IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

CRIMINAL APPEAL NO. 43 OF 2021

(Originating from Nzega District court in Criminal Case No. 74 of 2020)

DAUD S/O SAMWEL.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date: 13/5/2022& 1/7/2022

BAHATI SALEMA, J.:

The appellant herein, **DAUDI S/O SAMWEL** appeared before the District Court of Nzega Tabora where he was arraigned for the offence of rape contrary to sections 130 (1)(2)(e) and 131(1) of the Penal Code, Cap. 16 [R.E 2019].

To appreciate the appeal before this Court, I find it apt to narrate, albeit briefly, the background facts which led to the appellant's arraignment. It is gleaned from the evidence adduced during the trial that Daudi Samwel, on diverse dates in November, 2019, at Nzega town within Nzega District and Tabora region, had carnal knowledge of KN (her name disguised to protect her identity), a girl aged 16 years.

PW1, KN a 17-year-old girl who was born in February, 2004 and was a student at Isanzu Secondary School, testified to the court that she had affairs with the accused and that their relationship began in October, 2019. She further testified that she had sex with the accused three times, and all the time they never used condoms. She stated that the last time she saw her menstrual cycle was at the end of October, 2019. Until June, 2020, she was discovered to be pregnant by her mother.

In proving the case, the prosecution lined up five witnesses, and the appellant had one. PW2, Ramadhan Majura, a teacher, testified to the court that she was enrolled with registration No. 1265 and she was in class A according to the special register. The victim attended the school in March, 2020 when the government closed the school due to the novel coronavirus outbreak. He stated that the girl has not attended school since 29 June, 2020 when the school resumed. He

stated that before the school resumed, his father came, suspecting his daughter was pregnant. He was given a letter to be examined, and upon examination on 15 July, 2020 the report showed positive. He then reported the matter to the police. The certified copy of the attendance register was admitted as the P1 exhibit since the original was in use.

PW3, Betha Paul Nonga, testified to the court that the girl was born in 2005 and in April 2020 she discovered that her daughter was pregnant. She told this court that when PW1 completed standard seven, she started studying pre-form one studies at DW1's mother at Nzega, and DW1's brother was a teacher. When she was doing her pre-form one studies, she was staying with DW1's mother at Nzega Town. She noticed the changes in her victim's body and, upon being asked, she told her that DW1, Samwel Daudi was responsible. She further testified that DW1 used to go to her home where he was growing watermelons and they had been staying with Samwel Daudi for three months.PW3 explained that the victim mentioned DW1 as being responsible, and PW1 is no longer attending school because she has already given birth.

PW4, who testified in this court as an investigation officer from the police, that DW1 admitted knowing the victim but denied having engaged in sexual affairs with her. He further told the court that the

accused person was arrested and taken to the police station, but he escaped and ran away before being caught by the police officers who ran after him, an act which indicates that the accused person felt guilty for the offence committed.

PW5, who was a clinical officer, testified to the court that on 24th June 2020 he was at Nzega town council hospital performing his duties as usual. On that day, PW1 and PW2 went with PF3, directing him to examine if she was pregnant. PW5 told the court that, upon examination, he discovered that the victim was at 32 weeks of pregnancy. The trial court heard the matter and, in the end, ruled that the prosecution had proved its case beyond reasonable doubt. The trial court convicted and sentenced the appellant to 30 years imprisonment.

Being aggrieved, the appellant seeks to impugn the decision of the trial court and has filed six grounds of appeal to fault the trial court. The said grounds are reproduced hereunder:-

1. *That, the case for the prosecution was not proved, against the appellant beyond reasonable doubt as required by the law,*

2. *That, penetration as required by Section 130 (4) (a) of the Penal Code, Cap.16 [R.E 2019] was no cogently established by the prosecution because of;*

3. *The doubt engulfing the alleged date of rape namely on a diverse date between October 2019 and the time of delivery (giving birth by PW1) as testified by PW2 & DW2 which namely August 2020. Delivered could have been in July 2020 if raped and impregnated in October, 2019.*

4. *The testimony by PW1 that she last saw her period in October, 2019 while allegedly raped three in October, 2019 if she was raped and impregnated in October, 2019 her last menstrual period could have been in September, 2019. This is a fact of science (biology) which the trial court was entitled to take judicial notice of, but didn't.*

5. *That, learned trial magistrate, did not address his mind to the discrepancy of the age of PW1 (the victim) as testified by PW1 & PW2.*

6. *That, evidence was not led from the prosecution on how the appellant was arrested to shade light on whether his arrest had any connection with the commission of the offence.*

7. *That, the learned trial magistrate did not take cognizance of the defence of alibi put forth by the appellant and hugely supported*

by DW2, an omission which occasioned a mistrial and consequential miscarriage of justice.

8. *That, the defence evidence, in its totality, was lightly discarded and not adequately considered.*

On a hearing date, the appellant was unrepresented and, being not a lawyer, he relied on his grounds, whereas the respondent was represented by the Republic, Mr. Rwegira Deusdedit, State Attorney who submitted first.

From the outset, Mr. Rwegira did not support the appeal. He strongly submitted that there was enough evidence from PW1, the victim who explained how she was raped by the appellant.

Arguing for the third ground in respect of the age of the victim. He submitted that the offence is statutory law. The age of the victim was proved to be below 18 years. He further submitted that although there was a minor anomaly between the charge sheet, which said 16 years, and while giving evidence she testified that she was 17 years. Also on page 14, her mother told the court she was born in 2005, which means she had 15 years. Despite these discrepancies, it remains within the cycle of 18 years. Those discrepancies show she was below 18 years old.

He added that apart from that, the evidence from PW5, a clinical officer who tendered PF3, proved the girl was 32 weeks pregnant and corroborates that she was raped by the appellant. On the strength of the above submission, Mr. Rwegira beckoned upon this court to dismiss the appeal.

In reply, the appellant submitted that the case was framed since he owed the father of the victim some money. He was promised to be paid by June. He further submitted that looking at the time when he was about to be paid, it was the same month he was arrested and framed in the case. He further submitted that the father of the victim did not come to give evidence since he framed the case.

He further stated that the girl was raped in October, 2019 and the PF3 stated the pregnancy was in November, 2019. He bitterly stated that they did not arrest anyone from that period. The victim also stated she got her menstruation cycle in October, 2019. He also stated that as to the allegation of a student, she said she conceived in October, 2019 as she was still in pre-form one. He wondered why they admitted her before inspecting the procedure.

He then claimed that the victim was examined by two doctors (nurses) who came to testify. The one who came to testify was the prison officer who read the PF3.

On the issue of her age, he stated that the trial magistrate believed she was under age; however, there was no clinical card or birth certificate to prove 2003, 2005, and the charges sheet of 16 years. He prayed to the court to allow his appeal.

Having heard from both parties, the issue is whether the appeal has merit. Going through the records, it is revealed that the appellant's grounds of appeal center on one issue; whether the prosecution proved their case to the standard required; that is, beyond reasonable doubt.

As already pointed out above, the appellant was charged before the trial court with a count of rape contrary to Sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16.

I will begin with the third and second grounds, which I think will dispose of the matter. It is not in dispute that the appellant was charged with statutory rape, whereby consent is immaterial, but rather the **age** of the victim is of the essence and has to be categorically stated in the testimonies.

I have revisited sections 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16. [R.E 20], one of the ingredients of a rape offence that ought to be proved beyond the shadow of doubt is the age of the victim at the time she was raped.

In respect of the age of the victim, the appellant claimed that the victim's age was not proved. Having perused through the records, the testimony of the age was not constant as from the charge sheet, the victim, and PW3, her mother. Although PW3, Betha Paul Nonga the victim's mother, was in a better position to know the age of her child as observed in **Salu Sosoma V Republic**, Criminal Appeal No. 31 of 2006 whereas the Court of Appeal observed that ;

"....A parent is better positioned to know the age of his child".

As stated earlier, establishing a statutory rape age is one of the ingredients. The law is settled that age may be proved by the victim, her parents or a medical practitioner (See **Isaya Renatus V. R., Criminal** Appeal No. 342 of 2015 at Tabora (Unreported). In this case, the age of the victim was proved by her mother. In the appeal at hand, since there was a contradiction, the trial magistrate was in a better place to address his mind on the discrepancies in the age of PW1 to clear up the doubt that emerged.

The Court in the case of **Dickson Elia Nsamba Shapwata & another V Republic** Criminal Appeal No. 92 of 2007 CAT (Unreported), the Court held that:-

"Evaluating discrepancies, contradictions, and omissions, it is undesirable for the court to pick sentences and consider them in isolation from the rest of the statements. The Court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."

I find this argument has merit since it goes to the root of the matter.

Coming to the second ground of appeal that as required by law section 130(4) (a) was not cogently established by the prosecution case.

As already stated earlier, another ingredient of rape is penetration. Regarding penetration, PW1 KN testified that she started having affairs with the accused in October, 2019 and she had sex with the accused three times, all the time they never used condoms.

The law is settled that penetration, however slight, is sufficient to constitute a sexual offence. In the case of **Omary Kijuu Vs The Republic**, Criminal No. 39 of 2005, the Court of Appeal at Dodoma 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;