

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA**

**HC. CRIMINAL APPEAL NO. 122 OF 2020**

(Original Criminal Case No. 63 of 2019 of the District Court of Geita District at Geita)

**FAUSTIN COSMAS ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

**05 & 13/10/2020**

**RUMANYIKA, J.:**

On 14<sup>th</sup> April, 2020 Faustin Cosmas (the appellant) was convicted and sentenced **absentia** to thirty (30) years for the charges of rape Contrary to Section 130(1) (2) (e) and (3)(1) of the Penal Code Cap 16 R.E. 2002 that the appellant raped the girl on 10/11/2018 at Kamena area Geita district.

The appellant is aggrieved hence a three grounds appeal which revolves around three (3) points essentially:-

- (1) That the prosecution case was not proved beyond reasonable doubts.
- (2) That the appellants' defence was just ignored.
- (3) That the trial court erred in law not holding that the complainant's evidence needed corroboration.

The appellant appeared in person. Ms. Lilian Meli learned state attorney appeared for the respondent Republic.

Ms. L. Meli learned state attorney supported the appeal only with respect to count number 1 charges. She argued the appeal generally that their case was proved beyond reasonable doubts. That although she did not promise the court to tell the truth pw1 gave credible and reliable sworn evidence much as true evidence of rape comes from the victim (case of **Seleman Makumba V.R** (2006) TLR 380) and that on that one the doctor corroborated the evidence.

From the record, a brief account of the evidence reads thus:-

Pw1 Taabu (name not real) a class V pupil of the Primary school stated that having been detected and the parents found her pregnant, she dropped out from school but having named one Faustine Cosmas (at the time not in court) her boyfriend who, upon promising to marry they consummated, she tested 3 months pregnant and delivered in June, 2019.

Pw2 Mussa Muhangwa the victim's father stated that the class V school girl of Bugando primary school was born in 2006 therefore now 14 years old that on inquiries, on 09/11/2018 she named one boy (at the time not in court) the responsible father. That he (pw2) reported the case to school and police. Then the appellant was arrested and arraigned in court.

Pw3 Kulwa Masalila at the time the victim's class teacher of Bugando primary school stated that she was the 87<sup>th</sup> pupil who, for the reason of pregnancy dropped out in 2018 (copies of the attendance register and letter – Exhibit "PE1" collectively.



Pw4 Kaitira Elly Mulusuri with 4 year work experience a medical doctor of Nzera Health centre stated that he graduated at Muhimbili College of Health and Allied Sciences in 2006. That following the incident and as he was on duty on 27/12/2018 he examined the victim and noticed that she was no longer virgin also the latter tested pregnant (copy of the PF3 – Exhibit "PE2").

Pw5 D.6556 D/Cpl. Jackson of Nzera out post of police (20 years work experience) stated that as he was, following the incident now on duty and at work on 27/12/2018, the victim and parents reported it to him. That as the victim named Faustine Cosmas, the letter was arrested and arraigned in court. That is all.

The issue is whether the prosecution case was beyond reasonable doubts proved against the appellant. The answer is no for four (4) main reasons:-

**One;** pw1 and pw2 (daughter and father) in their testimony are on record from the outset having stated that the responsible man had never been in court. **Two;** the appellant, if at all he may have raped pw1 on 09/11/2018 or even before but the girl did not name the appellant until after half a year or so upon being detected, probed and questioned by parents. Not only possibilities of the victim's evidence being after thought could not be ruled out, but also possibly she named somebody else not the appellant because as said, although the appellant was at the time in dock in court, in her testimony pw1 referred to a man not in court. **Three;** the 1<sup>st</sup> two reasons therefore would suggest that pw1 wasn't a credible witness (the case of **Selemani Makumba** (supra) is distinguished much as I

understand that in statutory rape cases like this one, it is not the victim's consent that counts but the prosecution's proof that she was under age. **Four;** as correctly in my considered view it was readily conceded by the learned state attorney that the charges of impregnating a school girl were not proved against appellant, and, as said the victim was not credible and reliable witness, so the charges of rape were not proved. If anything, and more so on the basis of the doctor's evidence, one may have had, with greatest respect wrongly relied on the victim's pregnancy as a conclusive evidence of rape. It is common knowledge that not all sexual intercourse resulted to conceiving. In other words like at times but quietly though in her testimony she suggested somebody other than the appellant, the latter may have not been the responsible father.

Without prejudice to the foregoing discussion, pw1 may or may have not been under age because pw2 and pw3 did not prove it. The parents simply stated the victim's age. The victim's birth and date may have had not been officially registered so that one could not have a formal proof yes, but the material fact should have been shown and proved by way of affidavit in lieu of a birth certificate much as I know no man or woman who, upon dating they demanded or produced birth certificates for the lover's scrutiny.

Now that in all aspects the prosecution case was not proved beyond reasonable doubts, I shall, as hereby do allow the appeal, quash the conviction and set aside the sentence. Unless he was held for some other lawful cause, the appellant be released immediately from prison. It is ordered accordingly.

Right appeal explained.



**S. M. RUMANYIKA**

**JUDGE**

**06/10/2020**



The judgment is delivered under my hand and seal of the court in chambers this 13/10/2020 in the presence of the Appellant and Ms. Subira Mwandambo state attorney.



A handwritten signature in blue ink, appearing to read "J. M. Karayemaha".

**J. M. KARAYEMAHA**  
**DEPUTY REGISTRAR**

**13/10/2020**