

PETER BUGUMBA @ CHEREHANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Madeha, J.)

dated the 30th day of April, 2019
in
Criminal Appeal No. 212 of 2018

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JUDGMENT OF THE COURT

2nd & 4th May, 2023

NDIKA, J.A.:

The High Court of Tanzania sitting at Mwanza (Madeha, J.) dismissed the appeal by the appellant, Peter Bugumba alias Cherehani, from the judgment of the District Court of Misungwi. By doing so, the High Court affirmed the appellant's convictions for rape and impregnating a schoolgirl as well as the corresponding sentences of thirty years' imprisonment. Believing that justice was not served, the appellant further appeals to this Court essentially on the contention that the offences were not proven beyond peradventure.

Based on the evidence adduced by four witnesses and supported by two documentary exhibits, it was the prosecution case, on the first count, that on an unknown date between January and July 2015 at an unknown time at Isesa village within Misungwi District in Mwanza region, the appellant had sexual intercourse with "RK" without her consent. To protect her privacy, we shall refer to her as "the complainant" or simply as PW1. On the second count, the prosecution sought to prove the accusation that on the same date and time and at the same place stated in the first count, the appellant impregnated the complainant who was a schoolgirl.

Briefly, the prosecution case tended to show that PW1 was a Standard VII pupil at Mangula Primary School in June 2015 and that she was due to join Ilujamate Secondary School as a Form I scholar in 2016 after passing her Standard VII examinations. She recalled that sometime in June 2015, she went to fetch water from a well in the appellant's farm. By chance, she came upon the appellant who immediately made sexual advances to her, but she snubbed him. Undeterred, the appellant clutched her arm and dragged her to a nearby maizefield where he had sexual intercourse with her. When he was through, he gave her TZS. 2,000.00.

About six months later, the complainant was suspected to be pregnant. She was taken to Mbarika Police Station where she was issued with a request for medical examination (PF3), which she took to Mbarika Health Centre. According to Muyambi Julius (PW4), a clinician at the said Centre, the complainant was six-months pregnant when he examined her on 1st January, 2016. The said PF3, documenting the medical findings, was admitted in evidence as Exhibit P1.

It appears that despite being pregnant, PW1 went ahead and joined Ilujamate Secondary School but three months later she dropped out after she delivered a baby girl.

Assistant Inspector Juma William Lamo (PW2) recalled that he learnt of the criminal allegations against the appellant on 1st January, 2016 when they were formally reported at the police station. As part of the investigations, he interviewed the appellant on 3rd January, 2016 and recorded his cautioned statement (Exhibit P2) by which he admitted having had unprotected sexual intercourse with the complainant at a maizefield on the material day. Although he was non-committal as to whether he was responsible for the pregnancy, he admitted being aware that PW1 was a pupil.

As it turned out, when the matter came up on 22nd November, 2016 for further hearing of the prosecution case, the appellant did not show up. He was again a no-show two days later when the matter came up for the continuation of hearing. At the request of the Public Prosecutor, the scheduled hearing proceeded in the appellant's absence in terms of section 226 (1) of the Criminal Procedure Act, Cap. 20 ("the CPA"). On that day, the trial court received the testimony of WP.6534 Detective Constable Neema (PW4). Her evidence was largely information she received from her interview with the complainant. At the end of her testimony, the prosecution closed its case.

Having addressed herself in terms of section 231 of the CPA and considered that the appellant had skipped bail and was on the run, the trial Principal Resident Magistrate delivered her judgment *in absentia* on 15th December, 2016. The court found both charged offences proven to the required standard and, accordingly, convicted and sentenced the appellant as hinted earlier.

Apparently, the appellant remained on the run for about 520 days until 9th May, 2018 when he was brought before the trial court. On being asked to explain his protracted non-appearance, he claimed that he was all along at his

home performing his daily routine. The trial court was unimpressed. It proceeded to hand down its judgment, convict and sentence him as stated earlier. The High Court was equally unconvinced as it dismissed his first appeal, hence this second and final appeal.

We heard the appeal on 2nd May, 2023. Before us, Mr. Cosmas K. Tuthuru, learned counsel, appeared for the appellant, who was also in attendance. On the other hand, Ms. Martha D. Mwadenya, learned Senior State Attorney, teamed up with Ms. Mwanahawa Changale, learned State Attorney, to represent the respondent.

Ahead of the hearing, Mr. Tuthuru abandoned the first and second grounds of appeal raised in the substantive memorandum of appeal as well as the second and third grounds cited in the supplementary memorandum of appeal. Thus, he argued ground 3 raised in the substantive memorandum of appeal along with grounds 1, 4 and 5 stated in the supplementary memorandum of appeal. The said grounds raised a myriad of issues, but we think the appeal can be disposed of upon resolving the general question whether the two counts were legally established upon the evidence on record.

Beginning with the first count, both Mr. Tuthuru and Ms. Mwadenya were cognizant that the gravamen of the offence, which was charged as statutory rape under section 130 (1) and (2) (e) of the Penal Code, Cap. 16, is a male person having sexual intercourse with a girl, with or without her consent, if she is under eighteen years of age, unless she is his wife aged fifteen years or above and is not separated from him. Besides proof of penetration, establishment of the age of the complainant is particularly significant as emphasized in the case of **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported):

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available by the production of a birth certificate. We are however, far from suggesting that proof of age, must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including the age of the*

victim on the authority of section 122 of [the Evidence Act]...."

After Mr. Tuthuru had made considerable argument assailing the creditworthiness, believability, and reliability of the testimonies of the prosecution witnesses, we queried him as to whether the complainant's age had been established to be within the applicable range for statutory rape. After scrutinizing the record of appeal, he answered the question in the negative. He contended that neither the complainant nor any of the other three witnesses testified to that key aspect of the offence.

Ms. Mwadenya, on her part, agreed with her learned friend's submission. Referring to **Robert Andondile Komba v. Republic**, Criminal Appeal No. 465 of 2017 (unreported), she submitted that the citation of the complainant's age in the charge sheet or before she took oath to testify was not proof of her age.

We agree with both counsel that the complainant's age as it was on the fateful day was not proved at the trial. Neither the complainant nor any of the other three witnesses testified on that aspect. Admittedly, the complainant stated before she took oath that she was sixteen years old implying that she was fifteen years old on the fateful day, but, as we stated in **Robert**

Andondile Komba (*supra*), such citation of age before taking the witness stand is not akin to proving it. In that case, we recalled what we stated in **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014 (unreported) that:

> *"... it is trite law that citation in the charge sheet relating to the age of an accused person is not evidence. Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age."*

See also **Solomon Mazala v. Republic**, Criminal Appeal No. 136 of 2012 (unreported) where we referred to our stance in **Andrea Francis** (*supra*).

We note from the medical examination report (PF3) – Exhibit P1, at page 24 of the record of appeal, that the complainant's age is stated as fifteen years on the date she was examined at the Health Centre. Nonetheless, both counsel were concurrent that the said document was worthless because, as shown at page 11 of the record of appeal, its contests were not read out after it was admitted in the evidence. We respectfully agree with them. This omission implies that the appellant, who was self-represented at the trial, was not

apprised of the substance of the report. Our jurisprudence instructs that such an omission would vitiate the fairness of the trial rendering the document worthless – see, for instance, **Robinson Mwanjisi & 3 Others v. Republic** [2002] T.L.R. 218. On this basis, we discount the report.

We also looked at the evidence on record in its totality to see if there are any circumstances that would have entitled the courts below to draw an inference as to the age of the complainant in terms of section 122 of the Evidence Act. Although it was undisputed that the complainant was a Standard VII scholar at the material time, that fact alone was not sufficient for drawing an inference that she was below eighteen years of age as the possibility that she was an overage person cannot be ruled out.

The net effect of it all is that since the complainant's age was unproven, the charged offence on the first count was not established.

Turning to the second count, we wish to observe very briefly, at the onset, that the charged offence of impregnating a schoolgirl was wrongly laid under section 60A (3) of the Education Act, Cap. 353 as amended by section 22 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016. Since in the instant case the said offence was alleged to have been

committed in June, 2015, which was about a year before section 60A was added to the Education Act, the charge should have been framed under the law that existed at the time. We have no doubt that the charge should have been laid under rule 5 of the Education (Imposition of Penalties to Persons who Marry or Impregnate a School Girl) Rules, 2003, Government Notice No. 265 of 2003 ("the Rules"), made under section 35 (3) of the Education Act. The said rule stipulated that:

> *"Any person who impregnates a school girl shall be guilty of an offence and shall be liable on conviction to imprisonment of a term not less than three years and not exceeding six years with no option of fine."*

What effect did the said defect have? It is crucial to note that the same offence of impregnating a schoolgirl, previously created by rule 5 of the Rules, was added to the Education Act under section 60A. However, there is one key difference: the penalty for the offence under rule 5, which was a minimum imprisonment of three years and maximum of six years with no option of fine, was enhanced under section 60A to the maximum of thirty years imprisonment but without any minimum. Even so, given that the criminal liability under both provisions is the same except for the imposable penalty, we think that the said

defect did not vitiate the trial over the second count – see **Ernest Jackson @ Mwandikaupesi & Another v. Republic,** Criminal Appeal No. 408 of 2019 (unreported), citing **Matu s/o Gichumu v. R** (1951) 18 EACA 311; and **R. v. Tuttle** (1929) 45 T.L.R. 357. The appellant could not be prejudiced by the defect because the offence under both provisions is in the same wording and that the particulars of the offence on the second count fully apprised him of the ingredients of the charged offence. To be sure, the ingredients concerned were that the complainant was pregnant, that she was impregnated while she was still a scholar in a primary school or secondary school and that she was impregnated by the accused person.

Adverting to the assailed conviction on the second count, we recall that Mr. Tuthuru argued with verve that the offence was similarly unproven because there was no credible evidence linking the appellant to the complainant's pregnancy. He attacked the credibility of PW1 on the reason that while she stated that her pregnancy was discovered in November 2015, she waited until January 2016 to report the matter to the police.

Ms. Mwadenya, on the other hand, conceded that the conviction on the second count was unsustainable but on a different ground. It was her

contention that although PW1 pointed an accusing finger at the appellant, the appellant denied being the biological father of the complainant's baby at the very beginning of the trial and prayed for a DNA paternity test to be conducted to unravel the truth. Referring us to page 12 of the record of appeal, she stated that the trial court granted his request on 23rd May, 2016, ordering that the test be conducted, but the order was never executed.

Citing **Malik George Ngendakumana v. Republic**, Criminal Appeal No. 353 of 2014 (unreported) for the proposition that the prosecution bears the burden to prove the criminal charge by linking the accused with the commission of the offence charged, the learned State Counsel submitted that the omission to conduct the forensic paternity test in the circumstances of the case was unfair to the appellant who had offered himself for the test. She concluded that the said oversight created a doubt that ought to have been resolved in the appellant's favour.

In resolving the issue at hand, we should, initially, reaffirm the settled position that proof by DNA paternity test is neither a legal requirement nor a practice in our jurisdiction – see, for instance, **Robert Andondile Komba** (*supra*). A charge of a rape or impregnating a schoolgirl can be sufficiently

proven without any forensic proof as it usually happens oftentimes. However, the circumstances of this case are quite peculiar. Apart from the complainant's word of mouth levelling the accusation against the appellant, there is no other evidence. It is significant that the appellant boldly challenged the accusation by cross-examining PW1 on it and was equally non-committal on the issue in the cautioned statement attributed to him (Exhibit P2). Perhaps, we should interject a remark here that both counsel were at one that Exhibit P2 was recorded without any certification contrary to section 57 (4) (a) to (e) of the CPA rendering it unreliable. We uphold their concurrent submission and, as a result, ignore the statement.

Ms. Mwadenya is correct that the appellant implored the trial court, right away after PW1 had testified, for a DNA paternity test to be conducted and an order to that effect was issued by the court. We cannot help but wonder why no explanation was given on record as to why the trial proceeded and concluded without the aforesaid order being complied with. In this context, Ms. Mwadenya's submission that the failure to conduct the test was prejudicial to the appellant who was ready and willing to do it makes a lot of sense. We uphold it. The omission casts a reasonable doubt to the prosecution case,

which we are enjoined to resolve in the appellant's favour. Consequently, we hold that the second count was not established to the required standard.

In the final analysis, we find merit in the appeal, which we hereby allow. In consequence, we quash the convictions, set aside the sentences and order that the appellant, Peter Bugumba @ Cherehani, be released from prison if he is not otherwise lawfully held.

DATED at **MWANZA** this 3rd day of May, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of May, 2023 in the presence of the Appellant in person and Ms. Mwanahawa Changale, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL