THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO. 80 OF 2020

(Originating from District Court of Liwale in Criminal Case No. 6 of 2020)

JUMA HAMISI GOCHIGOCHI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 09/6/2021
Judgment date on: 21/6/2021

NGWEMBE, J:

Juma Hamisi Gochigochi being so aggrieved by the decision of the District Court of Liwale, which convicted and sentenced him to thirty (30)years imprisonment, found his way to this court.

The genesis of this appeal, traces back to July 2019 up to 30th December, 2019 at Kiangara village within Liwale District in Lindi region, where the appellant is alleged to have unlawful carnal knowledge with a girl aged 17 years. Since the girl was below the age of majority, her actual name is hidden for the purpose of preserving her integrity in the society, instead she is baptized as **"RJN"** throughout of this judgement.

In the cause, the appellant was arrested and finally arraigned in court charge for two counts, namely; rape contrary to section 130 (1) (2) (e) and 131(1) of the Penal Code Cap. 16 R.E 2002; and second count is impregnating a secondary school girl contrary to section 60A (3) of the Education Act Cap. 353 R.E 2002, as amended by Act No. 2 of 2016.

Upon hearing both parties, at the end the trial court, found the appellant guilty on both counts. Consequently, was sentenced to serve a sentence of 30 years' imprisonment for the first count, and 5 years' imprisonment for the second count.

Being aggrieved with such conviction and sentence, he preferred an appeal to this court clothed with fourteen (14) grounds of appeal. However for convenient purposes, one ground may satisfy, that is, failure of the prosecution to prove the case beyond reasonable doubt.

On the hearing of this appeal, the appellant appeared in person, while the respondent was represented by Mr. Ndunguru learned senior State Attorney who outright supported the appeal on the second count of impregnating a secondary school girl while opposing the first count on rape.

Arguing on the 1st count, Mr. Ndunguru submitted that the offence of rape was proved by establishing all relevant ingredients of rape, which are; sexual intercourse, that is penetration. (The last time to have sexual intercourse was disclosed to be on 30/12/2019); age of the victim, that she was only 17 years old as she was born on 17/6/2003; and that the evidence pointed only the appellant. PW1 disclosed all that

facts and the responsible person was the appellant. Such evidence was corroborated by PW5 who proved that RJN was pregnant and she was matured on sexual intercourse, he added.

On the alleged impregnating a school girl, he submitted that same was not proved. That there was no other medical examination to prove such allegations of that pregnancy o otherwise.

In turn, the appellant though was not represented by an advocate, he argued on two valid points. That the age of the victim was not proved by either witness as required by law; second he denied to have sexual relationship with the victim. Thus, his appeal ought to allowed, he concluded.

Considering deeply on the rival arguments, advanced by both parties and upon review of the trial court's records, I find the issue for consideration is whether the evidence testified by the prosecution witnesses proved the alleged offences against the appellant?

In this appeal, I fully agree with the learned senior State Attorney that the offence of impregnating a secondary school girl was not proved. First the evidence of PW1 (Victim) boldly testified that she was no pregnant on the date she testified in court. Secondly, her evidence was to the effect that her pregnancy was of one month, while PW5 used ultrasound to determine the age of her pregnancy and proved that her pregnancy was of 9 weeks, meaning two months and one week. Surpringly, on the date she testified in court, PW1 had no pregnancy.

Unfortunate, the prosecution did not take any undertaking to prove if she was pregnant or otherwise.

More so, the trial court proceeded to convict the appellant on an offence which was not established and proved beyond reasonable doubt. Accordingly, and without laboring much on this point, the trial magistrate had no reason at all, to convict the appellant on an offence which was not established and proved as required by law.

It is a cardinal principle of law, which should not be forgotten, that in criminal cases, the prosecution has uncompromised duty to establish a prima facie case against the accused/appellant and not the accused to prove his innocence.

Notably, the duty of the prosecution is to bring evidences to prove what is alleged in the charge sheet. In the case of **Sylivester Stephano Vs. R, Criminal Appeal No. 527 of 2016** (unreported) the Court held:-

> *"When there is a failure of the prosecution to link evidence and charge sheet same may not lead into conviction".*

I think, it is now settled in our jurisdiction that when the evidence does not prove what is alleged in the charge sheet, a prima facie case will not be established. This position has a backing from the Court of Appeal in the case of **Salum Rashid Chitende Vs. R, Criminal Appeal No. 204 of 2015** (unreported) and in the case of **Mathias s/o Samweli Vs. R, Criminal Appeal No 271 of 2009** (unreported), held:-

> *"When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the*

offence was committed on that specific date, time and place".

Therefore, the offence of impregnating school girl was neither established nor proved, thus, I proceed to acquit the appellant from the second count of impregnating a school girl and I proceed to set aside the sentence of five years imprisonment.

On the first count of rape, I think the elements of rape is well established by countless precedents, including in the case of **Kayoka Charles Vs. R, Criminal Appeal No. 325 of 2007**, where the court held:-

"Penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ into her sexual organ"

Such decision was a replica of section 130 (4) (a) the Penal Code Cap 16. R.E 2019, which provide:-

"penetration however slit is suffice to constitute the sexual intercourse necessary to the offence"

The question is whether the elements stated above were established and proved by the prosecution during trial? In order to answer this question, review of the trial court's evidences is inevitable. In this point, PW1 testified that she was born 17/6/2003 and that she stated having love affairs with the appellant in year 2019. That their sexual intercourse was done in the parents house of the appellant. The last sexual intercourse was on 30/12/2019 at night in appellant's house.

She testified further that, on 29/1/2020 while was at school, she was taken to Kiangara Dispensary for pregnancy test, where she was observed to be pregnant. Such piece of evidence was corroborated by PW5 a Clinical officer, who examined **RJN** and provided her findings that she was pregnant with 9 weeks.

At the end she testified that she was not pregnant and did not know where that pregnancy went. Thus, remained on whether she was penetrated and who did it. I have no light doubt; any pregnant woman or girl must have penetrated by a male genital organ. In this appeal apart from the evidence of PW1 and PW5, the other witnesses, PW2, PW3, PW4 and PW6 were purely circumstantial.

In the circumstances of this appeal, the most reliable evidence, which the trial court believed to convict the appellant on the alleged offence was of RNJ (Victim) herself. I am also aware, on the legal principle pertaining to rape cases that, the best evidence comes from the victim. This position was strongly pronounced in the celebrated case of **Seleman Makumba Vs. R [2006] T.L.R 384**.

However, that should not be taken as Ten Commandments from Almighty God. Always Courts of law have statutory duty to evaluate every piece of evidence with serious caution and great care to avoid apparent danger of victimizing innocent persons, and or use the allegations of rape as stick over family conflicts. This position was likewise arrived by the Court of Appeal in the case of **Hamisi Halfan Dauda Vs. R, Criminal Appeal No. 231 of 2019** (unreported) where the Court held:-

"We are a live however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s)".

In this appeal, I have no slight doubt, the victim's evidence is wanting in terms of proving an impeccable explanation that was the appellant who committed the offence. At page 15 last paragraph of the proceedings she testified as quoted hereunder:-

"he is living with his parents, I do not remember the date and month we do sex together but on 30/12/2019 is when we do sex for the last time and do that sex at his place, it was during night hours. I went at his place that night and I do not remember how many times we did sex as I did not count there as we did it many times"

This piece of evidence created more questions than answers. Even the reliability of the witness is highly questionable. First, at the beginning she alleged to be pregnant of one month, but when she testified in court she said she had no pregnant. When she was asked as to where is that pregnancy, she answered she did not know where it was. In the contrary, PW5, the clinical officer proved that her pregnancy was of 9 weeks, the question is who was reliable in such circumstances?

Another area which raise unanswered questions is on the place where they were meeting for that offence. If the appellant was staying with his parents' in the parents' house, where did they committee the alleged

offence? Where were the parents of the appellant when the two were committing such offence? Undoubtedly, the testimonies of PW1 raised more questions than answers. As such she was not reliable witness. This case is similar to the case of **Wilfred Lukago Vs. R [1994] T.L.R 189**, where the court held:-

> *"the prosecution evidence had some serious contradictions and, in the circumstances of this case, it was impossible to assess the credibility of the appellant's wife whose evidence was heavily relied on in reaching conviction; all these raise a grave doubt as to the appellant's guilty"*

I am settled in my mind that the offence of rape like the offence of impregnating a school girl were not proved to the standard required by law, which is beyond reasonable doubt. I accordingly, allow the appeal, quash the conviction and set aside the sentence meted by the trial court, subsequently order an immediate release of the appellant from prison unless lawfully held.

I accordingly order.

Dated at Mtwara this 21st day of June, 2021.

P.J. NGWEMBE

JUDGE

21/6/2021

THE HIGH COURT OF TANZANIA

Date: 22/6/2021

Coram: Hon. A.H. Msumi, DR

Appellant: Present in person

For Respondent: Mr. Ndunguru, Senior State Attorney

B/C: Asha – RMA

Order: Judgment delivered today in chambers in the presence of the Appellant and Mr. Wilbroad Ndunguru learned Senior State Attorney for the Respondent/Republic.

A.H. Msumi

DEPUTY REGISTRAR

22/6/2021