IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

(DC) CRIMINAL APPEAL NO. 48 OF 2019

(C/F Criminal Case No. 60 of 2018 in the District Court of Rombo at Rombo)

EVOD MASHAURI KINASHA.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 13th July, 2020

Date of Judgment: 12th October, 2020

MWENEMPAZI, J.

The appellant Evod Mashauri Kinasha was charged at the District Court of Rombo with two offences, namely: Rape, contrary to section 130 (1) and (2) (e) of the Penal Code (Cap. 16 R.E. 2002) and impregnating a school girl, contrary to section 35 (3) of the Education Act, Cap 353 read together with section 5 of Education (Imposition of penalties to Persons who Marry or Impregnate a School Girl) of 2003, GN. No. 265 of 2003. He is alleged to have raped and impregnated one "AA" a girl of 16 years old, on an unknown date of October 2016 at about 12:00 hours at Mbomai Kati

Village within Rombo District in Kilimanjaro Region. He was convicted on the first count and sentenced to thirty (30) years imprisonment. On the second count the appellant was acquitted. Dissatisfied and aggrieved by both conviction and sentence he preferred this appeal stating four (4) grounds to wit:

1. That the trial magistrate grossly erred in both law and fact in holding that the prosecution had proved its case beyond reasonable doubts.

2. That the learned trial magistrate erred in law and in fact when she failed to notice the discrepancies between the charge sheet and the evidence on record.

3. That the learned successor Magistrate grossly erred in law in offending the mandatory provisions of section 214(1) of the Criminal Procedure Act Cap 20 RE 2002. Hence the appellant was convicted on an irregular proceeding.

4. That the learned trial magistrate erred in law and in fact when she failed to realize that the evidence on record was too short hence casting doubts to the allegations.

The court ordered for the appeal to be disposed by way of written submission. The appellant filed his written submission and the respondent did not file their reply submission. Under the circumstances, this appeal will be determined based on the grounds of appeal raised and the submission of the appellant. I will not reproduce the submission but I will discuss the same in the course of this judgment.

Examining the first ground which is in relation to the charge not being proved beyond reasonable doubt. The appellant argued that the elements of rape were not proved because the victim in her evidence showed signs of submission to the act; since she did not raise an alarm despite the scene of the crime being a public area and it was a day time. He also pointed out to the fact that the victim did not inform anyone about the act until she discovered she was pregnant. Relying on the unreported case of **Marwa W. Mwita and Another vs. Republic, Criminal Appeal No.6 of 1995** the appellant submitted that the court should have inquired into the reasons as to why the offence was not immediately reported.

Still on the same point the appellant argued that there was no doctor's report to prove the allegation of rape. That, since the trial court rightly decided that there was no evidence to establish that he was responsible for

the pregnancy of the victim then the same wisdom should have been applied to discharge him from the first count of rape. It was his view that the person who impregnated the victim was the person who committed the offence of rape. According to the appellant without doctor's report and DNA test there was no other evidence to point to his guilt.

In the second ground that there were discrepancies between the charge sheet and the evidence on record, the appellant submitted that the charge sheet indicated that the crime was committed on 6/1/2017 while the victim (PW1) said to have been raped in October 2016. He also submitted that the case was fabricated because the victim alleged to have been raped by three different people.

On the third ground the appellant faulted the succeeding Magistrate who took over the trial without informing the appellant of his right to have the trial continued or start afresh and also the right to call witnesses. He argued that although the word used in section 214 of the Criminal Procedure Act is 'may' which indicates discretion but since the right to fair trial is fundamental then the court has an obligation to conduct a fair trial in all aspects.

Finally, on the fourth ground of appeal the appellant argued that the evidence brought forward by the prosecution witnesses was too short to

establish the guilt of the appellant. He contended that the fact that there was no doctor's report to establish rape, and the same was only established after the victim was found pregnant, then it was doubtful as to who actually raped the victim. In the end the appellant prayed for this court to find merit in his appeal, quash the conviction and set aside the sentence.

Having gone through the proceedings of the trial court and grounds of appeal as submitted by the appellant I find the main issue for determination of this appeal is whether the case was proved to the required standard that is beyond reasonable doubt. The appellant was charged with statutory rape under section 130 (1) and (2) (e) of the Penal Code, Cap. 16 R.E. 2002 such offence is committed against a girl below the age of 18 years. Thus, to prove the offence two important elements have to be established by the prosecution that is penetration and the age of the victim. In this case however since the matter was reported after the victim was found pregnant and by the time, she was giving her testimony she had already given birth, the prosecution was required to prove if the appellant was the father of the child. This could only be done through DNA test which was however not conducted. According to the victim's testimony she was carnally known by two different men including the appellant; for this

reason it was necessary for the prosecution to prove that the appellant was actually the one who fathered the child, and may be that would have worked to prove penetration. I say so because there are medical literatures which show that pregnancy may result even without penetration.

The next important element to be proved was the age of the victim. This being a statutory rape the age of the victim must be proved by evidence. In this case the age of the victim is only mentioned in the victim's particulars before she gave her evidence and in the charge sheet. That is not sufficient to prove the age of the victim as it was held in the case of ***Solomon Mazala v Republic*, Criminal Appeal No. 136 of 2012, CAT at Dodoma** where it was held (at page 5):

> *"... the citations of the age of the victim in the charge sheet and before giving her evidence as shown above are not part of the evidence before the trial court and cannot therefore be taken to prove the age of the victim. In the absence of proof of the age of PW1 as of 25th July 2003, the conviction of rape grounded under section 130 (2) (e) (supra), cannot hold".*

In light of the above, and since the record show that no further evidence was adduced before the trial court to prove the age of the victim then it is apparent that the age of the victim was not proved; and consequently, in

absence of that proof it is correct to rule that the first count was not proved beyond reasonable doubt. It follows therefore that conviction on the first count cannot stand.

Having determined the first ground of appeal as discussed above it has with certainty concluded that the prosecution case was not proved beyond reasonable doubt which is the standard required in law. I have however observed that the contradictions and doubts raised in the second and fourth grounds of appeal were not established. I could not find any contradictions as referred to by the appellant. On the fourth ground I am of the opinion that the weight of evidence is not measured by the number of witnesses or length of the witness's testimony but what matters is the quality of the evidence so adduced. I therefore see no merit on these grounds.

With respect to the third ground the appellant challenged the procedure during trial by arguing that section 214(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 was offended. In determining this ground, I have directed myself to the provision of section 214(2) of the Criminal Procedure Act which provides as follows: -

> "*Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction*

passed on evidence not wholly recorded by the magistrate before the conviction was had, ***if it is of the opinion that the accused has been materially prejudiced thereby*** *and may order a new trial" (emphasis added).*

In light of this provision and having examined the record of the trial court I did not see how the appellant was prejudiced in the process so this ground also is not substantiated.

In light of the above, I proceed to allow the appeal by quashing the conviction, setting aside the sentence. The appellant be released forthwith unless being held lawfully for other reasons. It is so ordered.

T.MWENEMPAZI
JUDGE
12th OCTOBER, 2020