IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 15 OF 2021

(Originating from Criminal Case No. 136 of 2020 of District Court of Ngara at Ngara)

FAROUK ANDREA---------- APPELLANT

VERSUS

REPUBLIC---------- ---------- RESPONDENT

JUDGEMENT

Date of Last Order: 29/07/2021

Date of Judgment: 13/08/2021

Hon. A. E. Mwipopo, J.

The Appellant namely Farouk Andrea was charged and convicted by the District Court of Ngara at Ngara for two offences of Marrying a School Girl contrary to section 60A(1) (a) of the Education Act, Cap. 353 as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016; and Rape contrary to section 139(1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2019. It was alleged on the first offence that the Appellant on 18th June, 2020 during night hours at Kumunazi Village, within Ngara District in Kagera Region married one WS a form five

student of Lukole High School. In the second offence, it was alleged that on 18th June, 2020 during night hours at Kumunazi Village, within Ngara District in Kagera Region the Appellant did unlawfully have carnal knowledge of one WS a girl aged 17 years old. After hearing of the case, the Appellant was convicted for the rape offence and was sentence by the trial Court to serve thirty (30) years imprisonment, corporal punishment of six strokes and to compensate the Victim a sum of Tshs. 300,000/= for the injuries caused to her.

The Appellant was aggrieved by the decision of the District Court and he filed the present Appeal against the said decision. In his petition of appeal, the Appellant has raised a total of seven grounds of appeal as provided hereunder:-

1. That, the trial Magistrate erred in law and facts by convicting and sentencing the appellant on the offence which was not proved beyond reasonable doubt.
2. That, the trial Magistrate erred in law and facts by convicting the Appellant on the basis of the manufactured case.
3. That, the trial Magistrate erred in law and facts for failure to properly evaluate the evidence of the prosecution side which had a lot of contradictions. At page 2 of the Judgment the victim testified

to be form V student while at page 5 of the proceeding PW6 testified that she is a student of form six with Reg. No. 2525.

4. That, the trial Magistrate erred in law and facts by failing to examine the witnesses according to the law.
5. That, the trial Magistrate erred in law and facts by holding such conviction without any medical document (PF3) which was tendered before the Court to prove that the victim was real raped. At page 6 of the Judgment the Magistrate accepted the mere words of PW9 who said that she filled PF3.
6. That, the trial Magistrate erred in law and facts by accepting evidence of non-professional who testified as PW9. The judgment shows in page 6 that PW6 was a worker who works at Nyamiaga hospital and she is not a medical practitioner that is the reason she failed to file a PF3 form.
7. That, the trial Magistrate erred in law and facts by failing to find out the reason for her decision. At page 7 of the copy of judgment the issues raised does not show whether the victim was raped and who raped her.

At the hearing of the appeal, the Appellant appeared in person, unrepresented, whereas the Respondent was represented by Mr. Nehemia

John, learned State Attorney. In his submission in chief, the Appellant prayed for the Court to consider for his grounds of appeal found in the Petition of Appeal as part of his oral submission.

On his part, the learned State Attorney supported the appeal. It was his submission that the Appellant was charged and convicted for the offence of unlawfully having carnal knowledge of the girl aged 17 years. He said that the offence which the Appellant was charged and convicted of is statutory rape which the prosecution was supposed to prove the age of the victim and presence of the penetration. He argued that the best evidence rule in the sexual offences comes from the victim as it was held in the case of **Selemani Makumba V. Republic, [2006] T.L.R. 379.**

He said that the testimony of the victim – PW1 shows that she was taken by the Appellant and they slept together. She stated that when she wake up in the morning naked and felt pain in her vagina. This evidence by PW1 proved that she slept with the Appellant, but, it doesn't prove that she was raped. He added that there is no evidence to prove that the victim was penetrated by the Appellant as a result the offence of rape has no legs to stand.

The State Attorney went on to submit that there is no evidence at all to prove the offence of marrying a school girl at all. The particular of the

offence in the charge sheet did not reveal the name of the victim as result it is defective. It is difficult for the Appellant to understand the offence he was charged with. For those two reason the State Attorney supported the appeal and prayed for the conviction and sentence of the trial Court be set aside.

In his rejoinder the Appellant prayed for the Court to set aside his conviction and sentence and release him from imprisonment.

After considering the submissions by both sides and the record of appeal, it is clear that the Appellant was charged for two offences of marrying as school girl and rape before the District Court of Ngara at Ngara was convicted by the trial Court for the offence of rape contrary to section 130(1), (2) (e) and section 131(1) of the **Penal Code**, Cap. 16 R.E. 2019. The trial court did find that the offence of marrying as school girl was not proved. The conviction was on the offence of rape only. For that reason, the Appellant has appealed against the conviction and the sentence for the rape offence.

The learned State Attorney has supported appeal for the reason that there is no evidence in record to prove the victim, a girl aged 17 years, was raped by the Appellant. I'm convinced that the issue of failure to prove penetration as among the ingredients of the offence of rape for a girl below 18 years of age which was raised by the learned State Attorney is capable of

disposing of this appeal. For that reason, I'm going to determine the said issue first.

As it was rightly submitted by the learned State Attorney in order to prove the offence of rape under section 130(1), (2) (e) of Cap. 16 R.E. 2018 (statutory rape), the prosecution has duty to prove the ingredients of the offence which is the act of Appellant having a sexual intercourse with a girl who is below 18 years of age. Section 130 (1) of the Penal Code creates the offence of rape and in subsection (2) provides for different descriptions of the rape offence including a rape to the girl aged bellow 18 years as it was in the present case. The section reads as follows, I quote:-

> *"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:*
>
> > *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

From above cited section, it is important where the Appellant was charged with statutory rape to prove the age of the victim and the penetration (presence of sexual intercourse). In the present case the age of

victim was well proved by the testimony of the victim (PW1) and PW2 who is victim's mother that the victim was aged 17 years at the time of incident.

The second important element to be proved in a charge of rape offence is presence penetration. The learned State Attorney submitted that there is no evidence to prove that the Appellant had penetrated the victim. The Appellant also raised the same point in ground No. 7 of his the petition of appeal that the prosecution evidence does not prove that the victim was raped and who raped her.

As it was rightly submitted by the learned State Attorney, the best evidence rule in the sexual offences comes from the victim. It is a settled principal of law that the best evidence in rape cases is that of the victim. In the case of **Selemani Makumba v. Republic**, (Supra), the Court of Appeal 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."*

The Court of Appeal had similar position in the case of **Godi Kasenegala v. Republic, Criminal Appeal No. 10 of 2018,** (unreported), where it held that:-

"It is now settled law that the proof of rape comes from the prosecutrix herself."

In this case, the victim's (PW1) evidence found in page 8 of the typed proceedings shows that the victim entered in the room of the Appellant on the date of incident and she slept as she was feeling sleepy. When she woke up she heard people knocking the Appellant's door and the Appellant helped her to wear her underwear and gown. She said that she felt pain in her vagina. Appellant opened the door and the police came in and took both of them to police station. In the next morning police wrote her statement and took her to Nyamiaga Hospital for checkup where the Doctor said she was penetrated and there are bruises. This evidence from the victim does not at all show if the Appellant did penetrated her vagina. Also, it is not clear as to what or who has caused the bruises and pain in her vagina. What she said is that she felt pain in her vagina. It was the Doctor who told her that she was penetrated and there are bruises.

In the case of **Kayoka Charles v R, Criminal Appeal No. 325 of 2007, Court of Appeal of Tanzania, at Tabora,** (Unreported), it was held by the Court of Appeal that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ.

In another case of **Ex- B 9690 SSGT Daniel Mshambala v. R, Criminal Appeal No. 183 of 2004**, (unreported), the Court of Appeal held as follows, I quote: -

> *"PWl ought to have gone further to explain whcthcr or not thc appellant inserted his penis into her vagina/ whether or not the penetration was slight etc. In general PWl ought to have been more forthright and thorough in her evidence on the alleged rape. It was not enough to make assertion that she was raped, without more. She ought to have been more forthcoming in her evidence in order to enable the court to make a meaningful finding whether or not rape was committed."*

From the above cited cases, the victim (PW1) ought to have been more forthright and thorough in her evidence on the alleged rape. It was not enough to make assertion that she felt pain in her vagina, without more. The trial Court held that the evidence of PW9 (Medical Doctor) proved that PW1 was penetrated by blunt object in her vagina as she had bruises and pain in the vagina. The trial Court went on to convict the Appellant for the reason that Appellant was the last person to be found with the victim unless proven otherwise. I'm of the opinion that the trial Magistrate erred to convict the Appellant for the offence of rape on the basis of the principle of the last person to be seen with the victim. The best evidence for the offence of rape was supposed to come from the victim herself which is not the case in the

present matter. The victim (PW1) ought to have been more forthcoming in her evidence in order to enable the court to make a meaningful finding whether or not rape was committed. Thus, it is my finding that there is no evidence to prove that the Appellant penetrated the victim as result the offence of rape was not properly proved as rightly submitted by the learned State Attorney.

For the above reasons the appeal is allowed. The conviction of the Appellant is quashed and the sentence of 30 years imprisonment and six strokes of the cane are set aside. I order for his (Appellant) immediate release from prison unless he is held therein for a lawful cause.

A.E. Mwipopo

Judge

13.08.2021

The Judgment was delivered today, this 13.08.2021 in chamber under the seal of this court in the presence of Appellant and in absence of the Respondent.

A. E. Mwipopo

Judge

13.08.2021