IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 63 OF 2021

(Originating from the Court of a Resident Magistrate of Mbeya Region at Mbeya in Criminal Case No. 253 of 2020.)

Between

SHADRACK AMBAKISYE .....APPELLANT

VESRSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

A.A MBAGWA J.

The appellant was first arraigned in the Court of the Resident Magistrate of Mbeya at Mbeya with two counts, the first count rape contrary to sections 130(1)(2)(e) and 130(1) of the Penal Code [Cap. 16 R: E 2019] and the second count, impregnating a school girl contrary to section 60A of the Education Act Cap. 353 R: E 2002 as amended by section 22(3) of the Written Laws(Miscellaneous Amendment) Act No. 2 of 2016. The appellant pleaded not guilty to both counts, the prosecution paraded a total of five(5) witnesses to prove the case while the appellant defended himself.

The brief facts leading to the charge is that PW1 and the appellant are related, the appellant is a step brother of PW1, in 2018 they were staying together before their parents got separated, after separation of their parents the appellant kept visiting the house of PW1 and in December, 2019 they started love affairs. In February, 2020 the appellant went to PW1's home and found her alone, he grabbed PW1, raised her shirt, stripped of the underwear and the appellant put off his trouser, laid down PW1 and the appellant laid on top of her then inserted his penis into her vagina upon finishing he left and never visited them again. In June, 2020 her mother asked if she was pregnant and told her that she had sexual intercourse with Shadrack (the appellant). The matter was therefore reported to village chairman and later to police where PW1 was issued with PF3 and went to Ifisi hospital. PW1 added that she was born on 21/8/2003 and was a student at Makama Secondary school from 2017 to August, 2020. She further said that she was no longer going to school because of being pregnant. Her evidence was corroborated by PW2, victim's mother, PW3, a Clinical Officer and PW4, Second Master at Makama Secondary School.

PW3(Maine Adam Sephukwe) told the court that on 07/08/2020 he examined PW1 found her with 23 weeks pregnancy. PW3 tendered PF3 which was admitted as exhibit P2.

Amada.

On his part, the appellant denied the allegations. He claimed that the case is a framed up because his step mother after hearing that he had sold the shamba, promised to make a case against him it is why he was arrested by police and is in court charged.

Upon full trial, the trial magistrate was impressed that the prosecution proved both counts and thereby convicted the appellant of both counts and sentenced to thirty years imprisonment in each count, sentence was ordered to run concurrently. Unpleased with conviction and sentence the appellant filed petition of appeal containing three grounds namely;

1. That the trial honourable court erred in law in convicting the appellant with the offence of charged despite the contradiction and inconsistency of prosecution witnesses which went to the root of the matter.
2. That the trial honourable court erred in law and fact in convicting the appellant while the prosecution case was not proved beyond reasonable doubt as required by the law.
3. That the trial honourable court erred in law and fact in convicting the appellant based only on the evidence of the prosecution side without critical evaluation and taking into account the defence/appellant evidence, hence the decision is a nullity.

When the appeal came for hearing the appellant had the service of Emmanuel Clarence, learned advocate while the respondent Republic appeared through Hannarose Kasambala, learned State Attorney. Counsel agreed the appeal to be disposed of by way of written submission and both parties complied with the schedule.

The appellant's counsel in first ground submitted that the prosecution testimonies of PW1, PW2, PW3 and PW5 had inconsistencies and contradictions. He outlined that PW1 stated that they made love affairs in February, 2020 and then the appellant never visited them again. On the contrary, PW2 stated that PW1 does not know when she got pregnancy and worse enough PW3 when examined PW1 on 2/8/2020 found pregnancy was of 2-3 weeks. He was of the view that inconsistencies went to the root of the matter and raised doubt as to whether the appellant had carnal knowledge with PW1 in February. He added that another inconsistence is on variation between charge and testimony of the prosecution in respect of place where the offence was allegedly committed. He said that the charge indicated the place to be at Msalala village whereas prosecution witnesses stated that it was at Nsalala.

Submitting in support of the second ground, Mr. Clarence argued that prosecution did not prove the case that it was the appellant who raped

and impregnated PW1 because whereas PW1 certified that she had intercourse with the appellant in February, 2020 PW3, a clinical officer, examined PW1 on 02/08/2020 and found her to have pregnancy of 2-3 weeks. The counsel argued that the alleged date of conceiving was incompatible with the age of pregnancy.

Another inconsistence was the testimony of PW3 and PW5 while PW3 examined PW1 on 2/8/2020, PW5 stated that the complaint was lodged on 7/8/2020 and the appellant was arrested on 28/8/2020. The counsel questioned why PF3 was presented to PW3 on 2/8/2020 while the complaint was lodged on 7/8/2020. Mr. Clarence concluded that evidential value of PF3 and credibility of the prosecution witnesses were doubtful.

In the third ground, Mr. Clarence submitted that evidence of bad blood relationship between the appellant and PW1's mother was not considered by the trial court. He was of the view that inconsistencies pointed out proves that the case was cooked and the defence evidence was weighty enough to raise reasonable doubt.

In response to the appellant's submission, Ms Kasambala for the respondent resisted the appeal. She argued that the appeal generally. The learned State Attorney submitted that the prosecution side had proved the case beyond reasonable doubt because the section with

which the appellant was charged requires the prosecution to prove that the victim (PW1) was under the age of eighteen and that there was penetration which resulted into impregnating the victim.

She submitted further that the evidence on record shows that the victim was sixteen years as per PW1 and PW2 as well as exhibit P2 (PF3) and exhibit P3 (TSM9). Ms Kasambala added that the victim knew the appellant as his step brother and clearly told the court that she had sexual intercourse with the appellant sometimes in February 2020 PW1. The learned state Attorney insisted that in sexual offences, best evidence comes from the victim. She cited the case of **Selemani Makumba vs Republic** [2006] TLR 384 to support the argument. Ms. Kasambala argued that the victim was a credible witness as found by the trial court. She submitted that the trial court's findings on credibility of witness is binding to the appellate court unless there is good reason for reassessment of the evidence. She cited the case of **Dickson Elia Nsamba Shapwata & Another vs R**, Criminal Appeal No. 92 of 2007 CAT at Mbeya.

The learned counsel for Republic continued to submit that there was no good reason for the lower court to disbelieve the evidence of the victim as her evidence was consistent. To further her argument, Ms. Kasambala submitted that the evidence of PW1 was corroborated by

PW2 who discovered that her daughter was pregnant and PW3, a clinical officer who examined PW1and found her with 23 weeks pregnancy. She said that the pregnancy was not 2-3 weeks as wrongly submitted by the counsel for the appellant.

Ms Kasambala continued to submit that the appellant though given chance to cross examine prosecution witnesses, he did not do so on the aspect of the age of pregnancy. She cited the case of **George Maili Kemboge V R,** Criminal Appeal No. 327 of 2013 CAT at Mwanza(unreported) at page 4 where the court held that it is trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence.

The learned state Attorney was opined that the trial court considered the defence evidence and found it too scanty to raise reasonable doubt. In the alternative, she submitted that this being the first appellate court has a room to re-evaluate evidence as a whole and reach its own conclusion where it sees that such evidence was not considered. In support of her position, she cited the case of **Prince Charles Junior v R,** Criminal Appeal No 250 of 2014, CAT at Mbeya at page 8. Finally she prayed the appeal to be dismissed in its entirely and conviction and sentence of the lower court to be upheld.

I have gone through written submissions of both parties along with a thorough perusal of record of the trial court. In deciding this appeal I will adopt the manner preferred by the appellant's advocate to argue grounds of appeal as presented in the petition of appeal.

To start with first ground on the inconsistency and contradiction, I will be guided by the principles laid in the case of **Abiola Mohamed @ Simba versus the Republic**, Criminal Appeal No. 291 of 2017, CAT at Arusha(Unreported) **one**, the court has a duty to address the inconsistences and try to resolve them where possible, else the court has to decide whether the inconsistences and contradictions are minor or whether they go to the root of the matter. **Two,** it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. **Three**, in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of the occurrence. Minor contradictions or inconsistences on trivial matters which do not affect the case of the prosecution should not be made grounds on which the evidence can be rejected in its entirety.

In this appeal, the inconsistencie pointed by the appellant's advocate is in regard to when rape was committed and weeks of PW1's pregnancy. I have gone through the records of the trial court and found that PW1 in her evidence was clear that the sexual intercourse took place in February, 2020 and that her mother (PW2) discovered her pregnancy in June, 2020. I think the attack by the appellant's counsel on the evidence of PW2 is not founded because the evidence that PW1 had sex with appellant in February, 2020 is not in dispute. The contention that PW2's evidence was to the effect that PW1 does not know when she got pregnancy has no merits.

As for evidence of PW3 that on 2/8/2020 PW1 had pregnancy of 2-3 weeks while PW1 testified that she had sex in February, 2020, Ms Kasambala replied that original record reveals 23 weeks and not 2-3 weeks. I have passed through typed and hand written proceedings particularly evidence of PW3 and found that PW3 at page 12 of the typed proceedings is indicated that PW1 had pregnant of 2-3 weeks. However, in the hand written proceedings which in authentic shows that PW1 had pregnancy of 23 weeks. In fact, there is variance of between typed proceedings and handwritten proceedings as to pregnancy of PW1, it is a settled practice and indeed cardinal principle of practice that whenever there is a dispute or impeachment of court record, it is hand

written proceedings that must be resorted to ascertain the veracity of the court document to meet the ends of justice. I am also persuaded by the holding of my fellow learned **Judge Tiganga** in the case of **Joseph Nyigana @ Baba Bhoke Appellant versus the Republic**, High Court Criminal Appeal No. 218 OF 2019, High Court of Tanzania at Mwanza when he held that;

'I think I should go to the hand written original, because even the typed proceedings are certified from the original hand written.'

In addition, exhibit P.2 (PF3) under the medical practioner remarks, it is clear that at the time of examination i.e 02/08/2020 the victim PW1 had 23 weeks pregnancy. The same is also supported by exhibit P1 (Clinic card) which, among other things, tells it well that the victim lastly experienced her menstrual period on 23/02/2020. Further, exhibit P1 indicates that the expected delivery date was 30/11/2021.

On account of the foregoing evidence, it goes without say that there was no contradiction in the evidence of PW1, PW2 and PW3 as the appellant's counsel wants this court to believe. This ground is therefore without merits.

Regarding issue of proof beyond reasonable doubt, Mr. Clarence here again pointed two grievances one, variance between lodging complaint

with police and when PW1 was examined. It was submitted that PW5 stated that the complaint was lodged on 7/8/2020 while PF3 was issued and PW1 was examined on 2/8/2020 by PW3. In reply, Ms Kasambala submitted that PW1 was found a credible hence such finding is binding to this Court unless there is misapprehension in evaluation of evidence.

Upon scrutinizing record of the trial court, I have found that PW5 in evidence stated to have received the case file from OCCID on 7/8/2020 and not lodging complaint as suggested by the appellant's counsel while PW3 stated in evidence he examined PW1 on 2/8/2020. The evidence on when the matter was reported to police is silent. Further, on carefully reading the evidence, PW5 did not say that she issued PF3 on 07/08/2020. Thus, on hollistic appraisal of the evidence, there is no contradiction in PW5's evidence. 28/08/2020 refers to the date of arrest whereas 07/08/2020 is in respect of being assigned the investigation file. PW5 did not mention the date she issued PF3 nor did she testify on the date the matter was reported at police. I have reviewed evidence of PW1 who narrated that in February the appellant inserted his penis into her vagina and no one had sexual intercourse with her, this piece of evidence was to establish penetration and the appellant did not cross examine her. Also there is evidence when the appellant went to PW1 home the victim was alone, evidence which is not disputed by the

appellant. The appellant defence was that he did not rape PW1 and the case is a frame up. It is settled law that in sexual related trials, the best evidence is that of the victim as per **Selemani Makumba v. R,** [2006] TLR 379. The appellant did not cross examine PW1 on important matter hence PW1's evidence is unchallenged. Evidence on age of the victim was well covered by PW1 and PW2 both testified that the victim was born on 21/3/2003. Thus, in 2020 PW1 was 16 yrs hence, below the age of eighteen. Therefore any sexual intercourse with PW1 by amounted to rape.

There is ample evidence from PW1, PW2 and PW4 which established that the victim was a student at Makama Secondary school and that PW1 by the time they gave evidence was pregnant. The appellant did not deny that PW1 was a student. In the circumstances, I am of the unfeigned view that the case against the appellant was proved beyond reasonable doubt. This ground is dismissed for being devoid of merits.

On the third ground in respect of evaluation of evidence of both parties, Mr. Clarence argued that the appellant defence was that he had bad blood relationship with PW1's mother which was not considered by the trial court. In reply Ms. Kasambala submitted that this piece of evidence was an afterthought as the appellant did not cross examine PW2. She referred to page 10 of proceedings in support of the argument. With due

respect to the appellant's counsel, upon reading the judgement, in particular at page 6, it is clear that the trial magistrate considered the appellant defence.

In addition, I invoked the powers to re-evaluate the evidence and like the trial magistrate, I am of the views that the appellant's defence did not raise reasonable doubt.

As I wind up, I wish to remark that the appellant was charged with two counts, rape contrary to section 130(1)(2)(e) and 130(1) of the penal Code [Cap 16 R.E. 2019] and impregnating a school girl contrary to section 60A of the Education Act Cap. 353 R: E 2002 as amended by section 22(3) of the Written Laws(Miscellaneous Amendment) Act No. 2 of 2016. The two counts are the result of one act but constitutes an offence under two different Acts. I find that the appellant cannot be punished twice as this will amount to double jeopardy envisaged under section 70 of the Interpretation of Laws Act [Cap. 1 R.E. 2019]. In fact, the second count was supposed to be an alternative to the first count. The law is very clear that in case of double jeopardy, the appellate court should quash conviction in respect of lesser offence. See the case of **Omary Mohamed China & 3 others vs. The Republic**, CA No. 230 of 2004 CAT at Dar es salaam.

However, in this instant appeal both counts/offences are punishable by 30 years imprisonment. Consequently, I invoke my discretionary powers to quash conviction and set aside the sentence in respect of the second count of impregnating a school girl.

In the event, save for conviction and sentence in respect of the second count of impregnating a school girl, this appeal is dismissed for being meritless. Conviction in respect of rape and its consequent sentence of thirty (30) years imprisonment are hereby upheld.

It is so ordered.

Right of appeal fully explained.

A.A. Mbagwa
Judge
27/12/2021

Judgment delivered in the presence of the appellant in person and Ms Kasambala State Attorney for the respondent this 27th day of December, 2021.

A.A. Mbagwa
Judge
27/12/2021