IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

BUKOBA DISTRICT REGISTRY

CRIMINAL APPEAL NO 79 OF 2020

(Originating from Criminal case No. 61 of 2020 of Ngara District Court)

SAULO JOSEPH .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

29/07/2021 & 20/08/2021

NGIGWANA, J.

In the District Court of Ngara sitting at Ngara hence forth (the District Court) the Appellant was charged with two counts: First, Rape contrary to sections 130(1) (2) (e) and 131 (1) of Penal Code Cap. 16 (R: E 2019). Second; Impregnating 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.

It was alleged on the first count that the appellant on 20th day of November, 2019 during night hours at Chivu Village within Ngara district in Kagera region did unlawfully have carnal knowledge of one E.N (Identity of the child hidden) a girl aged 16 years old.

As regards the 2nd count, it was alleged that the appellant on 20th day of November 2019 during night hours at Chivu Village within the District of

Ngara in Kagera Region, did impregnate E.N a school (Form II) girl at Ntobeye Secondary School.

What actually transpired is that, on 20th day of November, 2019 during night hours the victim (PW1) aged 16 years had forceful sexual intercourse with a man. The matter was reported at Ngara Police Station on 01/03/2020 where PF3 was issued to the victim and then, headed at Nyamiaga Hospital for medical examination where the Clinical Officer (PW3) medically examined the victim and found that she was pregnant. The appellant was apprehended on allegations that he is the one who raped and finally impregnated the victim, and stood trial as described above.

After the trial, the trial court made evaluation of evidence of all three (3) witnesses and one exhibit to wit: PF3 and finally came to its own finding of acquitting the appellant on the second count on the ground that the PF3 did not reveal the age of the pregnancy for purposes the date of impregnating and the delivery of the child, and the prosecution did not explain to the court as to when the girl gave birth (if any)

As regards the 1st count, the appellant was convicted and sentenced to thirty (30) years imprisonment.

The Appellant was aggrieved by both conviction and sentence on the first count hence this Appeal. The Appellant at first filed five (5) self-crafted grounds of appeal, but later filed other additional grounds of appeal upon which he asked this court to quash the conviction, set aside judgment and set him free. Though the grounds appears to be ten (10) in number, they

are full of repetitions and therefore, for purpose of clarity this court grasped the context and summarized the raised appellant's grounds of appeal into two grounds; **One,** that the trial Magistrate erred in law and facts by convicting and sentencing the appellant while the charge had not been proved beyond reasonable doubt. **Two,** that the trial court erred in law and fact by relying on bare assertion of recognition as a sole basis of the appellants identification while the incident took place during the night.

When this appeal was called on for hearing the appellant stood unrepresented while Mr. Grey Uhagile, learned State Attorney appeared for the Republic.

Now the relevant question to be answered in this appeal is whether the evidence adduced by the prosecution witnesses in the trial court was sufficient to establish the guilty of the appellant beyond reasonable doubt

It must be noted that, the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The High Court of Tanzania speaking through Katiti J (as he then was) in **JONAS NKIZE V.R [1992] TLR 213** *held that,*

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking"

The test applicable was well stated in the famous South African case of **DPP VS Oscar Lenoard Carl Pistorious Appeal No. 96 of 2015,** as follows;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

The trial court has done its role whereas the matter is now in this court as the first appellate court. Describing the duty of the first appellate court, the Court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the

trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus R**, Criminal Appeal No.341 of 2017 CAT (Unreported)

In doing so the appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify, thus the guiding principle is that a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles. ***See OKENO V. R [1972] EA 32***

In this case, the appellant was charged under Section 130(1), (2) (a) and 131 (1) of the Penal Code.

130 (1) of the penal code Cap 16 R: E 2002 provides

"*It is an offence for a male person to rape a girl or woman"*

Section 130 (2) of the Penal Code provides;

"*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 the offence of statutory rape upon which the appellant was charged with since PW1 was 16 years old, among the vital and apparent elements which the prosecution needs to prove is;

(a) Penetration of the penis into the vagina of the victim;
(b) The age of the victim;
(c) That it was the appellant who is responsible for such act.

Expounding on the first ground of appeal Mr. Uhagile submitted that, in this case the evidence of PW1 was very strong and since the best evidence in sexual offences comes from the victim, the trial court was right to find that PWI was raped by the appellant. Uhagile referred the court to the case of **Selemani Makumba versus R [2006] TLR 379**.

He added that the evidence of PW1 was corroborated by the evidence of PW3 who found that the victim was pregnant, which in simple logic means the penis penetrated into her vagina. Though at the outset, it must be noted that any activity that introduces sperms to the vagina makes pregnancy possible without penetration. That means a woman can become pregnant without being penetrated by a male organ. What matters therefore is evidence in support of the charge for the court to determine that there was no other activity which introduced sperms into the victim's vagina except the penis whether slightly or fully penetrated into the victim's vagina.

In this case, as per trial court record, the evidence of PW2 and PW3 as to whether the victim was raped by the appellant is hearsay evidence. Neither PW2 nor PW3 was the eye witness of the incident. The charge sheet reveals that the incident of rape took place on 20/11/2020. It is the evidence of the victim (PW1) that she informed no body about the incident.PW2 who is the father of the victim (PW1) testified that he came to know that his daughter had sexual intercourse with a man when he was summoned at school on 27/02/2020 and informed that his daughter was pregnant, and when inquired as to who impregnated her, the victim mentioned the appellant. The evidence of PW3 is to the effect that he tested the victim's urine on 02/03/2020 and found that she was pregnant, though the age of the pregnancy was not indicated.

The prosecution did not bother to give evidence as regards the baby born out of the alleged pregnancy to attract the DNA test which could link the appellant with the offence, since PW1 alleged that, right after having sexual intercourse with the appellant, she missed her menstrual circle, and she had no sexual intercourse with any other man except the appellant. Under such a situation, though pregnancy is not one of the ingredients of rape but because there was a child born out the complained act of rape, for the interest of justice, the DNA test was necessary in order to correctly link the appellant with the alleged offence of rape, taking into account that rape is a serious offence which attracts a serious sentence of not less than 30y years.

Having seen that the evidence of PW2 and PW3 as to whether the appellant raped the victim, was hearsay evidence, the only remained

evidence is that of the victim. The decision of the Court of Appeal in the case of **Makumba** (Supra) is very clear that true evidence in sexual offences comes from the victim but the same Court currently, while addressing the evidence of the victim in sexual cases in the case of **MOHAMED SAID V.R, Criminal Appeal No.145 of 2017 (Unreported)** stated that,

"We think that it was never intended that the word ***of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness.....***"

The learned Justice Professor Lilian Tibatemwa Ekirikubinza of the Supreme Court of Uganda, in the case of **NTAMBALA FRED V. UGANDA Criminal Appeal No.34 of 2015** referring what Lord Justice Salmon stated in R V. Henry Maning (1969) 53 Criminal Appeal Rep 150,153 observed that;

"In cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases, girls and women do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all"

The emphasis here is that, in order to convict an accused person basing on the evidence of the victim, the trial court must be satisfied that what the victim has testified is nothing but the truth, because what matters in evidence is not the number of witnesses testified but the quality of the

evidence presented before the court. See section 143 of the evidence Act, Cap 6 R: E 2019.It follows therefore that the witness must be a credible witness.

However, it has to be noted that the credibility of witness is the monopoly of the trial court. In **Shabani Daudi v. R. Criminal Appeal No. 28 of 2000** (unreported) the court held: -

"The credibility of witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including the accused person".

When the evidence of PW1 is considered with the evidence of PW2 and PW3, it is very easy to doubt credibility of PW1.The incident took place during night hours, she said that she raised an alarm for help but the villagers were not cooperative so nobody came as a result she decided to remain silent. Surprisingly, right after arriving at her home place she told nobody at earliest possible time about the incident until when she was noticed that she was pregnant. It was held in the case **of Marwa Wangiti Mwita and Another V.R [2002] TLR** 39 that,

"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry"

In the case of **Paschal Sahel, versus R,** Criminal Appeal No.23 of 2017 the Court of Appeal went a step further discussing the position of law given in the case of **Makumba**, and held that

"While we agree that the above is the position of the law, we hasten to say that it does not mean such evidence should be taken wholesome, believing and acted on to convict the accused persons without considering other circumstances of the case. In the present case, apart from the words of PW, the victim there was no eye witness to the incident of rape...."

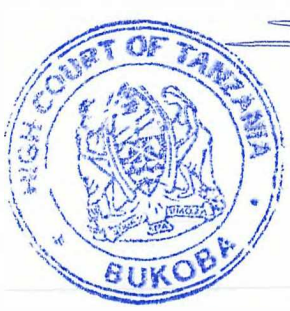
Applying the same principle, in the instant case it is hard to believe the victim's evidence alone since no cogent evidence that it was the appellant in exclusion of any other person who raped her. In this case, the appellant disputed to have committed the offence, and he raised the defense of alibi, and in my view, it was not properly considered by the trial court.

It was necessary for the prosecution to give the details and description as to how the appellant was identified by the victim on the material night. It was not sufficient just to say the appellant was not a stranger to her.

Indeed, in absence of any other evidence, it cannot be said that, the prosecution had managed to discharge its duty of proving the case beyond reasonable doubt, as the principle that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense case has been established a long time ago. **See KERSTIN CAMERON V.R [2003] TLR 84, and JOHN S/O MAKOLOBELA KULWA MAKOLOBELA AND ERICK JUMA @ TANGANYIKA V.R [2002] TLR 296.**

In the premise, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence of thirty (30) years meted against the appellant. I further order for an immediate release of the appellant from prison custody unless if he is held for some other lawful cause

It is so ordered.



E.L. NGIGWANA

JUDGE

13/08/2021

Court: Judgment delivered this 13th day of August 2021 in the presence of the appellant, Emmanuel Kahigi, learned State Attorney for the Republic, and E. M. Kamaleki, Judge's Law Assistant.

E.L. NGIGWANA

JUDGE

13/08/2021