**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**IN THE DISTRICT REGISTRY OF BUKOBA**
**AT BUKOBA**

**CRIMINAL APPEAL NO. 38 OF 2020**
*(Arising from criminal case No. 68/2019 of Bukoba Resident Magistrates' Court)*

**ROBERT KALIBARA.....APPLICANT**

***VERSUS***

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of last order 04/11/2020*
*Date of judgment 04/12/2020*

***Kilekamajenga, J.***

The appellant was arraigned before the Resident Magistrate's Court of Bukoba for two counts namely, rape contrary to **section 131(1)(2)(e) and section 131 (1) of the Penal Code Cap. 16 RE 2002**; and impregnating a primary school girl contrary to **section 60A (3) of the Education Act, Cap. 353 RE 2002** as amended by **section 22 of the Written Laws (Miscellaneous Amendments No. 2) Act No. 4 of 2016**. During the trial, the appellant pleaded not guilty to the two counts prompting the prosecution to summon witnesses to prove the offences to the required standard. The prosecution summoned four witnesses while the defence relied on the oral testimony of the

appellant. PW1 testified that one day when she was going to fetch water, she met the appellant who was also her teacher at Mwenge Primary School. The appellant pulled her into the bedroom and wanted to have sexual intercourse with her. PW1 refused and the appellant gave her Tshs. 5,000/= and the two had sexual intercourse. After the sex, PW1 felt pain and she went to the river where she washed herself. When she came back from the river, she never told her grandmother about what happened because she was warned by the appellant not to tell anybody. Thereafter, PW1 and the appellant continued to meet and have sex; they did so about three times. On 15th March 2019, her mother suspected she was pregnant. She was taken to Izimbya Hospital for medical examination and she was found to be pregnant. Thereafter, PW1 was taken to the Ward Executive Officer and the matter was reported to the police where PW1 recorded her statement.

PW2 was the father of PW1 who testified that PW1 was born on 08th March 2003. He remembered that on 15th March 2019, he was informed that PW1 was suspected to be pregnant. He informed the school about the suspicion and PW1 was taken to Izimbya Hospital for medical check-up where she was found to be five months pregnant. When they came from the doctor's office, PW1 informed PW2 that the appellant impregnated her. He went to report the matter to the Ward Executive Officer and finally to the police.

PW3 was the police officer who testified that, while at work on 15th March 2019, he was assigned to investigate this case. He interrogated the victim and the appellant. In his investigation he discovered that the victim was a standard VI pupil and the appellant was a teacher at Mwenge Primary School. He tendered the school attendance register which was admitted and marked exhibit PE1. PW4 was a clinical officer who examined PW1 and filled in the PF3 form. In his examination, he found PW1 to be pregnant. He tendered the PF3 form which was admitted and marked exhibit P1.

During the defence, DW1 (appellant) testified that the case was fabricated against him because he had serious grudges with the victim's family. He further testified that the DNA test also revealed that he was not responsible for the child but DNA was later concealed. He challenged the prosecution's evidence for being weak to support the conviction.

Finally, the appellant was convicted of the offences charged and sentenced to serve 30 years in prison. Aggrieved with the decision of the trial court, he appealed to this Court armed with four grounds of appeal thus:

1. *The learned trial Magistrate erred in law and fact, on the ground that after he had made a finding that there was no electronic evidence of **DNA** test to match the borne child and with that of the appellant as a biological father, he proceeded to convict the appellant as he failed to critically*

*analyse and consider that the prosecution side on **ipso facto** had not proved the case beyond reasonable doubt as the standard required in criminal cases.*

2. *The learned trial Magistrate failed to analyse critically and consider that the defence of animosity and rivalry between the appellant and the victim's family was a reasonable doubt to water down the entire prosecution evidence to wit, the victim evidence (PW1).*
3. *The learned trial Magistrate erred in law and fact in failing to consider that the sole testimony of PW1, which the trial Court solely relied and based to convict was tainted with lies and was unreliable and incredible witness as he failed even to describe the room of the appellant which he alleged to have been raped in.*
4. *The learned trial Magistrate misdirected himself in addressing on the exhibit P2 (PF3) which was the test for 5 months pregnancy of the victim which had neither nothing to prove penetration as an element for rape nor had nothing to connect the appellant with that pregnancy.*

During the hearing of the appeal, the appellant appeared in person while enjoying the legal services of the senior learned advocate, Mr. Richard Rweyongeza. The respondent, the Republic, was represented by the learned State Attorney, Mr. Juma Mahona. In the oral submission Mr. Rweyongeza informed the Court that the appellant was aggrieved by the decision of the RMs Court of Bukoba in Criminal Case No. 68 of 2019 where he was convicted and sentenced to serve 30 years in person. The appellant filed the petition of appeal with four grounds. Before arguing the grounds of appeal, he reminded the Court

on the principles governing criminal cases that the prosecution must prove the case beyond reasonable doubt except in strict liability offences. Also, the weakness of the defence, even the lies of the accused, does not strengthen the prosecution case which is already weak.

When arguing on the 3rd ground, Mr. Rweyongeza informed the Court that this case involves sexual offences which are complex because the evidence is based on the accused and victim only. The complexity of these cases was stated in the case of **Mohamed Said v. Republic Criminal Appeal No. 145 of 2017**, CAT at Iringa (unreported). He submitted further that this case depends on the evidence of the victim. The major question is whether the evidence of PW1 passed the tests stated in the case of **Mohamed** (*supra*) because in absence of the evidence of PW1, the remaining evidence is so weak. He further averred that the victim alleged to have been raped on 08/10/2018 but she never told anybody about this incident. Rape is not an ordinary event to be kept secret. The act of rape became evident on 15/03/2019, which means five months after the alleged rape. The victim stated that she was warned by the appellant not to tell anybody. However, she was not threatened and it is not stated whether she was given the money she was promised.

Mr. Rweyongeza stated further that PW1 named the appellant after the pregnancy. However, the prosecution failed to link the accused with the

pregnancy. The prosecution could have brought strong evidence because a son was later born after the alleged rape. To bolster his argument, he referred the Court to the case of **Yust Lala v. Republic, Criminal Appeal No. 337 of 2015**, CAT at Arusha (unreported).

When submitting on the 1st and 4thground, Mr. Rweyongeza reminded the Court on the case of **Lala** (*supra*) where the Court of Appeal hinted on the role of scientific evidence in proving offences of this nature. The appellant alleged that there was DNA test but he was not challenged. Because the appellant was undefended he failed to issue a notice to produce it. Also the trial Court could have invoked **Section 195 of the Criminal Procedure Act, Cap. 20 RE 2019** to cause the DNA result to be tendered. The dearth of scientific evidence was the major weakness in this case. He further submitted that the 4th ground is not so important because it talks about penetration while there was pregnancy. On the 3rd ground, Mr. Rweyongeza insisted that the appellant stated that there were grudges between him and the victim's family. The trial Magistrate however did not consider the issue of grudges. Mr. Rweyongeza invited the Court to consider the case of **Lala** (supra) on the existence of grudges. He finally urged the Court to quash the decision of the trial Court; set aside the conviction and sentence thereof.

On the other hand, the learned State Attorney objected the appeal and supported the conviction and sentence meted against the appellant. He further argued that the accused's lies may support the prosecution case. The 3rd ground is hinged on credibility of witness and PW1 was a credible witness. She clearly narrated how she met the appellant and how he seduced her to have sex.

The trial court observed the demeanour of this witness and this Court should consider the coherence of the evidence of PW1 and other witnesses. PW1 testified that she was raped on 08/10/2018 after being given Tshs. 5,000. She was subjected to medical test on 15/03/2019 where she was found to be five months pregnant. Therefore, the evidence of PW1 was coherent and proved the offences against the appellant. On credibility of witnesses, the learned State Attorney referred the Court to the case of **Nyakuboga v. Republic Criminal Appeal No. 434 of 2016**, CAT at Mwanza. He further insisted that the evidence of PW1 was coherent and passed the criteria set by the law.

On the 1st and 4th ground, the learned State Attorney submitted that there was no need of DNA test in proving pregnancy and the court is not bound by the expert's report. The duty of the Court is to trust witnesses if they are trustworthy and reliable. In this case, PW1 named the appellant as the person responsible for the pregnancy. It was also proved that the victim was a standard VI pupil at Mwenge Primary School. The appellant also confirmed that the victim was his

student. Therefore, the Court was right in convicting and sentencing the appellant even in the absence of DNA test. He fortified his argument with the case of **Japhari Salum alias Kikoti v. Republic, Criminal Appeal No. 370 of 2017, CAT at Dar es Salaam** (unreported).

Mr. Mahona further averred that the appellant did not request for DNA test during the trial. On the issue of grudges between the appellant and the victim's family, Mr. Mahona was of the view that such grudges were irrelevant in this case. Also, the appellant never cross – examined PW1 and PW2 on the alleged grudges. Generally, the appellant's defence did not raise any doubt and the appellant was rightly convicted. He invited the Court to consider the case of **Mathias Robert v. republic, Criminal Appeal No. 328 of 2016**, CAT at Tanga (unreported) at page 10. Mr. Mahona finally urged the Court to dismiss the appeal and uphold the conviction and sentence passed by the trial court.

When rejoining, Mr. Rweyongeza invited the Court to distinguish the case of **Nyakuboga** (*supra*) with this case because there was no issue of pregnancy. Also, the case of **Japhari** (*supra*) is distinguishable because it never determined the issue of pregnancy. He further reiterated that the evidence of PW1 was not strong hence the prosecution's case was not proved to the required standard even if the appellant had remained silent. He finally reiterated the prayer to allow the appeal.

At this point, I am obliged to determine the merits or otherwise of the appellants grounds of appeal. In my view, there is one major issue cropping-up from the grounds, whether the prosecution case was proved to the required standard. During the oral submission, Mr. Rweyongeza reminded the Court on the principle of law governing proof of criminal cases. I am generally in agreement with him that a criminal case demands a higher standard of proof than civil cases. To sustain a conviction in criminal cases, the prosecution must prove its case without leaving doubts. It is not a mere waste of time to stress further that the requirement of proving a case beyond reasonable doubt is not the discretion of the court but the requirement of the law which has no exception. A trial court will always be bound with the provisions of **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2019** whenever determining the guiltiness or otherwise of an accused person. The section provides:

> *'A fact is said to be proved when–*
> *(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the* ***prosecution beyond reasonable doubt*** *that the fact exists;'*

The proof beyond reasonable doubt principle is popular in the realm of criminal justice and cannot be lowered for lack of evidence or volition of the trial magistrate. The principle has gained prominence not only in Tanzania but also in

other jurisdictions around the global. In Tanzania, the land mark case of **Hemed v. Republic [1987] TLR 117** stressed that:

> *'...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities.'*

Therefore, a criminal case cannot be decided on suspicions even if such suspicions may carry weight to the extent of being painted as truth. The case of **Nathaniel Alphonce Mapunda and Benjamin Mapunda v. R [2006] TLR 395** provided guidance on the value of suspicion in criminal trials that:

> *'In criminal charge, suspicion alone, however grave it may be is not enough to sustain a conviction...'*

In the instant case, as already stated, the appellant was charged with rape and impregnating a primary school pupil. He was finally convicted and sentenced to serve 30 years in prison. However, the proof of the second count depended on the proof of the first count (rape). Before going further, I wish to consider the case of **Mohamed Said** (*supra*) which was cited by the counsel for the appellant. The case provides some informative information on the care needed in handling sexual offences. The Court of Appeal of Tanzania stated that:

> *'Given the tricky nature of the circumstances of this case, we have deemed it necessary to make some observations pertaining to the need to exercise care in handling cases of sexual offences.'*

The Court went further stating that:

> *'We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness.'*

Also, I take the discretion to reproduce the words used by the Lord Chief Justice Mathew Hale in the case **People v. Benson, 6 Cal 221 (1856)** quoted with approval in the case of **Mohamed Said** (*supra*), he said:

> *'...is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never innocent.'*

The naked truth is, if courts can only bank on the sole testimony of the victim in convicting persons alleged to be rapists, without satisfying the requirement of the standard of proof, then a rape case may be easily employed to incarcerate even an innocent person. Therefore, it is always important to exhaust all reasonable doubts before relying on the victim's testimony to achieve a conviction.

In the case at hand, the only evidence available to prove the alleged rape was the testimony of the victim (PW1) and the pregnancy which finally led to the birth of the child. Considering the fact that the victim was 16 years when the pregnancy was discovered, under the law, whoever carnally knew her would be charged with rape because the offence fall under statutory rape. There is no

doubt, the victim had sexual intercourse and finally conceived but the obvious question is who rape her? As earlier stated, the victim's testimony cannot, alone, base a conviction. The only strong evidence to link the appellant with the offence was the DNA test to establish whether the appellant was the father of the child. Such evidence could clear all doubts. Currently, there is a major doubt in this case. For instance, how far was the victim safe from having sex with other persons apart from the appellant? Conceiving is a onetime event which takes place in a fraction of minutes.

The Court of Appeal of Tanzania had a similar situation in the case of **Yust Lala** (*supra*) which was also supplied to this Court by the learned advocate, Mr. Rweyongeza. The Court of Appeal stated that:

> *In this case, PW1 mentioned the appellant as the person who raped her. She did so after she had become pregnant. While the offence is alleged to have been committed on 14/7/2013, the appellant mentioned him in November, 2013 as the person who is responsible for the pregnancy. The issue is whether in the absence of any other evidence, such as medical evidence, the testimony of PW1 linking the pregnancy with the rape alleged to have been committed against her sufficiently proved the offence against the appellant. In our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt on the credibility of PW1. It was her evidence that she did not mention the appellant for all that period because of his threat that he would slaughter her if she disclosed to anybody that he raped her. Since*

*she was not staying with the appellant we find it doubtful that with such a serious offence, she could for all that period fail to tell her mother about it. These factors combined with the appellant's complaint that he was framed by PW2 due to grudges which existed between them because of a land dispute, raise reasonable doubt on the prosecution's case. We find therefore that had the learned appellate judge considered these factors, she would have found that the evidence of PW1 was doubtfully, the result which rendered the prosecution case unproved.'*

If I take a comparative analysis between the case of **Yust Lala** (*supra*) and the case at hand, I find the following similarities: in the instant case, there was no evidence to link the appellant to the child; the victim never told her grandmother about the alleged rape on the allegation that she was promised money by the appellant; the victim lived far from the appellant and there was no constant threat to force the victim to keep this evil incident a secret; the appellant alleged that there were grudges between him and the victim's family; and the appellant was convicted based on the testimony of the victim. Based on this similarity, I have no better reason to depart from the findings of the Court of Appeal in the case of **Yust Lala** (*supra*).

However, before concluding this brief analysis, I wish to reiterate the principles governing proof of rape cases as stated in the case of **People of the Philippines v. Benjamin A. Elmancil, G. R. No. 234951, dated March**

**2019** which was quoted with approval in the case of **Mohamed Said** (*supra*), the Court in Philippines stated that:

> *'In reviewing rape cases, this Court has constantly been guided by three principles, to wit: (1) on the accusation of rape can be made with facility; difficult to prove but more difficult for the person accused though innocent, to disprove; (2) in view of intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complaint must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of thing the accused may be convicted solely on the basis thereof.'*

It is may call on the subordinate courts with jurisdiction to try rape cases to observe the above principles in order to avoid the possibility of victimising innocent persons by basing a conviction on the testimony of the victim. The victim's testimony has to clear all reasonable doubts and pass the standard required in criminal cases.

Before I put down my pen, I may be mean if I cannot appreciate the research and the resourceful submission made by the counsel for the appellant, Mr. Richard Rweyongeza. He proved to be a senior counsel and an officer of the

Court. His composure, guidance to decided cases, honesty and tackling of issues was exemplary. His submission was well founded and much researched.

Based on the above reasons, I hereby allow the appeal. The appellant should immediately be released from prison unless held for other lawful reasons. Order accordingly.

**DATED** at **BUKOBA** this 04th Day of December, 2020.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**04/12/2020**

**Court:**

Judgment delivered in the presence of the appellant present in person and the learned State Attorney, Mr. Juma Mahona. Right of appeal explained to the parties.

**Ntemi N. Kilekamajenga.**
**JUDGE**
~~**23/10/2020**~~
04/12/2020