IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 21 OF 2021

(Originating from the District Court of Lindi at Lindi in Criminal Case No. 73 of 2020)

JACKSON SIMONI DAUDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

4 & 28 October, 2021

DYANSOBERA, J.:

Jackson Simon Daudi, the appellant, appeared before the Senior Resident Magistrate, Hon. E.D. Massawe, sitting at Lindi in the District Court of Lindi on a criminal charge of two counts. The first count related to the offence of rape contrary to sections 130(1) (2) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2002 which is now R.E. 2019]. He was also charged with impregnating a secondary school girl contrary to section 60A

(3) of the Education Act, [Cap.353 R.E. 2002] as amended by The Written Laws (Miscellaneous Amendment) (No.2) Act, 2016, in the second count.

The particulars of offence in the first count alleged that the appellant on dubious dates between May and June, 2020 at Nahukahuka Village within the District and Region of Lindi had carnal knowledge of one **"FAS"** or the victim a girl of 16 years old. In the second count the prosecution alleged that the appellant the appellant on dubious dates between May and June, 2020 at Nahukahuka Village within the District and Region of Lindi did impregnate one **"FAS"** or the victim a Secondary School Girl. When called upon to plead after the substance of the charge had been read over and explained to him, the appellant, in both counts denied. However, after a full trial, the trial court was satisfied that the case against him was proved beyond reasonable doubt. Thus, it meted a sentence of thirty (30) years imprisonment term for the first count and two (2) years imprisonment term for the second count which run concurrently.

The brief facts material to this appeal as can be gleaned from the record are that the victim (PW 1) is a girl of sixteen years old. She was born on 22nd day of February, 2004. This is clear from her own version and the evidence of her mother, Amina Ahmed Dadi (PW 2). PW1 is a form two student of Nahukahuka Secondary School who was registered in 2019 but was expelled from school on account of being pregnant. On 10th July, 2020 PW1 underwent medical check-up purposely for pregnancy tests. The

preliminary observation was conducted at the PW1's school compound and the confirmation was done at Nyangao Hospital as testified by Octavian Milanzi (PW3), a teacher at Nahukahuka Secodanry School and Godfrey Celestin Kambuga (PW5), a clinical officer at Nyangao Hospital. The victim was found pregnant in both stages of test. Sabinus Caspery Malibiche (PW 4), a nurse at Linoa Dispensary did, on 9th day of August, 2020 attend PW 1 who had diarrhoea, was vomiting and suffering from malaria. She supplied to her medicine and then found her bleeding from her private parts suggesting that she had an earlier abortion. She cleaned PW 1's womb.

It was the evidence of PW 5 who medically examined PW 1 on 11th July, 2020 that the appellant was pregnant for one month.

It is also in evidence that the victim mentioned the appellant as a person responsible for the pregnancy. According to her, in May, 2020 she was in the appellant's plot for purposes of having sexual intercourse. In the same month they had sexual intercourse for the second time and for the third time, they had the same at the end of May, 2020. Their hideout was at the appellant's plot where there was bush. As to how they were

having sex, PW 1 explained that the appellant was undressing her, taking his penis and inserting it into her vagina.

In the defence, the appellant denied to have had either have sexual intercourse or any relationship with the victim arguing that it was a mere hatred. He challenged the victim's version that she had her first sexual intercourse him for the first time without feeling any pain. The appellant alerted the trial court on the variance of evidence on the age of pregnancy as testified by PW 1 and PW5.

After a full trial, the appellant was convicted and sentenced accordingly.

Aggrieved, the appellant has preferred this appeal vide a petition of appeal which contains three grounds of appeal. The appellant also filed four additional grounds. For clarity and ease of reference, the said grounds are reproduced as hereunder:-

1. That the learned trial Magistrate erred in law and facts by convicting the appellant while the prosecution failed to prove that the appellant is the one who has committed the hereinabove offenses as required by Section 110(1) and (2) of Evidence Act, [Cap 6 R.E. 2002].
2. That the prosecution witnesses did not testify in any time during the proceedings that the appellant is the one who committed the hereinabove mentioned offences as required by section 7 of

Evidence Act which requires relevant facts in issue, and of no others, to be proved or disapproved by evidence.

3. That the trial Magistrate in law and facts by convicting and sentencing the appellant while the prosecution did not prove their case to the standards required by law.

ADDITIONAL GROUNDS

1. That the trial court erred in law and by failing to comply with the requirements of section 235(1) and 312 (2) of the Criminal Procedure Act[Cap 20 R.E. 2002] a failure which occasioned to miscarriage of justice, through the judgment it is clear that the trial magistrate did not consider the defence section 235(1) of the Criminal Procedure Act obligated the trial magistrate to compose a judgment after hearing both the complainant and accused and their witnesses, the trial court's judgment the prosecution evidence was not weighed against that of the appellant, and it is right to conclude that the trial's court finding was arrived at without subjecting the evidence of both sides to objective analysis and evaluation, in the case of KAIMU SAID VS THE REPUBLIC CRIMINAL APPEAL NO.390 OF 2019 IN THE COURT OF APPEAL OF TANZANIA AT MTWARA(Unreported)it was held that such analysis evaluation and findings should be apparent in the record(page 7) this made the appellant not to be fairly tried since the appellant was deprived of his right of having his defence properly considered by the trial magistrate as held in the case of HUSSEIN IDD and ANOTHER VS THE REPUBLIC[1986] TLR 166.
2. That the trial magistrate erred in law and facts by convicting the appellant while the age of the alleged victim was not proved. In statutory rape it's mandatory that the alleged victim must be under 18 years as held by the courts that such proof must be proved using a birth certificate, through a biological parent, near relative or a guardian. The age of the alleged was not establishes since the alleged mother PW2 testified to the effect on ZARIDU FADHAWA (Pg. 11) and not the alleged complainant "FAS" there is no where established if the alleged names were of PW1.

3. That the trial magistrate erred in law and facts by unprocedurally admitting exhibit P.1 as evidence in court. Exhibit P.1 was never cleared before being admitted, the record fails to reflect how PW3 identified exhibit P.1T.Therefore should be expunged from the records.
4. That the trial magistrate erred in law and fact by convicting and sentencing the appellant relying on the evidence adduced by the PW4 and PW5 which leave behind doubts.
   - In his testimony, the PW4 (the nurse) did not mention the victim (PW1) as the patient he attended on 09/08/2020.Even the alleged victim (PW1) did not reveal the issue of early abortion, during her testimony, so that to corroborate with the evidence of the PW4.Also, PW4 did not tender before the court any document (exhibit) to support his evidence. This casts doubt if there was real earlier abortion or it was just the way of escaping the DNA test thereafter, know that the whole story was cooked one.
   - The PW 5 (clinical officer) testified that on 11/07/2020 he conducted the pregnancy test for the PW1 who went to the hospital accompanied by her brother. This casts doubt on the validity and reliability of the exhibit P2(PF3) and the test conducted as there was no independence witness (even the police officer) during the test and preparation of the PF3).

At the hearing of this appeal the appellant appeared in person and unrepresented whereas the respondent Republic enjoyed the services of Mr. Wilbroad Ndunguru, the learned Senior State Attorney. On his part, the appellant submitted that he had nothing to add to what he had stated in writing.

In reply, Mr. Ndunguru resisted the appeal and stated that the evidence against the appellant proved the case beyond reasonable doubt. On the first ground of appeal, he submitted that the evidence of PW1 was

clear that she was 16 years old and had sexual relationship with the appellant which resulted into her conceiving. Furthermore, the learned Senior State Attorney argued that the relationship between PW 1 and the appellant started in 2020. When cross – examined she clearly stated that the appellant was her first and sole lover with whom they were having sex. He stressed that this evidence was corroborated by PW5, PW3 and PW4. In his view, the fact that the pregnancy of PW 1 was caused by the appellant was amply demonstrated by the prosecution. He also argued that in the judgment the trial court considered the evidence of the victim as was enjoined by the case of **Selemani Makumba**.

Submitting on the second ground. Mr. Ndunguru argued that PW1 was credible and the trial court believed her and there was no shaking of her credibility, she was confident. He further argued that the trial court analysed well all the evidence and came to the right conclusion. Apart from that, he submitted that this court has also the duty to re- valuate the evidence and come to its own finding of fact. On the age of the victim the learned Senior State Attorney argued that the victim was 16 years old as per PW1 and PW2 who said that PW1 was born on 22.2.2004. Thus, he was of the settled view that the issue of age was not in dispute.

Responding to the third ground, Mr. Ndunguru argued that exhibit has no bearing on the case as it did not affect the strong evidence against the appellant.

As to the fourth ground, the learned Senior State Attorney submitted that PW4 and PW5 supported what PW1 had stated and it is to the effect

that the victim was penetrated and impregnated. Lastly, Mr. Ndunguru was of the view that in total the evidence against the appellant proved the case beyond reasonable doubt and the sentence was merited.

In a very short rejoinder, the appellant submitted that the charge sheet stated that they met on 13.6.2020 and had sexual intercourse but the victim stated on unknown date in May. He also argued that PW4 did not mention PW1.Hence, he prays to be released.

On my part, I have gone through the record of the trial court, the grounds of appeal and submissions of both parties thereto. Since the appellant has filed seven grounds of appeal, I think I will tackle them randomly as follows.

I will start with second ground of appeal on the complaint that:-

> '2.The prosecution witnesses did not testify in any time during the proceedings that the appellant is the one who committed the hereinabove mentioned offences as required by section 7 of Evidence Act which requires relevant facts in issue, and of no others, to be proved or disapproved by evidence'.

I have considered this ground. I have also perused the record of the trial court. With respect, this ground has no basis. The evidence is clear that the appellant was mentioned by both the victim and PW 2 to be the person who was having sexual intercourse with the victim. This evidence can be found at pages 9, 10 and 11 of the typed proceedings of the trial court. For instance, PW1 at page 9 and 10 testified that: -

> "-I conceived after I had sex with the accused Jackson Simon Daud

I know Jackson we a (sic) living the same village at Rihoa. He is the accused here in court.

He approached me on May 2020 when I was in his plot a week after he proposed me. The intention to meet him at his plot was to have sex.

- In his plot there is bush which we hide and have sex.
- He undressed me take his penis and put into my vagina...
- I had sex with Jackson Daud"

Whereas at page 11 PW2 testified that: -

"- She said the responsible person was Jackson Simon Daud. He is a boy living in our village".

In view of the above excerpt, I find the second ground of appeal unmerited.

With respect to the second additional ground, it is definitely true that age can be proved by the either biological parent of the victim, guardian, the victim herself or by a birth certificate. This position was stated in the case of **Andrea Francis v. R.**, Criminal Appeal No.173 of 2014(unreported) where the Court observed that: -

"in a case such as this one where the victim's age is the determining factor to establish the offence the evidence must be positively laid out to disclose the age of the victim. Under normal circumstances evidence relating to the victim's age would be expected to come from

the any or either of the following: -the victim, both of her parents or at least one of them, a guardian, a birth certificate, etc."

In the present case the age of the appellant was proved by PW2 when she testified that the victim is 16 years old and as she was born on 22nd day of February, 2004.This is reflected at page 11 of the typed proceedings of the trial court. The contention of the appellant that PW2 mentioned ZARIDU FADHAWA at page 11 is not true. Initially PW2 had testified that she has six children and she mentioned them by listing them only that between the name of ZARIDU and the victim there was a comma which was skipped. This was a very minor error. PW2 mentioned the victim that is sixteen years old and went further and mentioned the date, month and year she was born as will be elaborated in the due course in my judgment. This complaint is baseless.

Coming to the third additional ground of appeal, the appellant has complained that Exhibit P1 was not cleared before being admitted. According to the record, PW 3 testified that he wrote a letter to police station at Mtama on his own writing and bears his signature and he stated that he can remember it when shown to him since is stamped. I think this was enough that PW3 prepared Exhibit P1 and thus was conversant to tender it. This is reflected at page 13 of the typed proceedings of the trial court. However, as the record shows, that document was not admitted in court otherwise, it would have been marked. In that respect, I find the document which was not admitted is no evidence worthy consideration of this court. This means that the prayer by the appellant to have exhibit P 1

expunged from the record cannot be granted as there is nothing on record to expunge.

I now move to the first and third grounds in the original memorandum of appeal and the fourth additional ground. These grounds are combined as they appear to form only one substantive complaint which is, whether the prosecution side proved the case against the appellant beyond reasonable doubt as required by the law.

As the record clearly shows, the appellant was charged with an offence of two counts, which are rape and impregnating a school girl. I undertake to start with the first count of rape.

There is no dispute that this is a statutory rape and important elements to prove its commission include age of the victim and penetration of the male organ into the female private parts.

With respect to the age of the victim, under paragraph (e) of sub-section (2) of section 130 of the Penal Code, the law makes it mandatory that before a conviction of the offence of rape can stand, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the alleged offence. It is equally true that the Court of Appeal in the case of **Andrea Francis versus Republic**, Criminal Appeal No. 173 of 2014 (unreported) said that

"...it is trite law that the citation in a charge sheet relating to the age of the accused person is not evidence. Likewise, the citation by the magistrate regarding the age of a witness is not evidence of that person's age.

Was the victim's age proved? The answer is obvious. PW 1, the victim, told the trial court that she was 16 years. This evidence was fully supported by the evidence of her mother one Ahmed Dadi (PW 2) who categorically stated that PW 1 was born on 22nd day of February, 2004. Likewise, PW 3, a teacher at Nahukahuka Secondary School where PW 1 was schooling informed the court that their STD Two student (the victim) was born on 22.2.2004. Even PW 5 who medically examined PW 1 and filled in the PF 3 (exhibit P. 2) was clear that the victim was 16 years old. It cannot be gainsaid that evidence of proof of age of the victim can be sourced from the victim herself, a relative, a parent, a medical practitioner, or where available, by the production of the birth certificate or even a clinical card. With the available evidence, I am satisfied that the prosecution proved beyond reasonable doubt the age of the victim which is below 18 years.

With regard to penetration, it is a general rule supported by many authorities that true evidence of rape has to come from the victim. For instance, the Court of Appeal in the case of **Godi Kasenegala v. R**, Criminal Appeal No. 10 of 2008 observed:-

> 'It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative'

Likewise, the same Court in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 stated 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 woman where consent is irrelevant that there was penetration."

This position was re-iterated by the same Court in the case of **Mhina Zuberi v. R**: Criminal Appeal No. 36 of 2016. The word penetration was defined by the Court of Appeal in the case of Hassan Bakari @ Mamajicho v. R., Criminal Appeal No. 103 of 2012 where at p. 11 of the typed judgment said:-

'Penetration means penis entering the vagina. Such entering, however slight it may be, is an important ingredient of the offence of rape'.

Did the victim in the instant case prove to have been sexually penetrated by the appellant? I think the answer must be in the affirmative.

The evidence of PW 1 when testifying at the trial as recorded on 17th August, 2020 is the following:-

'PW1: FAZAHA ABDALLAH SIAMINI (FAS) 16 YEARS, MAKONDE, RIHOA VILLAGE, STUDENT, ISLAM: AFFIRM AND STATE

Chief examination

- I am living at Rihoa village Nahukahuka Ward Lindi District
- I am living with my parents my father Abdallah Seif Siamini and Amina Ahmad Dadi
- I am sixteen years old a student of Nahukahuka Secondary School form two
- I was expelled from school after I conceived
- I concieved after I had sex with the accused Jackson Simon Daudi
- I was first checked on 10/07/2020 at school
- I know Jackson we a living the same village at Rihoa. He is the accused here in court.
- He first approaches me on May 2020 when I was in his plot a week after he proposed me. The intention to meet him at his plot was to have sex.
- In his plot there is bush which we hide and have sex.
- He undressed me take his penis and put into my vagina. After he finished I went home.
- The second time on May 2020 we met again and has sex.
- The third time was end of May we also had sex on the same area.
  That was the last time.

- On 10th July 2020 we was tested for pregnancy at school. Later we was taken to the dispensary after first results shows that I was pregnancy.
- The at school I was asked for the responsible person after they call our parents. We was then taken to police station of Mtama who provides me with PF3 and taken to Nyangao Hospital
- I was examined at Nyangao hospital and found positive. They them fill my PF3.
- I had sex with Jackson Daudi

Cross exam

- I can't recall dates but it was May 2020
- We make love in your plot.
- I only had sex with you
- We use to meet in noon hours
- It was my first time to have sex that day and you was my first man'.

In analysing this evidence, the learned Senior Resident Magistrate at p. 5 of the typed judgment recorded:-

> 'The victim evidence in this court left no doubt for not to be believed. She is sixteen years old she was confident and straight. She explained how the accused approached her, proposed her and her acceptance. Fact that they had sexed means that there was penetration in her vagina....'

At the hearing of this appeal, the learned Senior State Attorney submitted that PW 1 was credible and confident and the trial court believed her and there was no shaking of her credibility.

I agree. From her narration of how she came to get acquainted with the appellant, how, where and when they were having sexual intercourse leaves no doubt that she was a witness of truth and her evidence was not only strong but also credible. I have no any scintilla of doubt that the victim was testifying on what she knew and saw. There was nothing in her

evidence showing that she had any interest to serve other than vindicating the law. Indeed, the appellant during his defence was clear that they well knew each other and that he had no bone to pick with her. The trial court found her credible and I have nothing material to fault that finding.

As was the trial court, I find that the prosecution proved beyond reasonable doubt that the appellant raped PW 1, the victim. He was rightly found guilty and convicted.

The sentence of thirty (30) years term of imprisonment was the bare minimum prescribed by law.

With regard to the second count of impregnating a school girl, I am far from being convinced that prosecution managed to lead sufficient evidence to implicate the appellant. It was alleged in the charge sheet in the second count that the appellant on dubious date between May-June, 2020 at Nahukahuka Village within the District and Region of Lindi did impregnate one Fazaha Abdallah Siamini, a Secondary School Girl. In her sworn evidence, PW 1 was clear that she had sexual intercourse with the appellant thrice in May and the last time to have sexual intercourse with him was at the end of May though she could not recall the exact date. However, PW 5 who medically examined her on 11th day of July, 2020 and filled in the PF 3 (exhibit P 2) was clear that PW 1 was one month pregnant. This means that if PW 1 had the last sexual intercourse with the appellant in the end of May, 2020, she could not be one month pregnant on 11th July, 2020 when PW 5 medically examined her and made that finding. Taking into account that not less than two months had passed

from the last sexual encounter with the appellant to when she was discovered by PW 3 to be enceinte for one month.

This inconsistency was not minor as it went to the root of the case on whether the appellant was actually responsible for the PW1's pregnancy. For that reason, I am in no doubt that the second count was not proved to the required standard.

In the end result and for the reasons stated, I allow appellant's appeal on the conviction and sentence in the second count. I quash conviction and set aside the sentence of two years term of imprisonment imposed against the appellant in the 2nd count.

As far as the appellant's appeal in the first count of rape, I find it devoid of any merit. The same is dismissed in its entirety.

The appeal is allowed to the extent explained above otherwise, it is dismissed.

Order accordingly.

W.P. Dyansobera

Judge

28.10.2021

This judgment is delivered under my hand and the seal of this Court this 28th day of October, 2021 in the presence of the appellant who has appeared in person and unrepresented and Mr. Wilbroad Ndunguru, the learned Senior State Attorney for respondent Republic.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge