IN THE HIGH COURT OF TANZANIA

AT BUKOBA

HC CRIMINAL APPEAL NO. 47/2016

(Arising Criminal Case No. 243/2015 at Karagwe District Court)

ALEXANDER EMMANUEL ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

24/5/2018 & 31/05/2018

KAIRO, J

The Appellant Alexander s/o Emmanuel was charged before the District Court of Karagwe at Kayanga on two counts. Firstly, rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 RE 2002]. Secondly, impregnating a school girl contrary to section 35 (3) of Education Act Cap 353 RE 2002 read together with section 5 of the Education Rules Published in Government Notice No. 265.

The particulars of the offence in the first count were that Alexander s/o Emmanuel was charged on 3rd day of July, 2014 at Kitwechenkura village within Kyerwa District in Kagera Region did unlawfully have sexual intercourse with one Devotha d/o Deogratias, a school girl of Kitwechenkura secondary school form two aged 17 years.

In the second count the particulars of the offence were that Alexander s/o Emmanuel charged in 3rd day of July, 2014 at Kitwechenkura village within Kyerwa District in Kagera Region did unlawfully impregnate one Devotha d/o Deogratias a school girl form two aged 17 years.

When sworn, the complainant testified that she is seventeen years. Then went on to testify that she was a student at Kitwechenkura secondary school. She started form one in the year 2013 and in year 2014 she was in form two. She knows the accused person. She stated that the accused was the one who impregnated her. That on 03/07/2014 at around 3:00 p.m she was at grassing field cutting grasses for cattle. At that moment, the accused came behind and forced her down and undressed her while covering her mouth not to shout for help. He then undressed his clothes and raped her. When cross examined by the accused, the complainant (Pw1) stated that he raped her and sexual intercourse took place at the bush very far from the people. He reiterated that they were neighbors with the accused. She was given the clinic card when she was found pregnant at school and that she mentioned the accused to be responsible for the pregnancy.

In his defence, the appellant denied to have raped the complainant. He stated that Pw1 has never presented any evidence to show sperms and bruises thus no evidence to prove that she was raped. He believes that this case was planted to him.

The trial court was satisfied that the offence of rape was proved against the appellant beyond doubt. He was convicted and sentenced thirty years (30) imprisonment for the first count and four (4) years on the second count. The sentences were to run concurrently.

Being aggrieved by conviction and sentence, the appellant has preferred this appeal on four grounds thus:

1. That, the Hon. Trial Magistrate erred as he contravened the mandatory proviso of s. 240 (3) of the CPA Cap 20 RE 2002.
2. That, the Hon. trial court misdirected itself as the complainant Devotha Deogratias didn't name the appellant at the earliest opportunity thus lacks credibility.
3. That the Hon. Trial Magistrate erred as there is no supportive evidence i.e documents (clinic card) which discloses the appellant as the child's father.
4. That, the Hon. Trial Magistrate erred when ignored the appellant's defence of enmity.

In his additional Petition of Appeal the appellant added six grounds of appeal. He challenged the evidence of penetration arguing that it was not

proved. He challenged the admission of PF3 to be contrary to section 240 (3) of CPA [Cap 20 RE 2002]. He further challenged that Pw3 and Pw4 were not listed as Prosecution witnesses during the Preliminary hearing and no notice was issued to court for additional of witnesses hence contravened section 147 (4) of Tanzania Evidence Act [Cap 6 RE 2002]. He also faulted the trial court that it relied on the hearsay evidence of Pw2, Pw3 Pw4 and Pw5. He further faulted the trial court to believe the evidence of Pw1 that she was given a clinic card while the same was not tendered in court to prove that she was pregnant. He further challenged the trial court for failure to calculate the date when the victim was raped and the date when the testing for rape was conducted i.e 03/07/2014.

At the hearing of the appeal, the appellant appeared in person to support his grounds of appeal. On the other hand, the Republic, led by one Ms Chema Maswi, the learned State Attorney conceded and supported the appeal.

Ms. Maswi learned State Attorney submitted that the appellant was convicted on two counts first was rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code. Secondly, impregnating a school girl. According to the first count, the ingredients with regard to consent is immaterial but what is required is the age so as the offence can be termed as statutory rape.

As to the issue of age, Ms. Maswi stated that the question of age was necessary to be shown in evidence. That, the age of the complainant must

be stated directly or by documentary evidence to prove that the girl who was raped was less than eighteen (18) years. She went on submitting that according to the evidence of the victim (Pw1) at page 6-7 she hasn't stated her age. The evidence of Pw2 who is the father of the victim did not mention the age of her daughter. Even the prosecution never stated the age of the victim whom was said to have an apparent age of 17 which she stated can be mistaken with 18 years or above.

Regarding the PF3, the learned State Attorney submitted that the same was admitted contrary to law. She stated that before being admitted, Pw1 has already started to explain the contents of it. She referred this court to the case of *Robinson Mwanjisi versus Republic [2003] TLR 218* where the Court of Appeal held that such an omission if proved will lead the court to expunge the same off the court record. She further stated that the trial court did not comply with section 240 (3) of the CPA on informing the appellant of his right to call the Doctor who filled the PF3. She said that the exhibit needs to be read over so as to appraise the accused on the contents of it. The record of the trial court did not show if the contents were read over to the accused person. She thus concluded that the exhibit ought to be expunged from the record.

On the question of penetration she submitted that the prosecution has failed to prove that there was penetration which is the main ingredients of rape. She further elaborated that the victim gave general statement that she

was raped without further explanation. She didn't tell the court how she was raped or what really happened.

Regarding the credibility of the victim Pw1, the learned State Attorney stated that Pw1 told the trial court that the incidence occurred on 03/07/2014. Meanwhile, the teacher, (Pw4) told the court that on that material date ie. 03/07/2014 they conducted medical check-up and discovered that Pw1 was pregnant. She maintained that on the same date of the alleged rape the pregnancy could not have been noted. Also the evidence of Pw5 was that they went at the Police on the same day which is the day when Pw1 was raped. (Proceedings at page 14-15). The Learned State Attorney concluded that with the above pointed out shortcomings, it was wrong for the trial court to convict him for the first count of rape which she argued was not proved beyond reasonable doubt.

With regard to the second count she argued that it wholly depend on the first count which she submitted that the prosecution has failed to prove it, as such the same has to follow suit.

However, she prayed this court to order for DNA testing as per section 366 (1) (c) of CPA [Cap 20 RE 2002]. She reiterated that they pray so because they had once encountered injustice being done to the child and the victim under the similar circumstances where the appellant was acquitted, but later it was learnt that it was true that he raped the victim and was the father of the child. This caused chaos as already there was a valid order of

the court acquitting the appellant. She insisted that to avoid a similar situation to occur, she prays the court to use its mandate under section 366 (1) (c) of Cap 20 RE 2002 and order the DNA test be conducted should the need arise and order that a further claim and/or proceedings could be opened if it will be found that the appellant is the biological father of the child whose mother was alleged to have been raped by the appellant.

On his part, the appellant stated that he had nothing to add apart from what has been submitted by the learned State Attorney. He further agreed to be tested for DNA if need be. He rests others to the court to decide.

The crucial issue in this appeal is whether the appellant had raped the victim and whether the prosecution has proved their case against the appellant beyond reasonable doubts.

It is not in dispute that the Appellant was charged with statutory rape whereby consent is immaterial rather the age of the victim is of essence and has to be categorically stated in the testimonies. The law provides that for the accused to be convicted of statutory rape, the victim must be below 18 years of age. However the record is silent on the age of the victim. Though her age was jolted down when sworn in, but the law is settled that swearing is not part of the testimony, as such I concede to the argument by the State Attorney that the age of the victim was not stated in the evidence adduced.

It was among the grounds of appeal raised by the appellant that penetration was not proved. The learned State Attorney conceded that the

prosecution has failed to prove that there was penetration which is the main ingredient for the rape offence as per. **Section 130 (4) of the Penal Code** provided as under:

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence".*

However the complainant in her testimony gave general statement that she was raped without explaining further on how she was raped and what transpired at the scene of crime. In the case of **Ryoba Mariba @ Mungare v R; Criminal Appeal No. 74 of 2003, (unreported)** the Court of Appeal held that it was essential for the Republic to lead evidence showing that the complainant was raped.

I join hands with both the learned state attorney and the Appellant that the victim; Pw1 gave a general statement that she was raped by the appellant without much explanation as to what actually took place there and how the sexual intercourse was conducted. On her own words she said and I quote:

> *"I remember on 03/07/2014 at 3:00 pm I was cutting grasses for the cattle. The accused came from behind. He let me down he unweared my clothes he covered my mouth. After he unweared me, he also did unwear his clothes and rape me" (pg 7 proceedings).*

In the case of **Seleman Makumba v R [2006] T.L.R 379 at page 384** the Court of Appeal observed that:

"True evidence of rape has to come from the victim, if an adult, there was penetration and no consent, and in case of any other woman where consent is irrelevant that there was penetration".

From my interpretation, it is certain that the true evidence of rape has to come from the victim who is supposed to tell the court what transpired at the scene of crime to which in the case at hand she didn't.

Another thing that raises doubts is why the victim did not report the incident at the earliest possible opportunity. She mentioned the appellant at the Police on 02/10/2014 when she was given the PF3 for medical check-up which almost three months from the date when the incident was alleged to have occurred at the bush on 03/07/2014. In my conviction, failure by the victim to report the alleged rape occurred on 3/7/2014 until 2/10/2014 when discovered as a result of the medical examination raises doubts as to whether it was the appellant who raped him. Legally such doubts are to be resolved in favor of the Appellant. To say the least, the testimony of Pw1 and non disclosure of her assailant at the earliest opportune time, have failed to convince the court that it was the Appellant who raped her. I found fortification in this stance in the holding of Court of appeal in the case of **Marwa Wangiti and Another versus Republic**, Criminal Appeal No. 6 of 1995 (unreported) that:

"The ability of witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as

unexplained delay or complete failure to do so should put a prudent court to inquiry".

Regarding the admission of PF3, the appellant has raised that Admission of PF3 was contrary to section 240 (3) of CPA [Cap 20 RE 2002]. This was also supported by the learned State Attorney that the same was admitted contrary to law. She stated that the trial court did not comply with section 240 (3) of the CPA on informing the appellant of his right to call the Doctor who fill the PF3. She said that the exhibit needs to be read over so as to appraise the accused on its contents. The record of the trial court did not show whether the contents were read over to the accused person. Similarly, I agree with both sides of the appellant and the respondent thus, the exhibit P1 was tendered by Pw1 where she stated at page 17 of the proceedings that:

"... The PF3 was supposed to be tendered by the Dr. who medically examined me. But he had gone for studies in Dar Es Salaam".

It is a cardinal principle of the law that the document has to be tendered by the maker of it. That was not complied with the trial court.

It was further alleged by the learned State Attorney that Pw1 read and explained the contents of exhibit P1 even before being admitted in court which is fatal and the same ought to be expunged from the court record. She invited this court to the case of **Robinson Mwanjisi and three others versus Republic** [2003] TLR 218 where the Court of Appeal held that:

(vi) Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same.

Applying the quoted decision to the case at hand, I join hands with the learned State Attorney that Pw1 started explaining the contents of the PF3 (exhibit P1) before admitting the same which is an incurable defect and the only remedy is to expunge it from the record as I hereby do.

Despite the pointed out shortcomings, the court has also observed that there were contradictions in the testimonies of the prosecution witnesses. According to the evidence from Pw2, Pw3 and Pw4 all testified to the effect that the victim was a student at Kitwechenkura secondary school and was in form two. That she was discovered to be pregnant while at school and was medically tested at Nkwenda Health Centre. That she was diagnosed with pregnancy. However, none of them were told by the victim that she was earlier being raped by the appellant. There is nowhere the appellant was mentioned to have sexual intercourse with the victim. The only evidence of rape has come from the victim where she mentioned the appellant to be responsible for her pregnancy without more explanations.

PW1 who is the victim testified that she was raped on 3/7/2024. PW3 and Pw4 told the court that in the cause of conducting the normal check-up to the girl students, on 3/7/2014 it was discovered that PW1 was pregnant.

That they took Pw1 at Nkwenda Police station to procure PF3 and then taken to Nkwenda health center. She was diagnosed with pregnancy. She reported the matter to the Police where her father was called and she handed over the complainant to her father.

It was also the evidence of Pw5 being an officer of the police responsible with investigation of cases at Nkwenda Police, on 3/7/2014 he was handed over a case concerning impregnating a school girl who happened to be Pw1. However, the evidence of Pw2 one Deogratias Vicent who is the father of the complainant (Pw1) was to the effect that on 01/10/2014 at around 4:00 pm he received a call from the Head Master of Kitwechenkura secondary school informing him that her daughter Devotha was pregnant and he should go to Nkwenda Police station. On 02/10/2014 he went to Police and found the accused in the lock up. Her daughter and her teacher were also present there as they were coming from the Health center; Nkwenda. Looking at the above pieces of evidence, the same are contradictory with regards to the dates when the pregnancy of PW1 was discovered. Besides it is unrealistic that PW1 was raped on 3/7/2014 around 3.00 pm (PW1) and on the same date the check-up was conducted and PW1 noted to be pregnant (PW3&PW4) and same day the issue was taken to Nkwenda Police. Suffice to say that a single day (in fact hours) is too short to note a female's pregnancy.

Essentially the burden of proving a case lies on prosecution side which proof is beyond reasonable doubt. [Refer the cases of **Said Hemed vrs R (1987) TLR 117 and Mohamed Matula vrs R (1995) TLR3].**

With the pointed out flaws, I join hands with the Learned State Attorney and without hesitant I am convinced that the prosecution has miserably failed to discharge the said duty. Having in mind that the second count depended wholly in the proof of the first count which the court found not to have been proved, I also concede to the State Attorneys submission/argument that the second count has to follow suit and thus the appeal is with merit.

The State Attorney has however prayed the court that despite finding the Appellant not guilty of both counts charged with, but the court should further order for DNA testing as per section 366 (1) (c) of CPA [Cap 20 RE 2002], should the need arise. The learned State Attorney told the court that she has so prayed so that justice on the child and the victim could be done. She further clarified that this court has mandate under section 366 (1) (c) of Cap 20 RE 2002 to order for the DNA test be conducted later and prays the court to order that a further claim could also be opened if found that the Appellant is the biological father of the child whose mother was alleged to have been raped by the appellant. On his part, the Appellant asserts that he concede to be subjected to DNA test.

For easy reference let me quote the cited provision:

Section 366 (1) (c) of CPA [Cap 20 RE 2002] reads that:

At the hearing of the appeal, the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the public prosecutor, if he appears, may then address the court and thereafter, the court may invite the appellant or his advocate to reply upon any matters of law or of fact raised by the public prosecutor in his address and the court may then, if it considers there is no sufficient grounds for interfering, dismiss the appeal or may-

(c) In an appeal from any other order, alter or reverse such order and, in any such case, may make any amendment or any consequential or incidental order that may appear just and proper.

I am thus satisfied that this court is empowered by section 366 (1) (c) of CPA, Cap 20 to alter or reverse the order as it thinks proper and just for the benefit of both parties. As the appellant did not refute the prayer by the learned State Attorney, I hereby order the same as per section 366 (1) (c) of Cap 20 that the DNA test be conducted at the expenses of the Government if the need to do so arises. I also order that a further claim and/or proceedings could also be opened against the Appellant should he found to be the biological father of the child following a DNA test, whose mother was alleged to have been raped by the Appellant.

For the fore going reasons, I allow the appeal to that extent. I further quash the conviction and set aside sentence imposed to the appellant by the Karagwe district court. I hereby order the Appellant be released from prison forthwith unless otherwise lawfully detained.

It is so ordered.

L.G.KAIRO

JUDGE

At Bukoba

31/05/2018

Date: 31/05/2018

Coram: Hon. L.G. Kairo, J.

Appellant: Present in person

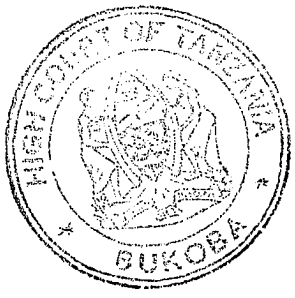
Respondent: Mr. Njoka - State Attorney

B/C: Peace M.

State Attorney: Hon. Judge, the matter is for judgment. We are ready to receive it.

Appellant: I am also ready for the judgment.

Court: The matter is scheduled for judgment. The same is ready and is read over before the Appellant in person and Mr. Njoka State Attorney representing the Respondent in open court today 31/5/2018.



L.G. Kairo

Judge

31/05/2018