

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 97 OF 2020

ANDREA s/o ANDREA _____ **APPELLANT**

VERSUS

THE REPUBLIC _____ **RESPONDENT**

*(Arising from the decision and orders of the district court of Serengeti at Mugumu, Hon.
Rugemalila SRM, in criminal case no 12 of 2020 dated 17.06.2020)*

JUDGEMENT

3rd & 20th November 2020

GALEBA, J.

Between July 2019 and 9th January 2020 **ABC** a school girl at Nyasura "A" primary school aged 14 years was raped and conceived a baby as a consequence. The appellant was arraigned before the district court of Bunda and was charged on two counts; one of rape and another for impregnating a school girl. The appellant disputed the charge but at the conclusion of the trial he was acquitted of the 2nd count of impregnating **ABC** but he was found guilty and convicted on the 1st count of raping the girl and he was sentenced to thirty (30) years imprisonment. It is this conviction and the sentence that the appellant is challenging before this court.

According to the prosecution, the offences were committed on various occasions between July 2019 and 9th January 2020 at

Nyamswa village within the district of Bunda in Mara Region where the appellant had carnal knowledge of **ABC** and impregnated her.

To prove the case, the prosecution called the following witnesses; **PW1**, the victim, **PW2, DR. KAGUMILWA KAIJAGE METHODIUS**, **PW3, SUALEHE MASOUD**, **PW4, EMMANUEL MSEKWA**, **PW5 MARGRETH MALIAKE MBISE**, and **PW6 E888 Sgt MOHAMED**. The brief evidence of each witness was as follows;

PW1, ABC, testified that in 2019, Andrea started to live at their home in Nyasura village as a houseboy and was also grazing their family livestock. She testified that in July 2019 Andrea approached her with sexual proposals which she readily agreed and they started having sex from the end of July 2019 to January 2020. In October 2019, **ABC**, discovered that she was pregnant. When she told Andrea of the pregnancy the latter told her that they would leave her father's house and start living together elsewhere. Following that plan, on 05.01.2020 the two left for Mwanza Busega village where on 09.01.2020, her father **SUALEHE MASUDI PW3** and **EMMANUEL MSEKWA PW4** arrested both ABC and Andrea. They were both taken to Nyasura police station and later she was taken to Nyasura health center where she was confirmed to be three (3) months pregnant. According to this witness, she was born on 26.10.2005.

The next witness was **PW2 DR. KAGUMILWA KAIJAGE METHODIUS** a medical assistant at Ikizu Health Center. He testified that on 09.01.2020 he examined the victim and noted that she had had

regular sexual intercourse as she had no hymen. He tested and discovered the girl was twelve (12) weeks pregnant. This witness tended **PF3 (EXHIBIT P1)**.

PW3, SUALEHE MASOUD testified that ABC was her daughter and Andrea his houseboy and was also grazing his livestock. He testified that on 05.01.2020 together with **PW4, EMMANUEL MSEKWA** went to Mwanza Busega in Butiama and arrested both ABC and Andrea.

PW4, IMMANUEL MSEKWA's testimony was substantially the same as that of PW3.

PW5 MARGRETH MALIAKE MBISE, the mother of the victim, testified that the latter was 14 years in 2019 as she had been born on 26.10.2005. She tendered **ABC's** birth certificate as **EXHIBIT P2**. She testified further that on 05.01.2020 at around 4.30 in the afternoon she sent ABC to Nyasura center to buy some wares, but till 20:30 hours the girl had not come back. She took ABC to Ikizu health center and upon examination she was found to be pregnant.

The last prosecution witness was **PW6 E888 Sgt MOHAMED** a police officer, who testified that on 09.01.2020 while at Nyasura Police station he interrogated Andrea, and the latter admitted to have had sex with ABC eight (8) times.

The prosecution closed its case and the trial court made a ruling that **Andrea** had a case to answer.

In defence **Andrea** testified that while at Nyasura an auxiliary officer came and told him that he was required at Nyasura police so he was taken there. At the police he found **PW3** and **PW4**. He was severely beaten that is why he admitted to have committed the offence charged. Generally, **Andrea** dismissed allegations of having raped **ABC**.

As for this appeal; **Andrea** raised 5 grounds of appeal, **first** the trial magistrate erred because she did not conduct a **voire dire** test before recording the evidence of PW1, who was 14 years, **secondly**, the appellant was not afforded a right to be heard in his trial and **thirdly** the trial magistrate erred when she convicted him without first obtaining a DNA test to establish whether the unborn baby was actually his. **Fourthly**, the trial magistrate erred to convict the accused person based on the caution statement which was not made in the presence of the justice of peace and **fifthly** the trial magistrate erred in law and in fact for not observing the principles of natural justice.

Before we could start off, **Andrea** requested that this court adopts his grounds of appeal as his submissions and then the state attorney be allowed to answer so that if possible the appellant would rejoin.

Responding to the 1st ground of appeal, Mr. Frank Nchanila who appeared for the respondent submitted that the first ground of appeal is misconceived because **voire dire** was abolished and the current practice is that a child of tender years may swear or affirm or

promise to tell the truth and give evidence. He cited the case of **Selemani Moses Soteli v the Republic**, Criminal Appeal no 385 of 2018 in support of his position.

Section 127(2) of the **Evidence Act [Cap 6 RE 2002]** provides that;

"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."

The position of law on this section, **voire dire**, oath or affirmation and an undertaking to tell the truth can be summarized by a passage from **Bashiru Salum Sudi v the Republic**, Criminal Appeal no 379 of 2018 (unreported) at page 10 where the Court of Appeal stated;

"...the current section 127(2) of the Evidence Act permits a tender age witness to give evidence with or without oath or affirmation. However, where the evidence is received without oath or affirmation, the witness must make a promise to tell the truth and not lies. What is gathered from the new provision is that conducting voir dire test is no longer a requirement for determining whether such a child witness is capable of giving his evidence with or without oath. It is equally not a requirement to record the court's opinion (if any) in the proceedings."

The point from this passage which is relevant to the 1st ground of appeal under scrutiny is **first, voire dire** is no longer part of our law, **secondly** a tender age witness like ABC may give evidence after affirmation as it happened in the trial court. In the circumstances the 1st ground of appeal is dismissed, because the witness was affirmed and conducting **voire dire** was not a necessary requirement of law. As the complaint in the 2nd and the 5th grounds of appeal both were relating to the violation of the right to be heard, in reply to them, Mr.

Nchanila argued that the appellant was afforded every right that the law guarantees and none was violated. He added that Andrea was fully heard, he was given a right to give his evidence and call his witnesses.

In my view to guarantee a fair trial, a judge or magistrate has to ensure that **first** the accused is present on all days that his case is called for any orders in court. **Secondly**, a charge must be read over to the accused even after hearing has started although in most cases, the accused would always indicate that there is no need to read the charge over to him. **Thirdly** an accused person must fully participate in the preliminary hearing including signing the matters he does not dispute in the charge. **Fourthly**, each after evidence in chief of the prosecution, the accused must be informed that he has a right to cross examine the witness and the fact that that right was afforded to the accused must be recorded. **Fifthly**, each time a prosecution witness is called to tender an **EXHIBIT** the accused must be asked whether he objects to tendering of the **EXHIBIT** or not and the response should be recorded and **lastly**, upon closure of the prosecution case section 231(1)(3) and (4) of the **Criminal Procedure Act [Cap 20 RE 2019] (the CPA)** provides for two fundamental rights; **one** is the accused to be informed that he has a right to give evidence in defending the case and to ask him how he would like to tender it and **two** is to inform the accused of his right to call other witnesses if he has any.

In this case I have navigated through the entire proceedings and I am satisfied that there is no right of the appellant was at all violated as alleged by him at the 2nd and 5th grounds. The appellant was fully heard. In the circumstances, the two grounds of appeal are hereby dismissed.

In the 3rd ground of appeal, the complaint of the appellant was that the trial court erred by convicting him and sentencing him as it did without the prosecution tendering a DNA test report in order to prove that he was related to the pregnancy. In reply to that complaint Mr. Nchanila submitted that in this case penetration was proved and the appellant was properly convicted.

In resolving this ground, it is important to remember that the appellant was acquitted of impregnating a school girl, which means that his relation with the pregnancy is irrelevant, for in order for a person to rape a girl or woman, he does not have to impregnate her; in any event in sexual offences DNA test is not a legal requirement, see **Robert Andondile Komba v The DPP**, Criminal Appeal no 465 of 2017 (unreported). May be the truth to seek is whether the girl was under 18 at the date of the offence and whether penetration was achieved irrespective of its extent. According to law evidence on age of a sexual assault victim is given by either her parent, the victim herself, a medical practitioner or her birth certificate see **Isaya Renatus v the Republic**, Criminal Appeal

no 542 of 2015 and **Bashiri John v the Republic**, Criminal Appeal no 486 of 2016, both unreported.

In this case, **ABC**, and both her parents **PW3** and **PW5** testified that she was born on 26.10.2005 and to cap it all **PW3** tendered her birth certificate recording the same birthday. That amount of evidence was sufficient to discharge the burden of proving that the victim was 14 years in 2019 when the offence was committed. Now, was **ABC** raped by the appellant? Again under the law, the best evidence in sexual offences is that of the victim as per the Court of Appeal decision in **Selemani Makumba v the Republic [2006] TLR 379**. **ABC** testified that the appellant was the only man who had sexual intercourse with her from the end of July 2019 to early January 2020. This evidence was corroborated by the evidence of **PW2** who medically examined the victim and found her with no hymen and concluded that the girl had had regular sexual encounters. The evidence of these two witnesses was enough to prove rape and this court cannot therefore fault the trial court in its findings on that aspect of the case. The point I want to make is that Andrea raped **ABC** and his conviction was right and his sentence was the proper punishment. That means the 3rd ground has no substance.

In respect of the 4th ground Mr. Nchanila submitted that caution statements are recorded by the police, they are not recorded by the justices of peace. So he submitted that the 4th ground of appeal is misconceived. I agree with Mr. Nchanila that justices of peace

record extrajudicial statements and not caution statements. In the circumstances, the 4th ground of appeal has no merit and the same is dismissed.

Based on the above reasons, the conviction for rape and the sentence of 30 years imprisonment imposed on **MR. ANDREA s/o ANDREA** for raping **ABC** is confirmed and this appeal is dismissed. The appellant shall continue to serve the above sentence of 30 years imprisonment from the time he was punished by Bunda District court. The appellant may appeal to the Court of Appeal in 30 days from today.

DATED at MUSOMA this 20th November 2020



Z. N. Galeba
JUDGE
20.11.2020