IN THE HIGH COURT OF TANZANIA

AT MOSHI

(DC) CRIMINAL APPEAL NO 59A OF 2006

C/F SAME DC CR. CASE NO.45/2006

MANGARE GEORGE.....APPELLANT

versus

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

HON. S. MUGASHA, J.

The appellant was convicted of two counts of Rape c/s 130 (1) (2) (e) and 131 (e) of the Penal Code and impregnating a School Girl contrary to rule 5 of Government Notice No. 265 of 2003.

The charges against the appellant were that, the appellant on unknown date of September 2005 at about day time at Hedaru B area within Same District in Kilimanjaro Region did have carnal knowledge of one Hadija d/o Ramadhani a girl aged 13 years, this impregnating her as a result of which she failed to complete compulsory Primary education.

The Prosecution called five witnesses in a bid to establish and prove the charges against the appellant. The trial court relying on evidence adduced during trial which is available on record found the appellant guilty as charged and convicted and

sentenced the appellant to 30 years imprisonment in respect of first court and six months in respect of second court. The sentence runs concurrently.

The appellant being aggrieved with both conviction and sentence the appellant has appealed to this court listing four grounds of appeal summarised as insufficiency of evidence to prove a charge against the appellant and procedural irregularities resulted by failure by the trial Magistrate to comply with section 192(3) of the Criminal Procedure Act, 1985 and section 127(2) of the Tanzania Evidence Act, 1967.

Basing on the grounds of Appeal, the appellant is requesting this court to quash conviction and sentence.

To appreciate what transpired in the trial court evidence adduced any briefly be stated as follows. PW1 informed the court that she was in primary school since 2000 and failed to proceed and complete education in 2oo6 because she was made pregnant by the appellant. PW1 further stated that between June and July 2005 the appellant used to tell Amina to call PW1 for the appellant and when PW1 went there then was asked as to whether she was hungry and PW1 replied negatively. Two days thereafter the appellant called PWl at his home and they played sexual intercourse and PW1 200/=. On another day the appellant followed PW1 at home and gave her 500/= and 200/= to PW1's young relatives. PW1 further informed the court that he played sex with the appellant for more than five times. PW1 further informed the court that Hadija (PW2) was aware of relationship. PW1 further testified that, she informed her parents that about the pregnancy but and that the appellant was responsible but PW1 did not inform the appellant. On cross

examination by the appellant PW1 stated that in July 2005 she told by her parents that she was pregnant.

PW2 stated in court that sometimes in June – July 2005, she twice found PW1 and the appellant at PW1's home. When PW2 was cross examined by the appellant she said PW1 told her that sexual play was done in appellant's room. When PW2 was cross examined by the court denied to have ever called PW1 for the appellant. On the other hand, PW3 testified that in January 2006 he was informed by PW2 that PW1 is pregnant and the appellant is the one responsible when PW1 was taken to a clinic in March 2006, she was nine months pregnant. When PW3 was cross examined by the appellant he stated that in July 2005 PW1 was not pregnant.

PW4, the School Head Teacher stated in court that since January, 2006 PW4 stopped attending to school and when he followed up the matter PW2 informed him that PW1 was pregnant and the appellant was responsible.PW5 informed the court that she was informed by PW1 that the appellant is responsible for her pregnancy.

In the Defence case the appellant raised defence that he had shifted to Mnazi and later he was informed that the parents of PW1 claim that the appellant is responsible for PW1's pregnancy. The appellant went to call PW1 and her parents so that they could discuss the matter but they refused and on 19/2/2006 was arrested and charge.

Nevertheless after analyzing both Prosecution evidence and Defence case; the trial court found that the case was proved beyond reasonable doubt hence convicted and sentenced the appellant.

The appellant appeared in person and the Respondent was represented by Ms. Rugaihuruza State Attorney.

Ms. Rugaihuruza submitted against conviction and sentence because the Prosecution did not prove a charge against the appellant, and the trial was flawed with a series of procedural irregularities which resulted into a miscarriage of justice. Arguing on the non compliance of section 127(2) of the Tanzania Evidence Act,1967, the State Attorney submitted that the trial Magistrate but admitted and acted on evidence of PW1 and PW5 were all witnesses of tender age without conducting voire dire examination contrary to the stated provision

On the other hand Ms. Rugaihuruza also argued that section 186 (3) of the Criminal Procedure Act, 1985 was not complied with by the trial Magistrate because the record shows that entire evidence was not received in camera, and that was a procedural irregularity which occasioned injustice.

On the issue of insufficiency of evidence by the Prosecution to prove a charge against the appellant, Ms. Rugaihuruza argued in the affirmative and in support of her submission she argued that, while PW1 stated that the affair with the appellant started in June – July 2005 and in July 2005 she was pregnant, PW3 stated that he was informed by his wife that PW1 was pregnant and in March 2006 PW1 was nine months pregnant. On the other hand, the State Attorney thence argued that, if the affair started in June – July, 2005 and if PW1 conceived, which is not supported by PW3 who stated that in July, 2005 PW1 was not pregnant. Moreover, the State Attorney argued that the prosecution evidence does not support the charge because if the incident occurred in September, 2005 then in March, 2006 PW1 would have been seven months pregnant as stated by PW3.

Also, apart from what was stated by PW3, that PW1 was 9 months pregnant in March, 2006, but in April, 2006 when PW1 was testifying in court, PW1 she to be was nine months pregnant when she was testifying in court i.e. April 2006.

Ms. Rugaihuruza concluded her submission by reiterating that evidence paraded by the prosecution was flawed with contradictions and in their totality creates doubts as to when PW1 conceived and therefore the Prosecution did not prove a charge against the appellant.

In view of the grounds of appeal and the submission made by the State Attorney points to be determined by this court are whether the prosecution proved a charge against the appellant, and secondly whether there were non-compliances amounting to procedural irregularities which vitiated the trial.

While the charge sheet indicates that the offence was committed in September 2005, PW1 stated in the trial court the sexual affair with the appellant started in June – July 2005, and that by July she was pregnant. But this position is contradicted by who testified that July 2005, PW1 was not pregnant and in March 2006 when PW1 was taken to a clinic she was nine months pregnant. Thus the Prosecution evidence does not support the charge because if the offence was committed in September 2005, then by March 2006, PW1 would have been seven months pregnant.

Moreover, if PW1 was not pregnant in July 2005 then in March, 2006 PW1 she could not have been nine month pregnant. A part from the aforesaid if at all the sexual relationship of PW1 and appellant started in June 2005 and she conceived in that

month which is not supported by PW3 who stated that by July's PW3 was not pregnant, then by March PW1 would have been eight months pregnant.

With the above stated evidence it is difficult to determine as to when be the offence committed thus it creates doubts and in essence the Prosecution did not prove a charge against the appellant. In the circumstances, I am satisfied that the trial Magistrate faulted in convicting the appellant acting on the stated evidence.

As regards the issue of non-compliance of some of the legal provisions which resulted into procedural irregularities which vitiated the trial , I agree with the learned State Attorney on this aspect It is evident in the proceedings that evidence of PW1 and PW5 was admitted and acted upon without the trial Magistrate conducting voire dire examination as required under Section 127 (2) of the Tanzania Evidence Act which provides that'

> *Wherein any criminal cause or matter a child of tender age is called as a witness does not, in the opinion of the court, understand the nature of oath, his evidence may be received through not given upon oath or affirmation if in the opinion of the Court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth".*

Therefore the noncompliance of section 127 (2) of the Evidence Act vitiated the proceedings as it was held in the case of Dhahir Ali Vs R. (1989) TLR P.27 where it was categorically stated that. "Failure by the Magistrate to comply with section 127 (2) of the TEA, vitiated the proceedings as evidence of witness of tender age was wrong admitted and acted upon. In the circumstances, therefore the trial Magistrate faulted in admitting and acting upon evidence PW1 and PW5.

It is also evident in the available record of the trial case that, section 186 (3) of the Criminal Procedure Act was not complied with because evidence during trial was nor received in camera contrary to section 186 (3) of CPA, 1985 which inter alia provides that:

"Notwithstanding the provisions of any other law, the evidence of all persons in trials involving sexual offences shall be received by court in camera....."

The non-compliance of the mandatory provisions was a procedural irregularity which in my opinion occasioned injustice on both the appellant and the complainants.

In the circumstances, the trial was flawed with procedural irregularities contravening mandatory requirements of the Law. But that notwithstanding, evidence on record was not sufficient for the Prosecution to prove a charge against the appellant as it was flawed with contradictory testimony of the Prosecution witnesses.

In the upshot of the aforesaid. I find that the appeal is meritorious, this I allow the appeal, quash conviction and sentence and order the immediate release of the appellants.

Right of appeal explained.

S.E MUGASHA
JUDGE
27/4/07

Date 25/4/07
Coram: S.E Mugasha, J.
For the Appellant –Present
For Respondent – Ms. Javelin Rugaihuruza, State Attorney

COURT: Judgment delivered in the presence of the appellant, and Ms. Javelin Rugaihuruza, State Attorney

S.E MUGASHA
JUDGE
25/4/07

AT SAME