IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO.39 OF 2020

(Arising from Judgment of the District Court of Chato at Chato in Criminal Case No. 280 of 2017)

LAZACK MUJITABA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 26.03.2020

Judgment Date: 02.04.2020

A.Z.MGEYEKWA, J

In the District Court of Chato, the appellant was arraigned and stand charged with two counts; 1st count; rape contrary to Section 130 (1) and (2) (e) and 131 (1) of the Penal Code

Cap.16. On 2nd count, impregnating a School girl contrary to section 60 A (3) of the Education Act, Cap.353 [R.E 2010].

A brief account of the evidence which led to the conviction of the appellant is as follows: On 1st count, it was alleged by the prosecution that on 15th June, 2017 at about 20:00 hrs at day time at Majengo Village within Chato District in Geita Region, the appellant did unlawfully had sexual intercourse with one Grace D/O Kambire a girl of 15 years old without her consent.

On 2nd count, it was alleged by the prosecution that on 15th June, 2017 at about 20:00 hrs at day time at Majengo Village within Chato District in Geita Region, the appellant did unlawfully had impregnating one Grace D/O Kambire knowingly that she was a student at Katema A Primary School.

Having, accepted the prosecution's version to be true the trial court convicted the appellant on the 1st and 2nd counts, He was sentenced 30 years imprisonment for the 1st and 2nd count,

and the sentences were to run concurrently. Undaunted, the appellant has preferred this appeal. In the petition of appeal he has raised six grounds of appeal as follows:-

1. *That, appellants' conviction was wrongly uneven and erroneously based on lacking ingredients of rape as far as no reliable and sufficient evidence was led to establish penetration, victims' age; and whether she was a school girl by then.*

2. *That, as the appellant was the fourth suspect to be arrested in connection of the crime in question with no comments on those discharged co-suspects; the trial court erred in law and facts to rely on inconclusive, theoretical and suspicious evidence which do not support by scientific evidence of DNA profile test to link him with the alleged crime.*

3. *That, the trial court erred in law and facts to rely on contents in exhibit P1 and 2 through the same were not read over into court thus of is unsafe to commit the appellant on that basis.*

4. *That, PW4 did not prove his competent qualification as a gynecologist expert sufficed to justify reception of this evidence into court and relied upon but the trial court had unlawful overlooked this fact.*

5. *That, the trial court erred in law and fact to base on uncorroborated evidence of the prosecution to commit the appeal.*

6. *That, the trial court erred in law and facts to convict the appellant based on prosecution evidence which is too dubious as in contrast to the strong and probative defence contention.*

Before me, the appellant entered an appearance in person, unrepresented whereas the respondent had a service of Ms. Fyeregete, learned Senior State Attorney.

When I asked the appellant to address me on his grounds of appeal, the appellant prays this court to adopt his grounds of appeal and asked the Republic to submit first while he deferred his right to rejoin.

On her part, Ms. Fyeregete supported the appeal concerning the 2nd count and supported conviction and sentence on the 1st count.

Submitting for the 1st ground of appeal, the learned State Attorney stated that the victim testified that the appellant approached her and they had sexual intercourse without using a condom. Ms. Fyeregete submitted that PW1 words proved that penetration took place and her words reveal that a penis was inside her vagina, therefore, penetration was proved.

The learned State Attorney admitted that the victim's age was not established, PW1 testified without mention her age, and her father also did not state the age of PW1. Ms. Fyeregete went on to submit that although the age of the victim was not established the age of PW1 is mentioned on the charge sheet that PW1 was 15 years old. Ms. Fyeregete fortified this court by referring to the case of **Ismail Ally v R** Criminal Appeal No. 112 of 2016. She went on stating that the appellant did not cross-examine the victim that means he consented. She asked this court to disregard this ground of appeal.

Submitting for the 2nd ground of appeal, Ms. Fyeregete rebutted that the appellant was arrested with other culprits, the

appellant was the only suspect who was arrested therefore she urged this court to dismiss this ground of appeal.

As to the 3rd ground of appeal, Ms. Fyeregete submitted that the record does not show if Exh.P1 was read over therefore she urged this court to expunge Exh.P1 from the court records but the court will still find that the evidence on record are heavy enough to ground a conviction.

In relation to the 4th ground of appeal, the learned State Attorney submitted that PW4, when testifying mentioned his qualifications, therefore, he was a qualified Doctor and he tendered the Exh.P1.

As to the 5th ground of appeal, Ms. Fyeregete in rape cases victim's evidence suffice to ground a conviction. To support her argument she cited the case of **Juma John v R** Criminal Appeal No.119 of 2009 Court of Appeal, Mwanza (unreported), it was observed that the evidence is that of the victim herself, therefore, there is no need for corroboration.

Submitting for the 6th ground of appeal, Ms. Fyeregete argued that the prosecution side proved its case based on evidence of the victim, she explained how she met the appellant as her first lover and they made love, therefore, she proved the case beyond a reasonable doubt.

Concluding, Ms. Fyeregete urges this court to uphold the decision of the lower court.

The appellant had no much to rejoined rather he stated that the victim did not prove if she was a student and ended praying this court to find that he is innocent and set him free.

Having considered the grounds of appeal and the submissions made by the learned State Attorney and the appellant, I will determine the issue of ***whether or not the present appeal is meritorious***.

In relation to the 2nd count, as the record reveals, the prosecution did not prove the 2nd count beyond a reasonable doubt. I am saying so because no DNA test was conducted to

prove that the appellant impregnated the victim. Thus, I am in accord with the appellant and the learned State Attorney for Republic that the 2nd count was not proved beyond a reasonable doubt; therefore, the 2nd ground is answered in affirmative.

Additionally, I find merit on the 3rd ground of appeal that the alleged PF3 Exh.P2 of the appellant was wrongly admitted, and the same was acted upon by the trial court, regardless of its shortcomings in both the law and facts. The procedure for admission PF3 was admitted but was not read aloud. In the case of **Omari Iddi Mbezi v Republic**, Criminal Appeal No. 227 of 2009 (unreported). In the trial under scrutiny, on page 8 of the trial court proceedings, it is evidently shown that the PF3 upon admission as exhibits PE2 was not read over to the appellant as required by the law thus the same is a fatal irregularity. Therefore, I proceed to expunge Exh.PE2 from the court records. The 2nd ground of appeal is answered in affirmative.

Addressing the 1st ground of appeal, it goes without KUSITA that penetration which is an essential ingredient in rape cases was not proved. It was the duty of the prosecution to prove beyond a reasonable doubt that the accused took part in an act of sexual penetration with the victim. In the instant appeal, PW1 evidence does not reveal if she was penetrated with a blatant object, she was required to explain clearly how penetration took place. In record, PW1 testified that the appellant was her boyfriend and they made sex without using a condom. PW1 did not narrate how they performed the said sex the same does not establish penetration. In the case of **Kayoka Charles v R** Criminal Appeal No. 325 of 2007, the Court of Appeal held that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. Failure to that penetration is not proved.

Additionally, there were none of the prosecution witnesses proved that penetration took place; PW3 (Doctor) examined

PW1 to find out if she was pregnant he did not examine if there were any bruises or blood stains to prove penetration. It is trite law that for the "offence of rape "*...there must be unshakeable evidence of penetration*." In the case of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal considered whether or not the complainant had been raped by the appellant and observed: -

> " *True evidence of rape has to come from the victim, of an adult, that there was penetration and no consent, and* ***in the case of any other woman where consent is irrelevant, that there was penetration***..." *[Emphasis added]*.

I have carefully considered the circumstances surrounding this case and found that penetration was not proved, therefore, I found that the evidence was not watertight to convict the appellant for an offence of rape, unless there are other evidence on record to support the offence of rape.

Another ailment pointed out by the appellant is that the age of the victim was not proved; I have revisited the trial court

records and found that none of the prosecution witnesses proved the age of the victim. It was important for the prosecution to prove the age of the victim that she was under the age of 18 when the alleged act of sexual penetration took place. I understand that a parent of the victim is in a better position to know the age of her/his child as it was observed in the case of **Salu Sosoma v R Criminal** Appeal No.31 of 2006 whereas the Court of Appeal observed that:-

> *"... a parent is better positioned to know the age of his child."*

In the instant appeal, the victim's father did not mention the age of the victim. Therefore, the age of the child was not established. The law requires that the citation in a charge sheet relating to the age of an accused is not evidence, and even the citation of the victim before giving evidence is no evidence. As it was held in the case of ***Andrea Francis v Republic***, Criminal Appeal No. 173 of 2014 as stated by the Court of Appeal:-

"...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 a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age."

Guided by the above provision of the law, it was not proved that the age of the victim is under the age of eighteen years. Therefore, it was required for the prosecution to prove the age of the victim either by one of the victim parents that the victim was less than 18 years. Failure to that statutory rape was not established. Therefore, section 130 (1), (2) (e) of the Penal Code Cap.16 [R.E 2019] was not rightly invoked by the trial court.

With the foregoing observation and the findings which I have made suffices to hold that the trial court's conviction against the appellant was not proved beyond reasonable doubt and occasioned to failure of justice on the part of the appellant.

Under the circumstances, I allow the appeal. I quash the conviction and set aside the sentence. I order the immediate release of the appellant from prison unless he is lawfully held.

Order accordingly.

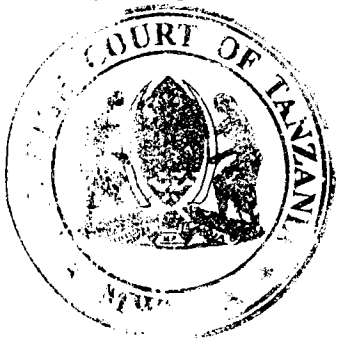
DATED at Mwanza this 2nd April, 2020.

A.Z.MGEYEKWA

JUDGE

02.04.2020

Judgment delivered on this 2nd April, 2020 in the presence of Ms. Fyeregete State Attorney and the appellant.



A.Z.MGEYEKWA

JUDGE

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Right to appeal full explained.