IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL No. 90 OF 2020

(Arising from the District Court of Karagwe at Karagwe in Criminal Case No. 183 of 2020)

TUSHABE GIDIONE---------- APPELLANT

Versus

THE REPUBLIC---------- RESPONDENT

JUDGMENT

30.07.2021 & 11.08.2021

Mwenda, J.:

Before the District Court of Karagwe, the appellant one Tushabe Gidione was prosecuted for two offences namely rape contrary to ***section 130 (1) (2) (e) and 131 (1) of the Penal Code [CAP 16 R.E 2019]*** and impregnating a school girl contrary to ***section 60 A of the Education Act [CAP 353 R.E 2019]*** as amended by ***section 22 of the written laws (Miscellaneous Amendment) Act No. 4 of 2016.***

The accusations against the appellant were such that on unknown date day of October 2019 at Lukajange village within Karagwe District in Kagera Region did unlawfully have sexual intercourse with one Happyness D/O Fabian aged 18 years a student of Bugene Secondary School.

According to the prosecution, the appellant's act amounted to rape as appearing in the first count, the act of the which resulted into impregnating a school girl as it was alleged in the second count.

Despite the fact that the appellant had protested for his involvement throughout his trial, at the end of the trial he was found guilty of both counts. He was sentenced to serve thirty years (30) imprisonment for each count and the sentence are to run concurrently.

Being aggrieved with the decision of the Karagwe District Court the appellant appealed to this court with a total of six grounds of appeal.

During the hearing of this appeal the appellant was represented by Mr. Dickson Laurent the learned counsel and the republic marshalled Mr. Juma Mahona learned state Attorney.

During the hearing of this appeal the Learned counsel for the appellant Mr. Laurent started by submitting on ground no 4, and he was of the view that exhibit P1 that is clinic card of the victim, Exibit P2 register book of Bugene Secondary School and attendance register for Bugene secondary were not read before the court which is contrary to the law. He stated that the effect of such failure hindered the appellant an opportunity to know its contents and to question on its authenticity. To bolster his argument learned counsel referred the case of ***Steven Salvatory vs Republic Criminal Application no. 215 of 2018(unreported)*** where the exhibit was not read before the court and the failure of which it was to expunge from the court's record.

On the first ground of appeal the learned counsel for Appellant submitted that charges were not proved beyond reasonable doubt for two reasons, first there is no proof that a victim was student of Bugene Secondary school therefore it was wrong to convict the accused especially after expunging exhibit P1 and P2 above and the only remaining evidence was that of PW3 which do not prove that the victim was a student of Bugene Secondary school. The second issue, is on the age of the victim where there is no any other evidence other than that of the victim herself that shows she was of the age of 18 years. According to the counsel for the appellant, the appellant conviction under ***section 130(1) (2) (e) and section 131(1) of the Penal Code*** especially ***sub section (e)*** of the Code ought to be under circumstances where the victim is below 18 years. In the circumstances of this case the accused was required to be charged with rape if the victim has never consented. He went further by submitting that the only issue which we should ask ourself is, was the victim raped and how could she be silent for about 8 months without reporting anywhere.

Mr. Laurent went further by submitting that the victim herself stated that she voluntarily entered to the accused room and if that is so then she consented. He also submitted that even her silence for 8 months implies that she consented for that act and to bolster his argument he cited the case of ***Majaliwa Ihemo vs Republic Criminal Appeal No. 197 of 2020 (unreported)*** where the Court of Appeal questioned the victim's silent for

about 6 days to report incident. So according to him the prosecution failed to prove its case beyond standard required.

On the 3rd ground of appeal learned counsel for the appellant submitted that there is a doubt if the appellant impregnated the victim. He also submitted that the victim is an adult and neighbour of the appellant and she is staying with her mother, so why did she take a long time to report such an incident. He also went further by submitting that there is no scientific proof that the child belongs to the accused, so it is doubtful if the appellant is the one who impregnated the victim.

Learned counsel also submitted that, he knows the best evidence in rape cases is that of the victim but according to him the victim silence for about 8 months is doubtful, he also submitted that her silence meant she did not know who impregnated her.

On the 2nd ground of appeal, the learned counsel for the appellant submitted that, the trial court erred for failure to consider the defence of alibi during trial and there were no reasons as to why such evidence was not considered.

Counsel for the appellant concluded by saying that with what stated above he pray this appeal be allowed conviction be quashed and the sentence be set aside and the appellant to be released from prison.

Mr. Juma Mahona learned state Attorney supported the appeal by submitting that he is in agreement that it is true exhibit P1 and P2 were not

read before the court as seen at page 10 of the proceedings and cited the case of **Robson Mwanjisi vs R. TLR 2003 at page 218.**

On the issue of the age of the victim Mr. Mahona was of the view that, it seems that the accused was charged with statutory rape where proof of the age is mandatory. According to him in the particulars of the offence the victim was of the age of 18 years therefore there is no statutory rape.

Mr. Mahona submitted that at page 4, 5 and 6 of the typed proceedings the victim in her testimony testified that rape was forceful when the accused called her in his home. He went further by submitting that if the accused being charged for under ***section 130(1) (2) (e) and 131(1)*** instead of ***section 130 (1) (2) (a) of CAP 16*** did not prejudice/ affect the accused person in any way as according to him this is curable under section ***388 of the Criminal Procedure Act [CAP 20 R.E 2019].***

Mr. Mahona went further by citing the case of ***Seleman Makumba vs Republic TLR 2006*** on the issue of the credibility of the victim. Mr Mahona submitted that the incident occurred in October 2019 but the victim mentioned the accused on 07/05/2020 when she was discovered being pregnant almost seven months later so according to him this shakes the credibility of the victim and if rape was forceful that was a bad incident which ought to be reported immediately. To bolster his argument, he cited the case of ***Yust Lala vs Republic Criminal Appeal no. 337 of 2015 the Court of Appeal of Tanzania*** at page 10 where the scenario is similar to this appeal that lapse of

time between rape to the time of mention of the accused creates doubt. He concluded by saying that in our case 7 months lapsed for such serious offence she ought to have report immediately being silent shaken her credibility.

On the issue of failure to produce scientific proof, Mr. Mahona was of the view that it was necessary to do so as the child was already born.

On the issue of the defence of Alibi, Mr. Mahona was of the view that, this court can just step on the shoes of the trial court but since other ground of appeal are enough to dispose this matter there is no need of dealing with defence of alibi and he concluded by saying that he support the appeal.

On a brief rejoinder the counsel for the appellant had nothing to add from what submitted by the learned state attorney.

After going through submission of both parties this court come up with only one issue to be determined in this appeal that is if the prosecution proved its case beyond reasonable doubt.

The law requires under ***section 3 (2) (a) of the Evidence Act [CAP 6 R.E 2019]*** and precedents in ***Said Hemed v. Republic [1987] TLR 117; Mohamed Matula v. Republic [1995] TLR 3; and Horombo Elikaria v. Republic, Criminal Appeal No. 50 of 2005,*** that the burden of proof in criminal cases is on the prosecution side and the standard is beyond reasonable doubt.

In the present appeal there are doubts which were raised, that is the issue of credibility of the evidence of the victim, scientific proof so as to connect

the accused and the born child and the issue of exhibit P1 and P2 which were not read before the trial court as per requirement of the law.

The conviction of the appellant was solely based on exhibit P1 and P2, the pregnancy and born child and the testimony by the victim (PW1) who testified that it was the appellant who forcibly raped her and as we know in rape cases the best evidence is that of the victim as stated in the case of ***Ndikumana Philipo Vs Republic Criminal Appeal No. 276 of 2009(unreported)*** court 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 women where consent is irrelevant that there was penetration".*

Despite of the above principle, courts are also required to consider other circumstances before convicting the accused on the offence of rape such as credibility of the witness as it was stated in the case of ***Swaburudin Mansul vs The Republic Criminal Appeal No. 69 of 2021*** at page 4. So, in our present appeal the issue of credibility of witness must be considered, as the trial court did not direct itself properly in assessing credibility of this key witness the victim (PW1) who testified that, she was forceful raped in at October 2019 unknown date but she did not report until 07/05/2020 when it was discovered that she was pregnant with this kind of witness it weakens the credibility of witness.

So, since the victim credibility on her evidence has been shaken the only remain evidence to connect the appellant with the offence of rape is the born child. During the trial court the appellant was convicted by impregnating the victim without any scientific proof that is DNA profiling test while at that time when this matter was determine the child was already born so it was very risk to convict the accused without that proof as it was stated in the case of ***Mashaka Gervas @Kanyenye vs Republic, Criminal Appeal No. 159 of 2020, (Unreported)*** the court held inter alia that:

> *"...In my view the prosecution was in the position to conduct a DNA test to prove that the appellant was responsible for the pregnancy. I am saying so because time had already passed by and the baby was already born."*

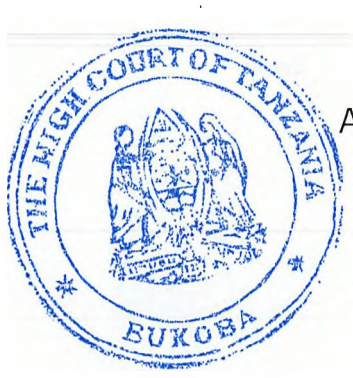
Since exhibit P1 and P2 were admitted without the same be read before the court as the required by the law both two exhibits must be expunged from the record this being the case makes no proof that the victim was a school girl.

This court find it difficult to uphold the conviction entered by the District Court with this serious discrepancy hence found out that the prosecution did not prove the case beyond standard required that is reasonable doubt.

I therefore find merits in this appeal and I therefore allow this appeal, quash the conviction entered and set aside the sentence of thirty years (30) imprisonment imposed against the Appellant in both counts. I further order for

an immediate release of the Appellant from jail unless otherwise held for some other lawful reasons.

It is accordingly ordered.



A.Y. Mwenda

Judge

11.08.2021

This judgment was delivered in Chambers under the Seal of this Court in the presence of the Appellant Tushabe Gidione and in the presence of Mr. Juma Mahona learned state attorney for the Respondent

A.Y. Mwenda

Judge

11.08.2021