

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY**

**AT MWANZA**

**HC. CRIMINAL APPEAL No. 131 OF 2020**

**(Original Criminal case No. 205 of 2019)**

**PETER SILVESTER.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

19<sup>th</sup> April, 2021 & 29<sup>th</sup> April, 2021.

**TIGANGA, J.**

Before the District Court of Bukombe, the appellant stood charged with two counts, to wit rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2002] now [R.E 2019] and impregnating a school girl contrary to section 60A(3) of the Education Act [Cap 353 R.E 2002] as amended by section 22 of the Miscellaneous Amendments Act No. 2 of 2016.

The particulars of the offence were that on 28<sup>th</sup> day of July, 2018, at about 09:00hrs at Katome village within Bukombe District in Geita Region, the accused person, now appellant, did have sexual intercourse with, and impregnated one **S d/o A**, (names in initials) a form three student at Lyambamgongo Secondary School.



On arraignment, the appellant pleaded not guilty to the charge, but after full trial, the trial District court acquitted the accused of the first count, but found him guilty and convicted him of the second count of impregnating a school girl. It appears, the Republic was not aggrieved by the acquittal of the appellant in the first count that is why they did not appeal against that finding. However the accused was not satisfied by the decision which convicted him in the second count, he is now before this court challenging the same with a total of five grounds of appeal namely;

- i. That the trial Magistrate erred in law and fact to convict the appellant while he pleaded not guilty to the charge of stealing (sic).
- ii. That the trial Magistrate erred in law and facts to convict the appellant by using hearsay evidence given by prosecution side and that failed to prove all ingredients of the offence he was charged with.
- iii. That the trial court erred in law by using evidence given by PW5, thus the doctor did not prove that the appellant was the one who impregnated the victim.



- iv. That trial Magistrate erred in law to convict the appellant by using contradiction (sic) explanation given by prosecution side and their witnesses. For example the prosecution side stated that on 28/07/2019 the appellant raped the victim and that did impregnate her, but as a result of that sexual attack at that time PW2 in December 2018 the victim was five months pregnancy (sic).
- v. That the trial Magistrate erred in law to convict the appellant without basing the defence given by the appellant.

The appellant prays that both, the conviction and sentence be quashed and set aside, appeal be allowed and that he be released from prison.

On the date set for hearing of this appeal, the appellant appeared in person, and personally argued his own appeal, whereas the respondent was represented by the learned State Attorney Miss Magreth Mwaseba.

Called upon to argue his appeal, the appellant had nothing more to say apart from praying that his grounds of appeal be adopted and used as his submission.

In her reply to the appeal, Miss Mwaseba, State Attorney, for the respondent, Republic, supported the appeal stating that the appellant

was accused of rape and impregnating a school girl but he was acquitted of rape and found guilty and convicted of impregnating a school girl. She submitted that since the prosecution never proved the fatherhood or paternity of the child, then the offence was not proved beyond reasonable doubt and the conviction was therefore not proper.

Following that submission, the appellant had nothing to rejoin, he called upon this court to decide basing on what the State Attorney submitted.

Now having considered the grounds of appeal advanced by the appellant and the submissions made by the learned State Attorney, the main issue that calls for determination is whether or not the present appeal has merits in the sense that whether the evidence was cogent enough to prove the case beyond reasonable doubt?

Going through the trial court's records, I find that the prosecution as rightly submitted by Miss Mwaseba, State Attorney, failed to prove the offence of impregnating a school girl. No evidence was tendered to prove that it was the accused, now appellant, who impregnated the victim. There was no DNA test conducted to prove that the accused was responsible.



Lack of that important piece of evidence creates doubt as to whether the appellant was indeed responsible considering the fact that he was not found guilty in the first count of rape.

For those reasons I find that the trial court misdirected itself by relying on the evidence which did not prove the important ingredient of the offence. It was incumbent for the prosecution in criminal cases to prove the cases beyond reasonable doubt. This duty is two folds, first to prove that the offence was committed, and second to prove that it was the accused who committed that offence. See **Maliki George Ngendakumana versus The Republic**, Criminal Appeal No. 353 of 2014, CAT- Bukoba (unreported). What the prosecution was able to prove was that the victim was impregnated. It did not bring concrete evidence to prove that it was the accused, now the appellant, who caused such pregnancy. That would have best been proved by scientific evidence, and in the circumstances of the case the DNA test evidence was much appropriate to ascertain the fatherhood of the baby, which evidence, in turn would have proved a person liable for impregnating the victim. In the absence of such kind of evidence it was unsafe to find the appellant guilty of impregnating the victim.

That said and as conceded by the learned State Attorney for the respondent, it can be said that just like the offence of rape, the offence of impregnating a school girl was not proved beyond reasonable doubt as against the appellant. This appeal is therefore allowed, the conviction is quashed and sentence is set aside. The appellant is to be released unless otherwise he is lawfully held.

It is accordingly ordered

**DATED at MWANZA this 29<sup>th</sup> day of April, 2021**

  
**J.C. Tiganga**

**Judge**

**29/04/2021**

Judgment delivered in the presence of the appellant on line via audio conference and Miss Mbuya learned Senior State Attorney for the respondent. Right of Appeal explained and guaranteed.

  
**J.C. TIGANGA**

**JUDGE**

**29/04/2021**

