**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 97 OF 2020**

**(Appeal from the judgment of the District Court of Mtwara at Mtwara in Criminal Case No.19 of 2020 (Hon. L. M. Jang'andu, RM) dated 20.8.2020)**

**ZAWADI JUMA MSHAMU.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

15 March & 12 April, 2021

**DYANSOBERA, J.:**

The appellant herein was charged in the District Court of Mtwara at Mtwara with an offence of rape contrary to sections 130 (1), (2) (e) and 131(1) of the Penal Code [Cap 16 R.E. 2002]. The prosecution alleged that on divers dates between August, 2017 and October, 2017 at Likonde area

within the Municipality and Region of Mtwara, did have carnal knowledge of one R.A.S., a girl of eleven years old. The appellant pleaded not guilty but at the end of the day, he was convicted and sentenced to 30 (thirty) years term of imprisonment.

The brief facts of the case were that the victim R.A.S. was, at the time of the incident, a pupil schooling in STD V at Mlimani Primary School. She did not complete her primary education as she was suspended on account of being pregnant. Her mother Havana Mussa, after noting that the habit of her daughter was not good, she took her to the Police Station and then to Likombe Hospital for medical examination where she was informed that the victim was pregnant. She was not told the age of the pregnancy but was told that the person responsible for the pregnancy was the appellant.

PW 3 Hassan Wasima, a Medical Assistant did, on 11th October, 2017 receive the victim who was in company of a policeman and was required to ascertain if the victim was pregnant. PW 3 medically examined the victim and found her pregnant. He then filled in the PF 3 (Exhibit P. 1). PW 2 reported to the Police for the arrest of the appellant and was given an RB n that year of 2017. The appellant was nowhere to be found until in

February, 2020. PW 2 informed her husband who apprehended him and took him to the police station. The appellant was then arraigned in court.

In his defence, the appellant denied to have committed the offence. He recalled that while he was at the restaurant, the victim's father called him at his football hut, locked the door and started beating him. The appellant told the trial court that the victim's father did not tell him why he was assaulting him. The appellant was then collected by the police. At the police station the appellant was not told what offence he had committed until he was arraigned in court on the offence of rape.

DW 2 one Kasimu Ahamad testified to have witnessed the appellant being assaulted by Ally Magoba, the victim's father. DW 2 called the Street Chairman who reported to the police.

In his decision, the learned trial Resident Magistrate was satisfied that the offence of rape had been proved by the prosecution. He reasoned that the ingredients of the offence were established. He believed the story of the victim that it is the appellant who gave her pregnancy. Reliance was placed on the cases of **Selemani Makumba v. R**. [2006] TLR 380 and **Godi Kesenegala v. R**. Criminal Appeal No. 10 of 2018. In the latter case

it was held that it is now settled that the proof of rape comes from the prosecutrix herself.

According to the learned Resident Magistrate, since the evidence of PW 1 that she was given pregnancy was corroborated by that of PW 3 and exhibit P 1, the element of penetration was established. Further that there was proof from Havana Mussa that the victim was a child and that the defence did not cast doubt on the prosecution case.

It is this finding that aggrieved the appellant hence this appeal which is grounded on seven complaints. One, that the case was not proved beyond reasonable doubt. Two, the evidence and circumstances of the case were not carefully scrutinised. Three, the evidence of the prosecution witnesses was contradictory. Four, the provisions on which the appellant was convicted was not specified. Five, the conviction was pegged on the evidence of Zainab Juma Mshana while disregarding his (appellant's) defence. Six, the case hinged on suspicion and circumstantial evidence and seven, the trial Magistrate never complied with the provisions of law on receiving the evidence of a child of tender age.

On 15th day of March, 2021 when the appeal came up for hearing, the appellant was represented by his learned Advocate one Mr. Ali Kassian Mkali, whereas the respondent enjoyed the services of Ms Caroline Matemu, learned State Attorney.

Supporting the appeal, the appellant, through his learned counsel Ali Kassian Mkali, abandoned the grounds Nos. 4-7 and argued grounds 1, 2 and 3.

Submitting in support of the appeal, learned Counsel for the appellant informed the court that the offence of rape the appellant was facing at the trial was not proved to the required standard. He contended that the person who reported the incident to the police in October, 2017 was PW 2, the victim's mother who stated that her daughter had bad habits. Counsel explained that there was no clarification by PW 2 on what she meant by the statement 'bad habits' and the trial court did not make analysis on this.

It was his further submission that the offence was committed in October, 2017 but the appellant was arrested in February, 2020. Counsel was of the view that there was no evidence to bridge the gap of this span

and that the allegations that the appellant had absconded was not proved particularly where the appellant was clear that he was at Likombe throughout the time.

On another dimension, learned counsel for the appellant submitted that when the appellant was arrested and taken to the police and then to court he did not know what offence he had committed but came to know it when he was arraigned in court. The offence of rape was, therefore, novel to him, Counsel stressed.

With regard to the person who accompanied the victim to the hospital, Mr. Mkali asserted that there was contradiction on the gender of the said person, whether it was a man or a woman.

On the victim's pregnancy, Counsel for the appellant argued that the Doctor who medically examined the victim although found that the victim was pregnant, he did not state the age of the pregnancy. Insisting on the span between the time of the alleged commission of the offence-2017 and the appellant's apprehension, Mr. Mkali pressed that the investigator was not called to clear this doubt which existed in the prosecution case.

Responding to the submission by learned counsel for the appellant, Ms. Caroline Matemu admitted that PW 2 did not clarify on what she meant by bad habits on part of the victim but learned State Attorney explained that the failure to give clarification did not affect the truth that the appellant who had sexual intercourse with the victim aged seven years contravened the law particularly where the victim was clear that the appellant was meeting with her regularly. As to why it took a long time from the time of the commission of the offence to the apprehension of the appellant, it was submitted on part of the respondent that the appellant had absconded after he had committed the offence. On the complaint on the gender of the person who took the victim to the hospital, learned State Attorney informed the court that it was immaterial whether the person was a male or female as the evidence was clear that the victim went to the hospital and was medically examined. The offence of rape was proved beyond reasonable doubt taking into account that the true evidence of rape comes from the victim as was stated in the case of **Selemani Makumba**, learned State Attorney emphasised. She concluded that since the court has to consider what is on record, the record is clear that the

evidence tendered sufficiently proved the case against the appellant beyond reasonable doubt.

In his rejoinder, Mr. Mkali stated that the case of **Selemani Makumba** is not applicable in this case in which there was full of doubts. He said that the evidence of PW 2 that her daughter had bad habits was not clarified. Since the case was full of doubts, such doubts should be resolved in favour of the appellant, Mr. Mkali impleaded.

I have considered the three argued grounds of appeal, the submissions from either sides. I have also taken into account the record of the trial court. I think the whole appeal hinges on whether or not the charge against the appellant was proved beyond reasonable doubt. That is the gist of the appellant's complaint in his first ground of appeal.

Having analysed the evidence unfurled at the trial court vis a vis the grounds of appeal, I am in no doubt that the prosecution miserably failed to prove the charge against the appellant beyond reasonable as the evidence of the prosecution case was tainted with many doubts which had, in law, to be resolved in the appellant's favour. This I will tell.

The cardinal principle of criminal law is that the duty of proving the charge against an accused person always lies on shoulders of the prosecution, it does not shift. The Court of Appeal had occasion to consider this legal position in the case of **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika** [2002] T.L.R. 296 where it was held that:

> *"A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt."*

This position was echoed by the same Court in the case of **Galus Kitaya v. R,** Criminal Appeal No. 196 of 2015, Mbeya Registry (unreported).

As far as the instant case is concerned, the prosecution failed to discharge their burden and the trial court failed to give analytical evaluation of the evidence that was presented before it.

In the first place, the nexus between the victim's pregnancy and the appellant's participation was not established. This is particularly so because, it was not established when the appellant carnally knew the victim and when the victim conceived. Neither the evidence of PW 1 nor that of PW 3, the Medical Assistant who medically examined her proved this important fact. Indeed, PW 2 who is the victim's mother was clear that she did not know the age of the pregnancy at the time the victim was medically examined.

Second, it is on record that the offence was committed between August and October, 2017 but the appellant was apprehended in February, 2020. The span of three solid years was not sufficiently explained away. The argument that the appellant absconded after commission of the offence was not proved because, as correctly pointed out by Mr. Mkali, the person who investigated the case did not testify. In my view, the evidence of the investigating officer was crucial to shed light on the gap of three years from the time of the commission of the offence to the time of the apprehension of the culprit. The importance of this evidence cannot be overemphasised particularly where it was clear that at the time of the appellant's apprehension and the victim's giving her testimony in court, the

victim was no longer pregnant and there was no tangible evidence implicating the appellant with the offence of rape. In her evidence, PW 1 was clear that the pregnancy got destroyed at a period of six months when she was at her father in Mozambique. She was silent on why and how the pregnancy was destroyed.

Third, there is no dispute that the victim did not report of the incident at the earliest possible time. Besides, the reason why her mother reported to the police authority was the discovery that her (victim's) habit was not good while she was in STD V. As correctly submitted by learned counsel for the appellant, PW 2 did not clarify on what he meant by 'her habit was not good'. The possibility that the victim had sexual relations with other men who could also impregnate her was not ruled out particularly where it was not proved that the appellant had exclusive access to the victim as far as sexual relationship is concerned.

I agree to the learned counsel's argument that the charge of rape against the appellant was not proved, leave alone proved beyond reasonable doubt as the prosecution case was tainted with doubts which should have been resolved in favour of the appellant.

On account of the above finding, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. I order the appellant to be set free forthwith unless his liberty is being lawfully assailed for other causes.

Rights of appeal explained.


**W.P. Dyansobera**

**JUDGE**

**12.4.2021**

This judgment is delivered under my hand and the seal of this Court on this 12th day of April, 2021 in the presence of Mr. Paul Kimweri, learned Senior State Attorney and the appellant. Mr Ali Kassian Mkali, learned Advocate for the appellant is also present.


**W.P. Dyansobera**

**JUDGE**