IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

DC. CRIMINAL APPEAL NO. 32/2020

(Originating from the District Court of Mbinga at Mbinga Criminal Case No.49/2020)

MOHAMEDI MAKWINJA ..... APPEALANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 24/02/2021
Date of Judgment: 10/03/2021

BEFORE: S.C. MOSHI, J.:

The appellant was arraigned before the District court of Mbinga at Mbinga for the offence of rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code CAP 16 R.E. 2019. It was alleged that on February 2019 at Kipika Street within Mbinga District in Ruvuma Region the appellant did have sexual intercourse of one Walivyo Nyenje a girl of 17 years. After a full trial, the appellant was found guilty and he was convicted accordingly. Consequently, he was sentenced to 30 years imprisonment. Aggrieved by the conviction and sentence he has appealed to this court on the following grounds: -

1) *That, the trial court erred in law and fact when it convicted and sentenced the appellant where the prosecution failed to prove their case beyond reasonable doubt.*

2) *That, the trial court erred in law and in fact to convict and sentence the appellant while the prosecution evidence left a lot of doubt that could benefit the appellant.*

At the hearing of the appeal the appellant was represented by Mr. Kitala Mugwe whereas the Republic was represented by Mr. Emmanuel Barigila, State Attorney who opposed the appeal.

Mr. Mugwe abandoned the second ground, he therefore submitted on the first ground only. He said that the case was not proved beyond a reasonable doubt because the prosecution did not prove rape ingredients. The evidence shows that the victim was examined and it was detected that she was pregnant. It was believed that it was the appellant who was responsible for pregnancy. He suggested that, there ought to be DNA test to prove this fact.

He argued that, the victim claimed that it was the appellant who was responsible. The doctor PW3 detected that the victim was pregnant and

had contracted sexually transmitted disease but it was not proven if the appellant was responsible for the pregnancy.

In response thereto, Mr. Barigila submitted that the prosecution proved the case beyond a reasonable doubt on the following grounds; the appellant was charged with rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2019. This is statutory rape, its elements being sexual intercourse and the victim must be under the age of eighteen years. He said that, the lower court's record shows that these elements have been proved.

Concerning sexual intercourse between the appellant and WN (victim); he said that, the victim's testimony shows that she had sexual intercourse with the appellant for a period of three years and throughout that period she was still a student and they did the act in accused's house.

He cited the case of **Seleman Makumba v. R** (2006) TLR 379, where it was held that the best evidence comes from the victim. He said that the appellant in his defence admitted that he had been having sexual intercourse with the victim, the evidence which was supported by victim's father. He said that, therefore a part from pregnancy there was sufficient evidence to prove the offence. He made Reference to the case of **Peter**

Sanga v. R, Criminal Appeal 51/2008, Court of Appeal sitting at Iringa (Unreported), where the court held that the accused who confesses his guilty is the best witness.

Regarding the age of the victim he said that, having sexual intercourse with a child with or without her consent is rape unless she is the wife of the accused. He said that this ingredient was proved by two witnesses, victim's father PW1 and victim (PW2), where it was stated that the victim is aged 17 years. The charge shows that the offence was committed in February 2019. The victim's testimony shows that she was born in June 2002. Therefore, the age of the victim was very well proved, and the appellant did not prove that the victim is his wife.

Lastly, he said that the appellant's advocate has argued at lengthy about pregnancy, the issue is not paternity but rape. Pregnancy was part of evidence as an outcome of their love affair. Hence, pregnancy was not the basis of conviction.

In rejoinder, Mr. Mugwe reiterated his submission in chief, that the prosecution did not prove the offence. Regarding the age of the victim, he said that the appellant argument was that the victim was of age of majority, as she completed her studies and had no plan to study further,

hence they were supposed to prove the age. It was not proved that the victim was under 18 years. He argued that statutory rape was not proved. They were supposed to bring a birth certificate. Otherwise, the benefit of doubt goes to the accused.

Having gone through the proceedings of the trial court, grounds of appeal and submissions by the parties, the main issue for determination is whether the appeal has merits.

The appellant was charged with statutory rape under section 130 (1) and (2) (e) of the Penal Code Cap 16 R.E 2019,this offence is committed against a girl who is below the age of 18 years. Thus, to prove the offence two important elements have to be established by the prosecution, that is penetration and the age of the victim.

I subscribe to what has been submitted by Mr. Barigila that the case was proved beyond reasonable doubt, the above two elements were proved beyond a reasonable doubt by the prosecution side. As far as penetration is concerned, the law is settled that, the best evidence to prove penetration comes from the victim herself. See the case of **Seleman Makumba v. R** (2003) TLR 203 where the Court of Appeal held that: -

"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of any other women where consent is irrelevant that there was penetration".

In order to prove penetration, the prosecution is duty bound to lead the victim and other witnesses to adduce evidence on what the accused did to her. The court will be in a position of determining penetration basing on the evidence adduced by the prosecution witnesses. General statement from prosecution witnesses without explaining what took place is not sufficient as held in **Mathayo Ngalya @Shaban v. R**, Criminal Appeal No. 170 of 2006, Court of Appeal, (Unreported) that: -

"For the offence of rape, it is not of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence".

However, the current position of the law about penetration it is not necessary for the victim to state graphically what the accused did to her to prove penetration. This position was stated in the case of **Hassan Bakari**

@Mamajicho v. R Criminal Appeal No. 3 of 2012 Court of Appeal at Mtwara (Unreported). Furthermore, in the case of **Baha Oagari V. R,** Criminal Appeal No. 39 of 2014, the court of appeal held thus: -

> *"several decisions of this court have expounded the scope of section 130 (4) (a) in so far as proof of penetration in sexual offences is concerned. This scope is now settled that in proving that there was penetration it does not in all cases expect the victim of alleged rape to graphically describe how the male organ was inserted into her female organ".*

Guided by the above position of the law, I have examined the evidence adduced by the victim of rape (Pw2) to see whether penetration was proved. She deposed to have sexual intercourse with the accused person several times and that, she was impregnated by the accused person. Pw2 deposed as follows: -

> *"I started that love relationship with the accused person because we loved each other. We had that sexual relationship for many times. We were having sex for all that time..... i was taken to Mbuyula District hospital where I was found with three months pregnancy"*

It is my considered view that, the above evidence was sufficient to prove penetration. The appellant was implicated for having sexual intercourse with the Victim (PW2) thereby impregnating her. The appellant on his part did not deny. The evidence as a whole indicates that the appellant and the victim were lovers

The appellant's advocate complaint is to the effect that, the case was not proved as a DNA test was not conducted to prove penetration. It is not a legal requirement that penetration should be proved by DNA or medical evidence as held in the case of **Mawazo Anyandwile Mwaikwaja v. DPP**, Criminal Appeal No. 455 of 2007, and Court of Appeal at Mbeya (Unreported).

Penetration can be proved by oral evidence adduced by the prosecution. Section 134 (4) of the Penal code is relevant in determining the appellant's complaint. It provides that penetration however slight is sufficient. It is immaterial whether or not the male person ejaculated thereby leading to pregnancy or not. Therefore, despite the fact that DNA test was not conducted, the undisputed evidence adduced by PW2 that the appellant had sexual intercourse with her thereby leading to pregnancy was sufficient to prove penetration. This is so when it is considered that

the testimony of PW2 was not challenged by the appellant neither during cross examination nor during defence case. In fact the request for DNA test was never demanded during trial. On the other hand the appellant admitted to be responsible for pregnancy, he even said that he was taking care of the victim. Thus, the circumstances of this case did not call for need of DNA testing.

The second ingredient of statutory rape is the victim's age. The prosecution was duty bound to prove that the victim was below 18 years. Evidence to prove this ingredient can be adduced by the victim, relatives, parents, medical officers or by tendering birth certificates, if any. See **Issaya Renatus v. Republic**, Criminal Appeal No. 342 of 2015, Court of Appeal at Tabora (Unreported), where it was held thus: -

> *"we are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to the proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate".*

In the present case, the victim stated that she was born in 2002, therefore during the commission of the offence that is in February 2019, she was seventeen years and six months. This was also stated by his father (PW1) that his daughter was seventeen years old. In the case of **Salu Sosoma v. R**, Criminal Appeal No. 31 of 2006, the court of Appeal observed that a parent is in a better position to know the age of his child. The same was also stated by the appellant himself when cross examined by the prosecution that the victim was below eighteen years old. Therefore, it was duly proved that the victim's age was below 18 years.

Considering the appellant's defence, he did not dispute victim's testimony that he had been having sex with the victim for the past three years. Likewise, he didn't dispute the fact that the victim was a child aged below 18 years. He even admitted that the victim was below the age of majority, see page 14 of typed proceedings. The accused's defence that the victim had finished school and had no intention of continuing with studies legally does not exonerate him from criminal liability because the yardstick for statutory rape is age of the victim not otherwise.

All in all, I find that the defence does not cast doubt on prosecution's evidence.

In the upshot, the court finds no merit in the instant appeal, it is doomed to fail. It is accordingly dismissed in its entirety.

Right of Appeal explained.

S.C. MOSHI

JUDGE

08/02/2021