IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 86 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Criminal Case No. 53 of 2016)

GOROBANI S/O BRANDI @ KATUMBO ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

7th October and 24th November, 2021

F.H. MAHIMBALI , J.:

Gorobani Brandi @ Katumbo, the appellant in this case was arraigned before the district court of Serengeti at Mugumu and charged with the offence of Rape c/s 130(1), (2) (e) and 131 (1) of the Penal Code and Impregnating a school girl c/s 35 (3) and (4) of the Education Act, cap. 353 R.E 2002. It was the prosecution claim that on the 7th day of October, 2015 at 21:00 hours at Mugumu within Serengeti district in Mara Region, the appellant had sexual intercourse with AB / victim (her named disguised to protect her identity) a girl aged 17 years old and as a result he impregnated her.

The trial court heard the matter and, in the end, ruled that the prosecution had proved its case beyond reasonable doubt and it

convicted and sentenced the appellant to 30 years imprisonment in respect to the first count of rape. In respect of the second count of impregnating a school girl he was ordered to pay fine of 300,000/= tshs and in case of default to serve three years imprisonment. The court ordered the sentences to run concurrently.

The material facts leading to this appeal are as follows; AB a form three student at Serengeti secondary school testified that on the 07/10/2015, the appellant became her lover and that was the first time they had sexual intercourse without using protection (condom) in the appellant's room at police line famously known as "kwa bibi kenedy". On the 3rd of February, 2016 the appellant convinced her to escape and they fled to Sarakwe as the appellant was afraid of being arrested. They stayed at Sarakwe up to the 10th day of February, 2016 when they left for Shinyanga. At shinyanga they were living at the appellant father's place up to the 8th day of March, 2016 and on the next day the appellant gave her tshs. 27,000/= as fare and the victim travelled back to Mugumu. On arrival, her mother one Maria Maro (PW1) had gone to Shinyaga in search of her. Her evidence was corroborated by her mother who testified that she was the mother of eight children and AB was among them and AB was born on the 22nd day of September, 1999. On the 02nd day of February, 2016 she had gone to church and when she

came back on the 3rd of February, 2016, she did not find AB but her uniform was in the house. She received information on the 06/03/2016 that the appellant and her daughter were at Shinyanga and the next day she embarked on the journey in search of her daughter at Shinyanga. She was informed that the appellant was arrested on the 9th day of March, 2016 and on the same day her daughter went to Mugumu.

When she arrived at her place, on the 17/03/2016 she was given a PF3 and she took AB for medical check-up. At the hospital, Albert Kasanga Mnalimi, a medical doctor examined the victim and at the end he made a report to the effect that the victim was five months' pregnant. He filled in the PF3 , which he tendered in court and it was admitted as exhibit P.2 without any objection.

As this was a criminal matter a case file ;MUG/IR/257/2016 was opened and it was assigned to F. 5837 D/CPL Masoud (PW4) on 03/02/2016. He received information from the victim's mother that the appellant was in Shinyanga. That the appellant was then arrested and taken to Mugumu police station on the 13/3/2016 and the victim's statement was taken on the 17/03/2016 by another police officer and she was given a PF3 so as to go to the hospital. PW4 interrogated the appellant on the 16/03/2016. He also went to the school of the victim and the school confirmed that she was their student but she had not

attended school for one month. The victim's registration number was Reg. No. 3668. He was also given a letter from the victim's school, which he tendered in court and it was admitted and marked as exhibit PF3 without any objection from the appellant.

The trial court found the appellant with a case to answer and in bid to prove his innocence he fended for himself under oath and stated the following; that on 01/9/2015 he left his home Malianda village to go to Mgeta village. He travelled to Shinyanga via Mwanza. He went to work for a security company known as Unity. He reported to his work station on the 2nd of September, 2015. He worked until the 9th of March, 2016 when two people went to his work station and introduced themselves as police officers. They told him to report at the police station and he was at the police station until on 13/03/2016 when he was taken to Mugumu. He stayed in the lock up until on 17/03/2016. He was interrogated and later arraigned before the court.

Consequently, the court was satisfied that the prosecution had proved its case beyond all reasonable doubts. It went on to convict and sentence him as stated earlier.

This decision did not amuse the appellant. In bid to prove his innocence he has lodged a petition of appeal armed with five grounds of appeal to the effect that;

1. That the trial magistrate erred as the prosecution did not prove its case beyond reasonable doubt.
2. That the trial magistrate erred as it did not prove penetration.
3. That, the trial magistrate erred as it did not conduct DNA examination on the appellant.
4. That, the trial magistrate erred as it did not prove the age of the victim as there was no documentary proof.
5. That, the trial magistrate erred as his defence of ALIBI was not considered.

When this matter came up for hearing, the appellant was present in person while the respondent enjoyed the legal services of Mr. Malekela, State Attorney. The matter was heard by way of audio teleconference linking the appellant from Mollo – Prison in Sumbawanga getting diligence support from the office of Deputy Registrar from Sumbawanga High Court.

Submitting in support of the appeal, the appellant prayed his grounds of appeal to be adopted to form part of his appeal submission.

Objecting to the appeal, the respondent submitted on the first ground that the case was proved beyond reasonable doubt, as the victim was abducted by the appellant and they lived at Shinyanga and it is also undisputed that the victim was impregnated and the victim had known no man before.

It was his submission that penetration had been established by the victim and the resulting pregnancy. It was his view that the first and second grounds of appeal lacks merits.

On the third ground, he conceded that no DNA test was carried out to link the appellant and the pregnancy. It was his submission that the second offence was not established.

Responding to the fourth ground of appeal he submitted that the age of the victim is not solely proved by birth certificate as alleged. As per law, the age of the victim can be proved by the parents, victim and a doctor. In this case, the age of the victim was proved by the parents (page 9 of the typed proceedings). He submitted further that the fact that there was consent of the victim, is immaterial as the victim was below 18 years (see section 130 (2) (e) of the Penal Code).

The complaint that the incident was reported late to the police is due to the fact that the victim was abducted and taken to Shinyanga

and according to PW1 , the report at Mugumu was issued on the 2/2/2016 (page 10 of the typed proceedings) and on 9/3/2016 is when the victim returned home and the same day the appellant was arrested at Shinyanga. It was his view that it is timely reporting, there was no delay.

Regarding the fifth ground of appeal, the appellant's grief is that his defence of alibi was not considered. The respondent submitted that in order for it to be considered he had to give notice as per section 194 (4), (5) (6) of the CPA.

In fine, he found this appeal bankrupt of merits and the same be dismissed and he prayed the conviction and sentence in respect of the first count to be enhanced.

During rejoinder, the appellant reiterated his grounds of appeal, he also stated that the fact that the victim is pregnant is not conclusive proof she was raped as in this century a lady can be pregnant without being sexually known. He further stated that the manner this offence has been committed and linked to him is wanting.

Having heard the rival submissions of the parties and gone through the court's record. This court will now determine if this appeal

has merits. In doing so, it will mainly resolve the issue; whether the prosecution proved it case beyond reasonable doubt.

The appellant in this case is charged with two counts; rape and impregnating a school girl. The victim in this case is 17 years old, therefore the offence was statutory rape. In order to establish statutory rape, there are two ingredients to be established, which is penetration and age of the victim. Therefore, this court will determine whether there was penetration and the age of the victim. Regarding penetration, AB testified that she started having sexual intercourse with the appellant on 07/10/2015 when they became lovers. They also fled to Sarakwe on 03/02/2016 and later went to Shinyanga. All this time they were living together as lovers. The victim returned home on 09/03/2016. This means they were lovers for almost six months. The law is settled that penetration however slight is sufficient to constitute sexual offence. In the case of **OMARY KIJUU vs THE REPUBLIC**, Criminal No. 39 of 2005, Court of Appeal at Dodoma at page 8 held;

"... But in law , for the purposes of rape , that amounted to penetration in terms of section 130 (4) (a) of the Penal Code Cap. 16 as amended by the Sexual Offences Special Provisions Act 1988 which provides :

" For the purposes of proving the offence of rape – penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"

In the case at hand the victim stayed with the appellant for almost six months and he knew him very well that means there was no chances of mistaken identity. Therefore, it is safe to state that penetration was proved by the victim. The best evidence in rape cases is from the victim. This principle was stated in **Selemani Makumba v Republic**, [2003] TLR 203 when the Court of Appeal held:

> "***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 women where consent is irrelevant that there was penetration***" [Emphasis supplied].

The appellant's second complaint is that the victim did not state in her evidence that his penis penetrated into the victim's vagina. I have gone through the court's record and it was the victim's testimony that they became lovers on 7/10/2015 and they had sex. It is my humble view that having sex means the same thing a penis penetrating into a vagina. In the context of this case, it is a vaginal sex the PW2 was referring to after the male penis of the appellant had penetrated into her

vagina. She being 17 years old, it is rape in the context of our law (See section 130(1), (2) (e) of the Penal Code). Hence, this grief is baseless.

Moving to the second ingredient of the age of the victim. The law is settled that age may be proved by the victim, her parents or medical practitioner (See **Isaya Renatus vs R**, Criminal Appeal No. 342 of 2015, CAT at Tabora -unreported). In this case the age of the victim was proved by her mother on page 9 of the typed proceedings where she stated that the victim was born on 22/09/1999. That means she was 17 years old. The appellant's complaint that there was no documentary evidence to prove the age of the victim is bankrupt of merits as that is not the law. Having stated so, the age of the victim was proved. Therefore, the fourth ground of appeal is meritless and dismissed.

The other appellant's complaint is that there was no DNA conducted in regard to the appellant impregnating the victim. This court is at one with the learned state attorney that, in order to establish that the appellant was the father, it had to conduct DNA, but in this case it was not. In that regard, his third complaint has merits and it is allowed.

Furthermore, the appellant moans that his defence of Alibi was not considered. The respondent objected to this ground and stated that the appellant had not complied with the law. For the defence of Alibi to be

considered notice has to be issued first. The law is settled that a person who intends to rely on the defense of alibi is to give notice of that intention before hearing. This is as per section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E 2019. If he is not able to do so prior the commencement of the trial, then he can supply the notice any time prior the prosecution closing its case; section 194 (5) of the CPA. Failure to do so the court will accord not weight to it, section 194 (6) of the CPA. In the instant case, no notice was given hence the court cannot consider his defence of alibi. This ground is bankrupt of merits and it is dismissed.

Before, I pen off I will discuss some issues that came into my attention. One; whether the matter was reported on time. According to PW1, she went to report the incident on the 02/02/2016 at Mugumu police station. The accused person was arrested on the 09/03/2016. From this, it is clear that the incident was timely reported.

The second issue is on the PF3, it was taken on 17/03/2016 by the victim's mother but the medical examination was done on 18/5/2016. To any reasonable man this raises doubts. How comes the medical examination was done after almost two months. It is this court's holding as stated earlier, that the best evidence for rape cases comes from the

victim and not medical report, therefore the delay does not vitiate the prosecution evidence.

The third issue is whether this court can rely on the evidence of PW1, she told this court that she reported the abduction of her daughter on the 02/02/2016, she went to church on 2/2/2016 but returned on the 3/2/2016 and she did not find her daughter. This means she reported the incidence prior to its occurrence. She also obtained information that the victim was at a Shinyanga on 6/5/2016 and she went to Shinyanga on 07/03/2016. According to this information, it means she went to Shinyanga prior to her daughter and the appellant going there. It is safe to state that the court cannot rely on such evidence. It is safe to state that it still remains that the best evidence in rape cases is from the victim. In this case the appellant only cross examined the victim on the sexual intercourse they had at his place but he never crossed examined her on the sexual intercourse they had at Shinyanga. It will be safe to state that he admitted to the sexual intercourse at Shinyanga. That said, it is this court's holding that the charge of rape was proved beyond reasonable doubt.

In fine, this court partly allows the appeal and partly dismisses it. On the second count of impregnating a school girl, the appeal is allowed

as the offence was not proved beyond reasonable doubt. On the first count of rape, the appeal is dismissed as the prosecution proved its case beyond reasonable doubt.

The appellant will continue serving his sentence in regards to the first count of rape as rightly convicted and sentenced. It is so ordered.

DATED at MUSOMA this 24th day of November 2021.

F.H. Mahimbali

Judge

24/11/2021

Court: Judgment delivered today in the presence of Mr. Niko Malekela state attorney for the Republic - Respondent while the appellant is at virtual teleconference from Mollo Prison.

Right of appeal explained.

E. G. Rujwahuka

Ag. Deputy Registrar

26/11/2021