IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 07 OF 2021

(Originating from Criminal Case No. 247 of 2020 of Kibondo District Court Before S.G. Mcharo, RM)

ESSAU S/O SAMWEL..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

12th & 20th April, 2021

A. MATUMA J.

The appellant Essau s/o Samwel, a Primary School teacher at Minyinya Primary School at Minyinya village within Kibondo District in Kigoma Region stood charged in the District Court of Kibondo for two counts of the charge; 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 60A of the Education Act Cap. 353 R.E. 2002 as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act No. 4 of 2016.

He was alleged to have raped and impregnated his own pupil, a school girl **B** d/o **M** aged 16 years old who was a pupil of standard seven. The offences were alleged to have been committed on 28th March, 2020 in the afternoon hours.

After a full trial the trial magistrate (S.G. Mcharo RM) was satisfied that the prosecution case was sufficiently proved in the first count of rape but not proved in the second count of impregnating a school girl. The appellant was thus convicted of rape and sentenced to suffer a custodial sentence of thirty (30) years while he was acquitted of impregnating a school girl.

The appellant became aggrieved of the conviction and sentence hence this appeal with three grounds of appeal the essence of which forms two major complaints that;

i. *That the conviction was wrongly entered as the evidence of the victim PW1 was illegally recorded in contravention of section 127 of the Evidence Act, Cap. 6 R.E. 2019.*

ii. *That the offence of rape was not proved beyond reasonable doubts hence the conviction and sentence was wrongly entered.*

At the hearing of this appeal the appellant was present in person and represented by Mr. Method Kabuguzi who withdrawn the first complaint and argued the second only.

The respondent had the service of Mr. Robert Magige learned State Attorney.

Mr. Kabuguzi learned advocate submitted that the Appellant was wrongly convicted of rape after his acquittal of impregnating a school girl since the two alleged offences related and were alleged to have been committed at the same action. That the trial court did not believe the evidence of PW1 the victim and that of PW4 the doctor in relation to the pregnancy and thus ought to have disbelieved them on the rape as well because it could have not been possible for the appellant to have raped the victim but did not impregnate her.

The learned advocate for the appellant further submitted that even though the offence of rape was not proved because the evidence of the victim who testified to have been raped on 28/03/2020 was contradicted by that of the doctor who testified that the pregnancy was conceived in April. That had the appellant raped the victim on the alleged date, the victim would have been 23 weeks contrary to the observation of the doctor and that is why he was acquitted on the allegations of impregnating

a school girl. The learned advocate invited me to the authority of **Mohamed Said Matula versus Republic** (1995) TLR 3 to resolve that the discrepancies between the prosecution witnesses favoured the appellant hence his acquittal.

Mr. Kabuguzi learned advocate further challenged the credibility of the victim who did not disclose the alleged rape until five months later when she was arrested and thus she could not be the witness of the best evidence as it ought to be in sexual offences. He also challenged PW5 the investigator as he did not go to the crime scene to satisfy whether the crime scene resembled to the descriptions made by the victim as the appellant had denied having residence thereat as alleged by the victim.

The learned advocate finally submitted that the appellant had material defence testimony in that at the alleged material time he was at the church where he was recording notices of the teachings which he tendered as exhibit D1 and that the trial magistrate to rule out that the crime scene was not far from the church to the extent that one could move quickly was conjectures as no evidence of distance to that effect. Also, that the appellant's defence that the place where the victim alleged to have been grazing goats prior the appellant came to pick her has no grazing lot was not rebutted by the prosecution.

On his party Mr. Robert Magige learned State Attorney opposed the appeal submitting that the prosecution case was proved beyond reasonable doubts and that an acquittal of the appellant in the count of impregnating a school girl does not necessarily lead to acquittal of rape as well since the two offences are distinct although related. That the appellant was acquitted of impregnating a school girl merely on suspicions of when exactly the pregnancy was conceived. The learned State Attorney argued that as far as the offence of rape is concerned, there was positive evidence from the victim that it was on 28/03/2020 the evidence of which was not affected anyhow by whatever discrepancies in the other count.

Mr. Magige learned State Attorney was of the view that it is possible for one to be acquitted of impregnating a school girl but convicted of rape but not vise versa i.e acquittal on rape but conviction of impregnating a school girl.

He further submitted that the reason why the victim concealed the crime is apparent on record as the crime itself is what is commonly known as statutory rape in which the victim and the appellant were lovers and according to the victim, she even had informed the appellant of the pregnancy. That on that account PW1 cannot be discredited merely because she concealed the crime.

About the crime scene, the learned State Attorney submitted that the victim's evidence was corroborated by that of PW3 the appellant's fellow teacher that the appellant has a room at the school compound where he used to change clothes.

About the defence evidence, the learned State Attorney submitted that the same was considered but discredited as exhibit D1 was not readable nor understood.

Having heard the parties' arguments for and against the appeal I will discuss generally whether the prosecution case was proved to the required standard against the appellant in line of the submissions made by the parties before me.

The learned advocate for the appellant as I have herein above reflected, was of the view that since the trial court found that the prosecution case was not proved on the second count of impregnating a school girl for doubts in the prosecution case, ought to have found that the first count of rape was as well not proved on the same doubts. The learned State Attorney opposed such argument as herein above reflected as well.

Now, does an acquittal on the offence of impregnating a school girl always necessitate an acquittal on the partner offence of rape?

It is my firm finding that, if the trial court acquits, the accused person on one count of the charge due to the fact that the witness was not credible and reliable, it would be necessitated to acquit the accused in other counts as well because once the witness is found incredible and unreliable it is dangerous to act on his/her evidence despite of its impressiveness it might be.

In the case of ***Festo Mawata versus Republic***, *Criminal appeal No. 299 of 2007 (*unreported) it was held that;

> *'A witness might be perfectly honest but mistaken at the same time.* ***On the other hand, it is a fact of life again that even lying witnesses are often impressive and or convincing witnesses'***

In the circumstances, it would be very dangerous and detrimental to justice to act on the evidence of a witness who has been discredited as being incredible and unreliable.

Now in the instant case, did the trial court acquit the appellant in the second count because the witnesses particularly PW1 were incredible and unreliable? The answer is not. PW1 testified that she had sexual intercourse with the appellant three times, the last one being on 28th March, 2020. From that moment she didn't enter into her menstrual cycle up to the time she was discovered pregnant.

The trial magistrate considered this evidence along with that of PW4 Dr. Emily Malaka who gave his expert opinion that the victim PW1 was five months pregnant and that she might have conceived the pregnancy on April, 2020.

It is from the testimonies of these two witnesses the trial court entertained doubts that;

> *'The prosecution evidence is silent if there was possibility that even if the accused raped the victim on 28th March, she could have been able to conceive on April, as testified by PW4 a doctor at Kibondo District Hospital'.*

That being the case, it was not the question that the trial court did not trust the evidence of PW1 but that medical evidence was not further given to explain whether the sexual intercourse of March, 28th could lead to pregnancy on April. Rather the trial court found that PW1 was a witness of truth, credible and reliable;

> *'The case at hand I find the victim is credible witness because she answered all questions and some of her evidence is corroborated by the defence witness himself especially the fact that he owns a house at school quarter, the place well described by the victim was used to rape her two different times'.*

That being the case, an acquittal in one count cannot be the basis of acquittal in other counts provided that the court is satisfied that the evidence was credible and sufficiently proved such other count or counts.

Even though the trial magistrate was wrong in her conclusion that PW4 testified that the victim conceived the pregnancy on April. PW4 was positive that the test he did does not show when pregnant was conceived but that such period is calculated by the Ultra Sound Machine which might show when the pregnancy was conceived. The witness further stated in evidence that a part from the Ultra Sound Machine, the other way to know when exactly the pregnancy was conceived is to ask the victim herself as to when was her last menstrual period. PW4 to mention April was thus his personal assumption and not evidence as he clearly stated so;

'She might have conceived on April, 2020'.

Such assumption which was not even a medical opinion should have not been used to doubt that the sexual intercourse of 28th March, 2020 was the cause of the pregnancy in question. There was nothing between the evidence of PW1 and PW4 to be entertained as doubts in favour of the appellant. Even though the difference between 28th March and April was hardly two days. Thus, the assumption of PW4 was too close to the stated date by the victim.

Even if the assumptions of PW4 supra would have been positive medical opinion, on the finding of the court itself that PW1 was a trustworthy witness, then the alternative medical opinion to her evidence would have no room as it was held in the case of ***Abdul-Abdul-Baad Timim v. SMZ*** *[2006] TLR 188 that;*

> *'When the evidence of eye-witness is found to be credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive'.*

And that;

> *'Once credibility is settled, then even adverse medical evidence will not be taken to be conclusive as against the evidence of an eye-witness'.*

But since the prosecution did not cross appeal on the acquittal in the second count, I leave it as such but make my finding that the acquittal of the appellant in the instant matter on the second count of impregnating a school girl did not in any way affect the independent findings on the first count of rape as rightly submitted by the learned State Attorney, Mr. Robert Magige.

Now, was the rape proved to the required standard against the appellant?

The learned advocate for the appellant submitted that it was not, while the learned State Attorney maintained that it was. Reference is made to their respective submissions as herein above.

As I have earlier on indicated herein above, the trial court ruled out that PW1 was credible witness. It thus relied on her evidence and the provisions of section 127 (7) of the Evidence Act along with various authorities to the effect that the true evidence of rape has to come from the victim herself. The relied authorities by the trial court to that effect were ***Moses Norbert Achiula vs. Republic,*** *Criminal Appeal No.63 of 2012* Court of Appeal of Tanzania at Mbeya (unreported) and ***Seleman Makumba vs. Republic,*** *Criminal Appeal No. 94 of 1999.*

It is a cardinal principle of the law that it is the trial court which is better positioned to assess and determine credibility of a witness. I have not found any alternative suggestions on the evidence on record to interfere with such finding. Mr. Kabuguzi was of the argument that PW1 was not credible because she concealed the crime until when she was arrested five months later for her absenteeism to school. The learned state attorney on the other hand was of the argument that the victim and the appellant were lovers and the offence is that of a statutory rape and therefore it is apparent on record why she concealed the crime. In my

view, the concealment of the crime did not in any manner affect the credibility of the victim as rightly argued by the learned State Attorney. Rather it added value to her evidence in that she had no any ill-motive against the appellant and tried her level best to serve him from the saga due to their existing love as I shall demonstrate herein below. I will thus scrutiny the evidence of PW1 as to whether it sufficiently proved the offence of rape against the appellant.

PW1 testified that the appellant was her teacher and that on 28/03/2020 while grazing some goats the appellant called her to his home at the school quarters and had sexual intercourse with her. She was then discovered pregnant and thus refrain herself from going to school until when she was arrested together with her mother for being an absentee pupil.

PW1 further testified that such a date was not the first time to have sex with the appellant as they had in the first time made sexual intercourse on December, 2019 at Kibondo followed with several other sexual intercourse.

To prove the offence of rape particularly when the victim is a girl under the age of 18 years like in the instant case, only the age and penetration has to be proved as consent is immaterial. In the instant matter I have

no doubt that the victim's age was sufficiently proved to have been under 18 years old. This is in accordance to her own evidence, the evidence of her mother and the affidavit as herein above stated. The two witnesses qualified to testify on the age of the victim as it was held in several cases including that of ***Andrea Francis vs. the Republic,*** Criminal Appeal No. 173 of 2014 (CAT) that the victim's age may be proved by the victim him/herself, his/her both parents or one of them among others. Even though the victim's age was not a fact in issue nor cross examined. A fact not cross examined is taken to have been proved.

About penetration no doubt that the same was sufficiently established. PW1 herself stated in evidence that on 28/3/2020 when the appellant took her into his home, he put her into the mattress which was on the floor, undressed her and himself then inserted his penis into her vagina. Thereafter she went back home without disclosing the fact to any person. The stated insertion of the penis into the vaginal is what amount to be penetration and it was well corroborated by PW4 who examined the vagina of the victim and discovered that she had old penetration. Since the rape took place on 28/03/2020 and the examination by PW4 was on 8/9/2020 more than five months, the finding that there was evidence of **old penetration** is well founded and grounded.

I therefore find that the prosecution case was proved beyond reasonable doubts on the two elements of the offence of rape, i.e age of the victim below 18 years and penetration.

As to who was responsible with the offence I have no doubt that it was the appellant as was well determined by the trial court.

I could not see why should the victim have fabricated the appellant in the saga once credibility was settled as herein above stated. There was no any ill-motive between PW1 and the appellant, and more so PW1 did not disclose either the sexual intercourse or the pregnancy to any, she did not name the appellant and decided to stay mute raising up her pregnancy expelling herself from the school. She only disclosed the fact after she was arrested along with her mother because she was an absconder from school. That is a clear indication that the victim PW1 was only necessitated to disclose the truth which she would have otherwise hidden had the school authority not bothered with her absence. In that respect the appellant would have not been detected to be the source of the absence of the victim into her studies.

In the final analysis, I find this appeal to have been brought without sufficient cause and the same is accordingly dismissed.

In terms of the provisions of section 131 (1) of the penal code supra, upon which the appellant was charged which provides that in addition to a custodial sentence the convict of rape shall in addition thereof be ordered to pay compensation of an amount to be determined by the court to the victim of the offence for the injuries caused, I hereby order that the appellant to compensate the victim PW1 **Tshs. 5,000,000/=** for the injuries she sustained leading her to drop out from school taking into consideration that as a teacher he ought to have positioned himself as a guardian to pupils and assist them to attain their education goals. The compensation ordered herein should be immediately recovered from attachment and sell of any of his movable or immovable property or from his pension contributions, whichever easier.

Right of further appeal to the Court of Appeal of Tanzania subject to the relevant laws governing appeals thereto such as the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and the Court of Appeal Rules,2009 as amended is hereby explained.

It is so ordered.

A. Matuma

Judge

20/04/2021

Court: Judgment delivered today 20th day of April, 2021 in the presence of the Appellant in person and in the presence of Mr. Raymond Kimbe learned State Attorney for the Respondent/Republic.

Sgd. A. MATUMA

JUDGE

20/04/2021