IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 04 OF 2021

(Originating from Criminal Case No. 234 of 2020 of the District Court of Geita at Geita)

KASONOKO S/O EMMANUEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 15.04.2021

Judgment: 19.04.2021

A Z. MGEYEKWA, J

In the District Court of Geita at Geita, the appellant was arraigned and charged with two counts; first count is Rape contrary to sections 130 (1),(2) (b), and 131 (1) of the Penal Code Cap. 16. [R.E 2019]. Second count; impregnating a school girl contrary to section 60 A (3) of the Education Act Cap. 353 as amended by section 22 of the Written Laws (Miscellaneous

Amendment) Act, No. 2 of 2016. The appellant was convicted on both counts. On the first and second counts he was sentenced to serve 30 years imprisonment, the sentences to run concurrently. Aggrieved, the appellant appealed to this court for both conviction and sentence. As I have hinted upon, the case for the prosecution was built around the accusation of rape. On the first count; it was alleged that on diverse dates and times between February, 2020 and 27th June, 2020 at Nyamigota village within the District and Region of Geita the accused person did have carnal knowledge of one Naomi D/O Makungu a girl aged 17 years old. On the second count, it was alleged that the appellant did impregnate a School girl, a pupil at Nyamigota Primary School in standard VI. Upon arraignment, before the trial court, the accused person entered the plea of not guilty. The trial court...

The appellant now seeks to impugn the decision of the District Court upon a petition of appeal comprised of seven grounds of appeal as follows:-

1. *That, the trial District Court erred in law and facts when making the decisions while the evidence of prosecution side was not meet the high standard requirement of proving this allegation.*

2. *That the decisions of District Court to convict and sentence the appellant based on suspicion. The prosecution side failed to prove the allegation beyond a reasonable doubt.*

3. *That the trial court magistrate making decisions contrary to the law of SOSPA of 1998 which required the court to prove penetration of the penis into the vagina. The same was not proved by the trial court.*

4. *That the trial court Magistrate relied on weak evidence from an expert (Doctor) who proved that the victim was pregnant but his report did not prove whether the appellant is one who had sex with the victim.*

5. *That, prosecution witnesses failed to prove whether the victim impregnated the victim. The prosecution's evidence was based on the age of the victim and her resident. No one testified to have seen the victim raping/impregnating the victim. Thus, the trial court erred in law and facts to issue a heavy punishment to the appellant.*

6. *That, there was short of proof in this allegation because it was mere narrations from the prosecution side as resulted in the trial court accepting weak and uncertain evidence, thereafter it was an error of the trial court to convict and sentence the appellant due to weakness of appellants' defense.*

7. *That, the trial court to convict the appellant for considering section 127 (7) of the Evidence Act, 1967 is not sufficient, it is required the trial court to prove the allegation beyond a reasonable doubt.*

Following the global outbreak of the Worldwide COVID-19 pandemic (Corona virus), the hearing was conducted via audio teleconference whereas the appellant and Ms. Gisela Alex, learned counsel for the respondent were remotely present.

Submitting first, the appellant avers that he is dissatisfied by the decision of the lower court and urged this court to adopt his grounds of appeal. The appellant urged this court to set him free.

Responding, Ms. Gisela, supported both the conviction on the first count; rape and the sentence. Ms. Gisela opted to consolidate the first, second and sixth grounds and argue them together which state that the prosecution failed to prove the case beyond a reasonable doubt. Ms. Gisela submitted that the trial court based its decision on the victim's evidence. She referred this court to pages 4 and 5 of the trial court proceedings, the victim testified that at the time when she was raped she was 17 years old and she stated that the appellant asked her to be his friend, and they meet and used to make love and the trial court believed her. The learned State Attorney stated that the evidence of the victim sufficed to ground conviction upon the appellant. To fortify her submission she cited the case of **Msalana v Republic**, Criminal Appeal No.229 of 2011.

Ms. Gisela went on to state that PW3, the Doctor testified that on 27th June, 2021 he examined the victim and found that she was four months pregnant. The learned State Attorney went on to state that PW3 tendered a PF3 as evidence and the same was admitted as exhibit P.3. She added that

exhibit P3 corroborates the evidence of PW1. Ms. Gisela insisted that the trial court found that the evidence on record was heavy enough to ground conviction upon the appellant.

With regard to the 3rd ground, Ms. Gisela stated that the appellant complained that penetration was not proved. She referred this court to page 4 of the trial court proceedings and argued that PW1 stated that the two of them were making love frequently therefore in her view penetration was proved. To support her submission she referred this court to the case of **Jumanne Shaban Mrando v R**, Criminal Appeal No. 282 of 2010, the Court of Appeal of Tanzania cited with approval the case **Hassan Bakari v Republic**, Criminal Appeal No. 103 of 2012 at Mtwara (unreported), it was observed by the Court of Appeal of Tanzania that in our African traditions it is not easy for the victim to explain how penetration took place. She further stated that being pregnancy by itself proved that PW1 was raped.

Arguing for the 4th ground, Ms. Gisela referred this court to page 14 of the trial court proceedings and stated that PW3's task was to confirm whether the victim was pregnant and not to name the responsible person. She admitted that PW3 examined the victim and found that the victim was

not a virgin and there was no any sperms in the victims' vagina. She urged this court to disregard this ground of appeal.

On the fifth ground, the learned State Attorney insisted that the trial court based its decision on the victim's evidence and the action was not witnessed by any other person. She urged this court to disregard this ground of appeal.

On the last ground, Ms. Gisela stated that the trial court was not required to conduct *voire dire* test since the victim was not below 14 years old. She went on to state that the victim proved that she was 17 years old therefore *voire dire* test was of no importance. The learned State Attorney went on to state that the trial court faulted itself for convicting the appellant on the second count; impregnating the school girl since there was no evidence to prove that the appellant is the one who impregnated the victim.

On the strength of the above submissions, Ms. Gisela She insisted that the prosecution proved the case beyond reasonable and beckoned upon this court to uphold the sentence on the first count; Rape contrary to sections 130 (1),(2) (b), and 131 (1) of the Penal Code Cap. 16. [R.E 2019].

Rejoining, the appellant had not much to say, he to urge this court to allow the appeal and set him free.

Having heard the submissions for both sides, I should state at the outset that in the course of determining this appeal, I will be guided by the canon of the criminal cases that, the onus of proof lies with the prosecution to prove that the defendant committed the offence for which he is charged with. In this case at hand, the issue is *whether the prosecution case was proved beyond a reasonable doubt*.

With respect to the first, third, and fourth grounds of appeal, the contention is that the prosecution witnesses failed to prove the offence of rape beyond reasonable doubt against the appellant. The learned State Attorney contention is that the prosecution discharged the burden of proving the case and that this being a rape case, evidence of the victim is the best evidence. In rape cases, the key ingredient is penetration of the accused's male organ into the victim's female organ. The same was held in the cases of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal of Tanzania observed that: -

" ***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].*

Based on the above authorities, I am going to analyse the evidence of PW1 to find out whether she proved the case. It was the evidence of the victim (PW1) that she used to make love with the appellant and later she realized that she was pregnant. PW1 testified to the effect that the appellant is the one who impregnated her. The conviction by the trial court is founded solely on the evidence of the PW1 that she was raped.

The main issue for determination is whether the ingredients of rape were proved? In order to prove the offence of rape under section 130 (1) and (2), (e) of the Penal Code Cap.16 [R.E 2019], one of the essential ingredients in rape cases is penetration. It was the duty of the prosecution to prove beyond 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. The Doctor (PW3) examined PW1 to find out if the alleged victim was pregnant he did not examine if there was any bruises

or bloodstain to prove penetration. In the case of **Kayoka Charles v R** Criminal Appeal No. 325 of 2007 the Court of Appeal of Tanzania 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.

It is trite law that in the "offence of rape there must be unshakeable evidence of penetration. In the case of **Selemani Makumba v R**, 2006) TLR 379, the Court of Appeal of Tanzania 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].*

The court records reveal that penetration was not proved, thus, 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. The cited case of **Hassan Bakari** (supra) is distinguishable because the victim, in this case, did not even try to explain how the appellant raped her. The mere words 'making love' does not prove penetration.

With regard to the second ground of appeal, the appellant claimed that the prosecution side failed to prove the case beyond reasonable doubt. I have perused the trial court records and found that PW1 testified that the appellant is the one who raped her and claimed that the appellant is responsible for the pregnancy. In a recent case of **Paschal Sele v R** Criminal Appeal No.23 of 2017 the Court of Appeal of Tanzania overruled the principle in the cases of **Selemani Makumba** (supra) and **Ndikumana Philipo v R**, Criminal Appeal No. 276 of 2009 (unreported), whereby the Court of Appeal of Tanzania 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."*

The Court of Appeal in the case of **Paschal Sele** (supra) held that:-

> " *While we agree that the above is the correct position of the law, we hasten to say that it does not mean that such evidence should be taken wholesome, believing and acted on to convict the accused persons without considering other circumstances of the case. In the*

present case apart from the words of PW1, the victim there was no eye witness to the incident of rape...."

Applying the above authority, in the instant case, it is hard to believe the victim's evidence since she failed to prove that penetration took place and there was no any other cogent evidence to prove that it was the appellant in exclusion of any other person who raped her. Therefore, the fourth ground is answered in the affirmative.

Before I pen off, I want to make it clear that as long as the first count; rape contrary to sections 130 (1), (2) (b), and 131 (1) of the Penal Code Cap. 16. [R.E 2019] was not proved that means the second count; impregnating a school girl cannot stand. The records reveal that PW3 examined PW1 and stated that she was pregnant but he did not know who was responsible for the said pregnancy. Therefore, the second count; impregnating a school girl contrary to section 60 A (3) of the Education Act Cap. 353 as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016 was not proved and the same cannot stand.

With the foregoing observation, I find no need to discuss the remaining grounds of appeal, which was raised by the appellant as to do so would be

a mere academic exercise. It only 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 for other lawful purposes.

Order accordingly.

DATED at Mwanza this 19th April, 2021.

A.Z.MGEYEKWA

JUDGE

19.04.2021

Judgment delivered on this 19th April, 2021 via audio teleconference whereby the appellant and Ms. Gisela Alex, learned State Attorney were remotely present.

A.Z.MGEYEKWA

JUDGE

19.04.2021

Right to appeal full explained.