IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 172 OF 2021

(Arising from the Criminal Case No. 14 of 2020 before the Kinondoni District Court)

HERMAN STEPHANO ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

Date of last Order: *11/10/2021*

Date of Judgement: *15/06/2021*

JUDGMENT

MGONYA, J.

The Appellant HERMAN STEPHANO was charged in the District Court of Kinondoni and convicted of impregnating the school girl **c/s 35 of Education Act, Cap. 353 [R. E. 2002]** and sentenced to four (4) years' imprisonment. The Appeal is against both conviction and sentence on the following five grounds:

1. ***That, the trial Magistrate erred in law by convicting the Appellant while he was charged under wrong provision of the iaw.***

2. ***That, the trial Magistrate erred in law by failure to specify the offence and section of the law under which the Appellant was convicted.***
3. ***That, the trial Magistrate erred in law for delivering a judgment with no point or points for determination, the decision thereon and the reasons for the decision.***
4. ***That, the trial Magistrate erred in law and fact by failure to examine, evaluate and analyse the evidence on records, as the victim (PW1) was discovered being pregnant after lapse of 1 year (12 months), and the age of the examined pregnancy (18 weeks) did not match with the date of the incident.***
5. ***That, the trial Magistrate erred in law and fact by failure to take into consideration on the Appellant's evidence.***

Whereof; the Appellant prayed this honourable court to allow his appeal, quash the conviction and set aside the sentence and acquit him from prison.

At hearing, the Appellant was representing himself, whereas he prayed the court to admit his five grounds of appeal and consider them.

Respondent in this appeal was represented by **Ms. Imelda Mushi the learned State Attorney.** Responding to the grounds of appeal, from the outset, the learned Counsel declared that Republic is in support of the appeal as the Prosecution during trial did not prove the offence charged beyond reasonable doubt.

Submitting further, Ms. Mushi informed the court that the Appellant was changed for impregnating a school girl. However, in order to prove the offence charged, there must be a proof that the Appellant is responsible of the pregnancy. Referring to the court's records, Counsel informed the court that the said school girl had miscarriage of which there was nothing for her to deliver for **DNA** in order to prove that the Appellant was the one responsible for the pregnancy; despite the fact that the Appellant gave his weak proof and that the doubts that were arose were neither cleared by Prosecution.

Pointing on other anomaly that happened during trial, Ms. Mushi informed the court that, Honourable Magistrate based his case on the offence of Rape contrary to the offence of impregnating a school girl as charged and contrary to the law.

From the above legal shortcomings and particularly due to the lack of proof to the offence charged, the learned State Attorney proclaimed to support the Appeal.

I have carefully gone through the records of this matter particularly the proceedings as they appear from the trial court. Indeed, the offence that the Appellant was charged at the trial court was that of **impregnating the school girl c/s 35 of Education Act, Cap. 353 [R. E. 2002]** where he was convicted and sentenced to four (4) years' imprisonment. In determining this Appeal, I have decided to focus on the propriety of law of evidence as the same reflects the five grounds of Appeal as advanced by the Appellant herein, as the same drove this matter to conviction and sentence of the Appellant.

Going through the victim's testimony who testified as PW1, I have noted from her testimony that the pregnancy that she alleged to have did not bear a child as she got miscarriage. From her own words in page 7 of the proceedings she stated:

> ***"On 2/9/2019 I got miscarriage. I was at home but I went to Sinza Hospital. It was my sister who sent me to Sinza Hospital."***

In that regard, as the Respondent's averment is that there was nothing to hold and prove that the Appellant was responsible for the alleged pregnancy. As we all know, to prove that the Appellant is the one who impregnated PW1, it was expected that the baby who was to be born out of that pregnancy would be subject to paternity test (DNA) so as to prove the offence. In the absence of the baby, there wasn't any proof to prove that the Appellant impregnated the victim.

In this regard, the medical proof was supposed to prove the offence and leave no doubt on this matter to attract conviction. Under the circumstances, two major results was supposed to come out of the scientific examination, If the paternity test was to prove positive, then the Appellant was to be subjected to conviction. If the result were negative, then he Appellant was supposed to be acquitted accordingly. However, nothing was in place to prove or disprove the offence charged.

From the omission as stated above, it is my form view that the leaned Magistrate at the trial court misdirected himself and came to the conclusion that the Appellant was guilty of the offence and convicted him erroneously for lack of evidence to prove the offence charged.

Under the circumstances, the DNA test of which is the scientific test was not avoidable. The importance of the DNA

test was stated in the case of ***JOSEPH LUGATE V.R Cr. App. No. 317 of 2009. (Unreported)*** where it was stated:

> *"Deoxyribonucleic Acid or DNA consists of long ribbon like molecules, the chromosomes, 46 tightly lie and cooled in nearly every cell of the body. These chromosomes -23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different sections of DNA have different identifiable and discrete characteristics.* ***When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made in the same sections extracted from a sample of blood provided by the suspect.***
>
> *The procedure which would be followed in relation to DNA evidence should, as far as is possible, be:*
>
> 1. *The scientific should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio.*
> 2. *Whenever such evidence is to be adduced, the prosecution should serve upon the defence details as to how the calculations have been carried out which are sufficient for the defence to scrutinize the basis of calculation.*

The forensic Science Service should make available to defence experts, if requested, the databases upon which the calculation have been made"

From all the above, I join hands with the learned State Attorney Ms. Mushi that at the trial court, Prosecution failed to prove the case beyond reasonable doubt to command conviction and sentence.

The proper meaning of proving beyond reasonable doubt was held in the case of ***YUSUPH ABDALLAH ALLY V. R Criminal Appeal No 300 of 2009(Unreported)*** that:

"To prove a prosecution case beyond reasonable doubt means, simply, is that the prosecution evidence must be strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irrestibiy point to the accused person and not any other, as the one who committed the offence. The said proof does not depend on the number of the witness but rather, to their credibility as per section 143 of The Evidence."

In the premises, **I allow the appeal and order that the Appellant be released forthwith from prison unless held further for other lawful causes.**

It is so ordered.

Right of Appeal Explained.

L. E. MGONYA

JUDGE

15/10/2021

Court: Judgement read this 15th day of October, 2021 in the presence of the Appellant in person, Ms. Edith Mauya, Advocate for the Republic and Ms. Veronica, RMA.

L. E. MGONYA

JUDGE

15/10/2021