IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 124 OF 2020

(Originating from Mtwara District Court in Criminal Case No. 43 of 2020)

NURDIN ABDALLAH MWIDINI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

29 Sept. & 27 Oct., 2021

DYANSOBERA, J.:

The appellant was charged in the District Court of Nachingwea at Nachingwea with two counts. On the first count, the appellant was charged with the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, [Cap. 16 R.E. 2019]. The same appellant was charged in the second with the offence of 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.02) Act of 2016.The particulars of the offence in the first count were that on unknown date and

time between April,2020 to July 2020 at Matangini village within Nachingwea District in Lindi Region the appellant, Nurdin s/o Abdallah Mwidin@ Matamba, did have carnal knowledge with "IE" or the victim who is a girl of 17 years old. The particulars of offence in the second count alleged that on unknown date and time between April, 2020 to July 2020 at Matangini village within Nachingwea District in Lindi Region, the same appellant unlawfully did impregnate on "IE" or "the victim," a secondary school girl of Kipaumbele Secondary School.

After a full trial, the appellant was convicted on first count and was consequently sentenced to imprisonment terms of thirty years for the offence of rape. With respect to the second count, the trial court found the case against him not proved beyond reasonable doubt and acquitted him under section 235(1) of the Criminal Procedure Act, [Cap. 20 R.E. 2019]. The appellant was dissatisfied with the decision of the trial court, hence, the current appeal.

At the trial court, the prosecution called five witnesses and two documentary exhibits that is exhibit PE1 and PE2. The case for the prosecution established that on 3/7/2020 PW2 (Hadija H. Issa Ngawina), Headmistress of Kipaumbele Secondary School conducted medical

examination on the female students by the aid of the nurses from Nachingwea District Hospital. The examination was made through two methods including eye examination and urine test. During the exercise the victim (PW3), a form three student female student, was tested positive on the pregnancy test. Upon inquiry and in the presence of PW 1, PW 2 and PW 5, the victim mentioned the appellant to have been the one who had impregnated her. As per the testimony of the victim, she was seduced by the appellant and she accepted his offer. The making sexual intercourse ensued. According to her, they had sexual intercourse twice at the appellant's room which is at the house owned by the street chairperson called Nassar Abdallah Kamaru. The clarified further that on two occasions she undressed her clothes and the appellant did the same then the appellant inserted his penis into her vagina. They had sexual intercourse twice without using condom.

Japhary Ally Mauridi (PW4), an Assistant Medical Officer at Nachingwea District Hospital did, on 7.2020, examine the victim on pregnancy test and found her positive with the pregnancy of 5 weeks as evidenced by Exhibit PE2.

In his defence, the appellant denied having any relationship with the victim. He also denied having raped and impregnated her. He asserted that the victim had a relationship with another man called Hassan Athuman Hassan.

Upon full trial, the appellant was convicted and sentenced as earlier on indicated. Dissatisfied, the appellant has preferred this appeal vide a petition of appeal which contain only one ground of appeal that, the trial court erred in law and in fact by convicting the appellant while the prosecution failed to prove their case beyond reasonable doubt as required by the law.

When this matter was called for on hearing the appellant appeared and was represented by Mr. Rainery Songea, the learned advocate whereas, the respondent Republic, was represented and enjoyed the services of Mr. Kauli George Makasi, the learned Senior State Attorney.

Submitting in support of the appeal, Mr. Songea contended that the case was not proved beyond reasonable doubt. Referring this court to the provisions of section 3(2) (a) of the Evidence Act, he said that the prosecution is duty bound to prove its case beyond reasonable doubt. He also cited the cases of **Hemed v. R** [1987] TLR 117, **Nathanael**

Alphonse Mapunda & Another. v. R [2006] TLR 395 to buttress his argument.

On the variance between the charge sheet and evidence, Counsel for the appellant submitted that in the charge sheet it was stated that rape incident occurred between April 2020 to July 2020 but the evidence is silent on the dates and even PW3 did not tell when the offence occurred. He argued that the law is clear that where specific time is mentioned the prosecution is duty bound to prove otherwise the prosecution has failed to prove the charge to the required standard. To fortify his argument the learned counsel cited the case of **Abel Masikiti v. R**, Crim. Appeal No. 24 of 2015 referred in the **Mwanjiku@ White v. R**, Crim. Appeal No. 175 of 2018 at p. 15 on the authority that if there is variance or uncertainty on the dates the case is not proved.

The conviction of the appellant was also challenged on another front. Mr. Songea argued that there is the victim's failure to mention the appellant in a reasonable time. According to him, the incident is said to have occurred between April and July but the victim throughout kept silent until she was examined and found pregnant. The learned counsel was of the view that this brings doubt on the witness's credibility as the mentioning of the culprit at the earliest time shows how reliable a witness is. He supported his argument by citing the case of **Alexander Emmanuel v. R**, HC Crim. Appeal No. 47 of 2016 Bukoba Registry at page 6 which made reference to the case **Marwa Wangiti and Anor. v. R**, Crim. Appeal No. 6 of 1995 whereby the issue of naming the culprit at

earliest opportunity was elaborated in detail. In that case it was stated that the incident occurred on 3.7.2014 and the victim was discovered pregnant on 2.10.2014 and after that discovery she mentioned the appellant as the person responsible. The court doubted the credibility of the witness and the appellant was released.

Therefore, Mr. Songea prayed the appellant to be set free. The position which was also stated in the case of **Yust Lala v. R**, Crim. Appeal No. 337 of 2015 CAT – Arusha at page 10 and 11 and **Robert Kalibara v. R**, Crim. Appeal No. 38 of 2020 High Court Bukoba, the facts were the same as the present case and the position was reiterated at page 12. In the light of that submission Mr. Songea was of the view that the case against the appellant was not proved to the required standard.

He further argued that in rape cases, the best evidence comes from the victim but the principle should not be used in the wholesome as the court has to consider the circumstances. In view of that submission Mr. Songea referred this court to its decision in the case of **Godfrey Leslie Ndumbaro v. R,** Crim. Appeal No. 108 of 2020 whereby this court reviewed the evidence and was satisfied that sometimes witnesses do not tell the truth but misuses that right and tell lies. The learned counsel submitted that this is possible as the mentioning was made after discovery of pregnancy. He insisted that the court has to satisfy itself that the prosecution has proved all the ingredients since the accusation of this nature is easily to be made hard to be proved and harder to be proved by the accused as it was stated in the case of **People v. Benson**,6 Cal 221(1856) cited in the case of **Robert Kalibara** (supra). In addition, the

learned counsel submitted that at page 13 of the copy of judgment of the trial court, the learned trial Magistrate was doubtful if any other person could have raped the victim.

In response, Mr. Makasi supported the appeal and was in agreement with the reasons given by Mr. Songea. He conceded that the prosecution is duty bound to prove the case beyond reasonable doubt as per s. 3 (2) (a) of the Evidence Act arguing that whatever has been alleged in the charge sheet has to be proved such as the time at which the offence is alleged to have been committed.

In his view, none of the witness proved the allegations in the charge sheet. Mr. Makasi departed a bit from the stance shown by Counsel for the appellant by arguing rebutting any variance between the charge sheet and evidence but explained that what was alleged in the charge sheet was not proved, to him, which suffices to dispose of the whole appeal. Submitting on the mentioning the appellant at the earliest moment the learned Senior State Attorney argued that PW3 mentioned the appellant after she was found with pregnant of five weeks. Mr. Makasi insisted that PW3 had to report matter before she had discovered to be pregnant.

Expectedly, Mr. Songea made no rejoinder.

Having gone through the record of the trial court, the ground of appeal and the submissions of the parties thereto, the issue calling for determination is whether the prosecution proved the case against the appellant to the required standard of proof.

In view of the fact that the respondent has conceded to the grounds raised by Counsel for the appellant in his submission, there is no need to labour much on the issues which are not controversial.

It is the law supported by many authorities that under section 3(2) (a) of the Evidence Act, the prosecution is duty bound to prove its case beyond reasonable doubt. This was emphasized in the case of **Hemed v. R** (supra) and **Nathanael Alphonse Mapunda & Another. v. R** (supra).

In the case under consideration, as rightly pointed out by Mr. Kauli George Makasi, learned Senior State Attorney, the allegations in the charge sheet on the date the offences are alleged to have been committed were not proved in evidence. The evidence was of the victim as per her testimony fell short of proving when she had sexual intercourse with the appellant which resulted into the rape and pregnancy. Her evidence only covers the event of having sex twice with the appellant and not any other person which is contrary to what is stated in the charge. The charge provides the particulars that the appellant had carnal knowledge with the victim between April to July, 2020 but at unknown dates and time. The same applies to the second count. However, the evidence adduced by the victim or other prosecution witnesses fell short on the date, time, month and year when the appellant had carnal knowledge with the victim which eventually resulted into the pregnancy. For clarity it is imperative to reproduce what was testified by the victim at the trial as reflected at page 16 of the typed proceedings of the trial court as follows: -

"When I am at form three, the accused person one Nurdin Matamba was prayed to have a love affairs with me. I accepted and I have a sex intercourse with the accused person. I sexed two times with the accused. In doing sex I undressed my clothes and the accused person undressed his clothes too and inserted his penis into my virginal (sic). I had sexed with the accused person without using a condom and no other man I had met with him other than the accused person in this case"

It is true that settled law is that the best evidence in rape cases comes from the victim as was stated in the case of **Seleman Makumba v. R** [2006] TLR 379 at page 384 where the Court of Appeal 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", however, the mere words that the victim was seduced by the appellant that she accepted him and they had unsafe sex twice and with no other man other than the appellant is insufficient incriminating evidence. I am fortified in this by what was decided in the case of **Mathias Samweli v. Republic**, Criminal Appeal No.271 of 2009 (unreported) where the Court of Appeal observed as follows: -

"We are of the opinion that when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that offence was committed by the accused by giving cogent evidence and proof to that effect." (Emphasis added).

Apart from that flaw, there was also failure on part of the complainant to name at the earliest possible time the person who carnally knew her. On this aspect, Counsel for the appellant argued that this conduct brings doubt on the credibility of the witness. Mr. Makasi conceded to this fact. With due respect both Counsel are right. In the case of **Marwa Wangiti and another v. Republic** [2002] T.L.R 39, the Court at page 43 stated that: -

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

In the case at hand the victim mentioned the appellant on 3rd day of July, 2020 before PW1, PW2 and PW5 as the one responsible person for her pregnancy. This revelation was also made after being interrogated by her teachers.

It is not clear why the victim so tarried in naming the appellant as the person responsible for both the rape and pregnancy. This lapse of time creates doubt which, in my view, is not unreasonable and also affects the credibility of the victim. In the case of **Yust Lala v. Republic** (supra) at page 10 the Court of Appeal stated: -

> "In our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt on the credibility of PW1.It was her evidence that she did not mention the

appellant for all that period because of his threat that he would slaughter her if she discloses to anybody that he raped her"

In the light above incurable defects as pointed out by Mr. Songea and accepted by Mr. Makasi, I find constrained to hold that this appeal is meritorious and should be allowed.

Consequently, I quash the conviction and set aside the sentence of thirty (30) years imprisonment term meted by the trial court. I order an immediate release of the appellant, unless held for other lawful reasons.

It is so ordered.

W.P. Dyansobera

Judge

27.10.2021

This judgment is delivered under my hand and the seal of this Court this 27th day of October, 2021 in the presence of Ms Priscilla Mapinda, learned Advocate for the appellant and Mr. Wilbroad Ndunguru, learned Senior State Attorney for respondent Republic.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge