IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 53 OF 2020

(Originating from Criminal Case No. 81 of 2019)

RAMADHANI IDD @ MNYAMPAA ..... APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

19/4/2021 & 21/6/2021

MZUNA J.

The appellant is challenging the conviction and sentence imposed on him by the District court of Babati. Before that court he stood charged with two counts; One for Rape C/S 130 (1) and (2) (e) of the Penal Code Cap 16 RE 2002 and another count for Impregnating a School Girl C/S 60A (3) of the Education Act Cap 353 R.E 2002. It was alleged that on the unknown date of December, 2018 at Nakwa Village, within Babati District in Manyara Region, the appellant had sexual intercourse with a school girl named HS (to hide her identity) aged 16 years old and impregnated her.

He was convicted as charged and sentenced to thirty years (30) imprisonment in respect of the first count whereas in the second count he was sentenced to one year (1) imprisonment. The sentence to run concurrently.

In this appeal, the appellant appeared in person, unrepresented. The Republic through Ms. Akisa Mhando, learned State Attorney strongly opposed the appeal and supported the conviction and sentence. Hearing of the appeal proceeded orally.

The background story is that the victim, a Secondary school girl, then aged 16 years (born on 30/03/2003) did have sexual intercourse with the appellant after she went to sell some firewood to him, at his house. He then made some promise to her by giving her some pocket money. The first sexual intercourse was in December, 2018. She was given Tshs 5,500/-. On the second incident which was after four days, she was given Tshs 2,500/-. In January, she went to school. She never saw her menstrual period up to April, 2019. Upon notifying the appellant during mid -term, he chased her and told her should run from home and go to Dodoma as a house girl of which she did. Due to such sexual act, she conceived and got a baby born on 2nd October, 2019.

That story was given support by her Mother Hadija Rajabu Hangalii (PW2). She complained to the Headmaster and Police after noticing her absence at school. Her absence was indeed given support by her class teacher Emmanuel Shayo (PW5). He tendered the attendance register of Form IIB at Bagara Secondary School as exhibit PE2 The victim upon being traced, underwent Hospital Laboratory embryo test by Dr. Felix Joseph Komba (PW3). She was found to be pregnant as evidenced by PF3 (exhibit PE1). She mentioned the appellant to be responsible. The investigation by WP 6900 PC

Bahati (PW4), led to the arrest of the appellant and institution of a criminal case, subject in this appeal.

When called upon to make his defence, the appellant gave no defence. He left for the court to decide.

During hearing of this appeal, the appellant opted to adopt the three grounds of appeal. He asked for the court to find him not guilty and consequently acquit him. I propose to start with the first ground. It reads:

1. *That, the trial Court erred in law and in fact by not complying with the mandatory provisions of section 231 (3) of the C.P.A cap 20 R.E 2002. According to Sub section (3) of section 231 (supra), the trial court and the prosecution ought to have given its comments of failure by the accused to enter his defence including explaining the accused the negative impacts that might face the accused considering the accused is a lay person and necessity of a fair trial. The right to a fair trial is a cardinal principle of our system and a basic constitutional right.*

The main issue is whether the omission by the trial court as well as the prosecution to comment on his failure to defend as well as explaining to the appellant the adverse effect of his failure to enter a defence has occasioned a failure of justice? If so, what is the effect?

Supporting his appeal, the appellant said that, he can not read or write, he prayed for the court to consider his grounds of appeal as raised in his filed grounds of appeal.

On her part, Ms. Akisa Mhando, the learned State Attorney said in response to the 1st ground of appeal that, there is no violation of section 231 (3) of the CPA as the accused person waived his right when he opted not to testify and leave it for the court to decide. It was her prayer that this complaint be dismissed.

Reading from the record, the trial court after it had made a finding that the accused has a case to answer, he was then called upon to make his defence. His response was that:- *"I do not have any kind of evidence in my defence. I leave the matter to the wisdom of this honourable court."*

The court proceeded to fix a date for judgment. The appellant's view is that the court as well as the prosecution ought to have given its comment for such failure to give evidence in view of section 231 (3) of the CPA.

In a similar case of **Haji Shame and Another v. Republic** [1987] TLR 70 (HC), the appellants opted not to cross examine prosecution witnesses after their request to engage an advocate was ruled out allegedly that they were employing a delaying tactic, the view which was affirmed by the High court. When they were called upon to defend, they opted not to do so. On appeal, the High court, Sisya, J (as he then was) held at page 75-76 that:-

> *"From the brief account of events in the trial court already narrated hereinabove - and I see no cause to reiterate the same - it is clear that the appellants were given opportunity not merely to cross - examine PW 2 but actually to defend themselves as well.* ***Both of them refused***

to say anything in defence thereby forfeiting their right to defend themselves. Surely they cannot now properly be heard to complain. I dismiss the appellants' complaints on this point as being without substance in law..." (Underscoring mine).

Looking at the appeal grounds, the appellant seems to say was not informed the adverse effect of not making his defence and that there was no comment by the court and the prosecution as well stated under section 231 (3) of the CPA. That provision reads:-

> *"231 (3)* ***if the accused, after he has been informed in terms of subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence."***
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> (Underscoring mine).

The mere fact that the court as well as the prosecution, never drew an adverse inference against him or even comment on the failure by the accused to give evidence, in my view, is not a material irregularity. He waived his right to defend. To say he was denied his "fair trial" and or that "to do so was against the constitutional right of right to defence or the right to a fair trial which is a cardinal principle of our system and a basic constitutional right" with due respect, is an afterthought. I agree entirely with Ms. Akisa Mhando, the learned State Attorney that there is no violation of section 231 (3) of the CPA as the accused person waived his right when he opted not to testify and leave it for the court to decide, notwithstanding that he is a lay person. I say so based on

section 388 of the CPA, Cap 20 RE 2002 because "such error, omission or irregularity" did not "in fact occasion a failure of justice". This ground fails.

The second and third grounds of appeal touches on the failure of the "trial court to scrutinize the evidence on record" and that the "conviction and sentence on the appellant was based on the offence which was not proved by concrete evidence."

Responding to these grounds, Ms. Akisa, the learned State Attorney said that the trial magistrate warned himself before using the evidence of the victim who was under age. The victim (PW1) told the court how the incident occurred and how their relationship started on December 2018. She mentioned him to her parents and identified him before the court. The learned State Attorney cited the case of **Jacob Mayani vs The Republic**, Criminal Appeal No. 558/2016 CAT at Shinyanga, (unreported) where it was held that, the evidence of the victim can be safely relied by the court to sustain a conviction.

Further, her evidence was corroborated by the evidence of PW3 (a Doctor) who tendered Exhibit P1 and PW5 (the teacher) who testified that the victim was in Form II B when the incident occurred. He tendered exhibit PE2 (attendance register) to prove his argument, but it was tendered contrary to the law as it was a photocopy. She prayed for the court to expunge that exhibit leaving his evidence alone.

She added that, in rape cases there is no need of corroboration. As it can be seen in **Jacob Mayani**'s case (supra) the court was satisfied that the child of tender years or the victim of sexual offence is able to tell the truth. For that reasons, the prosecution's case was proved beyond all reasonable doubts.

Reading from the evidence of PW1, she narrated how the appellant hoodwinked her by giving her some money and promises and then had sexual intercourse with her. It is from this act which led to the impregnating her. At page 4 of the typed judgment, the trial Magistrate remarked that:-

> *"According to her, accused did approach her and give her promise...She was taken and lie on bed and accused did remove her underwear. Then he undressed himself his trouser and underwear then lay horizontal to me (sic)...Then he took his penis and inset (sic) it into my virginal (sic)...The victim told the court that she got pain...there was white mucus discharging from her virginal (sic)..."*

The above transcript of the judgment which is based on the evidence on record, shows the appellant inserted his penis into her vagina. Section 130 (1) and (2) (e) of the Penal code, Cap 16 reads:-

> *"130 (1) It is an offence for a male person to rape a girl or a woman.*
>
> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(a) –(d) N/A*

(e) with or without her consent when she is under eighteen years of age..."

In a rape charge for a girl below 18 years, consent is immaterial. What matters is only evidence/proof that there was penetration. The girl/victim proved such penetration. According to the evidence of her mother (PW2) she was aged 16 years. The PF3 corroborates the evidence of the victim which due to such penetration of a male organ into her vagina, she became pregnant.

The trial Magistrate clearly evaluated the evidence and came to the conclusion that true evidence of rape comes from the victim citing the case of **Daudi Shilla v. The Republic,** Criminal Appeal No. 117 of 2007, CAT (unreported).

The first count of Rape just like the second count of Impregnating a School Girl, were proved by the prosecution beyond all reasonable doubt. The trial Magistrate properly evaluated the evidence and came to the correct findings. I am convinced, the pregnancy and child born thereafter, is the outcome of the rape by the appellant. The conviction and imposed sentence cannot be nullified. Ground No. 2 and 3 are bound to fail.

For the above stated reasons, this appeal is devoid of merits and is hereby dismissed. The appellant should continue to serve the imposed sentence.

M. G. MZUNA,
JUDGE.
21/06/2021