

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**HC. CRIMINAL APPEAL NO. 79 OF 2021**

(Arising from Criminal Case No. 370 of 2020 of Geita district court)

**BENARD S/O KAZIMILI .....APPELLANT**

**VERSUS**

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

**JUDGMENT**

17<sup>th</sup> & 30<sup>th</sup> August, 2021

**RUMANYIKA, J.:**

One having had been charged and convicted for rape and impregnating a school girl contrary to Sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 RE. 2019 and Section 60A (3) of the Education Act Cap 353 RE 2002, the appeal is against conviction and custodial sentence of thirty (30) years concurrently running as meted on Benard Kazimili (the appellant) on 23/4/2021. Regina Fabian @ Lushika on the 3<sup>rd</sup> count of aiding another person to commit an offence formerly together and jointly charged with the appellant having had been acquitted. Unless the context otherwise required, in this judgment there would be no further mention of the latter. By way of audio teleconference through mobile

number 0737877746 the appellant appeared in person. I heard Ms. L. Meli learned state attorney for the respondent Republic through mobile number 0717418929.

May I from the outset confess that due to linguistic hemorrhage caused by draftsman the grounds of appeal were too difficult to be apprehended.

The 6 grounds of appeal revolved around 4 points only; **(i)** that the trial resident magistrate improperly evaluated the evidence **(ii)** that in recording evidence the trial court abrogated the provisions of Section 127 (7) of the Evidence Act Cap 6 RE 2019 **(iii)** that in absence of proof of penetration the prosecution case wasn't beyond reasonable doubts proved. **(iv)** that the complainant's conduct namely failure to name the appellant at the earliest opportunity possible or raising alarms it rendered her testimony unreliable.

Additional to his memorandum of appeal, the appellant submitted that actually the victim was not proved being under age. That is it.

Ms. L. Meli learned state attorney submitted that with exception of the 2<sup>nd</sup> count of impregnating a school which lacked evidence of DNA

analysis and report, the respondent supported the conviction of the appellant and sentence because the offence of rape was beyond reasonable doubts proved as the essential ingredient of actual penetration, therefore rape it was proved by the victim given the long established legal principle that true evidence of rape comes from the victim (the case of **Selemani Makumba v. R** (2006) TLR 379 (CA). Leave alone non contested corroborative cautioned statement of the appellant (Exhibit P2) and, with regard to the victim's birth date and age the reliable father's testimony (the case of **Karim Seif @ Slim v.R**, Criminal appeal no 161 of 2017 (CA) unreported (who would competently testify on some one's age) the victim's failure to raise alarms notwithstanding because her consent was immaterial given the nature of the charges. That is all.

In his rejoinder, the appellant submitted that Pw2 was not credible because it was not clear as to who reported the matter her teacher or the victim's mother? That he was only fixed given the lapse of time. That is all.

A brief account of the evidence on record would read as follows;

Pw1 Tabu Tundu (not the real name) stated that she had just completed class vii therefore a form I pupil in waiting. That sometimes in

August, 2020 having had been seduced by the appellant's sister in law reluctantly though the two began love affairs and they had sexual intercourse in the appellant's bed room. That say 4 months later, but only having had the mother suspected her, the case was reported to the local leaders, to police and hospital where she was examined and proven pregnant.

Pw2 Molo Melane, a teacher of Lukaranga primary school and patron for class vii stated that the victim read No. 4446 in the school register but Pw1' father reported the incident to him on 04/01/2020.

Pw3 Tundu Tundu (the name not real) stated that he was the victim's father that having had the victim's teacher reported the pregnant school girl to him in September 2020, too, he reported the case to the local ten cell leader and police and the victim named the appellant.

Pw4 WP 5619 DC. Constancia stated that as she was at work place on 4/11/2020, with regard to the incident of rape she interviewed and duly recorded the appellant's cautioned statement (copy – Exhibit "P2").

Pw5 Neema Maige a clinical officer of Geita Town Dispensary stated that as she was on 3/11/2020 on call and at work place, among others she

- attended the victim (Pw1) and established that the latter had no bruises or spermatozoa in vagina cavity but she was examined and proven pregnant. That is all.

On his part, the appellant is on record having had denied the charges that if anything, he was friend of the 2<sup>nd</sup> accused's husband one Simeo until when the two had quarreled therefore parted the company. Then he was arrested and charged as such. That is it.

Precisely so in my considered opinion, appeal against conviction and sentence having had been readily supported by the state attorney and I allowed it, the pivotal issue is whether the offence of statutory rape was beyond reasonable doubts proved. The answer is yes for two main reasons: - **One**; at least with the evidence of pw1, pw2, pw3 and pw4 more so with regard to the rule in the case of **Seleman Makumba** (supra) the best evidence of rape is the victim, the issues of essential ingredient of age of the victim and penetration therefore they should not have raised whether or not at the earliest possible opportunity the victim had reported the incident, she named the appellant or raised alarms at the very scene it was immaterial much as, unlike in ordinary rape cases where express or implied consent of the victim counted, in any statutory rape

case only under age of the victim was essential ingredient (case of **Mashaka Mussa v. R**, Criminal Appeal No. 15 of 2016 (CA) unreported Grounds (ii), (iii) and (iv) of the appeal are dismissed.

**Two;** On top of the foregoing evidence there was, in all aspects an uncontested Exhibit "P2" the appellant's cautioned statement freely made by him and duly recorded by Pw4. It would have been a different scenario which is not the case here, if, during the trial the appellant had retracted or, as the case may be repudiated it or his ground of appeal was that on that one the learned resident magistrate had falsified the evidence. This reminds me of the long settled principle of law therefore unbroken chain of authorities that the best witness is an accused who confesses the guilty (see the case of **Mohamed Haruna Mtupeni & Another v. R**, Criminal Appeal No. 259 of 2007 (CA) unreported.

When, in totality all is said the issue of improper evaluation of the evidence by the trial magistrate was neither here nor there. Ground (i) of the appeal is dismissed. The appeal is dismissed in its entirety.

Right of appeal explained.

**S. M. RUMANYIKA**  
**JUDGE**

**19/08/2021**

The judgment delivered under my hand and seal of the court in chambers this 30/08/2021 in the absence of the parties.



**S. M. RUMANYIKA**  
**JUDGE**

**30/08/2021**