**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[ARUSHA DISTRICT REGISTRY]**
**AT ARUSHA.**

**CRIMINAL APPEAL NO. 26 OF 2020**

*(Originating from the District Court of Arusha, Criminal Case No. 260 of 2017)*

**GODFREY EVARIST ..... APPELLANT**

***Versus***

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*17th May & 6th August, 2021*

**Masara, J.**

In the District Court of Arusha (the trial Court), the Appellant stood charged with two offences; namely, Rape, contrary to Section 130(1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 [R.E 2002] in the first count, and Impregnating a School Girl, contrary to section 60A (3) of the Education Act, Cap. 353 [R.E 2002] as amended by section 22 of the Written Laws (Misc. Amendments) (No. 2) Act No. 4 of 2016 in the second count. The accused denied commission of the two offences.

It was alleged by the Prosecution that on unknown date of January, 2017 at Moivaro Chekereni area, within Arumeru District in Arusha Region, the Appellant did have sexual intercourse with LY, a form two secondary school girl of 15 years thereby impregnating her. It was the Prosecution evidence that, PW1 (the victim), a form two secondary school student at Lesirway Secondary School, who was born on 6/7/2002 had engaged in sexual affairs with the Appellant sometimes in 2017. Due to prolonged sexual affairs, the victim was impregnated and subsequently she was dropped from school. At the hearing of the case, it seems that she turned hostile and as a result she was declared a hostile witness as per section 164(1)(c) of the Evidence Act, Cap. 6 [R.E 2002]. When cross examined, the victim denied to know the Appellant or to have told her parents and relatives that it was the Appellant who was responsible for the

pregnancy. Instead, she blamed that it was her parents who forced her to testify in Court. she also denied that she made untrue statement at the police as she was not aware that it could be used against her in Court.

The rest of the Prosecution witnesses including her parents gave evidence to the effect that the victim had named the Appellant as the person who was responsible for the pregnancy. At the police, the victim also mentioned the Appellant as the person responsible for the pregnancy and her statement was recorded by PW4 to that effect. The victim's statement was admitted as exhibit PE.1. When she was subjected for clinical test, on 24/6/2017, she was confirmed six months pregnant. The PF3 was admitted as exhibit PE. 2.

On his defence, the Appellant denied to have love affairs with the victim stating that as a bodaboda rider he used to take the victim as a passenger, dropping her at Muivaro Lodge, but he did not know the man who was with the victim in the lodge. He also denied to take care of the new born child stating that he was not responsible for the pregnancy.

After hearing the evidence, the trial Court was satisfied that the prosecution had proved the case beyond reasonable doubts. The Appellant was then convicted of the two offences and sentenced to serve 30 years imprisonment for the first count and 5 years imprisonment for the second count. The sentences were ordered to run concurrently. The Appellant was aggrieved by both the conviction and sentence. He therefore appealed to this Court vide Criminal Appeal No. 133 of 2018, but the appeal was struck out with leave to file on 12/7/2019 after the Notice of Appeal was found defective. He then filed Misc. Criminal Appeal No. 72 of 2019, seeking for extension of time to file both the Notice of Appeal and Appeal out of time. He was granted 21 days to file both the appeal and the notice of appeal. In compliance thereof he filed the

current appeal. The appeal is preferred on six grounds of appeal which are to a large extent on the evaluation of evidence. One can sum them to one ground; whether the evidence was properly scrutinized to warrant the Appellant's conviction and sentence.

At the hearing of the appeal, the Appellant was represented by Mr. Richard Patrick Mosha, learned advocate, while the Republic was represented by Ms Tusaje Samwel, learned State Attorney. The appeal was heard *viva vorce*.

At the hearing of the appeal, the Appellant's advocate asserted that because PW1 (the victim) had turned hostile during her testimony, independent evidence and witness was required so as to ground a conviction. He averred that the victim admitted that what she informed the police and her parents was not true as opposed to what she testified in Court. Mr. Mosha submitted that since all other witnesses testified on what they were told by the victim, their evidence was rendered hearsay, which could not be relied on to ground conviction. He concluded that the Prosecution did not prove the case on the required standard.

On her part, the learned State Attorney supported the appeal on the reason that since the victim (PW1) turned hostile there was no other evidence that could be relied on to warrant conviction. She cited the case of ***Seleman Makumba Vs. Republic*** [2006] TLR 379, which insists that the best evidence in sexual offences comes from the victim. According to the learned State Attorney, the Appellant was convicted on the evidence of PW1 who had turned hostile. That the victim's evidence could not be used as she was not credible and reliable witness.

After hearing the submissions, I invited the counsel for both parties to address me on the legality of the sentence imposed on the Appellant regarding the second count. The learned State Attorney responded that the proper sentence ought to have been 30 years imprisonment, a response which was conceded by Mr. Mosha, the Appellant's counsel.

The main issue that I find apposite for this Court's to determine is whether the Appellant was properly convicted and sentenced.

At the outset, the law is settled that in sexual offences the best evidence comes from the victim. There is a litany of authorities in that respect. The examples of such decisions are: ***Seleman Makumba Vs. Republic*** (supra), ***Goodluck Kyando Vs. Republic*** [2006] TLR 367, ***Mathias Robert Vs. Republic***, Criminal Appeal No. 328 of 2016, ***Charles Juma Vs. Republic***, Criminal Appeal No. 391 of 2016 and ***Richard Mgaya @ Sikubali Mgaya Vs. Republic***, Criminal Appeal No 335 of 2008 (all unreported). In ***Seleman Makumba Vs. Republic*** (supra), it was observed:

> *"**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. In the case under consideration the victim, Ayes, said the appellant inserted his male organ into her female organ. That was penetration and since she had not consented to the act, that was rape notwithstanding that no doctor gave evidence and no PF3 was put in evidence."* (Emphasis added)

Similarly, in ***Mathias Robert Vs. Republic*** (supra) the Court of Appeal made similar observation that:

> *"Therefore, we hasten to say that there is no better direct evidence which could have been adduced by the prosecution to establish the offence which the appellant was convicted of other than the evidence of PW1, the victim."*

In the appeal under consideration, as the record shows, the victim (PW1) denied to have named the Appellant as the person responsible for the

pregnancy. She denied her statement made at the police (exhibit P.E 1) which was the basis of the Appellant's conviction. PW1 was declared a hostile witness, which impliedly means that her evidence could not support the Prosecution as her credibility was doubtful. The purpose of treating a witness as hostile is to shake his/her credibility and indicate that there is no confidence in his evidence. In the case of ***Inspector Baraka Hongoli and 2 Others Vs. Republic***, Criminal Appeal No. 238 of 2014 (unreported), the Court of Appeal cited an ancient case of ***Saidi Mwamwindi Vs. Republic*** (1972) H.C. D No. 212 where Onyiuke J. held:

> *"I took the view that by treating the witness as hostile witness the prosecution was putting his credibility in issue and was impliedly indicating that it had not much confidence in him as a witness of truth.* ***The evidence of such witness was negligible if not entirely worthless."*** (Emphasis is mine)

Rightly as conceded by the learned State Attorney, having been declared a hostile witness, the victim's credibility was shaken. It is also noteworthy that exhibit PE. 1 (which is the statement of the victim at the police) was retracted by the victim. Moreover, the evidence of the rest of the witnesses was that they were told the whole incident by the victim. Their evidence was therefore nothing but a hearsay, which cannot be relied on safely to warrant conviction. See ***Vumi Liapenda Mushi Vs. The Republic***, Criminal Appeal No. 327 of 2016 (unreported) at page 6.

Regarding the sentence imposed on the Appellant in respect of the second count, both learned counsels are right because it is vividly provided under the law. Any person convicted of impregnating a school girl is liable to a custodial sentence of 30 years. Section 22(3) of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 which amended section 60 of the Education Act, by adding a new section 60A, provides:

*"22:- (3) Any person who impregnates a primary school or secondary school girl commits an offence and shall, on conviction, be liable to imprisonment for a term of thirty years"*

Applying the principle in ***Seleman Makumba Vs. Republic*** (supra), the offence of rape was not proved since the victim's credibility was in issue. As hinted above, the trial Magistrate erred in relying on exhibit PE 1 which the victim denied in Court. Therefore, the offence of rape was not proved by the Prosecution. As the offence of rape was not proved, the second count as well was not proved. For the above reasons, the Prosecution did not prove the two counts to the required standard. Therefore, the Appellant was improperly convicted and sentenced. This ground alone suffices to dispose the entire appeal. I therefore find no apt reasons to dwell on the rest of the grounds of appeal.

That said and done, I find merits in the Appellant's appeal. It is consequently allowed in its entirety. The Appellant's conviction is quashed and the sentences set aside. The Appellant should be released from prison with immediate effect unless otherwise lawfully held.

Order accordingly.

Y. B. Masara
**JUDGE**
6th August, 2021.