IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 59 OF 2021

MATONDO MHOGOMI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Maswa at Maswa.]

(Hon. F.R. Lukuna SRM)

dated the 19th day of October, 2020
in
Criminal Case No. 83 of 2020

JUDGMENT

11th May & 8th July, 2022.

S.M. KULITA, J.

Matondo Mhogoni, referred to as the Appellant in this appeal, was charged in the District Court of Maswa for Rape, contrary to the provisions of section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 RE 2019] and Impregnating a School Girl, contrary to section 60A (3) of the Education Act Cap 353 as amended by written laws Misc. Act No. 2 of 2016.

In a nutshell the prosecution case as it was unfolded by its witnesses is that, on 28th December, 2019 at about 20:00 hours the Appellant seduced the victim who was a form two student at Senani Secondary School. The evidence is to the effect that, on that material date, they got one sex round at the Appellant's house and the same resulted to the victim's pregnancy. The offences came to be known after the victim's attendance at school, sometimes in July, 2020 being noted wanting. The medical examination at hospital revealed that the victim was holding a 7 (seven) months pregnancy.

Though the Appellant denied to have committed the offence, at the conclusion of the trial he was accordingly found guilty in respect of the 2nd count which is *Impregnating a School Girl*. Upon conviction, a thirty years' imprisonment sentence, was met to him. This was on 19th of October, 2020.

Aggrieved with that decision, the Appellant preferred the instant appeal on eight grounds which can be summarized into three as follows; **One**, that the case was not established at the required standard, **two**, the prosecution evidence did not involve DNA test to prove that the Appellant was responsible for the pregnancy, **three**, the defense evidence was not considered.

The Appeal was heard on 11th May, 2022. The Appellant appeared in person whereas the Respondent, Republic had the service of Ms. Gloria Ndondi, learned State Attorney who resisted the appeal.

It is not in dispute that, for the offence of impregnating a school girl to be proved, among other things, the elements that must to be proved includes; **one**, the victim is a female student, **two**, the victim is pregnant and **three**, the one responsible for the impregnating the victim is the Accused (Appellant herein).

In this case, the first element as appearing above was proved by PW3, the victim's Teacher, through his oral testimony that the victim is his student. The second element, was proved by PW4, a Clinical Officer who testified that, he examined the victim and found that she was pregnant of seven months. The last element is, who impregnated the victim. This was answered by the victim in her sworn testimony.

In her testimony the victim who testified as PW1 stated that, it was on 28th December, 2019 at 20:00 hours when the Appellant approached her stating that he was in love with her. She went ahead showing that, at the same time they went to the Appellant's house and they had a one hour sex round. Her evidence further, was to the effect that, since then, she did not see her menstruation cycle, which means, she undauntedly

knew that she was pregnant. She then mentioned the Appellant on 09th July, 2020 as a person responsible for the pregnancy she had.

As the Appellant has raised a concern that, the prosecution case was not proved at the required standard, the issue is whether this part of the victim's evidence can be relied upon?

It is not in dispute that, the victim delayed for more than 6 (six) months to report the offence. Unfortunately, that delay was not accounted for by the prosecution side in anyhow.

The requirement of reporting the matter as early as possible was emphasized by the Court of Appeal of Tanzania in the case of **The Director of Public of prosecutions Vs. Simon Mashauri (Civil Application No. 394 of 2017) [2019] TZCA22;** (28 February) 2019 where the Court held that;

> *"Besides that, PW1 did not report to the police station at the earliest opportune time. In that night, she took shower which was not proper in the circumstances and slept. In the next morning she went to church. The question we ask ourselves, was it a wise idea going to church instead of taking the necessary steps of*

reporting the rape incident to the police station. PW1 said she did not do it during that night because it was late. We think, if that was the case, reporting to the police in the following day would have been the first thing to do instead of going to church and waiting to report to PW7 first. We find her evidence to be unreliable"

It is a trite law that, the prosecution has a duty to establish a prima facie case and prove the offence against the accused beyond reasonable doubts. The same principle was repeated in the case of **Joseph John Makune vs. The Republic [1986] TLR 44,** in which it was held;

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence".

The victim's act of delaying to report the incidence for over six months, without explanation, makes the victim unreliable witness and thus created serious doubts on the guilty of the Appellant. The benefits of the doubt ought to have been given to the Appellant.

In the circumstances, I allow the appeal. The Appellant's conviction is hereby quashed and the sentence set aside. It is hereby ordered that, the Appellant be released from custody forthwith, unless otherwise lawfully held.

S.M. KULITA

JUDGE

08/07/2022

DATED at **SHINYANGA** this 08th day of July, 2022.

THE HIGH COURT OF TANZANIA

S. M. KULITA

JUDGE

08/07/2022