IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC CRIMINAL APPEAL No. 212 OF 2020

(Original Criminal Case No. 32/2020 the Court of Resident Magistrate of Geita)

JOEL BULUGU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

16th & 29th June, 2021

TIGANGA, J.

Before the Resident Magistrates Court of Geita, at Geita, the appellant herein stood charged with two counts, to wit, rape contrary to section 130(1)(2)(e) and 31(1) of the Penal Code [Cap 16 RE 2019] and impregnating a school girl contrary to section 60A(3) of the Education Act [Cap 353 RE 2002] as amended by Miscellaneous Amendment Act No.2 of 2016.

The particulars of the offence were that, on diverse dates and time between August and November, 2019 at Bugalama Village within the District and Region of Geita, the accused person, now appellant, did have carnal knowledge of one A d/o Y, (names in initials) a girl aged 16 years. Also, that on unknown date of November 2019 at Bugalama Village within the District and Region of Geita, the appellant did

impregnate the said A d/o Y, a form two student at Bugalama Secondary School.

Having been arraigned before the trial court, the appellant pleaded not guilty to both counts. After full trial, which involved five prosecution witnesses and one defence witness, the Resident Magistrates Court found that the prosecution managed to prove, beyond reasonable doubt only the second count and so found the appellant guilty impregnating a school girl. The accused was not pleased with the findings of the trial court, he is now before this court challenging the verdict armed with a total of six grounds of appeal namely;

1. That the trial District Court erred in law and facts when relying on prosecution side without considering the side of the appellant as resulting this allegation to be decided without sufficient evidences(sic).
2. That the trial court erred in law and facts when failed to identify that all statements and exhibits tendered before the court was hypothetical because there were no any witnesses who were proved the commission of crime but the court had consider and accept false evidences illegally from pw1, pw2, p4 and pw5 (sic).

3. That the court used suspicious evidence to make decision of convicting and sentencing the appellant without prove the allegation under all beyond reasonable doubt (sic).
4. That the trial court Magistrate contradicted himself in law and fact to convict and sentence the appellant while the prosecution side failed to prove the allegation, therefore the decision of the trial court lies on probability because DNA tests was required to prove the allegation.
5. That the trial Court Magistrate erred in law and facts to decide the allegation without consider the presence of supportive evidence in order to prove the case beyond reasonable doubt according to the serious of offence (sic).
6. That the trial Court erred in law and fact to convict and sentence the appellant while in this case there were weak standard and shortage of proof of the witnesses from prosecution side.

The appellant prays before this court that both the conviction and sentence be set aside and that he be put at liberty.

On the date set for hearing of this appeal, the appellant appeared in person and was not represented, whereas the respondent Republic

was represented by the learned Senior State Attorney, Miss. Rehema Mbuya.

Called upon to argue his appeal, the appellant had nothing more to add apart from stating that he filed a total of six grounds of appeal, which he prays to be adopted and used as his submission. He also prayed that his appeal be allowed and he be acquitted.

In her reply to the appellant's submission, the learned Senior State Attorney stated that after passing through the records she supports the appeal. Her support is rooted in the evidence available on records. That the appellant was charged with two counts namely rape and impregnating a school girl but was found guilty of the second count of impregnating a school girl. She submitted further that it was evidenced that the appellant had been in a love relationship with the victim who was a student and that later the victim was suspected to be pregnant, a suspicion which was proved after the victim was examined and found to be pregnant. It was further evidenced that after being asked who was responsible the victim mentioned the appellant.

According to her, although it was proved that the victim was a student and that she was pregnant, but the allegations that it was the appellant who was responsible for the pregnancy was not proved.

As for the proof of the second count, the learned Senior State Attorney for the respondent submitted that, there has to be proof of paternity first before the offence of impregnating a school girl is proved. Therefore, having no evidence of DNA to prove that the appellant was really the father, it cannot be stated that the offence was proved beyond reasonable doubt.

Further to that, in her opinion, the fact that the offence of rape was not proved makes it impossible to prove the impregnating of a school girl.

Following that submission, the appellant had nothing to rejoin, he called upon this court to allow his appeal and acquit him.

Now having considered the grounds of appeal advanced by the appellant and the submissions made by the learned Senior State Attorney, the main issue that calls for determination is whether or not the present appeal has merits, in the other words whether the evidence by the prosecution 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 Rehema Mbuya, Senior 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 for the impregnation of the victim, 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.

Under section 110 and 111 read together with section 3(2)(a) of the Evidence Act [Cap 6 R.E 2019], the prosecution is required to prove the criminal cases to the standard of 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 Senior State Attorney for the respondent, Republic, it can be said that just like the offence of rape, the offence of impregnating a school girl was not proved beyond reasonable doubt against the appellant. This appeal is therefore allowed, the conviction is quashed and sentence is set aside. The appellant is to be released forthwith unless otherwise he is lawfully held.

It is accordingly ordered.

DATED at **MWANZA** this 29th day of June, 2021

J.C. Tiganga

Judge

29/06/2021

Ruling delivered in open chambers in the presence of the counsel for the parties on line via Audio teleconference.

J.C. Tiganga

Judge

29/06/2021