**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT SUMBAWANGA**

**DC CRIMINAL APPEAL NO. 87 OF 2019**

*(Originating from Sumbawanga District Court in Criminal case No. 159 of 2019)*

**JACOB KAULULE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

*Date of last Order: 23/07/2020*
*Date of Judgment: 21/10/2020*

**JUDGMENT**

**C.P. MKEHA, J**

Before the District Court of Sumbawanga, the appellant was arraigned for an offence of rape c/ss 130 (1) and (2)(e) and 131(1) of the Penal Code. It was alleged by the prosecution that on diverse dates between December 2018 and June 2019 at Kalakala Village within Sumbawanga District in Rukwa Region, the appellant did have sexual intercourse with a girl aged 16 years who in this judgment, as it happened before the trial court shall be referred to as VTM or PW4 interchangeably. Despite the fact that the appellant had pleaded not guilty to the charge, at the end of trial he was found guilty and convicted as charged. The appellant was sentenced to be imprisoned for thirty (30) years. He was also ordered to compensate the victim to the tune of TZS. 1000,000/=.

Aggrieved, the appellant appealed to this court with four grounds of appeal as hereunder:

1. That, the trial court erred in law and fact by convicting and sentencing the accused in a case which the prosecution failed to prove to the required standard,
2. That, the learned trial court erred in law and fact by convicting and sentencing the appellant relying on evidence of the prosecution side that the victim was under eighteen years while there was no birth certificate tendered before the court to prove the age of the victim;
3. That, the trial Magistrate erred in law and fact by convicting and sentencing the appellant basing on evidence adduced by PW4 in the absence of DNA test to authenticate if it was the appellant who impregnated the victim and
4. That, the trial court grossly erred in both convicting and sentencing the appellant relying on the appellant's cautioned statement without taking into consideration that the appellant was not given a chance to object admission of the said cautioned statement .

When the appellant was invited to argue his appeal, he merely adopted all the grounds of appeal as contained in his Petition of Appeal.

Ms. Mwabeza learned State Attorney represented the respondent. The learned State Attorney commenced her submissions by supporting the trial court's decision. She submitted in respect of the first ground of appeal that there was evidence on record proving all the ingredients of the offence charged. She referred to the testimony of PW1 on how she

came to know that the victim was pregnant. The victim was PW1's daughter.

Further, the learned State Attorney referred to the testimony of PW1 which proved that when the event happened, the victim was below 18. The victim was born in 2003 hence she was of 15 years in 2019 when she was carnally known leading to her pregnancy.

The learned State Attorney further referred to the testimony of the Clinical Officer (PW3) who confirmed in his testimony that he really examined the victim and found her pregnant. The learned State Attorney then referred to the testimony of PW4 (the victim) who testified on how she met the appellant sexually on 24/12/2018 and 25/12/2018. In respect of this ground of appeal, the learned State Attorney submitted that PW5 was on record on how he interrogated the appellant who confessed to have known the victim carnally. In that view, the learned State Attorney was of a firm stand that the offence was sufficiently proved. Reference was made to **Seleman Makumba's case (2006) TLR 473** in which it was held that true evidence of rape comes from the victim. The learned State Attorney then invited the court to dismiss the first ground of appeal for being baseless.

As to the second ground of appeal, it was the learned State Attorney's submission that absence of a birth certificate does not necessarily mean that age was not proved. The learned State Attorney submitted that, oral evidence suffices to prove the victim's age. Reference was made to decisions in **Seleman Moses Solel @ White Vs. Republic, Criminal Appeal No. 385 of 2018 and George Claud Kassanda Vs. DPP, Criminal Appeal No. 376 of 2017**.

The learned State Attorney submitted in respect of the third ground of appeal that it was unnecessary to prove the case by way of DNA test since the appellant was being charged with the offence of rape. In her considered view failure to conduct DNA test did not affect the prosecution's case in any way.

Lastly, the learned State Attorney submitted on the fourth ground of appeal that the appellant had been given a chance to object admissibility of his cautioned statement or otherwise hence the fourth ground of appeal was as well baseless. The learned State Attorney pressed for dismissal of the appeal.

In determining the appeal before me, I start by addressing the fourth ground of appeal. The trial court's record indicates at pages 12 to 13 of the typed proceedings that indeed the appellant was availed a chance to object admissibility of his cautioned statement. The accused/appellant did not object admissibility of the said statement. The same was admitted and marked as exhibit P2 and after it had been admitted the same was read over to the accused. In that way, as rightly submitted by Ms. Mwabeza learned State Attorney, the appellant was not prejudiced in any way. The fourth ground of appeal dismissed for lack of merit.

The learned State Attorney State Attorney submitted in respect of the third ground of appeal that it was unnecessary to prove the case against the appellant by way of DNA test since the appellant was being charged with an offence of rape. Indeed an offence of rape can be proved in many other ways without necessarily producing DNA reports in court. Proof may be through direct evidence of the victim, evidence from eye witnesses (which is rare), confessions of accused persons, through

medical evidence and other acceptable means under the Evidence Act. The issue is whether it was necessary to conduct DNA test in the circumstances of the present case.

While I agree that it was unnecessary to conduct DNA test in view of proving the charges levelled against the appellant, it is important to note that in this case, four out of five witnesses pegged their evidence on the victim's pregnancy. **See** the testimonies of PW1 (victim's mother), PW2 (victim's head teacher) PW4 (victim) and PW3 (Clinical Officer). PW4 is on record to have testified to the effect that, the appellant known her carnally on 24/12/2018 and on 25/12/2018 respectively. She also testified that on 07/06/2019, she was detected to be five months pregnant. The victim insisted in her testimony that the appellant met him for only two occasions as indicated in her testimony. **See** page 11 of the typed proceedings of the trial court. It is important to note that it is detection of the victim's pregnancy which prompted investigation of this case and ultimate arraignment of the appellant for raping the victim.

In the circumstances of this case, the victim's pregnancy and the act of being raped are inseparable in view of the testimonies of PW1, PW2, PW3 and PW4. That being the case, it was necessary to ascertain in any possible way whether it was the appellant who really impregnated the victim. This is because, in view of PW4 it is the act of the appellant knowing her carnally on 24/12/2018 and 25/12/2018 that led to her pregnancy. To such a limited extent the third ground of appeal is found to have merit.

As rightly submitted by the learned State Attorney it is not necessary that birth certificate should be produced to prove the victim's age. Age can even be proved orally by the victim's parent or guardian or the

victim herself. It can as well be proved by inference. **See: Seleman Moses Solel @ White Vs. Republic, Criminal Appeal No. 385 of 2018** and **George Claud Kassanda Vs. DPP, Criminal Appeal No. 376 of 2017.** The second ground of appeal is therefore unmeritorious. The same is dismissed.

It was submitted by the learned State Attorney in the first ground of appeal that the evidence of PW4 (the victim) and that of the police officer who purportedly recorded the appellant's cautioned statement, sufficiently proved the offence charged leaving no reasonable doubts. Reference was made to the case of **Seleman Makumba** that true evidence of rape comes from the victim. It is true. However for the said evidence to lead to the guilt of an accused credibility of the victim as a witness is of great importance.

The victim insisted in her testimony that she met the appellant sexually at only two occasions, that is, on 24/12/2018 and 25/12/2018 and that it is through the said encounters she got impregnated. When the victim was examined on 07/06/2019, she was found to be five months pregnant. The testimony of the victim, if subjected to a scientific gauge cannot yield results suggesting that PW4 was a credible witness. I hold her not to be a credible witness. Her testimony is accordingly expunged. In the absence of the testimony of PW4, it can not be safely said that the charges against the appellant were proved to the required standard. For the foregoing reasons, the appellant's conviction and sentence are quashed. An order for compensation is set aside. I hereby order immediate release of the appellant from custody unless he is held therein for other lawful cause.

Dated at **SUMBAWANGA** this 21st day of October, 2020.

**C.P. MKEHA**

**JUDGE**

**21/10/2020**

**Court:** Right of appeal explained.

**C.P. MKEHA**

**JUDGE**

**21/10/2020**

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| Date | - | 21/10/2020 |
| Coram | - | Hon. W.M. Mutaki - DR |
| Appellant | - | Present |
| Respondent | - | Ms. Irene Mwabeza State Attorney |
| B/C | - | Zuhura |

**Court:** Judgment delivered in the presence of the appellant in person and Ms. Irene Mwabeza learned State Attorney for the Republic.

**W.M. MUTAKI**

**DEPUTY REGISTRAR**

**21/10/2020**