IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 156 OF 2020

(Arising from Criminal Case No.10 of 2018 in the District Court of Kyela at Kyela)

Between

BARIKI GODONI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

A.A. MBAGWA J.

This appeal stems from Criminal Case No. 10 of 2018 in the District Court of Kyela. The appellant herein was arraigned on indictment containing two counts namely, Rape contrary to section 130(1) and (2)(e) and 131(1) of the Penal Code and Impregnating a School Girl contrary to section 5(4) of the Education Act.

The appellant pleaded not guilty to both counts, as such the prosecution paraded four witness and two exhibits to prove the offence. The appellant stood a sole witness in his defence.

After a full trial, the trial District Court found the appellant guilty and consequently convicted him of the second count to wit; Impregnating a School Girl. As such, the trial District Court, on 25th June, 2019, sentenced the appellant to imprisonment of thirty (30) years.

The facts, as per the record, which led to the appellant's arraignment and subsequent conviction may briefly be recounted as follows;

It is alleged in the charge that on 29th day of December, 2017 at Matema village within Kyela district in Mbeya region the appellant did have sexual intercourse with the victim as a result she became pregnant.

It was the testimony of the victim (PW1) that on 17th day of September, 2017 while on her way to church, the appellant approached the victim and requested her to his lover, a request which was welcomed by the victim. Following the established relation, on 6th day of October, 2017, the appellant invited the victim at his home. PW1 testified that on arriving at the appellant's home, they entered in the appellant's bedroom and had sexual intercourse from which she conceived.

Later on, i.e. 29th December, 2017 while in the farm, the victim's mother noticed the victim vomiting. She became suspicious that the victim was pregnant. Thus, she took the victim to Matema hospital where she was

examined and found pregnant. When asked as to who was responsible for the pregnancy, the victim mentioned the appellant

Thereafter, the victim's father went to report at Matema Beach Secondary School where the victim was schooling. Following the complaint registered by the victim's father (PW3), the Headmaster (PW2) again referred the victim to Uhai Hospital for second checkup. Similarly, the medical findings showed that the victim was pregnant. Thus, the Headmaster (PW2) referred the victim and her father to the village Chairman for arrangement of arresting the appellant.

The appellant was arrested and the matter was referred to Ipinda Police Station. The investigator of the case PW4 issued a PF3 to the victim for checkup. The victim was, for the second time, taken to Matema Hospital for medical examination. It was the testimony of the victim's father PW3 and through exhibit P1 (PF3) that the victim was found pregnant. Consequently, the appellant was arraigned in court and charged as herein above indicated.

The Headmaster of Matema Secondary School (PW2) testified that the victim was a student at his school but by the time he came to testify, the victim was no longer going to school because of his pregnancy. PW2

tendered the attendance register (exhibit P2) which indicated that the victim was attending school up to 7th day of December, 2017.

The victim told the court that by the time she had sexual intercourse with the appellant, she was seventeen (17) years as she was born on 28th day of September, 2001. This piece of evidence was corroborated by the victim's father (PW3)

The appellant, on his part, did not cross examine any of the prosecution witness nor did he specifically dispute the prosecution versions during his defence. He briefly made a general denial. His defence was comprised in a single sentence namely, '**I did not rape the victim**'

Upon evaluation of the evidence from both sides, the trial magistrate was satisfied that the prosecution proved its case beyond reasonable doubt in the second count. He therefore found the appellant guilty and convicted him of impregnating a school girl. Consequently, the appellant was sentenced to thirty (30) year imprisonment. The trial magistrate, however, acquitted the appellant of rape charges on the ground that the prosecution failed to establish, to the required standard, that the victim was aged seventeen (17) years.

Aggrieved by both conviction and sentence, the appellant has come to this Court to protest his innocence. He filed a petition of appeal containing several grounds of appeal which can be rephrased as follows:

1. That the learned trial magistrate erred in law and fact by convicting the appellant despite contradictions on the name of the victim
2. That the learned trial magistrate erred in law and fact by entering conviction whereas the PF3 exhibit P1 was neither read out nor was it elaborated by a medical doctor.
3. That the trial magistrate erred in law and fact to convict the appellant based on weaknesses of defence
4. That the trial magistrate grossly erred in law and fact by not conducting inquiry before admission of the caution statement
5. That the trial magistrate erred in law and facts by convicting the appellant without DNA test
6. That the trial magistrate erred in law and facts by convicting the appellant whereas the prosecution failed call Village Executive Officer and neighbour

When the appeal came for hearing, the appellant appeared in person to prosecute his appeal whereas the respondent Republic was ably represented by Mwajabu Tengeneza, learned state attorney.

The appellant adopted his grounds of appeal and prayed the Court to consider them and allow his appeal.

Conversely, Ms Tengeneza, on her part, completely resisted the appeal.

Submitting on the first ground of appeal in relation to the contradictions of the victim's name, Tengeneza said that as per the charge the victim was named as Stella Mwangosi but in her testimony at page 8 of the proceedings, the victim (PW1) introduced herself as Stela Ibrahim Mwela. The learned state attorney, however, told the Court that the victim's father (PW3) clearly elaborated that Stella Mwela was the name given by her uncle with whom she was staying when she went to register for standard one. Further, Ms. Tengeneza argued that even the School Headmaster (PW2) was referring the victim as Stela Mwela. The state attorney concluded that the alleged contradictions alleged are minor and not detract the fact that Stella who is being referred as Stella Mwela and sometimes Stella Mwangosi is the same Stella who testified as PW1.

With regard to the second ground of appeal, Ms. Tengeneza submitted that the said PF3 was admitted during the Preliminary Hearing where the appellant indicated that he had no objection. She was opined that since the PF3 was admitted during Preliminary Hearing, it was not necessary to be

read out. She referred to the case of **MGONCHORI (BONCHORI) MWITA GESINE vs THE REPUBLIC, CRIMINAL APPEAL NO. 410 OF 2017, CAT at Mwanza at page 13** where it was held that exhibit admitted during preliminary hearing does not necessarily need to be read out. Tengeneza told the Court that the rationale is that the exhibit is deemed to be ascertained or proved. The learned state attorney submitted that raising such argument at this stage, it is an afterthought. She was of the view that the ground is devoid of merit and prayed the Court to dismiss it.

With respect to the 3rd ground of appeal on the allegations that the trial magistrate convicted the appellant based on the weaknesses of the defence, Ms. Tengeneza strenuously submitted that the complaint was baseless. She said the trial magistrate considered evidence of both sides found that the prosecution proved the case beyond reasonable doubt. Tengeneza, however, remarked that though the trial magistrate, at page 5 of the judgment used the words '**this court found that his evidence is very weak to exonerate him from the offence of impregnating a school girl',** she was opined that on reading the whole judgment, it is clear that the magistrate was satisfied that the prosecution proved the case beyond reasonable doubt after he had dispassionately evaluated the whole evidence. Alternatively, the learned state attorney, submitted that this

being the first appellant court, she prayed the Court to re-evaluate the evidence. She referred this Court to the case of **AMAN ALLY @ JOKA vs THE REPUBLIC, CRIMINAL APPEAL NO. 353 OF 2019, CAT at Iringa at page 20**

Concerning the 4th ground of appeal that the trial court did not conduct inquiry in respect of the caution statement, the learned state attorney did not have much to talk about it. She dismissed the complaints on the ground that the alleged caution statement was not tendered in evidence so it is not before the court as such the lamentation was unfounded.

On the 5th ground of appeal in relation to DNA test, the state attorney replied that there is no legal requirement to prove sexual offence by DNA results. She submitted that the victim PW1 clearly established that the responsible person for her pregnancy was the appellant. Tengeneza made reference to page 9 of the proceedings, and said that PW1 told the trial court that she had sex with the appellant on the 6th day of October, 2017. She concluded that non production of DNA did not affect the prosecution evidence.

Coming to the 6th ground of appeal in respect of non-calling of the village executive officer and neighbours, the learned state attorney submitted that

in proving the case there is a specific number of witness required in law. It was her opinion that what is needed is credibility of witnesses and not the number. She referred to section 143 of the Evidence Act to support her contention. She concluded that the prosecution witnesses who were called, did prove the charge beyond reasonable doubt.

In conclusion, Ms. Tengeneza prayed the Court to dismiss the appeal and upheld the conviction and sentence imposed by the trial court.

Following the grounds of appeal raised, I invoked the powers of this Court to re-evaluate the evidence adduced at the trial.

The record speaks well that the trial magistrate acquitted the appellant with the count of rape. However, the prosecutions side did not appeal against the acquittal order nor was this matter raised in the appeal. As such, I will not deal with it in this appeal.

Starting with the first ground of appeal on the contradictions in the victim's name, it is true as correctly contended by the appellant and conceded by the state attorney that the charge indicates the victim as Stella Mwangosi whereas in her testimony, she introduced herself as Stella Ibrahimu Mwela. However, the anomaly was cleared by the victim's father Nsobi Mussa Mwangosi (PW3) who told the court that the victim was registered at school

in the name of Stella Ibrahimu Mwela as she was staying with her uncle when she went to start standard one. Be it as it may, it remains undisputed fact that both Stella Ibrahimu Mwela and Stella Mwangosi refer to the victim. As such the alleged contradictions are merely minor do not go to the root of the case. **See the case Dickson Elia Nsamba Shapwata vs. Republic**, Criminal Appeal no. 92/2007 CAT.

In respect of the second ground, I subscribe to the state attorney's views that the exhibit admitted during preliminary hearing does not necessarily require to be read out. It is the settled position of law that whatever is admitted during preliminary hearing it deemed to have been proved. See the case of **MGONCHORI (BONCHORI) MWITA GESINE vs THE REPUBLIC, CRIMINAL APPEAL NO. 410 OF 2017, CAT at Mwanza at page 13.**The record tells it well at page 6 of the typed proceedings that the accused was asked whether he had objection to the tendering of PF3 and he indicated that he had objection. In addition, the accused admitted fact no. 6 which was to the effect that the victim is pregnant. It is therefore untenable for the appellant to say that he did not understand the contents of exhibit P1 (PF3). To raise this complaint at this stage is indeed an afterthought.

On the 3rd ground of appeal the appellant challenged the trial court's findings on the grounds that it based conviction on the weakness of the defence. As indicated above, I have dispassionately re-evaluated evidence adduced in the trial court and found that the prosecution case was proved beyond reasonable doubt. It is undisputed that the victim PW1 was pregnant. Further, the victim's evidence is unchallenged that the pregnancy resulted from sexual intercourse which she had with the appellant on the 6th day of October, 2017. Besides, the School Headmaster PW2 told the trial court that the victim was a student at his school he tendered the attendance register (exhibitP2) to support his evidence.In the circumstances I am satisfied that the conviction was merited.

With regard to non-conducting of inquiry in respect of the caution statement in the 4th ground of appeal, I agree with the state attorney that the complaint is misplaced and unfounded for the alleged caution statement was not tendered in evidence.

The appellant further, lamented in the 5th ground of appeal that he was convicted without DNA evidence. Responding to this, Ms. Tengeneza argued that it was not a mandatory requirement to adduce DNA evidence in order to prove sexual offence. Tengeneza went on to submit that the adduced evidence sufficiently proved the charge. In the case of **Mussa**

Amrada

Sebastian versus the Republic, Criminal Appeal No. 406 of 2018, CAT at Dar es Salaam it was held that DNA test is not a popular means in our jurisdiction of proving rape rather the best evidence is that of the victim. In view of the foregoing, I agree with the state attorney that the 5th ground of appeal devoid of merits.

In the 6th ground of appeal, the appellant attacked the trial court findings on the ground that the prosecution did not call the village executive officer or neighbour to testify. Ms. Tengeneza replied that in law there in no specific number required to prove a certain fact. Tengeneza referred the Court to section 143 of the Evidence Act to support his contention.

It is a settled position of law that prosecution is not under obligation to call any witness who has evidence to testify at the trial. What is incumbent upon them is to bring necessary witnesses to prove their case. See the case of **Leornard Jonathan vs the Republic, Criminal Appeal No. 225 of 2007, CAT at Arusha.**

In this case, the prosecution brought all necessary witnesses who proved the case beyond reasonable doubt. As such, there was no need of calling other witnesses whom the prosecution did see important.

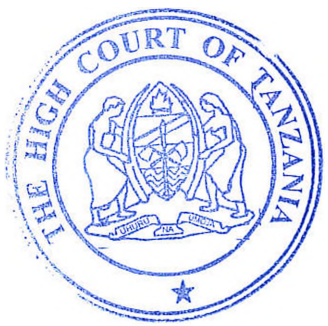
Apart from the grounds raised, I noted the defects in the charge. It is alleged that the fateful day is 29/12/2017. In contrast, the victim testified that she had sexual intercourse with the appellant on 06th October, 2017.

According to the evidence of PW2, 29/12/2017 is the date when the victim's mother suspected her of being pregnant after she observed the victim vomiting. Nonetheless, I found that the defects are curable under S.388 of the CPA for it remains a fact that it is the appellant who impregnated the victim.

That said and done, I am satisfied that there was sufficient evidence to ground conviction. This appeal is therefore without merits and therefore it is hereby dismissed. The conviction entered and sentence meted out by the trial court are upheld.

It is so ordered

The right of appeal is explained.



A.A. Mbagwa
Judge
22/11/2021