

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 159 OF 2020

(Originating from Criminal Case No. 312 of 2018 from Temeke District Court)

MOHAMED SALIM MPUPA APPELLANT

Versus

THE REPUBLIC RESPONDENT

Date of last order: 24/05/2021

Date of Ruling: 25/05/2021

J U D G M E N T

MGONYA, J.

Before this Honorable Court lies an Appeal originating from **Criminal Case No. 312./2018** at Temeke District Court where the Appellant was found guilty of the charges against him and sentenced to a term of imprisonment of **30 years** from two counts being Rape and impregnating a school girl contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 [R.E. 2002]** and **section 60 A (3) of the Education Act, Cap. 353 [R.E. 2002]** as Amended by **Act No. 4 of 2016**; that were levied against him.

Being aggrieved by the decision of the trial Court, the Appellant knocked the doors of this Court with **six (6)** grounds of appeal being:

- 1. That, the Honorable trial Magistrate erred in law to convict the Accused on the offence of rape while the prosecution did not prove it beyond reasonable doubt.**
- 2. That, the Honorable Magistrate erred in law and fact to convict and sentence the Accused by using the contradictory evidence of the witnesses,**
- 3. That, the Honorable Magistrate erred in law and facts for pronouncing judgment, convicting and sentencing the accused without expressing to the Accused his right of appeal,**
- 4. That, the trial Magistrate erred in law and facts for failure to put into consideration that the prosecution side failed to call the material witness,**
- 5. That the trial Magistrate erred in law and facts for convicting the Appellant relying on the evidence of PW6 without assessing and establishing the qualification of witness, and**
- 6. That, the trial Magistrate erred in law and facts for convicting the Appellant relying on the evidence of PW1 which its credibility is questionable.**

Wherefore, the Appellant prays this honorable court to allow appeal, quash conviction and set aside sentence passed by the trial Court and release the Appellant from prison.

Submitting in favor of the Appellant, Mr. Barakiliza, Advocate informed the Court that, after his client being aggrieved by Temeke District Court, his main concern is on failure of the prosecution to prove their case beyond reasonable doubt; on the contradictory evidence of the prosecution witnesses, that the Appellant was convicted and sentenced without expressing the accused's right of appeal, conviction basing on the PW6's testimony without evaluating the same and further Appellant being convicted and sentenced basing on the PW1's testimony which was neither credible nor reliable as the same was questionable under the circumstances.

In a cause of arguing the appeal, the learned Counsel for the Appellant Mr. Barakiliza decided to dispose the appeal by urging the 1st and 4th grounds of appeal only basing on the fact that the Prosecution failed to prove the case beyond reasonable doubt to command both conviction and sentence at the trial Court.

The learned Counsel averred that, according to section **114 (1) of Evidence Act, Cap. 6 [R.E. 2019]** the law requires Prosecution to prove case the case beyond reasonable

doubt to command both conviction and sentence. However, in the instant matter, it was not the case.

The Counsel supported his case by referring to PW1's testimony before the trial court where she admitted explicitly that she had intensive love affair with the Appellant since December, 2017. However, the day that is said the offence of rape was committed on 26/03/2018 where the victim's relatives went into his room the Appellant and the PW1 while in that room, the accused was in his pence while PW1 was naked. Further, Appellant admits to have been in such a scenario but he denied to have raped PW1 on that particular day. The fact that the appellant was in pence when other people entered the room was also supported by PW3 who was at the locality.

Further, it is the Appellant's Counsel concern that, for that particular day, the Appellant is still strongly denying to have any sexual affair with PW1 though they had love relationship. Further, PW1 in her testimony admitted to make love with the appellant several times during their love relationship and still they had a continuous and active love relationship with the appellant , the fact which PW1 admitted even before PW2 (the local Government Leader).

The counsel further informed the court that apart from the offence of rape, the appellant was charged with the offence of impregnating PW1 contrary to the provisions of Education Act.

As the result of the denial to the pregnancy, after the birth of the child, there was a DNA test conducted where it was revealed from the results that the child was not produced by the Appellant, though PW6 who was a doctor, proved penetration to PW1 in his report.

It is from the above, the Appellant was of the view that prosecution was not able to prove the case to the required standards at the trial court.

Responding to the Appellant's submission, the learned **State Attorney Ms. Imelda Mushi**, admitted the fact that the Appellant's case was not proved beyond reasonable doubt; and hence Republic supports the Appeal. The reasons of supporting the Appeal was stated by the learned counsel to be.

In reference to the PW1's testimony at Pg. 8 of proceedings, the learned Counsel told the court that it is not disputed by the same that the Appellant was his lover and they had love affairs and made love many times. However, the Counsel averred that, apart from that fact, and especially in incriminating the Appellant with the offence of impregnating PW1, PW1's testimony is not reliable as after the DNA test, the result that the Appellant was the father of the Appellant was **0%**. From this, it is Ms. Mushi's concern that the result demonstrated that PW1 was not a credible witness and out of the said results, it is her further conviction that the Appellant is

not the one who raped PW1; hence the Appellant's conviction and sentence thereto was a fault under the given circumstances.

It is from the above explanation, the learned State Attorney on behalf of the Republic announce to support the Appeal with the grounds above.

Having heard both Appellant's and Respondent's counsel respective submissions, I have the following:

That I am conversant with the principle of law that in criminal cases, it is the duty of the prosecution to prove its case beyond all reasonable doubts. This is provided under **section 3(2) (a) of the Evidence Act, Cap. 6 [R. E. 2002]**. Further, in case there is any doubt on the Prosecution side, such doubt have to benefit the accused. This is a settled principle of criminal jurisprudence and has been reiterated in a number of decisions including the case of **JONAS NKIZE VS. R [1992] TLR 213**, where the Court of Appeal made the following remarks:

"I would formulate the following propositions: Woolmington's case is concerned with explaining, and reinforcing the rule, that the prosecution must prove the charge it makes, beyond reasonable doubt, and consequently, that, if, on the material before the jury, there is reasonable doubt, the prisoner should

have the benefit of it The rule is general application, in all charges, under criminal law."

From the above narration, the issue before me is whether Prosecution during trial managed to prove its case beyond reasonable doubt to command the Appellant's conviction and sentence.

Further, I am aware that in rape cases as it is well known, the best evidence is the one comes from the victim herself. Taking into consideration her testimony before the court, and being the witness who actually knows what transpired between her and the Appellant, so the court have to consider her testimony and take the same with great weight.

In the case of ***SELEMANI MAKUMBA VS REPUBLIC [2006] TLR 379*** it was also 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 woman where consent is irrelevant that there was penetration".

From the above narration, the issue before me is whether Prosecution during trial managed to prove its case beyond reasonable doubt to command the Appellant's conviction and sentence.

In the case at hand, the evidence of **PW1** the victim, did not stand alone but as said earlier was corroborated by evidence of the doctor who proved penetration. Apart from the said evidence, there was a **DNA test** for the child by PW1 as to prove the owner of the pregnancy. Unfortunately, the result of the said DNA test revealed that the possibility of the Appellant to be the father to the victim's child is **0%**. Meaning that the Appellant is not the father to the PW1's child. This alone has shaken the PW1's testimony that she was raped and impregnated by the Appellant herein as the result of her pregnancy and finally a child.

I have to say that by the result of the DNA, of which is scientific results which have to be taken seriously, the same does not have chance to be interfered, so there is every reason to believe the same.

Indeed, I am obliged to take judicial notice of the scientific underpinnings of DNA typing, and many courts have done so. Courtroom debate has been terminated by the application of the forensic samples which were take form the Appellant and PW1 and the child and the procedures for declaring a match and interpreting its importance was of at most importance under the circumstances.

As the PW1's testimony has been shaken to this extent, I have to declare that I join hands with the Republic and

Appellant's Counsel by declaring that Prosecution at the trial court did not manage to prove its case beyond reasonable doubt to command conviction and sentence.

On those circumstances explained, am of the firm conviction that the Appellant was convicted without sufficient evidence. Therefore, **appeal is meritorious, and accordingly allowed. The Conviction is hereby quashed, and sentence is set aside. The accused is set at liberty, unless otherwise withheld with other offences.**

It is so ordered.



L. E. MGONYA
JUDGE
25/05/2021

Court: Judgment delivered in chamber in the presence of Ms. Imelda Mushi, State Attorney for the Respondent, the Appellant in person and Ms. Veronica, RMA this 25th day of May, 2020.



L. E. MGONYA
JUDGE
25/05/2021