IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 28 OF 2020
(Originating from the District Court of Kiteto at Kibaya, Criminal Case No. 49 of 2019)

MAGEGU RUTANDULA @KISANDU ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

8th & 17th December, 2020

Masara, J.

In the District Court of Kiteto (the trial Court), the Appellant stood charged with two counts; namely, Rape, contrary to Section 130(1) (2) (e) and 131 (1) of the Penal Code Cap. 16 [R.E 2002] and Impregnating a Secondary Pupil (sic), contrary to section 60A of the Education Act, Cap. 353 as amended by section 22 of Act No. 4 of the Written Laws Miscellaneous Amendment) Act, No. 2 of 2016. After hearing, the trial court held that the prosecution had proved the case against the Appellant beyond reasonable doubts. He was convicted of both counts and sentenced to serve a custodial sentence of 30 years in each count. The sentence was ordered to run concurrently. The Appellant was aggrieved by that decision, he has therefore preferred this appeal on the following grounds:

a) *That, the District Court Magistrate erred in law and fact for convicting the Appellant without taking into account that the evidence given by prosecution witnesses was not enough to prove the case against the Appellant beyond reasonable doubt;*

b) *That, the trial Court grossly erred to properly analyze the evidence on record hence reached into unjust erroneous decision against the Appellant;*
c) *That, the trial Court grossly erred in law and fact by shifting the burden of proof to the Appellant to prove his innocence rather than the Republic to prove the case beyond reasonable doubt;*
d) *That, the purported conviction of the Appellant is illegal as the case against the Appellant was not proved beyond reasonable doubt;* and
e) *That, the judgment and finding of the Trial Court are all a nullity for contravening the law.*

Basing on those grounds, the Appellant prays that the appeal be allowed by quashing the conviction, setting aside the sentence and he be set free. At the hearing of the appeal, the Appellant appeared in person, unrepresented, while the Respondent was represented by Ms. Tusaje Samwel, learned State Attorney. The appeal was argued *viva voce* via video link.

Before dealing with the substance of the appeal, it is important that brief facts leading to the conviction of the Appellant are encapsulated. It was the Prosecution evidence that sometimes in December 2018, the victim (PW2), who was a Form III student at Engusero Secondary School, met the Appellant at Engusero area. The Appellant asked her to have sexual intercourse with him. PW2 agreed and they had sexual intercourse in a bush for the first time. After three days they met at the same area again and had sexual. Since the Appellant was a Secondary School student, he left for school. According to PW2, since December 2018 she lost her menstrual period. In March 2019, PW2 was examined at the school and it was revealed that she was pregnant. The headmaster reported the matter at Engusero

Ward office, who in turn reported the incident at Matui Police Post. When PW2 was interrogated, she mentioned the Appellant as the person responsible for her pregnancy. On 6/3/2019, PW2 was examined again at Engusero Health Centre by PW1 who confirmed that she was three months pregnant. PW1 filled a PF3 which was admitted as exhibit P1. PW5 testified that he was the victim's class teacher at Engusero Secondary School. She tendered the attendance book which was admitted as exhibit P2.

In his defence, the Appellant denied commission of the offence. He admitted that in December 2018, he was at Engusero at his brother's house. The Appellant denied to have ever had sexual relationship with the victim stating that he does not even know her. He was arrested in March 2019 and taken to Police and later he was arraigned to court.

Submitting in support of the first ground of appeal, the Appellant contended that the victim did not prove her age that she was under 18 years of age. He added that the Prosecution case was weak as they failed to prove the charge beyond reasonable doubts. On the second ground, he submitted that the victim (PW2) testified that she was 16 years old but no one supported her version. That there was no evidence from the parents or birth certificate proving that she was pregnant as the Prosecutor stated that the victim was not pregnant and was continuing with her studies. The Appellant added that the trial Magistrate failed to evaluate the evidence, referring to pages 6, 8, 11, 14 and 15 of the proceedings.

Regarding the third ground of appeal, the Appellant contended that the trial magistrate not shifted the burden of proof on him instead of weighing the weight of the Prosecution evidence. Expounding the fourth ground of appeal, the Appellant averred that the trial magistrate failed to consider his defence. He stated that he asked for a DNA test to be conducted to prove the charge of the second count but it was not done as the Prosecutor said that PW2 was not pregnant and was in school. For him, failure to obtain DNA test made the evidence on the second count extremely weak.

Elaborating the fifth ground of appeal, the Appellant stated that exhibit P5 which was tendered by PW5 was not read in Court after it was admitted. Such failure and considering the prosecutor's statement about PW2 being in school made the evidence regarding impregnating her untrustworthy. The Appellant concluded that the trial magistrate convicted him on flimsy and weak evidence. He thus prayed to be acquitted so that he continues with studies.

Contesting the appeal, Ms Tusaje submitted that all the elements of the two counts were proved based on the evidence of the victim who stated that the Appellant was her boyfriend having met in December 2018 at Engusero where the Appellant had visited his brother. That they made love twice which made her pregnant leading to her suspension from school. The learned State Attorney maintained that as the Appellant admitted that he had visited his brother at Engusero in December 2018, it was highly probable that the offence was committed. On the issue of age of the victim, the learned State

Attorney submitted that the Appellant had an opportunity to cross examine the victim on her age and pregnancy but he did not do so. She cited the case of ***Nyerere Nyague Vs. Republic***, Criminal Appeal No. 67 of 2010 to support her position maintaining that failure to cross-examine amounts to admission of the facts stated. Regarding corroboration, the Learned State Attorney was of the view that in sexual offences, the best evidence is that of the victim; thus, PW2's evidence did not require corroboration.

Contesting the second ground of appeal, Ms Tusaje stated that PW1's evidence was clear that PW2 was three months pregnant, as it was also corroborated by the evidence of PW2 and PW5. She contested the Appellant's contention that the prosecutor stated that PW2 was continuing with her studies naming it as a hearsay as it is not backed with the records. On the third ground of appeal, Ms. Tusaje maintained that whereas it was true that the birth certificate of PW2 was not tendered, the evidence of PW2 and that of PW5 proved that the victim was a student.

On the fourth ground, the learned State Attorney contended that it is not true that the trial Court failed to consider the Appellant's evidence stating that both sides were accorded equal weight in the judgment. On the issue of DNA, the learned State Attorney argued that it is not a requirement of the law. Regarding the fifth ground of appeal, the learned State Attorney conceded that exhibit P2 was not read after it was admitted and ought to be expunged from the Court records. Ms. Tusaje insisted that with the uncontroverted evidence of PW2 and PW5 the case was proved beyond all

reasonable doubts. She cited the case of ***Seleman Makumba Vs. Republic*** [2006] TLR 379 to cement her views.

Having meticulously considered the trial court records, the grounds of appeal and the arguments made by the Appellant in support thereof and those in opposition from learned State Attorney, it is my considered view that the following issues call for the Court's determination: whether the victim (PW2) was raped by the Appellant; whether the victim (PW2) was impregnated, whether the evidence of both sides was properly evaluated and whether the prosecution proved the case beyond all the reasonable doubts.

Starting with the first issue, the Appellant denied to have committed the offence but admitted that in December 2018 the time when the alleged incident took place he was at Engusero where he had paid a visit to his brother who is a teacher. The Appellant maintained that the offence of rape was not proved as the victim's age was not proved. Ms Tusaje, on the other hand, maintained that there was such proof from the evidence of PW2, the victim, and PW5 who testified to be the victim's class teacher.

Considering that the Appellant was charged with the offence of statutory rape, one of the most important elements to prove is the victim's age. In the instant appeal, there was no witness who testified as to the age of PW2. The victim's alleged age of 16 years does not feature in any evidence, not even in the victim's own evidence. I therefore agree with the Appellant that there was no evidence which led to prove the age of the victim. Failure by

Prosecution to prove the age of the victim constituted a fatal omission whereby conviction under Section 130 (1)(e) of the Penal Code cannot be sustained. There is a plethora of authorities to the effect that failure to prove the victim's age in statutory rape cases is fatal. In the case of ***Projestus Zacharia Vs. The Republic***, Criminal Appeal No. 162 of 2019 (unreported), the Court of Appeal held;

> *"In the case at hand, as earlier indicated in the particulars of the offence, the age of the victim was not stated and* ***neither was it said in the evidence of the victim or her parent as reflected at page 8 to 11 of the record of appeal*** *...* ***This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim.*** *"*
> (emphasis added)

The Court of Appeal in ***Robert Andondile Komba Vs. Republic***, Criminal Appeal No 465 of 2017 (unreported), this aspect was explained extensively. The Court observed and held:

> *"Not only that, but in cases of statutory rape, age is an important ingredient of the offence which must be proved. We are not prepared to hold that citing of age of the victim is akin to proving it, and this is not the first time we make such observation. In Solomon* ***Mazala Vs Republic*** *and in* ***Rwekaza Bernado Vs Republic*** *(supra) we referred to the case of* ***Andrea Francis Vs Republic****, Criminal Appeal No.173 of 2014 (unreported) where the Court stated:*
>
> *".....it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise the citation by magistrate regarding the age of a witness before giving evidence is not evidence of that person's age."*
>
> *Before reproducing the above paragraph from the case of* ***Andrea Francis Vs Republic*** *the Court stated this in* ***Solomon Mazala;***
>
> *"Even if we go further and take the liberty to assume that the fact that the trial Court conducted a voire dire examination after*

being satisfied that PW1 was under eighteen years of age, that the law."

Therefore, it is our conclusion that there was no proof of PW1's age because what was cited in the PF3, even if there was no any other defect, was not proof of her age as required by the law. In the end in her submissions regarding the grounds of appeal, ***our conclusion is that there was no proof of statutory rape because there was no proof of the victim's age.*** *On that around we allow the appeal."* (emphasis added)

Similarly, in the instant appeal the age of the Appellant was not stated in the evidence. It was only mentioned in the particulars of offence and when taking the particulars of the victim before testifying where she was recorded to be 15 years of age. This does not amount to proof of the same as per the authorities above cited.

Regarding the Appellant's conviction on the second count, this Court is of the view that failure to prove the offence in the first count makes his culpability on the second count rather illusory. In addition, other than the evidence of PW1, which evidence was to the effect that PW2 was pregnant, there was no evidence connecting the pregnancy to the Appellant. While the complaints made by the Appellant regarding the victim being in school are not backed by the record, in his evidence he had asked the Court to call the victim so that the child could be observed. Notably, the record is silent on the pregnancy of the victim even when she testified in July 2019. It was expected that by that time the pregnancy would be in an advanced and notable stage, but no such record is made.

Before finalising this judgment, I have noted a procedural irregularity in the trial Court records. The trial commenced with H. M. Hudi, Resident Magistrate who heard the evidence of PW1 and PW2. On 6/9/2019 the case was taken over by another Magistrate, Hon. M. S. Sasi, RM, who heard the case to its finality. There is no record to show that he recorded reasons for taking over nor did he give opportunity to parties to comment on the take over with a view to recall any of the witnesses. This is contrary to the dictates of the law as provided under section 214(1) of the Criminal Procedure Act. The decision of the Court of Appeal in ***Priscus Kimario Vs. Republic***, Criminal Appeal No. 301 of 2013 (unreported) is instructive in this aspect. In that case it was held:

> *"We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded. If that is not done it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."*

Failure to comply with the mandatory provisions of the law on take over of magistrate renders the trial a nullity. Even if there were no other grounds to acquit the Appellant, this irregularity itself suffices to determine the suit. If we were to expunge the evidence of PW1 and PW2 and having already expunged the school attendance register, the Prosecution case is obviously rendered bare and cannot sustain the conviction of the Appellant.

Based on the above reasons, the appeal has merits. I see no reasons to discuss other grounds of appeal considering that the first ground alone

sufficiently disposes the appeal. The trial Magistrate should have acquitted the Appellant when the Prosecution failed to lead evidence to prove the age of the victim. That omission is fatal, it cannot be cured by section 388(1) of the Criminal Procedure Act. It vitiates the proceedings and the decision of the trial Court.

Consequently, the appeal is allowed in its entirety. The conviction met against the Appellant is quashed and the sentence set aside. The Appellant should be released from prison forthwith unless otherwise lawfully held for another lawful cause.

Order accordingly.

Y. B. Masara
JUDGE
17th December, 2020.