IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 14 OF 2020

(C/F District Court of Mbulu at Mbulu, Criminal Case No. 111 of 2018)

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

MANIMO S/O JOSHUA .....1ST RESPONDENT

MAGDALENA D/O THOMAS ..... 2ND RESPONDET

MAGANGA S/O MEDALD.....3RD RESPONDENT

JUDGMENT

22/7/2021 & 29/10/2021

ROBERT, J:-

The respondents herein were charged at the District Court of Mbulu with three counts of offences namely; Conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap. 16 (R.E 2002), Rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 (R.E 2002) and Impregnating a school girl contrary to section 60A (3) of the Education Act as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016.

Briefly stated, facts giving rise to this appeal reveals that, on the fateful date of 9th September 2018, at the village of Dongobesh within the District of Mbulu the respondents conspired to commit an offence of rape. It was alleged that on the same date, the first respondent did unlawfully have sexual intercourse with a secondary school student aged sixteen years old and impregnated her. At the fateful time, the victim was on holiday and she was staying at Dongobesh with the second respondent to attend tuition while helping her with activities at her restaurant.

It was alleged that, the victim (PW1) was seduced by the first respondent when he found her at the restaurant of the second respondent and when she informed the second respondent, she was advised to accept his request. Thereafter, the second respondent directed her to take a parcel somewhere together with the first respondent and when they reached to a place unknown to her, the first respondent took her to a room and forced her to have sexual intercourse with him then left her there. When she was crying after the first respondent had left the room, the third respondent appeared and informed her that he will call the first respondent so as to settle the matter, she refused and went to the second respondent who did not take any action on the matter. Thereafter, she went back to her mother at Dareda. After the holiday, she went back to

school where she noticed some changes and after the test, she was found to be pregnant. She informed her father about it and reported the matter at the police station. The respondents were apprehended and charged at the trial Court. After the trial, the trial Court found them not guilty and acquitted them of all charges. Aggrieved, the appellant lodged this appeal armed with two grounds:-

1. *That, the trial magistrate erred in law and fact in acquitting the respondents without considering overwhelming evidence against them.*
2. *That the trial magistrate erred in law and fact for failure to analyze the prosecution's evidence properly hence landing on to erroneous decision.*

When the appeal was called on for hearing on 24th day of June, 2021, the appellant was represented by Miss. Sabina Silayo, learned state Attorney whilst the respondents appeared in person, unrepresented. The appeal was argued by way of written submissions.

Submitting on the 1st and the 2nd grounds jointly, counsel for the appellant submitted starting with the 2nd count for the 1st respondent that, section 130(1) and (2)(e) of Cap. 16 R.E. 2002 prohibits a male person to have sexual intercourse with a female who is below 18 years of age whether with or without consent. Further to that, subsection (4)(a) of the same provision provide that to prove the offence of rape, there must be

penetration however slight. She maintained that, the prosecution had a duty to prove that there was an act of penetration to the victim's vagina by a male organ, that it was the first respondent who did that act, and the age of the victim. That duty was discharged by PW1 (the victim) who testified that the first respondent had sexual intercourse with her without her consent.

On the issue of identification, she submitted that, the 1st appellant was well identified as prior to the incident they were together at the restaurant of the 2nd respondent (See page 21 of the trial court proceedings). The said evidence leaves no doubt in respect of the issue of identification of the 1st respondent.

Regarding the issue of age, she argued that, it was proved by PW3, the victim's mother, who told the court that the victim was born in the year 2002, thus when the incident occurred, she was at the age of 16 years. She referred the Court to the case of **Andrew Francis vs The Republic**, Criminal Appeal no. 173 of 2014, CAT (Unreported) where it was held that, a parent is a legible witness to prove the age of the victim.

Further to that, it was also the decision in a case of **Seleman Makumba vs The Republic** [2006] TLR 379 that, the evidence of the victim suffice to prove the offence of rape.

Regarding the issue of pregnancy, counsel for the appellant submitted that, as the victim testified to have sexual intercourse with the respondent and denied to have any other boyfriend at the time she conceived, then the pregnancy was of the 1st respondent. Her testimony on pregnancy is corroborated with that of PW2, a teacher were the victim was studying before being expelled from school, together with the medical doctor (PW7) who attended her, although later on the victim had miscarriage.

She maintained that, the 1st respondent did not accomplish his mission alone, he was supported by the 2nd and 3rd respondents. The evidence on record speaks louder that, when the event occurred the victim was under the care of the 2nd respondent who advised her to have a relationship with the 1st appellant and set them up by sending them together while she was aware that the victim was still a school girl.

She submitted that, based on the records, the offence seems to have been committed at the premises of the 3rd respondent. The victim (PW1) testified that, she met PW3 at the house and when she informed her about the incident of rape, he insisted on settling the matter with the 1st respondent which suggests that, the 2nd and 3rd respondents conspired and helped the 1st respondent to fulfil his goal of raping the victim (PW1).

On the basis of the foregoing reasons, she submitted that, the prosecution proved the case against the respondents beyond all reasonable doubt. She made reference to the case of **Jonas Nkize vs Republic** [1992] TLR 213 in support of his submissions and for the appeal to be allowed and the respondents to be convicted in all counts as charged.

Opposing this appeal, the 1st respondent submitted that, the trial court was right to acquit them in all counts because the prosecution failed to prove the charges beyond reasonable doubts as required by the law. Firstly, the victim did not report the matter for more than a month, secondly, there was no medical examination to prove if there was penetration, and thirdly, the victim was not a credible witness. He cited the case of **Peter Abel Kirumi vs Republic**, Criminal Appeal No. 25 of 2016 (unreported) and **Mangiti Mansa Mwita vs Republic**, Criminal Appeal No. 6 of 1995 (unreported).

Regarding the issue of conspiracy, he submitted that, there was no conspiracy between them and the prosecution also failed to prove that allegation and the issue of him impregnating the victim was never proved by the prosecution. He maintained that, the victim and her mother did contradict each other on how the abortion occurred, while at page 25 the

victim said the abortion occurred at Babati stand, PW2 said it occurred at Dareda. That contradiction proved that the case was a cooked one and prayed for the appeal to be dismissed.

On her side, the 2nd respondent while opposing this appeal, argued that, the trial court was right to acquit them. Responding on allegations of conspiracy, she submitted that, prior to this case they never knew each other. She came to know the other respondents when they were apprehended and brought before the court. She maintained that, the prosecution failed to prove that they did conspired in order for the 1st respondent to commit the alleged offence. At the end, she prayed for the appeal to be dismissed with costs.

On his part, the 3rd respondent, like other respondents, submitted that, there is no relationship between him and other respondents. He argued that, he came to know them when the matter was brought before the court. He also maintained that, there was no evidence adduced by the prosecution to prove that the alleged offence was committed in his guest house and the victim (PW1) failed to prove the place where the alleged offence took place. Therefore, in the absence of any evidence connecting the respondents with the alleged offence of rape and conspiracy, the trial

court was right to acquit them. Therefore, he prayed for the appeal to be dismissed with costs.

From the submissions made by parties in this matter and evidence in record, I will now make a determination on the merit of this appeal.

It is basic that, failure or improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In the case of **Leonard Mwanashoka vs Republic**, Criminal appeal No. 226 of 2014 (Unreported)) the Court availed useful guidelines on what need to be considered in evaluation of evidence. It observed that:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis.*

In the present case, the trial magistrate summarized and scrutinized the evidence of both parties before reaching to a conclusion. The summary of the prosecution evidence can be seen from page 3 up to page 10 and from page 13 to 22 of the impugned judgment. For example, at page 14 third paragraph it reads as follows;

> *"Regarding the second issue, apparently PW1 is the sole witness, the rest of prosecution witnesses were merely told by the victim herself. PW3 and*

PW4 who are the victim's mother and father respectively were just informed by the victim about the pregnancy to be caused by the 1st accused person in rape episode....."

The trial Magistrate proceeded further that:-

"I then ask myself if I should believe PW1 version and anchor conviction against 1st accused person thereof....."

The question to be asked is whether the trial court was right to acquit the accused persons (respondents herein).

In the case at hand, the respondents were acquitted based on what appears at pages 17 to 22. The trial court did not believe the evidence of PW1 (the victim) as her credibility raised a lot of questions. First, the victim did not report the incident to his parents or to the police station for immediate action to be taken, instead she remained quiet until it was discovered that she was pregnant. In the case of **Shabani Amiri vs Republic**, Criminal Appeal No. 64 of 2003 the Court considered the victim not credible witness due to his failure to name the culprit at the earliest opportunity. Also, in the case of **Marwa Wangoti & Another vs Republic,** TRL 2002 at page 39 the court at page 43 observed that:

"The ability of witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as

unexpected delay or complete failure to do so should put a prudent court to inquiry".

In the present case, the incident was reported after a lapse of more than 30 days which the trial court took into consideration to questions the credibility of Pw1 (the victim). Having discredited PW1's evidence on grounds of credibility, the prosecution remained with no evidence to establish the offences of rape or impregnating a school girl. Similarly, the prosecution failed to prove the charge of conspiracy against the respondents for failure to prove ingredients of the offence of conspiracy against them (see page 13 to 14 of the trial court judgment).

Based on the reasons stated herein, this court is satisfied that, the trial court evaluated the evidence of both parties and accorded it the weight it deserves. Therefore, there was no miscarriage of justice as alleged by the appellant herein.

In the circumstances, I find and hold that the finding of the trial court cannot be faulted. Consequently, this appeal is dismissed for lack of merit.

It is so ordered.

K.N.ROBERT
JUDGE
29/10/2021