

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO.86 OF 2020

*(Original Criminal case No. 40 of 2020 of the District Court of Kwimba at
Kwimba)*

AMEDEUS SOSPETERAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGEMENT

Last Order: 30.07.2020

Ruling Date: 30.07.2020

A.Z.MGEYEKWA, J

In the District Court of Kwimba at Kwimba, the appellant was arraigned and charged with two counts. The first count was Rape c/s 130(2),(e) and 131(1) of Penal Code Cap.16 [R.E 2019] and upon conviction he was sentenced to serve 30 years imprisonment. The second count was

Impregnating a school girl c/s 60 A (3) of the Education Act Cap. 353 [R.E 2019] as amended by Act No. 2/2016. The appellant was acquitted on second count. Aggrieved, the appellant appealed to this court for both the conviction and sentence. The appellant now seeks to impugn the decision of the District Court upon a petition of appeal comprised of four grounds.

- 1. That the prosecution side did not prove the case beyond reasonable doubts as provided by the Evidence Act section 110 (1).*
- 2. That the victim PW5 did confirm before the trial court that the appellant is not responsible for the pregnancy and not the father of her child and it impossible that the appellant did rape the victim. The trial court should have relied to the evidence and the PF3 which shows that the father of the child of the victim is one Deus to reach its decision.*
- 3. That the magistrate erred in law for the conviction of the appellant as it is obvious that the evidence of PW5 is contradictory in itself in that PW5 had sexual intercourse with many men.*
- 4. That the responsible man who impregnate the victim and the father of the child Kabula Deus and who caused her not to attend school should have been arrested and charged accordingly but fun enough the same man had married her.*

On hearing of this appeal which was done via audio teleconference, the appellant defended himself, unrepresented, whereas the respondent the Republic had the service of Mr. Ndamgoba, learned Principal State Attorney.

Submitting first the appellant stated that the case against him was planted and thus he urged this court to adopt and consider his grounds of appeal and set him free.

Responding, Mr. Ndamgoba, after going through the grounds of appeal, the judgment and court proceeding, ended up supporting the appeal. He stated that the evidence of PW5 who is the key was to the extent that, PW5 implicated the appellant that they had unsafe sexual intercourse and it was the appellant who impregnate her. He went on to state that during cross examination, PW5 denied that it was the appellant who impregnated her. Mr. Ndamgoba stated that the act of PW5 denying the appellant involvement goes to the roots of the case and damage the credibility of PW5.

He went on submitting that, though the offence of rape was charged separately but as long as the conviction of the appellant based solely on

the evidence of PW5. He added that the victim named the appellant and caused his arrest, and during trial the victim denied that the appellant was responsible for the pregnancy. Mr. Ndamgoba added that the victims' evidence lacks credibility and the trial court was wrong to rely on it to mark the conviction of the appellant.

The appellant had nothing to rejoin.

Having heard the submissions of both sides, I should state at the outset that in the course of determining these grounds, I will be guided by the canon of the criminal cases that onus of proof in criminal cases lies with the prosecution to prove that the defendant committed the offence for which he is charged with. In this case at hand, the issue is *whether prosecution case was proved beyond a reasonable doubt*.

The appellant was charged, convicted and sentenced to serve 30 years imprisonment over the accusation of rape c/s 130 (2)(b) and 131(1) of the penal code. On records, I observed that PW5 denied that it was the appellant who raped her and she accused that he raped and impregnated her. However, during trial she denied the appellant's involvement I am in

accord with Mr. Ndamgoba that the evidence of PW5 was contradictory therefore the same was unreliable..

It is settled that, where there are contradictions in evidence the court is duty bound to reasonably consider and evaluate those inconsistencies and see whether they are minor or major ones that go to the root of the matter. This was held by the Court of Appeal of Tanzania in the case of **Lusungu Duwe v R**, Criminal Appeal No. 76 of 2014 (Unreported).

Similarly, in the case of Sahoba Benjuda v The Republic, Criminal Appeal No.96 of 1989, it was held that:-

" Contradiction in the evidence of a witness's effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence."

Based on the above legal authorities, it is my considered view that PW5 evidence was not credible and therefore, I proceed to expunge it from the records.

In the circumstances of this case where the best evidence of the commission of sexual offence emanates from the victim as it was held in the case of **Selemani Makumba v Republic**, [2006] TLR) 379), and for the reason that the evidence of PW5 has been expunged from the records, the trial court is left with no any evidence to prove the case beyond reasonable doubt against the appellant.

In the upshot, I allow the appeal, quashed the conviction and set aside and. I order the appellant be released from prison forthwith unless he is held for other lawful cause.

Order accordingly.

DATED at Mwanza this 30th day of July, 2020


A.Z.MGEYEKWA

JUDGE

30.07.2020

Judgment delivered on 30th day of July, 2020 and both parties were remotely present.


A.Z.MGEYEKWA

JUDGE

30.07.2020

