IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO. 41 OF 2007

FROM ORIGINAL CRIMINAL CASE NO. 237 OF 2005

OF LINDI DISTRICT COURT

BEFORE: I. ARUFANI, ESQ; RM

ALLY OMARY CHIKWENDO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

DATE OF LAST ORDER – 24/10/2007
DATE OF JUDGMENT - 04/12/2007

JUDGMENT

MJEMMAS, J.

The appellant Ally Omary Chikwendo was tried and convicted of two counts namely, rape contrary to sections 130 and 131 of the Penal Code and impregnating a school girl contrary to Rule 5 of GN.265 of 2003 made under section 35(3) of the Education Act No.25 of 1978. He was sentenced to serve thirty (30) years imprisonment in the first count and three years imprisonment in the second count. Both sentences were ordered to run concurrently. The appellant was aggrieved hence the present appeal.

PW.1 told the court that he knew one Amina Adamu (PW.2) who is his nephew. According to PW.1, he received information from

the mother of Amina Adamu that the latter was living with the appellant [for about five days at the time of the report]. PW.1 went to the house of the appellant but did not find Amina Adamu there. The following day he went to Nampunga Primary School where he found the girl. When PW.2 was asked about her whereabouts she told her teacher that the appellant was her lover. The girl was punished. PW.1 went on to tell the court that on 14/7/2005 PW.2 told him that she had been examined at school and found to be pregnant. She mentioned the appellant as the person who was responsible for the pregnancy. He (PW.1) and some militiamen arrested the appellant but he escaped. He was arrested later in October, 2005 and sent to Police Station.

PW.2 told the court that she was a pupil of Nampunga Primary School but did not complete standard seven because she became pregnant. She mentioned the appellant as the one who was responsible for the pregnancy.

PW.3 WP.4917 DC.Husna told the court that she was assigned to investigate the case facing the appellant. She said that in July, 2005 she gave PW.2 Police Form No.3 (PF.3) but she did not return it. That PW.2 went again to the Police Station in October, 2005 and she was told that the PF.3 must be filled. According to PW.3, the girl was examined in November, 2005 and found to be six months pregnant. PW.3 stated that the girl delayed to have the PF.3 filled because she did not have money to pay at the Hospital.

In his defence the appellant simply said that he was arrested by one Mussa Maulid but he was not told the reasons for his arrest. During cross examination he admitted and later denied to have sexual inter course with PW.2. The appellant called a witness who testified on his behalf. The witness, DW.2 who happened to be his mother told the court that her son was arrested by a person called Mkulima who did not disclose the reasons for the arrest. DW.2 insisted that PW.2 was not a student as alleged since she had completed school long time ago. She also said that the appellant had sent his proposal to marry PW.2 but her uncle refused because the appellant was a young boy.

During the hearing of this appeal the appellant appeared in person, unrepresented while the respondent – Republic was represented by Mr. Hyera, learned State Attorney.

The appellant did not have much to say or add to his petition of appeal.

Mr. Hyera, learned State Attorney for the respondent-Republic supported both the conviction and sentences imposed on the appellant. He submitted that there was no dispute that PW.2 was pregnant and that it was the appellant who was responsible because PW.2 mentioned him and he failed to cross-examine her on that point or evidence. Mr. Hyera went on to say that the evidence of PW.2 was sufficient to convict the appellant under section 127(7) of the Evidence Act.

Mr. Hyera challenged the argument by the appellant that PW.1 and PW.2 were relatives by saying that there is no law which prohibits relatives from giving evidence on their behalf. He concluded his submission on this point by saying that even the appellant had summoned his mother to testify on his behalf.

With regard to the appellant's argument that there was no identification parade which was conducted to identify him Mr. Hyera submitted that there was no need to conduct identification parade because the appellant and the victim knew each other before and for quite a long time.

On the argument by the appellant that the mother of PW.2 was not called to testify, the learned State Attorney submitted that in law there is no specific number of witnesses required to prove a fact.

In responding to some issues/questions which were asked by this court for clarification the learned State Attorney conceded that it was a weakness on the part of the prosecution for its failure to summon the head teacher of the girl's school to testify.

As noted earlier, the appellant was tried and convicted of the offences of rape and that of impregnating a school girl. In the case of **Christopher Raphael Maingu V. The Republic, C.A Criminal Appeal No.222 of 2004, Mwanza Registry (unreported)** the Court of Appeal pointed out that in order to prove the guilty of the appellant

as charged [for rape c/s 130(1)(2)(e) and 131 of the Penal Code] beyond any reasonable doubt the prosecution had to prove that:-

(a) the appellant had carnal knowledge of .....(victim) on ..... (date)
(b) there was penetration, however slight it might have been and
(c) the said ..... (victim) was a girl below 18 years of age and a such even if she had consented to the sexual intercourse, that was immaterial.

In proving that the appellant in the present case had carnal knowledge of PW.2 (Amina Adamu) between April and May, 2005 the prosecution side relied on the evidence of PW.1, PW.2 and PW.3. PW.1 told the court that he was informed by the mother of PW.2 that the said PW.2 was living in the house of the appellant. He reported the matter to the Village Chairman who told him to find the Area Chairman and Secretary and follow the girl at night. At about 2100 hrs they went to the house of the appellant where they met the appellant alone and the girl was not there. According to this witness, he followed the girl (PW.2) at her school where PW.2 admitted infront of her teacher that she was at the home of the appellant and that he (appellant) was her lover.

It is clear from that evidence that PW.1 did not see or give any evidence to prove that the appellant had carnal knowledge

of PW.2. What he said was mere hearsay from PW.2. Another thing is that the said teacher was not called to testify to corroborate what PW.1 said.

Another witness is PW.2, the victim herself. This witness testified that she was a student of Nampunga Primary School but she did not complete standard seven because she became pregnant. She told the court further that it was the appellant who made her pregnant – and that they started their love affair last year (2004) in or about June. She came to discover that she was pregnant in July, 2005. According to PW.2, they used to have sexual intercourse at the appellant's home. PW.2 told the court that she told the appellant about the pregnancy and he said it was okay.

PW.3 – WP. 4917 DC. Husna simply told the court how she gave PW.2 a PF.3 sometimes in July, 2005 but she did not return it. She asked PW.2 to have the PF.3 filled and that was done in November, 2005. According to this witness the girl (PW.2) told her that she failed to have the PF.3 filled because she had no money at the time i.e in July, 2005.

It is clear that the only evidence which was available to establish whether the appellant had carnal knowledge of PW.2 was the evidence of PW.2 herself. I agree with the learned State Attorney that the appellant failed to cross examine PW.2 on her evidence. I also agree that failure to cross examine a

witness on a vital point implies admission of what the witness said. I also agree with the learned State Attorney that section 127(7) of the Evidence Act allows the court to convict an accused person on the basis of the evidence of the victim alone. I however, wish to make the following observations. First, it is not uncommon for an accused person who is unrepresented in his trial to omit or fail to follow a certain procedure or to observe certain fundamental principles of the criminal justice process. By saying so I have not forgotten the general principle of criminal law that "Ignorance of law is no defence". While keeping that principle in mind I also wish to remind the prosecution that the burden of proof is always, unless otherwise stated, on the prosecution to prove the case against an accused person beyond reasonable doubt. It is also a settled principle that a court of law should not convict an accused person on the weakness of his defence without considering the strength of the evidence adduced for the prosecution. Refer to **Zabron Msua V. Republic, Criminal Appeal No.7 of 1979, Dar es Salaam Registry cited in B.D. Chipeta, Criminal Law and Procedure – A Digest of cases.**

My second observation is that the court may, as correctly put by the learned State Attorney, convict on the basis of the evidence of the child or victim of a sexual offence where it is satisfied that the child or victim is telling nothing but the truth. So the application of this provision i.e section 127(7) is dependent on the credibility of the witness.

As stated before, the most important witness in this case was PW.2 who was the victim. The learned State Attorney submitted that since the appellant failed to cross examine PW.2 then he should be taken to have admitted what PW.2 said. The learned State Attorney also said that the court could convict the appellant on the basis of the evidence of PW.2 under section 127(7) of the Evidence Act. I have already said or observed that the fact that the appellant failed to cross examine PW.2 it did not mean that the prosecution was excused from proving the case beyond reasonable doubt. I also pointed out that it is a settled principle that a court of law should not convict an accused person on the weakness of his defence without considering the strength of the evidence adduced for the prosecution. Now in the present case the only evidence that is implicating the appellant is that of PW.2. The evidence of PW.2 could be used to convict the appellant if the court is satisfied that PW.2 is telling nothing but the truth. It appears, from the judgment of the trial court that he believed what PW.2 said and that it was impressed by her credibility. It is a settled principle that an appellate court would not lightly interfere in the trial court's finding on credibility unless the evidence reveals fundamental factors of a vitiating nature of which the trial court did not address itself or address itself properly. Refer to **Pia Joseph v.R [1984] TLR.161, Augustino Kaganya and Two Others v.R [1994] TLR.15.**

In the present case PW.2 appeared to be a credible witness but the appellant has raised an argument which discredits her credibility. The appellant has raised an argument that PW.2 was issued with a PF.3 in July, 2005 to take to Sokoine Hospital to be examined but did not return the PF.3 until October, 2005. I think I agree with the appellant that the delay to return the PF.3 raises doubt as to why was it not returned in time. PW.2 did not say anything concerning the PF.3 while PW.3 said that she gave PW.2 the PF.3 in July, 2005 but she (PW.2) returned the PF.3 in October, 2005 and even at that time she had not been examined. She was examined in November, 2005. PW 2 did not tell the court the reasons for the delay instead it was PW.3 who said that she was told by PW.2 that she had no money. That reason cannot be true because PW.2 was taken to the Police Station by her uncle (PW.1) who was given the PF.3 to take PW.2 to Hospital but according to PW.1 he returned home. If PW.2 went to hospital and was asked pay money why didn't she tell her mother or PW.1 who was in the forefront to ensure that the appellant is booked? To take this point a little bit further, the incident was reported to the Police in July, 2005 but the appellant was not arrested until 23/10/2005. PW.1 alleged that after the appellant was arrested by militiamen in July, 2005 he escaped from custody but no militiaman was called to testify to that effect. So the delay in arresting the appellant who was living in the same village and the delay in filling the PF.3 suggest that PW.1 and PW.2 were not sure of what they were

alleging and doing. The arrest of the appellant in October, 2005 and filling of the PF.3 in November, 2005 instead of July, 2005 raise doubt as to the truthfulness of the allegations against the appellant. I therefore resolve that doubt in favour of the appellant. That means there is no watertight evidence to prove that the appellant had carnal knowledge of PW.2. That would have been enough to dispose off this appeal because once it has been shown that the appellant did not have carnal knowledge of the victim it follows that he cannot be held responsible for the offence of impregnating her. However there are certain issues in this appeal which I think I must address.

The appellant was charged and convicted of the offence of having carnal knowledge with a girl below eighteen years of age. One of the ingredients of the offence is to show or prove beyond reasonable doubt that the girl or victim was below 18 years old (Refer to the decision of the Court of Appeal in the case of **Christopher Raphael Maingu V. Republic** cited earlier in this judgment). In the present case the first charge sheet dated 25/10/2005 indicated that PW.2 – Amina Adamu was 19 years old. That charge sheet was later substituted with another one of 8/11/2005 which showed that PW.2 – Amina Adamu was 16 years old. When PW.2 – Amina Adamu was giving evidence she said that she was 15 years old. In his judgment the trial Magistrate mentioned the age of the victim (PW.2) as 15 years old (pg.2) and at another point 16 years old (pg.3). It is clear therefore, that the age of PW.2 was not

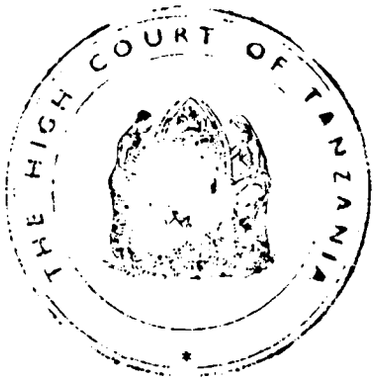
proved beyond reasonable doubt to be below 18 years old. From what has been shown above the girl could be 18 years old or above so she cannot be said to fall within the four corners of section 130(1)(2)(e) of the Penal Code as charged by the prosecution.

Another issue is that the appellant was charged, tried and convicted of impregnating a school girl but in his defence and to be specific DW.2 stated that the said girl (PW.2) was not a school girl because she had completed school long time ago.

The trial Magistrate rejected that defence because he believed what was said by PW.1 and PW.2. With due respect to the trial Magistrate, I think the issue whether someone was or was not a student and for what reason has he/she left school are better resolved by hearing the evidence of the teacher or teachers of a particular/relevant school. In this case the prosecution was supposed to summon the headteacher of Nampunga Primary School to testify. PW.1 said that he went to the school and spoke to one of the teachers who punished PW.2 for absconding from school. Why wasn't that teacher or any other teacher called to testify. I think it was also necessary to summon the teacher because PW.2 is not a reliable witness. I am saying so because if what was said about PW.2 is true that she could leave or disappear from her home for five days and without going to school she could lie about anything.

From the foregoing this appeal succeeds and I hereby quash the conviction of the appellant in both counts of rape and impregnating a school girl. The sentences of thirty years imprisonment for the first count and three years imprisonment for the second count are hereby set aside and it is ordered that the appellant be set free forthwith unless lawfully held for some other cause.

Order accordingly.



G.J.K. Mjemmas,
Judge
4/12/2007

Date: 4/12/2007

Coram: Hon. G.J.K. Mjemmas, J.

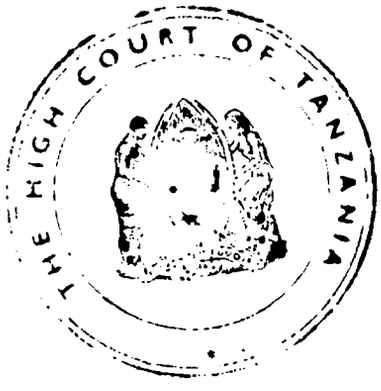
For the Republic: Mr. Hyera, State Attorney

Appellant: Present

B/C. Nanyanga, RMA

Mr. Hyera: This appeal is coming for judgment.

Order: Judgment delivered in chambers this 4th day of December, 2007 before Mr. Hyera, learned State Attorney and the appellant.



G.J.K. Mjemmas,
Judge
4/12/2007