IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 160 OF 2020

(From the decision of the District Court of Mbeya at Mbeya in Criminal Case No. 259 of 2019)

KENNEDY MAHUVE @ MAJALIWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order : 30/08/2021
Date of Judgement: 07/09/2021

MONGELLA, J.

Through legal services of Mr. Victor Mkumbe, learned advocate, the appellant filled this appeal containing five grounds as follows:

1. *That the trial court erred in law and fact in convicting the appellant on the charges of rape and impregnating a school girl when there was no report of any DNA test tendered in court to prove whether or not it was the appellant who indeed impregnated the alleged victim of rape (PW1).*

2. *That the trial court erred in law and fact in convicting the appellant on the charges of rape and impregnating a school girl without regard to the fact that the victim delayed for nearly two years to name the appellant as the rapist who impregnated her.*

3. *That the trial court erred in law and fact in convicting the appellant on the charges of rape and impregnating a school girl when the exact date of the offences was not mentioned.*

4. *That the trial court erred in law and fact in convicting the appellant basing on the alleged confession statement of the appellant which had been illegally taken from the appellant.*

5. *That the trial court erred in law and fact in rejecting the appellant's defence of alibi.*

The facts of the case are briefly as follows: the appellant was charged on two counts being: rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002; and impregnating a school girl contrary to section 60A (3) of the Education Act, Cap 353 R.E. 2002, as amended by section 22 (3) of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016.

On both counts it was alleged that on diverse dates between March 2017 and April 2019, at Ilomba area, within the City and Region of Mbeya, the appellant had carnal knowledge of a girl aged 16 years old (hereinafter referred to as "the victim"). In the course of having carnal knowledge he impregnated her.

The appellant denied the charges and the prosecution had to prove the case to the required standard. In the end the trial court was convinced that the appellant was guilty of the offences charged. It thus convicted the appellant on both counts and sentenced him to serve 30 years imprisonment for each offence, but to run concurrently.

Following the prayer by the appellant's counsel which was conceded by the learned state attorney representing the respondent, the appeal was argued by written submissions.

Addressing the first ground, Mr. Mkumbe contended that the appellant's main complaint regards the non-conducting of the DNA test to prove beyond any shadow of doubt that it was indeed the appellant who impregnated the victim. He argued that there was big shadow in the case in the sense that the alleged victim, PW1, testified that it was the appellant who impregnated her and she was four months pregnant by then, while the appellant defended that he was not in Mbeya from November 2018 to November 2019.

Referring to the testimony of PW2, the victim's guardian, he contended that this witness testified that at the time he was adducing evidence in court, the victim had already given birth to a baby girl. Under the circumstances, he was of the stance that a DNA test ought to have been conducted in accordance with section 25 (1) and (2) (b) of the Human DNA Regulation Act, 2009 so as to alleviate any possible doubt that it was the appellant who impregnated the victim. He added that the DNA test would have settled once and for all the question as to whether or not it

was the appellant who committed the offence, but the prosecution did not say anything as to why the DNA test was not conducted.

With regard to the second ground, Mr. Mkumbe argued that the trial court erred for not taking into account the fact that the victim delayed to report the crime for almost two years. Referring to the case of ***Marwa Wangiti Mwita & Another v. Republic*** [2002] TLR 39 and that of ***Nebson Tete v. Republic***, Criminal Appeal No. 419 of 2013 (CAT at Mbeya, unreported), he argued that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his/her reliability. He further referred to **section 164 (1) (d) of the Evidence Act, Cap 6 R.E. 2019**, he contended that the law terms people who delay to report a crime as being of "immoral character" whose evidence needs to be handled with care.

Concerning the third ground, Mr. Mkumbe, challenged the competence of the charge. He argued that the charge is defective for not stating the exact date of the rape incident. He was of the view that the wording that the rape occurred between "March 2017 and April 2019" in both counts is improper. Referring to the case of ***Sanke Donald @ Shapanga v. Republic***, Criminal Appeal No. 408 of 2013 he insisted that the charge ought to have mentioned the exact date the rape occurred.

Mr. Mkumbe abandoned the fourth and fifth grounds of appeal. Though in his submission, he mistakenly wrote that he abandons the third and fourth grounds. He prayed for the conviction and sentence by the trial court to be quashed and the appellant be set free.

The respondent was represented by Mr. Davis Msanga, learned state attorney, who opposed the appeal. Replying on the first ground, he argued that in accordance with section 130 (1) and (2) of the Penal Code, proof of rape is by showing that there was sexual intercourse. The sexual intercourse can be between a male person with a woman above 18 years without consent or with a girl below 18 years with or without consent. The latter is statutory rape. He further referred to the case of ***Mwita Charles Mkami v. Republic***, Criminal Appeal No. 418 of 2017 (CAT, unreported) in which it was decided that "*penetration however slight is sufficient to constitute sexual intercourse*."

On the DNA issue, Mr. Msanga contended that there is no law that requires for DNA test in proving the offence of rape or impregnating a school girl. Referring to the case of ***Charles Yona v. The Republic***, Criminal Appeal No. 79 of 2019 (CAT at DSM, unreported), he argued that the best evidence in rape cases comes from the victim, and that such evidence needs no corroboration if it can stand on its own to support conviction. In the premises he concluded that there was no need to conduct any DNA test as the evidence of the victim in this case could stand on its own to support the conviction.

Mr. Msanga challenged the second ground of appeal in which Mr. Mkumbe challenged the credibility of the victim's evidence for failure to mention the appellant for a period of two years. In his argument, he contended that failure to name the suspect at the earliest cannot affect the truth that it is the suspect who committed the offence. Referring to the same cases cited by Mr. Mkumbe, that is, the case of ***Marwa Wangiti***

Mwita (supra) and that of ***Nebson Tete*** (supra), he contended that the Court never meant that the failure to name the suspect automatically diminishes the witness's credibility. Instead, the Court ruled that unexplained delay in naming the suspect or failure of the victim to name the suspect at the earliest possible opportunity should cause the court to conduct an inquiry. Referring to the testimony of the victim, as seen at page 8 of the proceedings, he submitted that the victim explained that she was afraid of telling her grandmother. He argued that the victim being a child, it was normal for her to be afraid.

He further challenged Mr. Mkumbe's conception of the provision of section 164 (1) (d) of the Evidence Act, whereby he argued that the failure to mention the appellant at the earliest opportunity shows that the victim was if immoral character. On this, Mr. Msanga argued that the said provision provides that the credit of the witness may be impeached if it is proved that the said witness is of immoral character and not that the failure to mention the suspect directly renders the witness of an immoral character as misconceived by Mr. Mkumbe.

Mr. Msanga made no reply on the remaining grounds of appeal as the same were abandoned by Mr. Mkumbe. He concluded that the prosecution proved the offences charged beyond reasonable doubt through the evidence of PW1, the victim, PW3 who tendered the cautioned statement, which was admitted as exhibit P2 without any objection from the appellant, and through the evidence of PW5, the medical doctor who tendered the PF3, which was admitted as exhibit P3. He prayed for the trial court conviction and sentence to be upheld.

I have given the submissions of both counsels due consideration and thoroughly gone through the trial court record. In my deliberation, I wish to start with ground three of appeal, which is on competence of the charge.

On this ground, the appellant, as presented by his advocate, Mr. Mkumbe, alleges that the charge is defective for not stating the exact date the offences of rape and impregnating a school girl occurred. He challenged the competence of the charge as it stated in both counts that the offences occurred "between March 2017 and April 2019." Mr. Msanga, as I pointed out earlier, made no reply to this ground. I think he did not thoroughly read Mr. Mkumbe's submission to understand that he mistakenly stated that he abandoned ground three of the appeal. This is because he had already argued on this ground.

Mr. Mkumbe relied on the case of ***Sanke Donald @ Shapanga*** (supra) contending that it ruled that the charge must state the exact date the rape occurred. I have gone through the case and with all due respect, I find that Mr. Mkumbe has misconceived the ruling of the Court in this case. In this case the Court ruled that the prosecution failed to lead evidence on the commission of the offence simply because there were contradictions between the witnesses and what was stated in the charge regarding the date the offence was committed. This is quite distinguishable from the case at hand whereby the charge covers the period between March 2017 and April 2019 whereby PW1, the victim, clearly stated that she engaged in sexual relationship with the appellant sometime in March 2017 and the relationship sailed through April 2019.

Section 135(f) of the Criminal Procedure Act, Cap 20, R.E. 2019 requires the charge to indicate with reasonable clarity the dates, among other things. The provision however, does not oblige the dates to be exact, but rather there has to be a reasonable clarification of the dates. For the date to be exact or not depends on the nature in which the offence is alleged to have been committed. The issue regarding divers dates in a charge was also underscored by the CAT in the case of ***Paschal Aplonal v. The Republic***, Criminal Appeal No. 403 of 2016 (CAT at Tabora, unreported). From what the CAT decided in this case, the court has to consider the whole evidence, particularly that of the victim and whether the accused cross examined on the facts relating to the dates. In this case the exact dates in which the offence allegedly occurred were not stated. The Court thus held:

> *"The month of June 2013 as recounted by the victim squarely falls between June and October 2013 being the period during which the appellant raped the victim as stated in the charge sheet.* ***In this regard, since the prosecution paraded supportive evidence to that effect, the absence of the specific date as to the occurrence of the rape did not materially impeach the strong victim's account as to when she was raped by the appellant.*** *Also, as rightly found by the first appellate court, in the event the appellant did not cross-examine the crucial prosecution witnesses whose account incriminated him on the charged offence that was tantamount to acceptance of the evidence as accurate."*

I have gone through the prosecution evidence, particularly that of PW1, the victim. PW1 stated that she started having sexual relationship with the appellant in March 2017 and the same ended in April 2019. During this

whole period the two used to have sexual intercourse and that the appellant is the only lover she had. The period between March 2017 and April 2019 is the one covered in the charge. Though the record indicates that the appellant cross examined PW1, the victim, regarding the period in which the offence is alleged to have occurred, PW1 firmly replied that it was between March 2017 and April 2019. Thus considering the decision cited above I find the charge, particularly on the offence of rape being correctly drafted. See also: ***Emmanel Sang'uda @ Sulukuka and Another v. Republic***, Criminal Appeal No. 422 B of 2013 (unreported); ***Goodluck Kyando v. Republic*** [2006] TLR 363 and ***Mathias Bundala v. Republic***, Criminal Appeal No. 62 of 2004 (unreported).

On the other hand however, I agree with the appellant that with regard to the second count on impregnating a school girl, the charge is defective. PW2 testified that at the time the appellant was arrested, that is, on 13th August 2019, the victim was already 4 months pregnant. Considering this testimony, I find it incorrect for the charge to state that the offence of impregnating a school girl took place between March 2017 and April 2019. With respect to this offence the charge has not provided clear particulars, in terms of dates, as required under **Section 135(f) of the Criminal Procedure Act.** It is thus found to be defective with respect to the second count on the offence of impregnating a school girl. Having ruled as such, I shall deliberate on the remaining grounds with respect to the offence of rape.

On the first ground, the appellant claims that no DNA test was conducted to prove that the appellant committed the offence of rape. I in fact agree with Mr. Msanga's argument that DNA test is not a mandatory

requirement in proving rape. The Court of Appeal in the case of ***Aman Ally @ Joka v. The Republic***, Criminal Appeal No. 353 of 2019 (CAT at Iringa, unreported), ruled at page 18 that there is no requirement under the law for DNA test to be conducted to prove rape cases. See also: ***Christopher Kandidius @ Albino v. The Republic***, Criminal Appeal No. 394 of 2015 (CAT at DSM, unreported); and ***Juma Mahamudu v. Republic***, Criminal Appeal No. 47 of 2013 (CAT at Mbeya, unreported).

The law under section 130 (4) (a) requires only proof of penetration for the offence of rape. The same provision directs that an offence of rape can be said to have been committed even where the penetration is slight. The offence the appellant was charged falls under statutory rape in which, as argued by Mr. Msanga, to which I subscribe, the consent of the victim is immaterial. The law is also trite to the effect that the best evidence in rape cases comes from the victim as she is in the best position of knowing what happened to her. See: ***Selemani Makumba v. Republic***, (2006) TLR 386; ***Alfeo Valentino v. Republic***, Criminal Appeal, No. 92 of 2006 (unreported) and ***Shimirimana Isaya and Another v. Republic***, Criminal Appeal, No. 459 of 2002 (unreported) and ***Charles Yona*** (supra).

PW1, the victim, testified without contradictions on how the incident occurred. She testified on how she met the appellant and how the two entered into sexual relationship sometime in March 2017 and how the relationship lasted until sometime in April 2019. Her evidence was corroborated by that of other witnesses, especially the medical doctor who examined her and the PF3 tendered as exhibit without objection from the appellant. It was also corroborated by the appellant's own

cautioned statement which was also admitted without objection and has not been challenged at this appellate stage.

Every witness is entitled to credence and to have his/her evidence believed by the court. This position was settled in the case of ***Goodluck Kyando v. The Republic***, Criminal Appeal No. 118 of 2003 (CAT, unreported) whereby it was held:

> *"...it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

The trial court is always at a better place of assessing the credibility of a witness compared to an appellate court. The trial court in its assessment found the evidence of PW1 being credible and this Court as an appellate Court cannot interfere with that finding in the absence of compelling reasons. These are such as where there are serious mis-directions, non-directions, mis-apprehensions, or miscarriage of justice. See also: ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017 (unreported); ***Ally Mpalagana v. Republic***, Criminal Appeal No. 213 of 2016 (unreported); ***Jaffari Mfaume Kawawa v. Republic*** [1981] TLR 149; ***Mussa Mwaikunda v. Republic***, Criminal Appeal No. 174 of 2006 (unreported) and ***Michael Alias v. Republic***, Criminal Appeal No. 243 of 2009 (unreported). In the case at hand I do not find such mis-directions, non-directions, mis-apprehensions or miscarriage of justice to warrant interference on the findings of the trial court. The evidence of PW1 appears credible.

On the second ground, the appellant challenges the credibility of PW1, the victim, on the ground that she did not mention the appellant at the earliest possible opportunity. It is true that the law is settled to the effect that naming the suspect at the earliest possible opportunity is an important assurance of the reliability of the witness. Likewise, failure to mention the suspect at the earliest possible opportunity may put the credibility of the witness in question. See: ***Marwa Wangiti Mwita & Another*** *(supra)*; ***Bakari Abdallah Masudi v. Republic***, Criminal Appeal no. 126 of 2017 (CAT, unreported); and ***Jaribu Abdallah v. Republic*** [2003] TLR 271.

In my considered view however, each case has to be considered taking into account its own peculiar circumstances. As argued by Msanga, to which I subscribe, in the above cited decisions, it was not ruled that the failure to name the suspect at the earliest possible opportunity is an automatic discredit of the witness's credibility.

As I said, each case has to be considered in accordance with its own circumstances. As explained by PW1, the two were in a love relationship for a long time, that is, two years. In the premises, in my considered view, one cannot not expect the victim to report that she is being raped. I believe the victim was not even aware that she was being raped in accordance with the law. It is the pregnancy that led her into spilling the beans. The two could probably still be in the relationship if the victim did not get pregnant. In my settled opinion, PW1 was a credible witness.

In the upshot, in consideration of what I have discussed hereinabove, I quash the trial court conviction and sentence with respect to the count of

impregnating a school girl as the same was founded on a defective charge. On the other hand, I uphold the trial court conviction and sentence with respect to the charge of rape.

Appeal partly allowed.

Dated at Mbeya on this 07th day of September 2021.

L. M. MONGELLA

JUDGE

Court: Ruling delivered at Mbeya in chambers on this 07th day of September 2021 in the presence of the appellant, and Ms. Xaveria Makombe, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE

Court: Right of appeal to the Court of Appeal duly explained.

L. M. MONGELLA

JUDGE

07/09/2021