IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 52 OF 2019

(C/F Criminal Case No. 313 of 2018 District Court of Moshi at Moshi)

SALUM NICHORAUS MNYUMALI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

6TH JUNE, 2020 & 3RD JULY, 2020

JUDGMENT

MKAPA, J:

The appellant, Salum Nichoraus Mnyumali was charged with and convicted of the offence of impregnating a school girl c/s 60 A (3) of Education Act, CAP 353 as amended by the Miscellaneous Amendment Act No. 2/2016 and the offence of Rape c/s 130 (1) (2) (e) and 131 of the Penal Code, Cap 16 [R.E. 2002] respectively.

Aggrieved by the judgment and sentence of the District Court of Moshi has appealed to this court praying that the judgment and sentence be quashed and set aside. The appellant initially had raised eight grounds of appeal but later withdrew the 4th and 5th grounds and proceeded to argue the remaining six as follows;-

1. That, the trial magistrate erred in law and fact in holding that the case against the appellant was proved

satisfactorily to the required standard hence the appellant was wrongly convicted.

2. That, the trial magistrate erred in law and fact in failing to inform the appellant of his right to be represented since he is evidently physically incapacitated and indigent person who can neither afford to hire an advocate nor have legal knowledge.
3. That, the trial magistrate erred in convicting and sentencing the appellant without considering the evidence objectively for in order for the second count to stand it required a direct proof of the first count that was the reason why the appellant requested the court to order DNA test.
4. That, the trial magistrate erred in relying on the evidence of PW3 who is alleged to be appellant's neighbour but yet withheld the information regarding the relationship between the appellant and the victim.
5. That, the trial magistrate erred in law in admitting Exhibit P2 and P3 and testimony of PW5 a police officer which were not corroborated by any witness especially PW3 a neighbour who allegedly witnessed the search.
6. That, the trial magistrate erred in not finding that there were some irregularities raised which brought about reasonable doubt.

Brief facts of the case which gave rise to the instant appeal is to the effect that, on diverse dates between January and June, 2018 at Msaranga area where both parties reside, the appellant had carnal knowledge of the victim PW2 "Zawadi" (true identity hidden) a 16 years old girl. It was alleged on those occasions PW2 visited appellant's house where she was offered money and had sex voluntarily with the appellant. The evil deeds came into light when the victim was found in possession of a mobile phone make Nokia, at the same time her mother had suspected her to be pregnant. When Zawadi was asked by her parents as to who was responsible for her pregnancy she disclosed the fact that the appellant was the one who was responsible thereafter she ran away from home. It is alleged that her parents reported the ordeal to Majengo police station and they were issued with PF3 and the victim was sent to the hospital where she was discovered that she was twelve weeks pregnant. The appellant was arrested and charged for rape and impregnating a school girl. He denied the allegations claiming that the case had been framed against him. However, he was found guilty convicted and sentenced to one year imprisonment for the first offence and thirty years (30)

imprisonment for the second offence, the sentences were to run concurrently.

Aggrieved, by the judgment and sentence of the District Court, he appealed to this court praying that the judgment and sentence be quashed and set aside.

At the hearing of the appeal the appellant appeared in person unrepresented, while the respondent was represented by Ms. Grace Kabu, learned state attorney.

Arguing in support of the appeal the appellant submitted on the first ground the fact that the respondent failed to prove the case against him at the required standard as provided under **section 110 of the Tanzania Evidence Act**, Cap 6 [R.E. 2002]. He went on explaining that the quality of the prosecution evidence should always be water tight to ground conviction of the accused person. Further that, the evidence of all six prosecution witnesses were fabricated as could not support the conviction.

Arguing for the second ground the appellant submitted that, he is a layman, indigent and physically incapacitated thus was unable to engage in sexual intercourse as alleged by PW2, (the victim) however, the trial magistrate did not accord him the right to be represented as provided under section 310 of the Criminal Procedure Act, Cap 20, R.E. 2002. (CPA). To support his contention he cited the decision in the case of **Thomas Mjengi**

V R (1992) TLR 157 which held that failure to inform the accused person of his right to legal representation renders the whole trial a nullity.

On the third ground the appellant submitted that, the victim had already gave birth to a child but no proof was brought before the trial court showing that he was the father of the alleged child thus, it was the appellant's view that the 1st count was never established. Regarding the fourth ground, the appellant contended that, the trial magistrate relied on the testimony of PW3 a neighbour who claimed to have witnessed PW2 entering the appellant's house and warned him not to engage into love affair with school girls. However, PW3 never reported the matter anywhere. To support his argument, the appellant cited the decision in the case of **Mt. 38350 Pfe Ledman Mageresi V The Republic, Criminal Appeal No. 93 of 1988** where the court observed that;

> *"we think that where a witness is shown to have positively told lie on a material point in the case his evidence ought to be approached with great caution, and generally the court should not act on the evidence of such a witness unless it is supported by other evidence."*

Basing on the above decision the appellant challenged PW3 on the fact that being an adult it is illogical for him not to report the incident to the victim's parents or local authorities.

It was appellant's submission on the fifth ground that exhibit P2 and P3 were not sufficient to be relied upon by the trial court in reaching its decision. Elaborating further on exhibit P2 the appellant challenged the fact that the search was conducted un-procedurally without involving any government official from local authorities nor a neighbour as a witness. Further that, it was not certain whether PW3 was among the neighbours who witnessed the search since her testimony did not reflect the same.

The appellant applied the same line of argument in respect of exhibit P3 (the victim's school bag) since PW2 neither testified on the same nor identified the same when tendered before the trial court. The appellant explained further that, PW5's evidence did not establish where the said bag was kept before it was tendered in court thus it was the appellant's views that the chain of custody was broken.

On the last ground, the appellant argued that, PW6 testified as a teacher from JK Nyerere primary school while the victim attended the JK Nyerere school as a (form two) secondary school student hence his evidence is questionable. Furthermore, throughout the trial PW2 never appeared to have been pregnant

which is also doubtful. The appellant finally prayed for this court to re-evaluate and re-assess the proceeding, allow the appeal and finally set him free.

Resisting the appeal, Ms. Kabu submitted in respect of the first ground the fact that, the best evidence on sexual offences comes from the victim herself as was held in the case of **Selemani Mkumba V Republic** [2006] TLR 380. That, since PW2 thoroughly testified her sexual encounters with the appellant which resulted into her pregnancy as corroborated by PW4, a medical doctor and PW3 who witnessed PW2's visitation to the appellant's house.

On the second ground, Ms. Kabu argued that appellant's claims that he was not accorded the right to legal representation is not reflected in the trial court's proceedings. Regarding the 3 ground Ms. Kabu submitted that the trial court did examine PW2's credibility and believed her testimony and proceeded to convict him.

Disputing the fourth, and the fifth grounds Ms. Kabu submitted that the appellant neither objected nor cross examined on the exhibits tendered thus he could not raise the matter at the appeal stage. To support her argument Ms. Kabu cited the decision in the case of **Nyerere Nyague V the Republic**,

Criminal Appeal No. 67 of 2010 CAT (unreported) where it was held *inter alia* that;

> *"a party who fails to cross examine the witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the court to disbelieve what the witness has said"*

Ms. Kabu finally prayed that the appeal be dismissed.

Having considered arguments for and against the appeal bearing in mind the fact that this is the first appeal, I am duty bound to re-assess and re-evaluate the entire evidence on record and arrive at a just decision. **[See D.R.Pandya (1957) EA 336 and Iddi Dhaban Amasi V Republic, Criminal Appeal No 111 of 2006 (unreported)]**.

Applying the above principle, I will begin with the first ground of appeal to the effect that the law is settled that the essential ingredient to be proven in rape offence is **"penetration".** This position has been fortified in a number of cases including the case of **Ally Mkombozi V. R, Criminal Appeal No. 227 of 2007, CAT (unreported)** in which the Court of Appeal had this to say:

> *"The essence of rape is penetration, however slight is sufficient to constitute sexual intercourse necessary to the offence"*

In her evidence at page 8-9 of the trial court's typed proceedings PW2, the victim testified the following:-

> *"... I agreed and then we started relationship. I used to go to his house. Then we do sex always. I used to enter into the house. Then Salum sat with me on the bed. Salum took off his clothes, I also took off my clothes willingly. I lay down on the bed with my back, then Salum came on top of me and inserted his penis to my vagina. Then he started to move in and out...I did sex with him many times. We did sex last on 23/6/2018 at his home..."*

It is plain clear the above testimony has established penetration whereby PW2 had described how the appellant had inserted his penis into her vagina and the fact that she had sex with him many times. It is noteworthy to point out that the victim, a sixteen (16) years (by then) testified to have sex with the appellant willingly. However, according to section 130 (2) (e) of the Penal Code a person is guilty of rape if he carnally known a girl, "with or without her consent **when she is under eighteen years of age** ..." [emphasis mine].

It is also trite principle of law that the best evidence in rape case comes from the victim herself as the act is always conducted in secrecy. See **Selemani Makumba V R [2006] TLR 92.** More

so, PW2's testimony was well corroborated by PW1, PW2's father who testified how they arrested the accused who admitted to have committed the alleged acts, PW3 a neighbour who witnessed PW2 entering the appellant's house, and once warned the appellant not to invite and have love affair with students but the appellant did not heed to the warning instead he to told PW3 that prisons are meant for people like him. PW2's testimony was also corroborated by and PW4, a doctor who examined PW2 and found her to be pregnant and PW5, an investigator who found PW1's bag in appellant's home. These are evident at page 7, 14, 16 21 of the trial court's typed proceedings. I am therefore of the considered view that this case was proved at the required standard. Thus the first and sixth ground are meritless.

On the second ground of appeal relating to appellant's right to legal representation, **section 33 of the Legal Aid Act, 2017, GN No. 9 of 2017** provides the following;

> *"33.-(1) Where in any criminal proceedings, it appears to the presiding judge or magistrate that-*
>
> > *(a) in the interests of justice an accused person should have legal aid in the preparation and conduct of his defence or appeal as the case may be; and*

(b) his means are insufficient to enable him to obtain legal services,

the presiding judge or magistrate, as the case may be, shall certify that the accused ought to have such legal aid and upon such certificate being issued, the Registrar shall assign to the accused a legal aid provider which has an advocate for the purpose of preparation and conduct of his defence or appeal, as the case may be."

Regulation 22 of the legal Aid Regulation, 2018, GN No. 6 of 2018 provides that;

"For the purpose of facilitation of provision of legal aid services to persons in custody, the officer in-charge of the police station or prison shall distribute or cause to be distributed application form to each person in custody who intends to access legal aid services."

From the foregoing provision it is evident that legal representation in criminal cases for the accused persons in custody requires a formal application through respective officers in charge. The application can also be made orally at the trial court upon which the court issues a certificate for legal aid assigning the legal aid provider to the accused. As submitted by the respondent from the trial court's proceeding it is not revealed

whether the appellant prayed for such assistance and was denied. Since he failed to substantiate his claims, this ground crumbles.

Turning to the third ground of appeal, the appellant challenged the trial magistrate for failure to order DNA test in order to prove whether he was responsible for PW2's pregnancy. It is on record at page 15 of the typed proceedings the appellant when cross examining PW3 prayed for the DNA test, however no order was given to that effect. Although the DNA testing has an ability to exonerate the wrongly convicted and identify the guilty, the Court of Appeal in **Robert Andondile Komba V D.P. P,** Criminal Appeal No. 465 of 2017, [2020] TZCA 277; (03 April 2020) made an informed decision on the matter as follows;-

> *"Proof by DNA test is neither a legal requirement nor the practice in our Jurisdiction. Many a culprit would walk scot free if that were the case, in our view, and the suggestion by the appellant is impractical"*

I fully subscribe to the above authority as in the instant appeal one thing is obvious the fact that during the trial PW2 was still pregnant thus the child was unborn for testing. I therefore dismiss this ground of appeal for lack of merit.

Regarding the fourth ground on credence of evidence of PW3, I am in agreement with the respondent/ Republic on the trite

principle of law in the decision in the case of **Nyerere Nyague** (supra) to the effect that the appellant had to cross examine the said witness and clear all his doubt regarding her testimony. The fact that he did not challenge PW2's testimony draws inference that he conceded with her testimony. This ground therefore crumbles. The same applies to the fifth ground. On the sixth and last ground the same has been dealt with in the course of determining the first ground.

For the reasons discussed, this appeal lacks merit consequently, I dismiss it in its entirety for want of merit.

Dated and delivered at Moshi this 6th day of July, 2020.

S. B. MKAPA

JUDGE

06/07/2020