IN THE HIGH COURT OF TANZANIA

AT MWANZA

CRIMINAL CASE NO. 125 OF 2008

HOJA MWENDESHA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

BUKUKU, J.:

Before the District Court of Misungwi at Misungwi, the appellant was facing two charges of rape, contrary to section 130 (2)(e) and 131 of the Penal Code, Cap 16 (R.E. 2002) and also the charge of impregnating a school girl contrary to section 5 of the Education Act No. 25 of 1978 (Rules 2003).

When the charges, were first read out to him, the appellant denied committing the alleged offences. The District Court of Misungwi convicted the appellant as charged and sentenced him to 30 years imprisonment. He has now come to this court to claim his innocence in the appeal.

Before me, the appellant appeared in person, and adopted his six

grounds of appeal. Mr. Sarige, learned State Attorney appeared for the respondent / Republic.

The case for the prosecution at the trial was briefly that, **PW1** Mageni Lutabija, was a school going young girl. According to her own testimony, she engaged herself in sexual activities with the appellant until sometimes in October, 2008 when it was discovered that she was three months pregnant. Upon being asked by her school teacher, she admitted to have engaged in sexual activities with the accused and that it was the accused who impregnated her.

In his defence, the appellant unequivocally denied committing the alleged offence. In actual fact, he told the court that he did not know **PW1.** He came up with a totally different story that, he was arrested because he digging diamonds in the school premises, and that, following his failure to pay a fine of T.shs. 40,000/= imposed by the Head teacher, he was arrested by the sungusungu and later he was charged with rape.

The learned District Magistrate was not impressed by the appellant's defence. He rejected it and found it to be a pack of lies. He found that

there was very strong evidence from the prosecution witnesses to base a conviction.

This appeal seeks to challenge the District Court's decision. The nub of his grievance in the memorandum of appeal is that, the charge against him was not proved beyond reasonable doubt. During hearing of the appeal, Mr. Sarige supported conviction. He submitted that, the voir dire was conducted according to the law, citing the case of **Mohamed Sayinyenye V R. Criminal Appeal No. 57 of 2010 (CA – Arusha).** As for the second ground, Mr. Sarige submitted that, the age of **PW1** was confirmed by his father to be 13 years, which age is that of a child. As for the third ground, Mr. Sarige admitted that, section 240 of the Criminal Procedure Act was not complied with, and so he prayed the PF3 to be expunged, since the evidence of **PW1,** was strong enough to support conviction.

Arguing on the fourth ground, Mr. Sarige submitted that, there was no one other than the appellant who raped **PW1.** According to Mr. Sarige, **PW1** told the court that she had never slept with anybody else except the appellant. Finally, coming to the last ground of appeal, it is Mr. Sarige's

opinion that, the judgment had all the ingredients required in a judgment. For that matter, he prayed that the appeal be dismissed.

Let me now go to the substance of the appeal. Although the appellant has brought in six grounds of appeal, they could be summed up in the general ground which is that, the offence of rape against him was not proved by the prosecution side beyond reasonable doubt.

The trial court was satisfied that the offence of rape was proved beyond reasonable doubt on the basis of the evidence of **PW1, PW2, PW3,** and **PW4** and the exhibits **P2** and **P3** tendered in c ourt.In this case, the most crucial witness is **PW1** (the victim). It is now settled law that, the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence (**see: Selemani Makumba V.Republic; Criminal Appeal No. 94 of 1994; Burton Mwipabilege V. Republic; Criminal Appeal No. 200 of 2009; Shimirimana Isaya and Another V. Republic; Criminal Appeal No. 459 and 494 of 2002 (all unreported),**

In his appeal, the appellant has raised the issue of voir dire. He surmised that, the victim being a child of tender years, section 127 (2) of the Evidence Act was not fully complied with before taking her evidence. I am mindful of the fact that, section 127 (2) and case law, require that, after finding that a child does not understand the nature of an oath, a court has to satisfy itself, first that the witness is possessed of sufficient intelligence, and secondly, that the witness understands the duty of telling the truth.**(See:Godi Kasenegala VR; Criminal Appeal No. 10 of 2008 (unreported)**

At page 7 – 8 of the proceedings, the trial magistrate conducted a voire dire by way of question and answer to **PW1** before she gave evidence. After the, inquiry, he made a finding that the child understands the nature of an oath and that she is possessed of sufficient intelligence and understands the duty of speaking the truth. For that matter, I am satisfied that, section 127 (2) of the Evidence Act was complied with, and as such, the evidence tendered by **PW1** has evidential value. This concludes the first ground of appeal.

The second ground of appeal hinges on the age and consent of **PW1**. At page 11 of the proceedings, **PW2,** who is **PW1's** father testified

that, **PW1** was thirteen years when she was found pregnant. I have no reason to doubt him. My understanding is that, under the Penal Code, rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of eighteen years without her consent. Two, having sexual intercourse with a girl of the age of eighteen years and below with or without her consent (statutory rape). In either case, one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of penetration i.e. the penetration, even to the slightest degree of the penis into the vagina **(see:Masomi Kibusi V. Republic; Criminal Appeal No. 75 of 2005 (unreported).**

It was stated with sufficient lucidity by the Court of Appeal in the case of **Selemani Makumba V. Republic, Criminal Appeal No. 94 of 1999 (unreported)** that:-

> *"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 where consent is irrelevant that there was penetration".*

With the above narration, it is my considered view that, **PW1** being of the age of a child i.e. 13 years, the issue of consent does not arise. What is material here is to prove penetration by the appellant to **PW1.** With this, the second ground of appeal also crumbles.

The fourth and fifth issues need not detain me. When **PW4,** C.5438 D/Ssgt Adam testified, he told the court that, he was the one who took the appellant's caution statement, **(Exhibit P2).** According to **PW4** the appellant told him that, he started making passes to **PW1** since June, 2008 and hence succeeded, and began having sex. When **PW4** tendered in court the caution statement, the appellant never objected to its tendering and never questioned its contents. This implies that, what was contained therein was nothing but the truth. Under such circumstances, I therefore do not see any problems with the charge sheet as alleged by the appellant.

I think the pertinent issue here to be resolved to establish whether the prosecution case has proved its case beyond reasonable doubt. **PW1,** the victim herself, clearly testified about the relationship she had with the appellant. She detaildly told the court how, when and where they had sexual intercourse with the appellant who resided near to their house. At page 8 of the proceedings, **PW1** stated thus:

"Hoja Mwendesha, I know him because he is our relative. We were making love and as such I got pregnant. We were making love by inserting his penis in my vagina.(sic) The first day we made love, I felt much pains, we went in (sic).....we proceeded to make love.....".

From the above, it is evidence that, not only did **PW1** say that she had sex with the appellant, but that, there was penetration. According to **PW1,** they made love several times with the appellant that she could not remember how many times. I think this piece of evidence is enough to find a conviction. The appellant herein is not a stranger to **PW1.** When **PW1** was examined by the court, she had this to say:

"He is my relative. He is my grandfather. He is just clan grandfather.....The house of his and ours are very near.....He was coming to make love with me when our father was not present, when our father visited the other family, it is when he came in our house. We were sleeping one room with our youngsters. They could not hear because they were asleep".

The manner in which **PW1** described the whole issue, the only conclusion that one can come up with is that, **PW1** was telling nothing but the truth.

PW1's testimony is also corroborated by **PW2** Kisena Lutubija, **PW1's** father who said they are related with the appellant and that he used to stay at his house. **PW2** told the court how himself, three sungusungu and the appellant went to **PW1's** school and **PW1** named the appellant as the person responsible for her pregnancy. Likewise, we have the evidence **PW5** the Head teacher. He also testified to the effect that, when it was discovered that **PW1** was pregnant, he personally asked **PW1** who was responsible, and **PW1** without hesitation named the appellant. During cross examination, the appellant did not cross examine **PW5.**

All in all, much as the medical evidence was expunged, I am aware with the position that a sexual offence may be proved by any, other than medical evidence, especially if carnal knowledge is not in dispute **(see:Issa Hamis Likamila V R. Criminal Appeal No. 125 of 2005 and Prosper Mnjoera Kisa V R. Criminal Appeal No. 73 of 2003 (both unreported).** In the present case, the evidence of **PW1** has been well corroborated, and therefore, I have no doubt that the prosecution has

proved its case beyond all reasonable doubt I find the appellant's conviction to have been well founded.

With the above foregoing, the appeal is dismissed in its entirety.

Ordered accordingly.

Right of appeal explained.

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A.E. BUKUKU

JUDGE

Delivered at Mwanza

This 28th March, 2014