IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 12 OF 2021

(Arising from Criminal Case No. 100/2020 of Kigoma District Court, before Hon. E.B. Mushi – RM)

FOALED LAURENT ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

3/11/2021 & 13/12/2021

L.M. MLACHA, J.

The appellant Foaled Laurent was sent to the District Court of Kigoma in criminal case No. 100 of 2020 faced with a charge which had 5 counts. Counts 1 to 4 contain allegations of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code Cap 16 R.E. 2019. It was alleged that on dates stated, he raped Theresia Riziki, a girl of 16 years at Manyanga Village, Kigoma District. The 5th count had a charge of Impregnating a school girl contrary to section 60 A (3) of the Education Act, Cap 353, R.E. 2002. That, at the said place on 4/6/2020, he impregnated the said Theresia Riziki, a student of form I at Mkuti Secondary School. He was found guilty, convicted and sentenced to 30

years in jail on each count. Sentences were ordered to run concurrently. Aggrieved, he has now come to this court by way of appeal.

The appeal is based on 4 grounds which read thus;

1. *That, the trial court grossly erred in law and fact when it convicted and sentenced the Appellant for all five counts while the same was not proved beyond reasonable doubts.*

2. *That, the trial court grossly erred in law and fact when it convicted and sentence the Appellant for offence of impregnating a girl of 15 years old while her age was not proved to the required standard.*

3. *That, the trial court grossly erred in law and fact to enter conviction and sentence to the Appellant while the documents tendered as the exhibit were wrongly admitted. Hence renders the conviction and sentence nullity.*

4. *That, since there is a shadow of doubt regarding the behavior of the victim also evidence adduced on the side of prosecution (Republic) at the trial court ought to have acquitted the Appellant for both counts as the same were not proved beyond all reasonable doubt.*

The appellant was represented by Mr. Damas Sogomba while the respondent Republic was represented by Miss Edna Makala, State Attorney. Hearing was done by oral submissions through the virtual court services. The appellant was in Bangwe Prison while I was in the High Court. The counsels were in their respective chambers.

Before going to examine the grounds of appeal and the submissions, a brief summary of the evidence adduced at the lower court may be useful. The evidence from the prosecution side show that PW3, Theresia Riziki was a student of form one at Mkuti Secondary School Kigoma with registration number 2497. Her Headteacher, PW6 Edward Sagande told the court that she was admitted on 6/2/2020 as a form one student and proceeded with studies up to 17/3/2020. The evidence shows that she fell sick thereafter up to 5/6/2020 when she was discovered by her mother, PW1 Clemencia Yohana to be pregnant. PW1 said that she was vomiting that day and she suspected her to be pregnant. She consulted with her husband and conducted a pregnancy test at home. It gave a positive result. She reported the matter to the Village Executive Officer (VEO), PW5 James Method, who sent PW2 Twaha Aruna, a people's militia to arrest him. He was arrested and brought at the office. The victim, PW3 Theresia Riziki, came at the office and he could identify him as the one who made her pregnant. PW4, Dr. Mashaka Dominic received her on 14/6/2020. He conducted a pregnancy test which revealed that she had a pregnancy of 11 weeks. He filed the report on the PF3 which was received as exhibit P1. PW6 tendered copies of the Attendance and Admission Registers which showed that she was a form one student in 2020. They were marked Exhibit P2 collectively.

In her testimony, PW3 told the court that she came to know the appellant in 2018 and they became familiar. They were both at the Anglican Choir (Kwaya). The appellant stays with the pastor. Giving details of their relationships, PW3 said that they used to meet somewhere in the bush where they played sex on the following dates; 25/11/2019, 12/12/2019, March 2020 and 2/6/2020. In all the dates they moved freely to the bush, removed their clothes and had sex. She felt pain on the first day. She did not speak of pains on the days which followed.

The appellant admitted to know PW3 whom they had been at the church choir together. He denied to commit the crimes. He challenged prosecution witnesses. He said that none of them witnessed the crime.

The district court believed the evidence from the prosecution and proceeded to convict and sentence the appellant as said above.

Submitting on ground one, Mr. Silvester Damas Sogomba told the court that there was no evidence to prove the offences beyond reasonable doubts. Counsel submitted that there was no evidence adduced to corroborate the evidence of the complainant. He said that the PF3 did not show that she had sex with the appellant on the alleged dates. He added that the doctor did not say anything about rape. Counsel proceeded to

say that the existance of pregnancy does not mean that it is the appellant who did it. It may have been put by someone else. He invited the court to hold that the appellant did not commit any rape.

Submitting on ground two, counsel said that there was no evidence to show that the pregnancy was inserted in March. He said that PW3 is not reliable because he remembered all the dates, except the date of March 2020. Counsel proceeded to say that PW3 left school on 17/3/2020 according to the evidence of the headteacher so it cannot be said that it is the appellant who made her pregnant. He had the view that there was no evidence that the pregnancy was fixed in March 2020. He went on to say that the age of PW3 could not be proved. He demanded, the existance of an affidavit or birth certificate to prove age. He added that PW3 was hopeless. She played sex many times. He argued the court to set the appellant free.

Ms. Edna Makala, State Attorney did not agree with Mr. Sogomba. She said that there was evidence to prove the case beyond reasonable doubts. She referred the court to the evidence of PW3 who gave evidence showing the dates of rape and the case of **Selemani Makumba v. Republic**, [2006] TLR 384 which established the principle that true evidence of rape must come from the victim. She proceeded to say that

the charges of Impregnating a student were also proved because there was evidence that he played sex in March 2020. She connected the evidence of PW3 and that of PW6, the doctor who said that he examined her on 14/6/2020 and found that she had a pregnancy of 11 weeks. She said that the 11 weeks fell in March 2020.

The learned State Attorney went on to say that, rape is not proved by a PF3. She referred the court to **Mario Athanas Sipenga v. Republic**, Criminal Appeal No. 116 of 2013 on this aspect. In that case, counsel submitted, the Court of Appeal followed its decision made in **Ali Mohamed Makupa v. Republic**, Criminal Appeal No. 2/2018 where it was said that rape is not proved by medical evidence alone, some other evidence can also prove it.

In ground two counsel submitted that there was evidence showing that PW3 was born on 2/3/2005. PW3 said that she was born on 2/3/2005 proving that she was 15 years old at the time. She proceeded to say that age of a child is proved by a parent, doctor or guardian. Referring to the case of **Edward Joseph v. Republic**, CAT Criminal Appeal No. 273 of 2009, the State Attorney said that the evidence of a parent is better than that of a doctor in proving age. She added that the victim was aged 15 years and therefore not a child of tender age.

In ground 4, counsel submitted that PW3 had a good character and further that, even when it is proved that she had a bad character, that did not give the appellant permission to make her pregnant. She requested the court to dismiss the appeal.

Mr. Damas Sogomba made a rejoinder submission and reiterated his earlier position.

I plan to join grounds one and three in my discussions. In ground one, the appellant argues that there was no evidence to prove the offence and in ground three, the appellant challenge the conviction saying that the documents were wrongly admitted. Apparently, none of the counsel has addressed the court on ground 3.

In the famous case of **Selemani Makumba** (Supra), it was held thus;

> "***True evidence of rape has to come from the victim***, *if an adult, that there was penentration and no consent, and in case of any other woman where consent is irrelevant that there was penentration".* [Emphasis added]

In the case under consideration, PW3 was 15 years plus. Her case fell under the category of 'in case of any other woman' because she was

below 18 years. The evidence shows that she played sex with the appellant four times. She mentioned the dates except the March event where she simply said in March 2020. Mr. Sogomba has challenged the reason as to why she could not mention the specific date of much. I could not get difficult with that. Witnesses are not computers. That is the reason why we allow them to refresh memory. PW3 said clearly that they used to meet in the bush and gave details of how it was done. They used to undress and play sex. She felt pains in the first day but could not feel pains later simply because she was already used to the game.

The evidence of PW3 is clear and it was strong. The trial magistrate who had a chance to assess the demeanour of witnesses believed her. I find no reason for not believing her. Further, the evidence of PW3 is corroborated by the evidence of her mother (PW1), the doctor (PW4) and the headteacher (PW6). They all said that she was pregnant. Exhibit P1 carry the pregnancy test results. It reads. "Generally, UPT was positive, USS reveal GA of 11 weeks". The attendance and admission registers came to establish the fact that she was a student of form one at the time when she was made pregnant. This links to the evidence of PW3 who said that they had sex in March 2020.

The court received the PF3, exhibit P1 and Admission and Attendance Registers, exhibit P2 collectively. The record shows that they were admitted without objection and read in court. It is not correct therefore, to say that they were admitted illegally. See pages 21 and 27 of the proceedings.

The appellant admitted to know PW3 whom they sang together at the church choir. He denied to have a love affair with her. He also denied to make her pregnant. But, on the strength of the evidence from the prosecution as shown above, I think that he was just denying the obvious. The evidence is clear that he had a love affair with PW3 whom she made pregnant. That disposes grounds one and three.

In ground two, the issue is whether age was proved. I had time to read the authorities cited above. I find them relevant but I am more impressed by the decision of the Court of Appeal in **Issaya Renatus v. The Republic**, Criminal Appeal No. 542/2015. It was said at pages 8 and 9 as under:

> *"We are keenly conscious of the fact that **age is of great essence in establishing the offence of statutory rape** under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the*

victim must be under the age eighteen. That being so, ***it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or where available, by production of a birth certificate".*** [Emphasis added]

The court spoke of proof of age by evidence from the victim, relative, parent, doctor or a birth certificate. It did not end up there. It went on to say the following: -

"We are, however, for from suggesting that proof of age must, of necessity, be proved by such evidence. There may be cases, in our view, where ***the court may infer the existance of any fact, including the age of the victim, on the authority of section 122 of TEA".***

So, simply stated, the age of the victim may be proved by the evidence of the victim, relative, parent, medical practitioner or a birth certificate but the court can even infer it. The Court of Appeal in **Isaya Renatus** (supra) has extended the rule to section 122 of the Evidence Act. Under section 122 of the Act, the court may infer the existance of any fact which it thinks likely to have happened, regard being given to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. The court can thus, on the authority of the decision of the Court of Appeal, examine the

victim and facts around the case and infer that she is a person under 18 years in the absence of the evidence of the victim, relative, parent, doctor or a birth certificate.

In our case, there is evidence from the victim and her mother that she was born on 2/3/2005. There is also evidence from her teacher who brought the Admission and Attendance Registers. The court can make an inference under section 122 of the Evidence Act and establish that the victim was under 18 years because generally form I students are not expected to exceed that age save for situations of adult education which is not the case here. It is thus clear that, there was good evidence to prove that the age of PW3 was under 18 years. That disposes ground two.

Ground four is simple. The counsel for the appellant wants to tell the court that the victim was a girl of bad characters and thus there could not be a conviction on the part of the appellant. With respect, I find this as a strange submission for there was no evidence at all showing that the victim had sex with anybody else other than the appellant. Even if there was such evidence, still it could not remove criminal liability on the part of the appellant. In other words, the fact that the victim may have had sex with other men did not give justification to the appellant to have sex as well. I find ground four as baseless which is dismissed.

That said, the appeal is found to have no merits and dismissed.

L.M. Mlacha

JUDGE

13/12/2021

Court: Judgement delivered through the virtual court services. The appellant is in Bangwe Prison. The State Attorney is in his chamber while I am in the High Court Kigoma.

Right of Appeal Explained.

L.M. Mlacha

JUDGE

13/12/2021