IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 95 OF 2019

(Originating from the Resident Magistrate's Court of Arusha, Criminal Case No. 158 of 2016)

MOHAMED ABDALLAH TUPA ..... APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

11th December 2020 & 29th January, 2021

Masara, J.

This Appeal arises from the decision of the Court of the Resident Magistrate Arusha (the trial Court), where the Appellant, Mohamed Abdallah Tupa, was convicted of 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 School Girl, contrary to section 35(3) of the Education Act, No. 25 of 1978 read together with Rule 5 of the Education (Imposition of Penalties to persons who Marry or Impregnate a School Girl) Rules 2003, G.N No. 265 of 2003. He was sentenced to serve a prison term of 30 years on each count, the sentence to run consecutively! He was further sentenced to 12 strokes of the cane. The Appellant was aggrieved and has preferred this Appeal challenging his conviction and sentence thereof. The appeal is grounded on the following points:

a) *That, the learned trial Magistrate erred in both law and fact when she failed to scrutinize and evaluate the evidence of PW1 the victim as a result arrived on erroneous decision;*

b) *That, the learned trial Magistrate erred in law and fact in not finding that the Prosecution evidence was full of doubts and failed to prove the charge against the Appellant beyond reasonable doubt;*
c) *That, the learned trial Magistrate erred in law by admitting exhibit P2 (Cautioned Statement) which was tendered by the Prosecutor contrary to the procedure;*
d) *That, the learned trial Magistrate erred in law and fact by failing to scrutinize the purported caution statement of the Appellant according to the law;*
e) *That, the learned trial Magistrate erred in law and in fact by not complying with the conditions imposed by the provisions of section 127(7) of the Evidence Act, Cap 6 R. E 2002;*
f) *That, the learned trial Magistrate erred in law and fact to convict the Appellant while the charge sheet was defective;*
g) *That, the learned trial Magistrate erred both in law and fact for contravening the mandatory rules of procedure and law; and*
h) *That, the learned trial Magistrate erroneously dismissed the testimony by the Appellant without evaluating the same and there were no reasons given for not relying on the same.*

To appreciate the grounds hereinabove stated, it is useful to contextualise the evidence that led to the Appellant's conviction. The prosecution paraded four witnesses whose evidence can be summarized as follows. PW1, JM (the victim), had completed Standard VII in September 2015 and was waiting to be enrolled as a Form I student at Meru Secondary School. On an unknown date and month, in 2015, she was sent by her mother to buy tomatoes in a neighbouring stall belonging to the Appellant's wife. The Appellant's wife was not around, so she was welcomed by the Appellant who was inside his house. PW1 was asked to make choice of tomatoes. After she chose the tomatoes, the moment she was about to leave the Appellant's house, the Appellant grabbed her and pulled her in his bed. He undressed her pants as well as his, he covered PW1's mouth with a piece of 'khanga' so that she could not

scream. The Appellant inserted his chururuu (penis) into her vagina and started raping her. Thereafter, the Appellant threatened her not to tell anyone or else he would kill her. PW1 adhered to the order, she did not disclose the incident to anybody. On another day, she was sent to buy carrots and onions in the same stall where again she found the Appellant in his house, beside his door. The Appellant told her to enter inside but PW1 refuted. Again, the Appellant pulled her inside and raped her again.

On 24/3/2016, PW2, the victim's mother, noticed that the PW1's stomach had grown bigger. She suspected her to be pregnant. She took her to a Hospital. On examination by PW4, she was found to be five months pregnant. On interrogation, the victim mentioned the Appellant as the person responsible for the pregnancy. The PF3 was filled in and was admitted as exhibit P1. PW2 reported the matter to the Police and the Appellant was arrested. On 27/7/2016, PW1 gave birth to a baby girl. PW3, WP 3714 D/CPL Kijakazi, was assigned to investigate the matter. She is said to have recorded the Appellant's cautioned Statement on 25/3/2016 where the Appellant confessed to have raped PW1 and impregnated her. The Caution Statement was admitted as exhibit P2.

Before hearing commenced, the Appellant requested a DNA test to ascertain if he was really responsible for the pregnancy. Due to technicalities, the test was not done. Unfortunately, on 17/2/2017 PW1 died. Following the death, the trial court ordered the case to proceed without the DNA test. In his defence, the Appellant denied to have raped and impregnated PW1

reasoning that it was for such reason he tirelessly requested for the DNA test. The Appellant further stated that he knew the victim the day he was arraigned in Court. Despite the defence, he was convicted and sentenced as stated hitherto.

At the hearing of this appeal, the Appellant appeared in court in person, unrepresented, while the Respondent was represented by Ms. Tusaje Samwel, learned State Attorney.

The Appellant argued the appeal partly, in the sense that he did not argue all the grounds of appeal as advanced. Submitting in support of the first ground of the appeal, the Appellant contended that the learned trial Magistrate failed to scrutinize the evidence of PW1 which was full of doubts as the witness failed to explain the date and month she was raped, mentioning only the year. In his view, the witness failed because the evidence was cooked up.

On the second ground of appeal, the Appellant stressed that he and the child did not undergo a DNA test since the Republic was not ready to do so. He added that the offence of raping a school girl was not proved and that in her evidence the victim did not prove penetration, she simply said that the Appellant raped her.

Regarding the third ground of appeal, the Appellant stated that the witness who tendered the cautioned statement did not inform the court when the

Appellant was arrested so as to ascertain whether the statement was recorded within the prescribed time. The Appellant contended that the admission of the statement was requested by a State Attorney and after its admission it was not read out in court. He therefore prayed the same to be expunged. On the last ground the Appellant's complaint is that the trial Magistrate erred in sentencing him to 30 years imprisonment for each count and ordering the sentence to run consecutively.

Contesting the appeal, Ms Tusaje submitted that the evidence of PW1 was properly scrutinized and that there was proof that it was the Appellant who raped her in 2015. The learned State Attorney admitted that specific date and month was not mentioned but she maintained that it is not fatal as it was not part of the charge sheet. Regarding a DNA test, Ms. Tusaje admitted that the same was requested but due to errors in the samples and that before the samples were taken PW1 died thus frustrating the exercise of undertaking a DNA examination.

Ms Tusaje conceded that PW3 did not state when the Appellant was arrested and that the cautioned statement was tendered by a State Attorney contrary to the law and procedure and that the same was not read out after it was admitted. Relying on the decision of the Court of Appeal in ***Jacob Mayani Vs. Republic***, Criminal Appeal No. 558 of 2016 (unreported), she prayed that the same be expunged from evidence. She was, however, of the view that expunging the statement does not waken the Prosecution case as the oral evidence of PW3, coupled by the evidence of the victim, prove what was

contained in the statement. She cited the case of ***Goodluck Kyando Vs. Republic*** [2006] TLR 367 to support her contention. On the last ground regarding the sentence imposed on the Appellant, Ms. Tusaje conceded that the same should have been ordered to run concurrently and not consecutively as there were no reasons advanced for consecutive sentence.

I have strenuously considered the trial court record, the arguments made by the Appellant as well as those of the learned State Attorney be. In my view, two issues arise from all the grounds of appeal. These are: whether from the evidence on record, the victim (PW1) was raped and impregnated by the Appellant and whether the sentence imposed on the Appellant is lawful.

Starting with the first issue, I should state apriori that I aware that the best evidence in sexual offences is that of the victim. This is as per decisions of Courts of record such as those made in ***Selemani Makumba Vs. Republic*** [2006] T.L.R 379, ***Wiston Obeid Vs. Republic***, Criminal Appeal No. 23 of 2016, ***Galus Kitaya Vs. Republic***, Criminal Appeal No. 196 of 2015, ***Charles Juma Vs. Republic***, Criminal Appeal No. 391 of 2016 and ***Richard Mgaya @ Sikubali Mgaya Vs. Republic***, Criminal Appeal No 335 of 2008 (all unreported). However, under section 127(7) of the Evidence Act, Cap 6 R.E 2019 in some instances, such evidence needs corroboration especially where the credibility of the victim is doubtful.

In this appeal, the Appellant submitted that he did not rape or impregnate PW1. He added that penetration was not proved and the offence of

impregnating school girl was as well not proved. The learned State Attorney, on the other hand, supported the conclusion made by the trial magistrate in that from the evidence of the victim, penetration was proved. From the evidence on record, the victim is alleged to have been raped twice on unknown dates in 2015. She was discovered pregnant on 24/3/2016, five months later. It is on that date that she mentioned Abdallah (Baba Salha) as the person responsible for the pregnancy and the one who raped her. She also narrated how the incident took place to her mother, PW2, and the rest of the witnesses who testified.

The testimonies made by PW2, PW3 and PW4 relating to the issue of rape of PW1 by the Appellant fall in the category of hearsay evidence as they only reiterated what they were informed by PW1. In law, hearsay evidence has no evidential value. See ***Vumi Liapenda Mushi Vs. Republic***, Criminal Appeal No. 327 of 2018 (unreported). Considering the timeframe that passed before the rape incident was narrated, there was need that PW1's evidence be corroborated. That is notwithstanding the fact that corroboration is not a legal requirement in sexual offences. I see an eminent danger in relying on the uncorroborated evidence of PW1, considering circumstances of the case.

Since the victim had hidden the secret for such a long period of time fearing to be killed (which itself was not proved), and in the absence of any other credible witness I decline to agree with the learned State Attorney that it was sufficiently proved that the victim was raped and impregnated by the Appellant. Had PW1 mentioned the Appellant immediately after the incident,

it would have swung my mind. In ***Marwa Wangiti Mwita and Another Vs. Republic*** [2002] TLR 39 the Court of Appeal stated the following;

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry"*

Regarding the second offence which is impregnating a school girl, it was not proved whether the victim was a student at the time she was impregnated. Although Ms Tusaje asserted that PW1 was a student until September, 2015, her assertion is not backed by any evidence. The only evidence on record regarding the subject came from the victim's mother, PW2, who stated that PW1 was waiting to be enrolled as a Form I student in Meru Secondary School. However, until 24/3/2016 when the pregnancy was discovered, the victim was at home. By such a date one would expect Form I students to be in school and not at home. Therefore, in the absence of evidence from the said school or her teacher, it is difficult to ascertain that the second count of impregnating a school girl was proved beyond reasonable doubts.

The Appellant also contested the admission and reliability of exhibits. He challenged the recording and admission of the cautioned statement (exhibit P2), contending that there is no indication as to the time the Appellant was arrested and the time the statement was recorded. He also challenged its admission stating that it was requested by the State Attorney (Prosecutor) and not the witness. This was admitted by Ms Tusaje although she considered the absence of the documentary evidence to have no adverse effect to the Prosecution case.

I agree with the Appellant that there was no evidence led indicating when he was arrested. However, the testimonies of PW1 and P2 show that the Appellant was arrested on 24/3/2016 when PW1 was discovered pregnant. Exhibit P2 shows that it was recorded on 25/3/2016 at 17:17HRS. The exhibit, however, does not state the time the recording ended. The time prescribed for recording statements of suspects is four hours from the time when such person was placed under restraint. This is as per section 50(1) (a) of the Criminal Procedure Act. From the record available one cannot safely conclude that the law was complied. I also agree with both the Appellant and Ms Tusaje that it was the State Attorney who requested to tender the said cautioned statement as exhibit. This also applies to exhibit P1, which is the PF3. The two exhibits were also not read out in court after their admission. This prejudiced the Appellant as he did not understand the contents of those exhibits. The two exhibits were thus un-procedurally tendered for admission as it was held by the Court of Appeal in ***Jacob Mayani Vs. Republic,*** Criminal Appeal No. 558 of 2016 (unreported) where the Court observed:

> *"Exhibit P3 was un-procedurally tendered for admission because it was tendered by the prosecutor and not the witness ... we are unable to agree with his position because a person who is competent to tender an exhibit is a witness to whom the document was in his possession, custody authored it or had knowledge of its existence."*

On the requirement to read the exhibit after admission, the Court of Appeal in ***Nkolozi Sawa and Another Vs. Republic***, Criminal Appeal No.574 of 2016 (unreported) stated the following:

"In our considered view, the essence of reading the respective exhibits is to enable the accused to understand what is contained therein in relation to the charge against them so as to be in a position of making an informed and rational defence. Thus, the failure to read out the documentary exhibits was irregular as it denied the appellants an opportunity of knowing and understanding the contents of the said exhibits."

Guided by the above decisions, the PF3 of the victim (exhibit P1) and the Appellant's cautioned statement (exhibit P2) are expunged from the record for failure to adhere to the procedure of tendering and admission of exhibits. Having expunged the said exhibits from record, the court is enjoined to consider whether the remaining evidence would sustain the conviction of the Appellant on the first count. It is my firm view that without the cautioned statement, the remaining evidence is insufficient to prove the charges against the Appellant. Such evidence would have corroborated the evidence of PW1. As it stands, the prosecution evidence is weak to sustain the conviction and sentence met on the Appellant. The first issue is therefore answered in the negative.

Having resolved the first issue in the negative, discussion on the second issue becomes meaningless. I do however wish to say a few words about the sentence. The trial Magistrate ordered the sentences met on the Appellant to run consecutively. That means 60 years jail term. It is the finding of this court that such sentence was highly excessive. The Court of Appeal in various decisions has insisted that where a person commits more than one offence at the same time and in the same transaction, save under very exceptional circumstances, concurrent sentences are to be imposed. In

Festo Domician Vs. Republic, Criminal Appeal No. 447 of 2019 (unreported), the Court made reference to a decision from the Court of Appeal of Kenya in ***Peter Mbugua Kabui Vs. Republic***, Criminal Appeal No. 66 of 2015 where it was held inter alia:

> *"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act or transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."*

The same position had been given by the defunct Court for the Eastern Africa in ***Sawedi Mukasa s/o Abudulla Aligwasa*** [1946] 13 EACA 97. See also ***Ramadhan Hamisi @ Joti Vs. Republic***, Criminal Appeal No. 513 (unreported). In the instant appeal, the Appellant was sentenced on two offences which occurred in the same transaction; therefore, the proper sentence would be a concurrent sentence and not a consecutive one as imposed by the trial Magistrate. The trial Magistrate failed to justify why a consecutive sentence was proper under the circumstances. He also did not state why it was necessary to impose a corporal punishment. The second issue is also answered in the negative.

Before concluding this judgment, I see it appropriate to point out one of the obvious flaws detected in the course of going through the records of the trial court. It is perplexing to observe that the trial Magistrate did not notice the flaw in the charge presented against the Appellant in the first count. The Appellant was charged under Section 130(1) and **(2) (a)** and 131 of the

Penal Code, Cap. 16 instead of Section 130(1) and **(2) (e)** and 131 thereof. That was a defect that called for dismissal of the charge or at least an amendment. A charge under Section 130(1) and (2) (a) has more requirements to prove; such as lack of consent as opposed to the charge under Section 130(1) and (2) (e) where consent is immaterial. No evidence of consent was led by the prosecution.

That said, I find merits in the Appellant's appeal. It is allowed in its entirety. The Appellant's conviction is quashed and the sentence set aside. I order the immediate release of the Appellant from prison unless otherwise lawfully held.

Order accordingly.

Y. B. Masara
JUDGE

29th January, 2021.