IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 362 OF 2017

(Appeal from the judgement of the District Court of Morogoro at Morogoro, Criminal Case No. 16 OF 2017)

DAMIAN JEREMIA KOYESA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Damian Jeremia Koyesa, was convicted in both counts, in the first count he was sentences to serve thirty (30) years imprisonment for the offence of rape contrary to section 130 (1) (2) (e) and section 131 (1) of the Penal Code Cap 16 R.E. 2002 and the second count was sentenced to serve three (3) years for impregnating a school girl contrary to Regulation 5 of the Education (Imposition of Penalty to Persons who Marry or Impregnate School Girls) Rule, 2003 GN No. 265 of 2003 read together with section 35 (3) of the Education Act (Cap 353 R.E. 2002).

Briefly, facts of the case goes like this, on diverse dates between 1st June, 2016 to 2nd December, 2016 at Kingolwira within Morogoro District in Morogoro region, the appellant had carnal knowledge with Tatu Ramadhani Juma, a girl of 14 years a pupil of Primary school at Kingulwira. In the cause of rape, the girl got pregnant, she was forced to leave the school due to pregnancy. As a result, the appellant was arraigned in court charged with the offence of rape and impregnating a school girl.

In proving the case, prosecution lined up four (4) witnesses and the appellant did not prefer to call any other witness than himself. Being dissatisfied with the conviction and sentence, the appellant filed notice of appeal on 1st August, 2017, equal to 5 days from the date of conviction and sentence (27/7/2017). Initially he filed seven (7) grounds of appeal and later on filed another seven (7) supplementary grounds of appeal forming a total of 14 points of grievances, which may be conveniently condensed into one main ground namely: Whether the prosecution case was proved beyond reasonable doubt.

On the hearing date, the appellant was unrepresented and being not a lawyer he intelligently, relied on his grounds of appeal and added valid legal points, that PW1 did not adduce any reliable evidence for same was purely hearsay evidence. That the prosecution failed to prove, if at all the victim was a pupil of primary school. The age of the victim was not proved by either birth certificate or birth affidavit, if she had no birth certificate or clinic receipt or medical report proving her age. To comprehend his submission, he supplied the court with a judgement of the Court of Appeal in **Criminal Appeal No. 179 of 2014 between Mashala Njile V. R.** Further submitted that the evidence of PW4 (victim) was to the effect that she left school three (3) years ago, while the rest of prosecution witnesses stated that she left school due to pregnancy. It is also in record that PW4 was impregnated by one **Pastor Daniel** contrary to the appellant's name **(Damian Jeremia Koyesa).** The appellant's name was never mentioned by neither the victim nor any witnesses of the prosecution.

He further submitted that PW4 did not describe features of the private parts of the appellant to prove that the appellant was the one raped and impregnated her. Finally, he rested his argument by raising the issue of DNA, that during the trial, he requested

the trial court to order DNA test to prove that the issue born out of rape was related to the appellant, but the trial court refused.

On the adversary side, the respondent/Republic had the services of Ms. Elen Masululi, learned State Attorney who supported the appeal by raising three legal defects in the proceedings and judgement of the trial court:

That the charge sheet is the genesis of the whole case, when a charge sheet is defective the whole case becomes incompetent.The learned State Attorney submitted that the charge sheet which lead into this appeal was defective for combining 1st count on rape which is alleged to have occurred between 1st June to 2nd December, 2016 and the 2count which is alleged to have occurred between July to August, 2016. Those two occasions are interlinked to the extent that the act of rape caused pregnancy. Pregnancy and rape cannot have different dates, while there is no specific date and time when the appellant committed the alleged offence of rape. In supporting her submission, she referred this court into the Judgement of the Court of Appeal in **Criminal Appeal No. 270 of 2013 at page 11 to 15 and to the Criminal Appeal No. 229 of 2015 (both unreported) at page 11.**

Further argued that the evidence of PW4 is highly questionable. The victim (PW4) was alleged to have 14 years, but the trial court, did not ask necessary questions to satisfy that she promised to speak nothing but only truth as required by the law of evidence Act as amended. Such test was not done by the trial court instead she affirmed.

Submitted further that, though the prosecution under section 133 of the Evidence Act, has right to choose witnesses, yet some key witnesses cannot be left such as a school head teacher of Kingulwira Primary School where PW4 was attending or a class teacher, to prove that indeed PW4 was a primary school pupil.

The learned State Attorney rested her case by citing contradictions of evidence apparent on the record, that PW4 mentioned the father of her child as Mchungaji (Pastor) Daniel, while the accused/appellant is Damian Jeremia Koyesa. PW4 alleged that she left school 3 years ago, while PW2 alleged that the victim left school due to pregnancy. In the circumstances, the immediate question is when the victim was impregnated, was it when she was still schooling or when she left the school? Finally, the State Attorney, invited this court to consider all those inconsistences and decide in favour of the appellant.

Consciously, I have considered the apparent inconsistences in the record, as rightly submitted by both, the appellant and the learned State Attorney, that the prosecution abdicated their duty to proof the case to the standard required. As rightly submitted by the learned State Attorney, the foundation of this appeal, is the charge sheet. The charge sheet contains contradicting particulars of offence between count one and count two. It is in record that the offence of rape occurred between 1st June to 2nd December, 2016, while the second count, which is the result of rape, the appellant is alleged to impregnate the school girl between July and August, 2016. It means rape occurred on the whole of June 2016 did not impregnate the victim until the rape of July and August 2016 which caused pregnancy to PW4. Such inconsistences are sign of lack of seriousness on prosecution side.

Section 132 of the Criminal Procedure Act Cap 20 R.E. 2002, provide necessary prerequisites of proper charge, which must contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

The late, Judge Chipeta in his **Hand Book for Public Prosecutors** at page 33 alluded the purpose of charging, is to inform the accused person and the court, with

sufficient clarity, the allegations against the accused person. The accused person must know what he is up against beforehand so that he is not taken by surprise. This enables him to prepare his defence. Besides, a charge also enables the court to control the proceedings and confine evidence and arguments only to what is in dispute.

In the same vein, the Court of Appeal in **Criminal Appeal No. 202of 2013** stated:

"Framing of charge should not be taken lightly, we think it is imperative for the prosecution to carefully frame up a charge in accordance with the law. It becomes even more vital to do so where an accused is faced with a grave offence attracting a long prison sentence"

Various decisions of this Court and that of the Court of Appeal has dealt with proper charging the accused and the consequences of improper charge. Improper charge renders the whole proceedings of the trial court nullity.

It is difficult to reconcile, the situation upon which the appellant is accused of rape between 1st June to 2nd December, 2016 but the same accused is charged on impregnating PW4 between July and August, 2016. Without proper and satisfactory explanation as to how those two counts were made under one charge sheet. If at all pregnancy was a result of rape, logically , the prosecution ought to have provided the same time frame when the offence of rape and that of impregnation occurred.

Much as I agree with the learned State Attorney, that the charge sheet was defective to the extent discussed above, yet the reference to the two decisions of the Court of Appeal cited by the learned State Attorney, though relevant, the two are distinguishable to this appeal. The Court of Appeal in **Criminal Appeal No. 229 of 2015 and Criminal Appeal No. 270 of 2013** were dealing with defective charges, which the prosecution failed to cite proper provisions of the Penal Code. In this

appeal the prosecution cited proper sections 130 (1) (2) (e) and section 131 (1) of the Penal Code Cap 16 R.E. 2002 for the offence of rape. However, the prosecution failed to specify and link up the offence of rape and pregnancy of the victim. This ground alone would dispose of this appeal, but there are other fundamental issues to discuss prior to arriving to the conclusion.

Whether prosecution proved the offence of rape to the standard required. As rightly submitted by the appellant and supported by the learned State Attorney, the evidence of PW1and PW2 are not relevant to the charge of rape, but may be relevant to the charge of pregnancy. The only relevant evidence among all prosecution witnesses is of PW4 (victim). However, the trial court failed to satisfy itself if at all, the victim promised to speak nothing but only truth as required by law.

Section **127 (7)** of the Evidence Act 1967 as amended, states;

> *"**Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offences, the only independent evidence is that a child of tender years of a victim of sexual offence, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".***

The purpose of conducting the test is three folds;

(a) Whether a child of tender years is possessed of sufficient intelligence to testify;

(b) Whether the child understands the duty to tell the truth; and

(c) Whether the child knows the meaning of an oath.

It is apparent from the evidence on record that the trial magistrate did not conduct that important examination (**voire dire**) to satisfy that the alleged child knew the duty of speaking truth, in compliance to section 127 (7) of the Evidence Act, Cap 6 R.E 2002. The only statement recorded by the trial court on PW4 was the affirmation, and proceeded with evidence. Therefore, the procedure adopted by the trial court was contrary to section 127 (7) of the Evidence Act.

The only reliable evidence on the offence of rape was of PW4 which contain several contradictions when compared with evidences PW1 and PW2. While PW1 and PW2 alleged that the victim was a primary school pupil of standard 1V, PW4 under oath stated that she left school 3 years back. Simple mathematics, may lead us to year 2014 when the PW4 left school. In cross examination she consistently stated that she left school three (3) years back. Therefore, such inconsistences with the evidences of PW1 and PW2 leave this court into a serious doubt if at all PW4 was schooling at the time of rape and impregnation. That dilemma ought to have been cleared by the school teacher, if prosecution wanted to clear that doubt.

Another serious inconsistence is on the identity of the accused. While PW1 and PW2 stated generally that the accused was the one raped the victim and is the one impregnated PW4. in the contrary, the victim called by name the rapist as Mchungaji (Pastor) Daniel, without mentioning his second and third names of that rapist. The charge sheet identifies the accused as Damian Jeremia Koyesa not Daniel. In the circumstances why the prosecution did not clarify if at all, the victim knew the one who raped her? Whether the appellant was in real sense, the one who raped and impregnated PW4? Those questions ought to have been cleared by the prosecution,

but did not perform their duty and the trial magistrate did not direct his minds properly.

Further, PW4 was alleged to be 14 years old, but no proof of age was tendered in the trial court, be it her birth certificate or a birth affidavit indicating when she was borne or a clinic receipt of medical report. Failure to prove age of the victim disadvantaged the trial court and this court to understand properly whether the victim was of a tender years or was at the age of majority.

Based on all those discrepancies of evidence, whether the prosecution case was proved beyond all reasonable doubt? The Court of Appeal in various cases including: **Criminal Appeal No. 85 of 2012 (unreported)** held as follows: -

> ***"Taking into account that this is a statutory rape, it is important for the prosecution to give a clear evidence of age of the victim. Failure of that, will create doubt as to the real age of the victim in this alleged statutory rape"***

The issue of certainty of age in statutory rape is crucial. The court of Appeal in **criminal Appeal No. 274 of 2009 Masasi mathias V. R** (unreported), insisted that failure to certify the age of the victim in statutory rape or having variance between what is stated in the charge sheet and evidential facts from the testimony of the prosecution's witness renders the charge defective.

The duty is more compelling on the part of the prosecution to be keen on the evidence of any witness to adduce evidence direct and interlinked to the offence of statutory rape, when proved, the accused would serve long sentences.

Therefore, I am settled in my mind that the evidence on record was not sufficient to sustain the conviction. Ultimately, I agree with the Learned State Attorney that the

prosecution failed to prove the case of rape and impregnation of PW4 to the standard required. Consequently, this appeal is allowed, quash the conviction and set aside the sentence. I order an immediate release of the appellant from prison unless he is held there for other lawful purposes.

Dated at Dar es Salaam this 22nd day of June, 2018.

P. J. Ngwembe, J.

22/06/2018

Delivered at Dar es Salaam in Chambers on this 22nd day of June, 2018; in the presence of the Appellant and Ms. Elen Masululi State Attorney for the respondent.

P.J. Ngwembe, J

22/6/2018