IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO 6 OF 2019
(Arising from Criminal Case No. 64 of 2018 of the District Court of Kahama at Kahama)

MAGANGA S/O LUSHINDE .....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of the last Order: 14th January, 2020
Date of the Judgment: 22nd January, 2020

E.Y. MKWIZU, J.

In the District Court of Kahama at Kahama, the appellant MAGANGA LUSHINDE, was arraigned, tried and found guilty of the offence of rape. The charge indicated that the offence was contrary to **sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2002** and impregnating a school girl **c/s 60 A (3) of the Education Act Cap 353** as amended by the Written laws (Miscellaneous amendment) Act No.2 of 2016.

The appellant denied the charge, whereupon the prosecution paraded

five (5) witnesses. The victim of the offence testified as PW1 followed by Said Bundala (PW2) the victim's father, No. 5319 Cpl Jane the police investigator testified as (PW4) and finally, Mr. Kelvin Emilius a teacher at Bukamba Secondary School testified as PW5 and tendered a class attendance register as exhibit P1.

The brief facts of the case as gathered from the record could be stated that, the victim was a girl aged 17 years old, a form two student at Bukamba secondary school. She testified to the effect that on diverse dates between April and July 2017 she was meeting the accused in bushes for sexual intercourse. In July2017, she became impregnant and 29th January, 2018 she gave birth to a baby. On being interrogated by her father, she named the accused to be responsible. The matter was reported to Iyenze ward offices followed by the arrest of the accused person on 15th February,2018. Appellant was then taken to Kahama police station and later charged with the present case. On interrogation by CPL Jane (PW3), appellant admitted to have committed the offence. Kelvin Emilius (PW4), a teacher at Bukamba Secondary School confirmed that victim was a form two student at Bukamba secondary School.

The appellant dissociated himself with the alleged offence. At the end of the trial, trial court was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt, conviction was entered in both counts and the mandatory sentence of thirty (30) years imprisonment in each counts. The sentence were ordered to run concurrently.

Protesting his innocence, the appellant preferred an appeal to this court on five (5) grounds of appeal which may be summarized into the following major complaints:

1. Appellant's conviction was grounded on a hearsay evidence given by PW2, PW3 and PW4which could not prove the offence of rape and that of impregnating the victim.

2. Failure by the trial court to accord the appellant the right to be heard and non consideration of the appellant's defense.

3. Failure by the prosecution to call expert witness to prove that the born child had a blood relation with the appellant.

At the hearing of the appeal, appellant appeared in person, unrepresented, whereas there Respondent/Republic, was represented by Ms Immaculate Mapunda, learned State Attorney.

Appellant adopted his grounds of appeal as enumerated in his petition of appeal lodged on 14/1/2019. While in sisting on his innocence, he explained that the prosecution failed to bring the doctor who examined the victim to prove that he was the father of the baby born by the victim.

The learned State Attorney opposed the appeal on behalf of the respondent. She combined and argued together grounds number 1 and 2 of the petition of appeal which faults the trial magistrate for convicting the appellant on a hearsay evidence given by PW2,PW3, and PW4.On this ground the learned state attorney, was convinced that, the conviction of the appellant was properly grounded on the strength of credible evidence of the victim, PW1, PW2 and PW3.She elaborated that , the first count of rape was properly proved by the victim,PW1 who explained in her evidence at page 19 of the trial court's proceedings lines 10 to 12 on how she was raped and impregnated by the appellant. The state attorney went ahead explaining that, the victim was not cross examined by the appellant on this piece of evidence and therefore remained on record unchallenged. In her further submission Ms. Mapunda, the learned state attorney, implored the court to discredit the evidence of PW4 on the reasons that she only

participated on recording the appellant's cautioned statement which were found by the trial court to have been recorded contrary to the law.

On the second count, it was the State Attorney's submission that the victim's teacher PW4, confirmed that PW1 was a form two student at Bukamba secondary school. Concluding on the first and second ground Ms. Mapunda stressed that the evidence on record proved that the appellant raped the victim, PW1, impregnated he as a result she gave birth of a child.

The learned state attorney, next, submitted on ground three of the petition of appeal. In this ground the appellant faults the trial magistrate on two issues ***one***, that he was not accorded rights to be heard and ***second*** that his defence was not considered. Responding to these complaints, the learned State Attorney stated right away that, the complaints are a misconception. To her, the appellant was given his right to be heard, he gave his defense after section 231 of the Criminal Procedure Act was explained to him. On whether the appellant's defence was considered, it was Ms. Mapunda's argument that, after the closure of the case for the

defence the court considered the evidence on record including the defence evidence but found that the prosecution has proved the case beyond reasonable doubt. She invited the court to dismiss this ground of appeal grounds lacks merit.

On the ground four of the petition of appeal where the complaints is directed on the prosecution's failure to call the expert witness to prove the case, Ms. Mapunda responded that, this is an afterthought .She said, if the appellant had any doubt on the child born out of the alleged rape, he should have raised the issue before the trial court. She referred the court on the decision of the Court of appeal in **Edwin Thobias Paul Vs Republic,** Criminal Appeal No. 130 of 2017 at pages 9 to bolster her argument. She finally urged this court to dismiss the appeal for lacking in merit.

After reviewing the evidence on record and the submissions by the appellant and the learned State Attorney, the duty is now in this court to analyze the issues raising from the grounds of appeal as enumerated above in pursuit to determine the fate of this appeal. I will start with the second complaints then deal with the third complaint and the first complaint will be determined last.

On the second complaint by the appellant as elaborated in his 3rd ground of appeal, the appellant complaints is two pronged, ***One***, that he was not given the right to be heard and secondly, that his defence was not considered by the trial magistrate. This ground should not detain me here. As rightly submitted by Ms. Mapunda learned State Attorney, the appellant was availed his right to be heard from the beginning of the trial to the end.

Starting from when he was called to plead to the charge, the records of the trial court show at pages 1 and 2 that charge was read over and explained to the appellant who pleaded not guilty to all the counts. On 20/3/2018,the prosecution substituted the charge and the substituted charge was read over and explained to the appellant. He again pleaded not guilty and the court so recorded. When the fact leading to the charges against the appellant were presented and read over to him pursuant to section 192 (3) of the CPA, the appellant was recorded to have disputed all the facts except his name, that he was taken to the police station and later brought to court. There after prosecution paraded 4 witnesses and in all the proceedings, appellant participated. For instance, at page 10 and 12 of the proceedings appellant cross examined PW1 and PW2 respectively.

Furthermore, at page 15 of the trial courts proceedings after PW4 (who in my view was supposed to be recorded as PW3) while in an attempt to tender appellant cautioned statement, appellant was recorded to have objected to its being tendered and the court refused the prosecutions prayer. At page 16,appellantcros examine PW4 and in page 21 he is recorded to have cross examined PW5 .As if that is not enough, after the closure of the prosecution case ,the appellant was addressed on his right as per section 231 of the criminal procedure Act. He stated at page 27 of the trial court record that he would give his defence on oath and call no witness. At pages 28 and29 appellant is recorded to have given his defence. From this analysis, I have doubt that trial court accorded the appellant all his rights and that he fully participate in the proceeding of the charges which were levelled against him .This ground of complaints therefore, lacks merit, it is dismissed.

On whether the trial failed to consider appellant's defence, records are straight forward. In his defence at page 29 and 30,appellant narrated on how he came into the police hands and later charged with the offence of impregnating a school girl. She refuted to have known the victim. In the last two pages of the judgment, the trial court magistrate was satisfied that

appellant failed to show why he should have been implicated by the appellant. From that background, the trial court found that PW1 was a credible witness, the charges leveled against the appellant were proved beyond reasonable doubt. There is no gainsaying that the trial court did consider the appellant's defence. This point also has no merit

Next for consideration is the complaint the subject of the fourth ground of appeal. In this ground the appellant is faulting the prosecution for failure to call expert witness to prove that the born child had a blood relation with the appellant. The learned State Attorney rejected this complaint. She submitted that this ground was brought as an afterthought. If the appellant doubted as to whether the child was born out of the alleged rape, he ought to have raised the issue before the trial Magistrate.

In the case at hand, it was, in my view, the duty of the prosecution to prove that indeed the child was a result of the rape committed by the appellant even if PW1 was not questioned by the appellant on this matter. Ahead of me now, is whether the prosecution did discharge that duty. In her evidence, which the trial magistrate recorded at page 9 of the record, PW1 gave a detailed account on how the appellant raped and impregnated her, she said, I quote for clarity;

"Starting from the month of April up to July 2017 at different times I was meeting with this Maganga Lushinge...we used near our homestead, it was in bushes we used to meet so that we have sexual intercourse. For the first time we met in the month of May.2017. We met in the bushed. As we reached in the bushes we stood up. I just undressed myself of my skirt and my underpants. The accused as well undressed himself his trouser and short. Then I laid down over my back. And he came over my chest. As he was over my chest he just widened my thighs. He took his male reproductive organ and inserted in my virgin. I felt severe pains. And I saw blood from my female reproductive organ. After that month of June passed and in month of July I missed my menstrual cycle. It is this time when I came to know that I am pregnant....I had never met with any other man. On 29/1/2018 I gave birth of a baby..."

PW1's evidence above is clear and can stand alone to prove the offence of rape and that of impregnation. To start with the offence of rape, PW1 has given an obvious explanation on how they were going to the bush and how she participated into sexual intercourse with the appellant at the age of 17.

Again, PW2 on questioning the victim after giving birth as to who was responsible, PW1 mentioned the appellant. Undeniably, the best evidence of rape has to come from the victim. This has been said by the court of appeal in a number of authorities including a famous case of **Selemani Makumba Vs The Republic,** Criminal Appeal No 94 Of 1999. In convicting the appellant, the trial court believed the evidence of PW1 and that appellants defence failed to show why victim would have incriminated him. I have no reason to defer with the trial court's reasoning. This complaint also fails.

Coming to the complained result of rape, the child. The appellant is faulting the failure by the prosecution for not bringing an expert witness to prove that the child born by the victim had any blood relation with the appellant. Going by the PW1 version of evidence as stated above, there is no doubt that it is the appellant who raped the victim. And that non else but the appellant impregnated the victim. PW1 stated before the trial court that she had never met another man. This piece of evidence was corroborated by the evidence of PW2 the victim's father who had attended the victim after giving birth and to whom the appellant was mentioned by the victim to be responsible for the pregnancy. Yet again, the fact that victim (PW1)

was a student at Bukamba secondary school was established by PW5, her teacher.

When he was given chance to cross examine PW1 at page 10 of the records, Appellant did not cross examine the witness on this aspect. In the case of **Nyerere Nyague Vs The Republic**, Criminal appeal No. 67 of 2010, cited with approval by the Court of appeal citing at Mtwara in **Edwin Thobias** (Supra) the court said;

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

Again in the case of **Ismail Ally V. Republic,** Criminal Appeal No. 212 of 2016 (unreported), the appellant in a statutory rape case, complained on appeal on the age of the victim. Court of appeal observed:

> *"... the complainant's age was not raise during trial. It is also glaringly clear that the appellant did not cross examine PW1, PW2 andPW3 on that paint. Therefore, raising it at the level of appeal is an afterthought ... See the cases of* ***Edward Joseph v. Republic,*** *Criminal Appeal No. 272 of 2009,* ***Damian***

Ruhele v. Republic, *Criminal Appeal No. 501of 2007,*

Nyerere Nyegue v. Republic, *Criminal Appeal No.* 67 *of 2010, and* ***George Maili Kemboge v.*** *Republic. Criminal Appeal No.* 327 *of 2013/ CAT (all unreported)."*

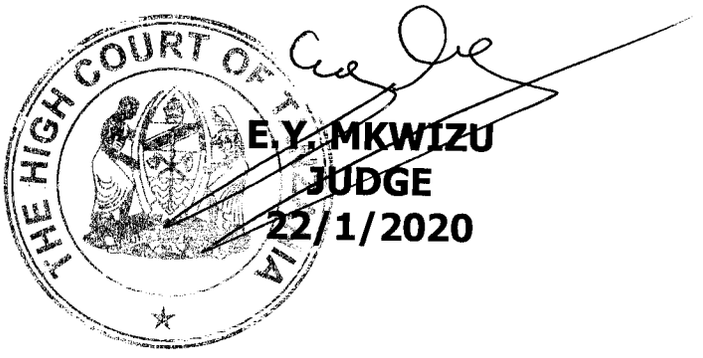
From the above therefore I am of the view that, non-summoning of an expert witness in the circumstance of this case, did not discount the evidence on record. It seems obvious to me that the prosecution's evidence established the link between the offence of rape and that of impregnating the victim.PW1 was a credible witness and her evidence proved the charges against the appellant.

The first complaints is pegged on the ground that appellant's conviction was grounded on a hearsay evidence given by PW2, PW3 and PW4 which could not prove the offence of rape and that of impregnating the victim. This ground should not detain me here. It is from the record that the trial court relied on the evidence of PW1 only to establish the guilt of the appellant. This ground is misconceived. It is hereby dismissed as well.

Under the circumstances explained above, I uphold the conviction and sentence. I accordingly dismiss the appeal for it is devoid of merit.

It is so ordered.

DATED at **SHINYANGA** this 22nd **FEBRUARY**, 2019



E.Y. MKWIZU
JUDGE
22/1/2020