IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 63/2012

(Arising from Criminal Case No. 309/2016 of the District Court of Karagwe)

BIMARK TIBIITA ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

2/8/2018 & 6/9/2018

Kairo, J.

The Appellant, Bimark Tibiita was found guilty of two counts charged with by the District court of Kayanga in Criminal Case No. 309/2016 which are; first rape contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 RE 2002 and second; impregnating a school girl c/r 5 of the Education Rules Published in GN No. 265/2003.

The brief particulars of the offences in the first count are to the effect that the Appellant on 28/3/2016 at Isingiro village within Kyerwa District in Kagera Region did unlawfully have sexual intercourse with one Aneth d/o Adolph, a school girl aged 16 and impregnate her as a result. The Appellant denied both charges. The prosecution called four witnesses and tendered three exhibits to prove its case. At the end of the trial, the District court found the Appellant guilty of both counts and sentenced the Appellant to serve 30 years imprisonment for the first count and four years imprisonment for the second count which were ordered to run concurrently. Determined to prove his innocence, the Appellant decided to lodge this appeal raising four grounds of appeal as follows:-

1. That, the trial magistrate erred both in law and facts to reach the decision in favor of the respondent who failed to prove the case on standard required; that is beyond reasonable doubts as there was no proof scientifically or in whatever means to prove that the appellant is the one who caused pregnancy to the victim and that is a father of the born kid.
2. That, the trial magistrate erred both in law and facts to reach the decision without considering the fact that there was a contradiction on who played sexual intercourse with the victim Pw1; whether the appellant, his young brother one Nature Tibiita or other students as there was no explanation by the prosecution on the contradiction

raised by the defence of the appellant on the fact, hence miscarriage of justice.

3. That, the trial magistrate erred both in law and facts to reach its decision basing on hearsay as there was no eye witness or medical proof on rape as claimed by the prosecution.
4. That, the trial magistrate erred both in law and facts to reach the decision without considering the fact that there was contradiction on time interval and age of the pregnancy which shows the case was planted to the appellant as one witness testified the pregnancy to be of four months while other testimony shows it to be three months.

The Respondent who was represented by Ms. Susan Masule assisted by Mr Ngassa; the Learned State Attorneys opted to reply the grounds of appeal during the oral submission. The Appellant is self represented.

When the case was fixed for hearing, the Appellant prayed the Respondent to start by replying to the grounds of appeal and that he will make his rejoinder later. The prayer was not objected by the State Attorney and the court accordingly granted the same.

Ms Masule started by generally informing the court that they oppose the appeal. She contended that the Republic managed to prove the case beyond reasonable doubts as opposed to what has been stated by the Appellant in his first ground of appeal. She argued that out of the four witnesses of the prosecution, the key witness was Pw1 who was a victim. That Pw1 told the

court that on 28/3/2016 while coming from the church she was informed by the Appellant's brother that the Appellant was sick. She thus decided to go and see him as they were schooling together. Pw1 went on testifying that when she reached at his home, she found him laying on the bed and that on seeing her, the Appellant wake up and closed the door, stripped off her clothes and had sexual intercourse with her for about an hour. The State Attorney argued that the trial court believed the said evidence to which they also believe thus leading to his conviction. She added that the state of the law is to the effect that in rape cases the true and reliable evidence has to come from the victim and fortified her contention by citing the case of **Selemani Makumba vrs R [2006] TLR 379**. The State Attorney thus concluded that, the Appellant was convicted basing on the heavy evidence of the victim contrary to what the Appellant contended in his first ground.

The Appellant has also argued that there was no scientific proof that he is involved in the commission of the offence. The State Attorney argued in reply that the expert opinion or scientific is only necessary to assist the court when analyzing the evidence before him but doesn't compel the court to abide with. She cited the case of **RV. Kelstin Camerun [2003] TLR 84** to support her argument. She further went on that, the case of **Abdul Abdul Brad Timm vs SMZ [2006] TLR 188** has observed that there is no evidence to challenge the eye witness. She thus concluded that even if there would have been scientific evidence, the same wouldn't have been able legally to

challenge Pw1's evidence. Thus the first ground should be dismissed as it has no base.

In reply to the second ground wherein the Appellant contended that Pw1's evidence was contradictory as she didn't state with whom she had sexual intercourse with. The State Attorney submitted that, there was no contradiction in the testimony of Pw1 which is depicted into pages 7-8 of the proceedings. Besides, the Appellant knew the Appellant very well, both being the students of Bishengo Secondary School. Further to that, the offence was committed in the afternoon. The State Attorney further submitted that when Pw1 discovered that she was pregnant she told the Appellant and it seems they were planning to abbot, adding that she sees no reason for Pw1 to lie and mention the Appellant. She thus prayed the court to find the second ground to have no merit as well.

As for the third ground, wherein the Appellant faulted the trial court to what he called considering the hearsay evidence as there was no eye witness, the State Attorney argued that the victim herself was the eye witness in this case. She further argued that, in rape cases as earlier stated, the victim is the key witness. But on top of that, the offence is not committed in public or before other persons. However the State Attorney expressed her surprise as to why PF3 was not tendered or why Pw1 wasn't recalled as prayed by the prosecutor. But she went on that even in the absence of PF3, she still considers the evidence of Pw1 to be heavier as she explained that she was dismissed from school due to pregnancy following being raped by the

Appellant. She reiterated that her evidence sufficed to convict him. Thus the third ground is without merit as well, she charged.

As for the 4th ground, the Appellant argued that there was contradiction with regards to the age of the pregnancy. However Mr. Ngassa the Learned State Attorney assisting Ms Masule submitted the contention to have no base. He went on clarifying that, Pw1 told the court that the offence was committed on 28/3/2016. That on 10/7/2016, Pw1 went on for medical examination and was informed that the pregnancy was about four months. He charged that when counting, the pregnancy was within the estimated age of four months. The State Attorney thus concluded that there was no contradiction, besides what the Doctor has said was just estimation. Nevertheless it is the cardinal principle of law that where there are contradictions, the court has to determine whether the same goes to the root of the evidence or not and where the contradictions don't prejudice the evidence, the same are ignored by the court, argued the State Attorney. He cited the case of **Saidi Mohamedi Matula VR [1995] TLR 3** to support his argument. He thus prayed the court to reject the fourth ground for want of merit and the court further dismiss this appeal.

In his rejoinder, the Appellant stated that he still maintains that he was not responsible for the offences the trial court found him guilty with. He argued that when the case was proceeding the child was already born but no DNA test was conducted to verify whether he is a biological father or not. But further the Clinic Card was not tendered to verify that he was mentioned as

a father of the child. He added that even the card which Pw1 was attending Clinic with during pregnancy was not tendered which omission he argued to raise doubts.

The Appellant also refuted what has been submitted as a reply for the second ground and that he still insists on the said ground. As for the third ground, the Appellant stated that there was no corroboration on the evidence of Pw1. Further to that, the victim didn't shout when being raped and didn't even tell anyone nor stated if she had relation with the Appellant before. When making his rejoinder for the fourth ground, he argued that the contradiction on the age of the pregnancy is vivid, adding that Pw1 stated at per page 9 of the Judgment that she was two months pregnant and that she was given the PF 3 on 5/10/2016 (page 5 and 7 of the PH) while Pw2 told the court that after Pw1 was given the PF3, and examined she was discovered to be 4 months pregnant. He argued that the testimonies of Pw1 and Pw2 show that none of them was sure with the age of the pregnancy which is the centre of this case. He concluded that the evidence left some doubts and thus prayed his appeal be allowed.

After going through the grounds of appeal, and hearing the submissions from both parties, the issue for determination before this court is whether the appeal is based on founded grounds. In so doing, this court will analyze the grounds of appeal in seriatim.

It is not in dispute that the claimant (Pw1) who is a victim in this matter was expelled from school in year 2016 after being noted to be pregnant. It was also not in dispute that the victim was a girl child of 16 years of age when expelled from school due to pregnancy. The law is clear that a male person commits an offence of rape if he has sexual intercourse with a girl or woman with or without her consent when she is less than eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man. In other words, consent is immaterial for a girl under 18 years [Section 130 (2) (e)]. In the case at hand it is patently clear that Pw1, having been expelled from school for pregnancy and being a girl child of 16 years of age, was raped. The wanting question is whether it was the Appellant who raped her or not. The trial court after analyzing the evidence adduced was convinced that it was the Appellant who raped her. However the Appellant is denying to ever having carnal knowledge or sexual intercourse with the victim (Pw1). In addressing the grounds of appeal, this court is guided to answer the following two issues;

1. Whether the Appellant has raped Pw1
2. Whether the Appellant has caused pregnancy to Pw1.

In the first ground, the Appellant has argued that the trial court erred to found him guilty while the case was not proved beyond reasonable doubt.

According to record, the prosecution paraded four witnesses in order to prove that it was the Appellant who raped the victim. Pw1 who was a key

witness narrated what transpired on the fateful date whereby she told the court that she was coming from the church at around 1:00pm on 28/3/2016. That on her way back home she met the Appellant's brother who told her that the Appellant was sick. She went on that she decided to go see him being her school mate. That on reaching his home, she found him lying on the bed, but suddenly the Appellant went to lock the door, undressed her and himself and they made love for about an hour. She latter proceeded to go home. Pw1 further told the court that she didn't shout nor informed her parents of the incidence for fear of being beaten. But later she lost her period and was discovered to be pregnant. The consistency of her testimony shows that the same was the truth of what transpired and that the witness was credible. The law is settled that the true evidence of rape offence has to come from the victim who is supposed to tell the court what transpired at the scene of crime. [Refer the cases of **Niyonzima Augustine vrs R: Criminal Appeal No. 483/2015 & Anselimo s/o Kapeta vrs R: Criminal Appeal No. 365/2015 both of CAT BK (unreported)**. In the case at hand, I am convinced that Pw1 who is a victim has managed to fulfill that condition.

The Appellant has also argued in the first ground that there was no scientific or other means which would have proved that the Appellant was the one who impregnated Pw1 and that he is a father of the born child. I will address this argument together with the fourth ground of appeal into which the Appellant argued that the trial court erred to reach a decision without

considering the fact that there was contradiction with regards to the age of the pregnancy.

The State Attorney in her submission stated that expert opinion is only to assist the court when analyzing evidence before the court and the court is not bound with it, which I concede as a general rule. However there are exception and one of them in my view is when it comes to proving a putative father wherein DNA is being tested. Reading between the lines the Appellant is disputing to be responsible for the pregnancy of Pw1. In his oral submission he charged that the child was born when the case was proceedings but no DNA test was conducted to prove that he was a biological father of the born child which omission is an error as rightly argued by the Appellant. In my opinion when a question is whether one is a putative father, it is desirable and pertinent to conduct a DNA test.

Regarding the contradictions stated, I went through the record and observed Pw1 to have testified that after being medically examined, she was found to be two months pregnant (page 9 of proceedings). However Pw2 in his testimony stated that after the medical examination, Pw1 was found to be 4 months pregnant.

The State Attorney when submitting argued that what the Doctor stated was just an estimation to which I concede. However the difference of two months is not minor when the age of pregnancy is at issue in my view, and that is why I stated above that the issue of DNA test was important in this

matter. More so when neither the Doctor who examined her testified nor was PF3 tendered in court. Besides, neither the Clinic card of the Pw1 when pregnant nor the card of the born child was tendered which would have at least suggested as to whether the Appellant was registered as the biological father of the born child.

In this regard therefore I found the part of the first ground (which dispute whether the Appellant is a biological father) and the 4th ground to have merit.

In the 2nd ground of the appeal the Appellant argued that there are contradictions as to who had sexual intercourse with Pw1 among either the Appellant, the Appellant's brother one Nature Tibiita or other students, as a result there is a miscarriage of justice. I have thoroughly gone through the proceedings of the trial court, but I didn't found any contradictions in the testimony of either the victim herself (Pw) who was a key witness nor to the other witnesses who were told by the victim. Pw1 was consistency and mentioned the Appellant throughout. Further the offence was committed in the afternoon for about an hour. Besides the duo were school mates so they knew each other well. As such the question of mistake in mentioning him couldn't arise. I thus found the ground to have no merit.

With regards to the 3rd ground, the Appellant argued that the trial court erred for reaching its decision basing on hearsay as there was no eye witness or medical proof of rape. As earlier stated, the law stipulates that in

rape cases, the best evidence is that of the complainant (victim). The said evidence is considered to be the evidence of truth where the court finds that the witness is credible. In the case at hand there were no doubts with regards to the credibility of Pw1 as she gave a consistent testimony. Besides Pw1 was an eye witness as far as the offence of rape is concerned. But on top of that such offences are committed in hidden places not in public, as such to have an eye witnesses apart from the victim is not an expected thing. With regards to medical proof suffice to say that the fact that Pw1 was discovered pregnant, which fact was not denied even by the Appellant is enough proof that she had sexual intercourse with a certain male person. Further, the fact that Pw1 was found to be pregnant at the age of sixteen is a proof that the male person who had sexual intercourse with, raped her as legally a girl of that age cannot give consent.

The wanting question was who raped her, which puzzle was answered clearly by Pw1 that it was the Appellant who raped her. Though however I should hasten to add that proof of the rape of the Appellant to Pw1 doesn't guarantee that she was impregnated by him. This is the gist of finding the 4th ground to be meritorious.

In the foregoing analysis, it is the finding of this court that the Appellant was raped the Pw1 (the victim). However, I wish to put it clear and confess that I have entertained serious doubts with regards to the age of the Appellant. Though the Appellant hasn't raised it, but it is the duty of the court to ensure justice is done to both parties, being a fountain of justice. According

to record, Pw1 and the Appellant were school mates. The age of the victim was proved through the evidence of Pw2 who was a father of the victim (proceedings page 11). But the age of the Appellant was stated by himself when sworn in before giving his defence, which he said to be 19 years of age (page 26 proceedings). In my conviction the age of the Appellant should have been established through evidence. This is so as legally a sworn in statement is not part of evidence. However, even if it would have been proved by evidence that the Appellant was 19 years of age, but the record shows that the offence was committed on 28/3/2016, while he testified on 3/7/2017 that is about 1 year and 5 months later. Simple arithmetic shows that he was certainly either at the apparent age of 18 years or below 18 years at the time of the commission of the offence. Not only that but the PH record further reveals that the Appellant was recorded to be 18 years on 5/10/2016 (page 5 proceedings) which again convince me that the Appellant was either below or the apparent age of 18 years. This fact would have necessitated to require an evidence to prove his exact age, the omission which I consider to be an error on the part of the prosecution with due respect.

However no other evidence regarding the age of the Appellant was brought, in the absence of which it raises doubts to conclude that the Appellant was an adult. Unfortunately, the trial magistrate fall into that trap and convicted the Appellant as an adult, which I consider to be an error as well on the part of the trial magistrate with much respect. This is so because the

punishment differs when it comes to commission of the said offence by a boy of 18 years or less, as such the exact age o the Appellant was to pertinent to be equally established. The law is settled that where there are doubts, the same are to be resolved in favor of the accused. In the same veins, I am of the opinion that, the safest way is to give the benefit of doubt to the Appellant. It is the finding of this court therefore that the Appellant had the age of 18 or less at the time of the commission of the offence.

As earlier stated the law provides for distinct punishments for adult offenders and the boys of 18 years of age or below who have committed the offence of rape as quoted hereunder:

> Sec. 131 (2) of the Penal Code Cap 16 RE 2002
>
> *Notwithstanding the provisions of any law, where the offence is by a boy who is of the age of eighteen years or less, he shall;*
>
> *(a). If a first offender, be sentenced to corporal punishment only*
>
> *(b). If a second time offender, be sentenced to imprisonment of a term of twelve months with corporal punishment*
>
> *(c) N/A.*

I have gone through the record and noted that the Appellant was first offender thus in the circumstances section 131 (2) (a) is applicable.

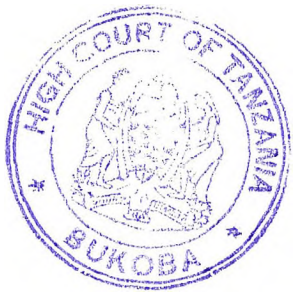
All having done and said, it is the finding of this court that the Appellant was properly convicted of raping Pw1. However the sentence was not correct

being a boy of 18 years or less. I thus quash and set aside the sentence of 30 years imprisonment imposed on the Appellant, instead I replace the sentence with the correct one as per section 131 (2) (a) of Penal Code (supra) and order six strokes of a can be imposed on him.

As for the offence of impregnating a school girl, I found the offence not to have been proved beyond reasonable doubt as above analyzed. I thus quash its conviction, set aside the sentence and acquit him of the said offence forthwith. It is so ordered.

Appeal allowed to that extent.

R/A explained.



L.G. Kairo

Judge

20/9/2018

At Bukoba

Date: 20/09/2018

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

Appellant: Present in person

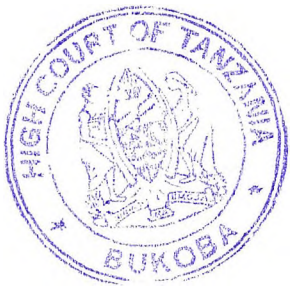
Respondent: Juma Mahona – S/A

B/C: Peace M.

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

Appellant: I am also ready to receive it.

Court: The matter is for judgment. The same is ready and is read over before the State Attorney one Mr. Juma Mahona representing the Respondent and the Appellant in person in open court today 20/9/2018.



L.G. Kairo

Judge

20/09/2018