**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CRIMINAL APPEAL NO.49 OF 2020**

(Originating from District Court of Hai at Hai in Criminal Case No. 181/2019)

**SOLOMONI SIRIKWA SAVUNYU.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

**MUTUNGI .J.**

The appellant Solomoni Sirikwa Savunyu is appealing against the decision of Criminal Case No. 181 of 2019. It all started by the respondent charging the appellant at the Hai District court, with two offences, one, of rape contrary to **section 130(2) (e) and 131 of the Penal Code, Cap.16 R.E.2002** and two, for impregnating a school girl contrary to **section 60A (3) of the Education Act [Cap. 353 R.E.2002]** as amended by **section 22 of the Written Laws Misc. Amendment No.2, Act No.4 of 2016**.

After the evidence of six (6) witnesses led by the prosecution namely: PW1-Agness Kumbwaeli Massawe, PW2-Cesilia Dominick Kulaya, PW3-Kumbwaeli Eliapenda Massawe, PW4-Loveness Oness Ndosa, PW5-Dr. Grace Zakayo Lyatuu and PW6-9558DC Stanley, the trial court was satisfied that the case against the appellant has been proved beyond reasonable doubt and proceeded to convict and consequently sentenced him to thirty years imprisonment for each count and sentence to run concurrently. Aggrieved he preferred this appeal stating seven (7) grounds to wit: -

1. That the prosecution did not prove the case against the appellant beyond reasonable doubts as required by the law.

2. That the court erred in law by convicting the appellant on circumstantial evidence without having any collaboration by the witnesses who witnessed the appellant raping the complainant.

3. That the court erred in law by convicting the appellant on the offence of rape by relying on the PF3 without taking consideration the duration when the complainant visited the medical doctor for the test.

4. The court erred in law by convicting the appellant on the offence of impregnating a school girl by relying only on the DNA test which was not genuine and not presented by either the maker or the expert who conducted the test.

5. The court erred in law by convicting the appellant on the offence of impregnating a school girl by relying on the attendance register while the student was no longer a student.

6. The court erred in law by failing to evaluate and to consider the defence evidence.

7. That the court erred in law by relying on the invalid proceedings as there was no good reason assigned for transfer of the file from one Magistrate to another.

At the hearing Mr. Lyimo and Praygod Manase Learned Advocates appeared and urgued the appeal on behalf of the appellant. Mr. Kibwanah Senior State Attorney on the other hand appeared on behalf of the respondent. In consensus the parties agreed this appeal be argued by way of written submissions with the following filing schedule; The

Appellant's submission to be filed on or before 12/10/2020, Respondent's reply on or before 26/10/2020, rejoinder if any on or before 2/11/2020 and the judgment was fixed on 19/11/2020.

Submitting on the grounds of appeal, the Learned Advocate for the appellant consolidated the 1st, 2nd and 3rd grounds of appeal which he contended that, they all relate to the failure by the prosecution side to prove their case beyond reasonable doubt. Supporting such argument, Mr. Manase averred that the burden of proof in criminal cases always lies upon the prosecution side, who are required to prove their case beyond reasonable doubts. This is as per the case of **Awadhi Waziri v. R, Criminal Appeal No. 303/2014, CAT at Arusha (Unreported)**. That in the case at hand the prosecution case was solely based on the evidence of PW1-victim, PW2-Headmisstress, PW3-Complainant's father, PW4-Student, and PW5- a Medical Doctor, who adduced either contradictory or hearsay evidence which had no effect at all of proving the prosecution case on the standard provided for in criminal jurisprudence.

Displaying the contradiction purported to be adduced by the prosecution witnesses, the learned Advocate for the appellant pointed out that PW1 claimed to have sex with the appellant two times through-out their alleged relationship. Glancing through the court's proceedings at page 7, PW1 claimed, the first time she had sex with the appellant at the forest and the second time was at the appellant's house. However, in her letter admitted as "**Exhibit D1**" PW1 claimed that the second time she had sexual intercourse with the appellant was in the school office.

Another contradiction was on the two different letters written by PW1 on the same date but claiming to be impregnated by two different persons. Additionally, the contradiction was also revealed through the evidence of PW1 who alleged that PW4 used to be sent by the appellant to call her so that they can meet, but surprisingly, PW4 denied having knowledge of the sexual relationship between PW1 and the appellant.

From such contradictions, Mr. Manase insisted that even though the best evidence in rape cases has to come from the victim but as per **Selemani Makumba vs. Republic [2006] TLR 348**, where it appears that such evidence is full of

contradictions and inconsistences especially on the key issues, the court should not regard the same as the best evidence. Supporting his argument he cited the case of **Mohamed Saidi Matula vs. Republic [1995] TLR, 3 and Athuman Waziri vs. Republic (Supra)**.

With regard to the DNA test results which the court relied upon in convicting the appellant for impregnating PW1, the appellant's Advocate reiterated, it is trite law that, where medical statements are used as evidence in court the accused person must be informed of his right to require the person who made the report to be summoned for cross examination. This is per **Section 240(3) of the CPA**. Unlike, in the present case the DNA test results were not tendered by the person who made the report nor was an opportunity to cross examine the maker afforded to the appellant. Such failure to give the appellant an opportunity to cross examine as per S.240 (3) supra not only led to prejudice on the part of the appellant but also caused serious miscarriage of justice. Backing up his argument, Mr. Manase cited the cases of **Sprian Justice Tarimo vs. Republic, CAT (Criminal Appeal No. 226 of 2007**, and **Agness Dorice Lindu v. Republic (1980) TLR**.

Basing on the errors pointed above, it was the appellant's Advocate's prayer that the said results be expunged from the record.

Concerning how the court failed to consider and evaluate the evidence of the appellant, Advocate Manase averred that, even though the appellant tendered several documents admitted as "Exhibits D1" and "D2" the court never consider the same while making its decision. Had the said documents been considered by the court, it would have cast enough doubts on the prosecution case and eventually reach a just decision by acquitting the appellant. Supporting this argument Mr. Manase cited **Section 213 (1) of the CPA**, and the case of **Leonard Mwanashoka v. Republic, Criminal Appeal No. 226 of 2014**.

The Learned Advocate for the appellant further submitted that, the court erred in law by relying on invalid proceedings as the same contravened **S.214 of the Criminal Procedure Act**. This is so because, the case subject to this appeal was heard by three different trial Magistrate but there was no reason explained for the same to be transferred from Hon A.

R. Ngowi to Hon. J. A. Swai, as well as from J. A. Swai to Hon. D. J. Msoffe.

From the reasons expressed in his submission, the Learned Advocate for the appellant prayed before this court, this appeal be allowed and the decision of the trial court be quashed and set aside.

Countering the appellant's side submission in chief, Mr. Kibwanah started by acknowledging the principle that, the burden of proof in criminal cases lies upon the prosecution side and this is per **S.110 (1) of the Tanzania Evidence Act** and also reiterated in the case of **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda v. Republic [2006] T. L. R CAT, 395**.

Mr. Kibwanah further argued that, the appellant was convicted on the strength of the evidence of the prosecution side as per the cardinal principle that the best evidence must come from the victim. In view thereof the victim in the present case managed to identify the appellant as the person who raped and impregnated her by mentioning his name, the evidence which was also collaborated by PW2, PW3, PW5, and PW6.

Regarding the fourth ground of appeal, Mr. Kibwanah submitted that, the trial court didn't solely rely on the DNA test when convicting the appellant. Be it that the same is expunged from the record, the remaining evidence suffices to prove that, the appellant indeed raped and impregnated PW1.

As for the appellant being denied his right to cross examine the maker of the DNA test results, the Learned Senior State Attorney argued that, first of all the same was properly tendered. Following the prayer by the prosecution side to further cross examine the appellant pursuant to **section 147 (4) of the Evidence Act,** the DNA test was shown to the appellant. He identified it but refused to tender it as his exhibit. Considering it was the appellant who insisted on the DNA test results and the results were tendered following the proper procedure, Mr. Kibwanah prayed the same should not be expunged from the record and if so, the court should draw an adverse inference on the accused person as to why he objected the result be tendered in court.

On the fifth ground of appeal, it was the respondent's submission that, the trial court didn't rely on the attendance

register in convicting the accused person but rather, the evidence adduced by all prosecution witnesses that she was pregnant at the time she was still a student at Sawe Secondary School. That apart, the Learned Senior State Attorney also argued that, the trial Magistrate largely evaluated and considered the evidence of both parties and therefore the allegation by the appellant's Counsel are mere assertions with no proof.

Lastly, concerning the reasons for reassignment, Mr. Kibwanah reiterated that the proceedings reveals that the reasons for the transfer and re-assignment of the said case to the respective trial Magistrates had been expressed, and the accused was properly addressed in terms of **section 214 of the CPA.** He therefore prayed for the dismissal of this appeal, and the whole judgment and sentence of the trial court be upheld as the appellant was convicted and sentenced fairly.

What then was the history behind this case?

The victim (PW1) after was suspected to be pregnant following the school checking routine, she was examined by the Doctor (PW5). By then she was in form four as affirmed by the Headmistress (PW2). Upon interrogation she mentioned

the appellant's name and elaborated she had an affair with him he was among the teachers where she was schooling. She supported her words by reducing the same in writing and by mentioning PW4 one of her fellow students who knew what had been transpiring. Her father was dully notified (PW3) and the matter reported to the police.

Back to the grounds of appeal, I have examined the records of the trial court and the grounds of appeal in the light of the arguments of the rival submissions. I should hasten to say that despite the existence of other anomalies raised by the appellant, this appeal revolves on the issue, whether the prosecution case was proved beyond reasonable doubts. However, before I deal with the above question, I wish to remark on the procedural anomalies pointed out in grounds number 4 and 7 of the petition of appeal.

Starting with the allegation by the appellant that the trial court relied on the DNA test which was not genuine and not presented by the maker or expert who conducted the tests, it was the appellant's submission that this contravened **section 240 (3) of the CPA** which requires a medical witness to be called upon and the accused person to be informed

of his right to cross examine him. In his submission, the Learned Senior State Attorney argued that the trial court followed a proper procedure before admitting the DNA test results, and this is in accordance with **section 147 (4) of the Evidence Act.**

Having gone through the trial courts records, it is apparent that after the closure of the prosecution case, the appellant prayed for the DNA test to be conducted, the prayer which was granted by the trial court. It is also apparent that after such an order, the appellant and PW1 appeared before the Government Chemist at Arusha after the request for the test had been made by the office of the OC-CID Hai District. The report for parentage test was therefore addressed and sent to the office of OC-CID Hai District on 14/4/2020. That means the said report was in the OC-CID's custody until the date when the same was tendered and admitted before the court.

The record also reveals that, the DNA test results were tendered in court before the closure of the defence case, and the same was tendered by the Prosecutor on 22/6/2020 after he was granted an opportunity to re-cross examine the appellant. Despite the allegations by Mr. Kibwanah that this

was the proper procedure as per the Evidence Act, it is clear from the outset that **section 147 (4) of the Evidence Act** provides for the procedure of recalling a witness which is totally different from what the trial court did. What the trial court did was to grant an order for re-cross examining the appellant after he prayed to close his case and thereafter allowed the prosecutor to tender the DNA results which was however admitted as **"Exhibit D2"**. Not only that the procedure is new to me but also the same contravened the exhibits tendering procedures. I am thus in all fours with the Appellant's Counsel that, the DNA test results ought to be expunged from the record. This ground is therefore valid and allowed.

As far as the 7th ground of appeal is concerned, the appellant's Advocate contended that failure by the succeeding Magistrate to give the reasons for re-assignment of the case to the appellant is contrary to **Section 214 of the CPA** and therefore nullifies the whole proceedings. Responding to this allegation, the Learned Senior State Attorney submitted that, the succeeding Magistrate clearly addressed the appellant on the matter and from there she proceeded recording the appellant's defence.

I have keenly gone through the trial court's record and discovered that, it is undisputed that the case was partly heard by three different Magistrates one, Hon. A. R. Ngowi-RM, Hon. D. J. Msoffe - RM and Hon. J. G. Mawole - SRM. Hon. A. R. Ngowi heard the prosecution case, Hon. D. J. Msoffe read the ruling and ordered a DNA test be conducted, and whereas Hon. Mawole heard the defence case. As clearly submitted by Mr. Kibwanah - SSA, it was Hon. J. G. Mawole who addressed the appellant in terms of **section 214 CPA**. Meaning that while the case was transferred from Hon. Msoffe to Hon. Mawole the appellant was addressed accordingly. The dispute therefore, is whether failure by Hon. Msoffe to address the appellant in accordance with section 214 CPA is fatal?

This court is alive with of the procedure that, before proceeding with the case partly heard by another Magistrate or Judge, the succeeding Magistrate is supposed to give the reasons for the transfer to the parties and address them in terms of Section 214 CPA failure of which may render the proceedings a nullity. However, in order to conclude that such omission is fatal or not the question will be whether failure to address the parties led to a miscarriage of justice.

See the case of **Twaha Ally and Another v. Republic, Criminal Appeal No.78 of 2004 (CAT) (Unreported)**.

Turning now to the facts at hand, despite the absence of the reason for transfer of the case from Hon. Ngowi to Hon. Msoffe, still the appellant had a chance before Hon. Mawole where she addressed him accordingly. Besides, if at all the appellant had any concern with failure by Hon. Msoffe to properly address him, he could have raised it and prayed for re-summoning of the prosecution witnesses. Since he admitted and agreed to proceed with the defence case, it is obvious that this allegation is an afterthought. The same falls by the wayside as it is unmerited.

Adverting to the issue whether the prosecution case was sufficiently established, I wish to restate the obvious that, in criminal trials the burden of proof lies on the prosecution and the standard thereto is proof beyond reasonable doubts (See **Mwingulu Madata and another v. R Criminal Appeal No. 257 of 2011 (unreported); Nathaniel Alphonce and Benjamin v. R [2006] TLR 395; Said Hemed v. R [1987] TLR 116 CAT**. This burden never shifts to an accused person since no duty is cast on the

accused to establish his innocence **Matula vs. Republic, [1995] TLR 3**.

Relating the principle to the available facts, it is evident from the record that the trial court relied on the evidence of PW1, PW2, PW3, PW4, and PW5 in collaboration with the letter written by PW1 and the attendance register collectively admitted as "Exhibit P1", PF3 admitted as "Exhibit P2", and the DNA test results admitted as "Exhibit D2". As earlier expressed, the DNA test results were erroneously admitted in court and therefore expunged from records. The question now is whether the remaining evidence suffices to uphold a conviction against the appellant?

It is obvious that the appellant was charged and convicted for Rape and impregnating a school girl. Both counts fall under the ambit of the sexual offences and therefore its proof can solely rely on the evidence of the victim which is always regarded as the best evidence. One of the key principles in reviewing cases involving the offence of rape is that in view of the essential nature of the crime of rape where only two persons are usually involved, the testimony of the victim is crucial and must be analyzed with extreme caution. Thus the

credibility of the victim is the most crucial aspect. If the testimony of the victim is credible, convincing, consistent with human nature, in the normal course of things, the accused may be convicted solely on the basis thereof. See **Mohamed Said v. Republic, Criminal Appeal No. 145 of 2019(TZCA) 252, and Section 127(7) of the Evidence Act**.

In the case of **Shaban Daudi v. Republic, Criminal Appeal No.28 of 2000 (Unreported)**, when the court was discussing on how the credibility of a witness can be determined had this to say;

*"The credibility of a witness can also be determined in two ways; one, when assessing the coherence of the testimony of that witness, two, when the testimony of that witness is considered in relation with the evidence of other witnesses including that of the accused person."*

I have carefully scrutinized the evidence adduced by the prosecution side, it is apparent that only PW1 gave an account of what really transpired. All other witnesses testified what they had been told by PW1 and thus renders their evidence as hearsay. PW1's testimony clearly established that, she had an affair with the accused person as a result he

impregnated her. Apart from that PW1's evidence also reveals that PW4 had knowledge of the said relationship and the appellant used to send her to PW1. Concerning the place where the appellant took PW1 to have sex with her, PW1 alleged that it was at the appellant's house.

As rightly submitted by the Appellant's Advocate, PW1's evidence had some inconsistence when compared to the evidence adduced by other witnesses especially PW4 whom she alleged to be her best friend. Unlike PW1, PW4 in her testimony alleged that she had no knowledge of the relationship between the appellant and PW1, and that she was informed of the same after PW1's termination from school due to the pregnancy.

During his defence, the appellant testified that PW1 wrote her statement at the teacher's office and she claimed that the one who is responsible for her pregnancy was IZACK JUMA but on the same date, she changed the story and wrote another letter pointing an accusing finger to the appellant. The said letters were collectively admitted in court as "**Exhibits D1 and D2"**. The court was to consider these exhibits as they had at a great extent shaken the prosecution case.

There is no dispute that after the discovery that PW1 was pregnant, PW1 was taken to the teacher's office and asked about the one responsible for the pregnancy. It is even clear that PW1 wrote a letter mentioning the one who was responsible, but to my surprise, the prosecution side never tendered such letter instead the appellant tendered the copies of the said letters which were admitted in court. The letters depict that, the appellant raped PW1 inside his office at school, but while testifying in court PW1 alleged that it was at the appellant's house.

At this juncture, I am in one with the appellant's Advocate that, if at all the Trial Magistrate would have considered the exhibits tendered by the appellant she could have reached to a different findings as the same reveals how PW1 was not trustworthy. The trial court should have been prudent enough to inquire from the evidence to ascertain the victim's credence.

In the case of **John Gilikola v. Republic, Criminal Appeal No.31 of 1999 CAT at Mwanza**, the court stated that: -

*"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability; in*

*the same way un-explained delay or complete failure to do so, should put a prudent court to inquiry".*

Furthermore, the Court of Appeal also laid down a principle in the case of **Aloyce Maridadi v. Republic, Criminal Appeal No.208 of 2016 CAT,(Mtwara)** that: -

*"Every witness is entitled to credence and must be believed and his testimony accepted, unless there are good and cogent reasons not believing a witness."*

Due to the existence of the already pointed inconsistence in the victim's evidence, which in my view the same goes to the root of the case, it is my considered opinion that the said evidence is doubtful which forms a cogent reason why her testimony cannot solely be relied upon to warrant the appellant's conviction.

Having examined the evidence in totality, I find the 1st, 2nd, 3rd, 4th, 5th, and 6th grounds of appeal raised with merits and consequently proceed to allow this appeal. The conviction and sentence metted out by the trial court are quashed and set aside, the appellant is to be set free, unless held for some other lawful cause.

It is so ordered.

**B. R. MUTUNGI**
**JUDGE**
**20/11/2020**

**Court: -** Judgment read this day of 20/11/2020 in presence of the Appellant and Mr. Isack Mangunu (S.A) for the Respondent.

**B. R. MUTUNGI**
**JUDGE**
**20/11/2020**

RIGHT OF APPEAL EXPLAINED.

**B. R. MUTUNGI**
**JUDGE**
**20/11/2020**