IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 91 OF 2021

(Originating from Criminal Case No.151 of 2019 at Singida District Court)

HANGO OMARY HANGO .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

08/6/2022 & 06/7/2022

KAGOMBA, J

The appellant, HANGO OMARY HANGO, being aggrieved by the decision of the District Court of Singida at Singida (henceforth "trial court") has filed his Petition of Appeal praying for the court to quash the conviction, set aside the sentence and set him free.

At the trial court, the appellant was arraigned for two counts. Firstly; Rape contrary to section 130 (1) (2) (c) and 131(1) of the Penal Code [Cap 16 R.E 2002] (henceforth "the Penal Code"). Secondly; Impregnating a school girl contrary to section 60 A (1) (3) of the Education Act, [Cap 353] as amended by section 22 of the Written Laws (Miscellaneous Amendment)

Act, No. 2 of 2016. He was accordingly sentenced to thirty (30) years imprisonment for the first count and 5 years for the second count.

It was alleged before the trial court that in between 15/12/2018 and 11/7/2019 at Mjudhuda Village Ikhanoda Ward, Ilongero Division within Singida District the appellant has sexual intercourse with **SHJ** being a girl aged 14 years, a pupil of standard four at Kisisi Primary School. It was further alleged that as a result of the said sexual intercourse he impregnated her.

The appellant denied the charges but after trial, he was found guilty for both counts and was convicted accordingly. The trial court sentenced the appellant to thirty (30) years imprisonment for rape and five years for impregnating a school girl. Being aggrieved, he has filed this appeal praying the court to quash the conviction and set aside the sentence so that he can be let free.

On the date of hearing the appellant fended for himself while the respondent was represented by Judith Mwakyusa, Senior State Attorney and Patricia Mkina, State Attorney. Being a lay person, the appellant prayed the court to adopt his grounds of appeal as per the Petition of Appeal as his submission on the appeal. The grounds of appeal are: -

1. That, PW1 Haji Ibrahim who is SHJ's father gave hearsay evidence before the trial court as he told the court what he was told by SHJ's teacher at Kisisi Primary School, that his daughter was pregnant.

2. That, the trial court erred in law and fact for accepting the contradicting testimonies from prosecution witnesses. While PW1 told the trial court on 22/10/2019 that his daughter has a baby boy, and she is not attending school, PW2 Samson Muria, teacher at Kisisi Primary School, told the trial court on 04/11/2019 that SHJ was pregnant and she is not attending school.

3. That, while PW2 Samson Muria, teacher at Kisisi Primary School alleged that it was on 11/07/2019 they took girls for pregnancy test, PW4 Dr Musa Moses, Clinic Officer at Mjughada Dispensary alleged that it was on 15/07/2019 he received pupils from Kisisi Primary School for pregnant test.

4. That, PW4 Dr Musa Mosses told the trial Court that SHJ told him that she could not experience her monthly period for five months, this was on 15/07/2019. If this was the case then expectation of giving birth was November 2019 (4 months later), but her father told the trial court on 22/10/2019 that his daughter had a baby boy, thereby showing contradictions and evidencing that the appellant is not responsible for the alleged offences.

5. That, PW4 Dr Musa Mosses didn't expose the contents of the PF3, including the age of the alleged pregnancy without apparent reason, which shows that the truth could be revealed that the appellant is not responsible for the alleged offences.

6. That, taking into consideration all circumstances of the case and evidence tendered before the trial Court, appellant's guilt was not proved beyond reasonable doubt.

In response, Ms. Patricia Mkina, learned State Attorney opposed the appeal, and submitted her reasons in respect of each ground of appeal as filed by the appellant.

On the first ground where the appellant stated that the evidence of PW1- Haji Ibrahim, who is the victim's father, was hearsay, Ms. Mkina submitted that PW1 saw his daughter's pregnancy himself. That he saw it on the date he was formed by the PW2 – the Head Teacher when the victim was called come out and she was seen by PW1. That, the victim stated that he was impregnated by the appellant. Ms. Mkina therefore argued that the testimony of PW1 is not hearsay.

Regarding the second ground of appeal, where the appellant said that the evidence was doubtful with contradiction on the age of the pregnancy, Ms. Mkina conceded that there were contradictions in view of the fact that PW1 testified that his daughter (PW3) on 22/10 2019 got a baby boy and was not attending school while PW2, the Head Teacher, told the court that on 4/11/2019 the victim was still pregnant. Ms. Mkina argued however that the doubt created by such contradiction does not go to the root of the case. She justified the contradiction on the fact that the teacher was not living

with the victim to know that on the said date of 4/11/2019 she had already delivered.

On the third ground of appeal where PW2 -Samson Mwaria, the Head Teacher, testified that the school took the girls to hospital for pregnancy test on 11/7/2019, while PW4 the doctor, testified that the examination was done on 15/7/2019, Ms. Mkina conceded again that there was a contradiction. She argued however that the contradiction does not go to the root of the case, and thus it did not affect the prosecution's case. She said that time had elapsed, and it was not possible for the witnesses to remember correctly the dates.

On the fourth ground of appeal regarding the testimony of PW4 who, on 15/7/2019, told the court that the victim told him that she had missed her period for past five months, which meant that the date of delivery was expected to be in November 2019, but the victim's father told the court that the victim delivered on 22/10/2019, Ms. Mkina responded again that it was a minor contradiction. She clarified that the date of birth is always an expectation, and not actual. She added that the difference between the two dates of 20/10/2019 and of November, 2019 which was the expected monthly of delivery is within range. She again argued that the same does not go to the root of the case.

Regarding the statement by the appellant, on the same ground of appeal, that he is not responsible for the pregnancy, Ms. Mkina submitted

that the victim had stated that their relationship started on 15/12/2018 and they continued to do sex even thereafter. She argued that, if they continued, it is highly probable that the appellant was responsible for impregnating the victim. She added that PW3 also stated that he did not have sexual relation with any other person. That, the victim mentioned the appellant as the person they were doing sex with, and it was not once.

Ms. Mkina submitted further that the best evidence in rape cases is the victim's evidence. She argued that since the victim herself had such evidence, it was apparent that it is the appellant who raped her as well as impregnated her.

On the fifth ground of appeal, where the appellant stated that PW4-Dr. Musa did not mention the content of PF3 including the age of the pregnancy for fearing that the age would reveal that the appellant was not responsible, Ms. Mkina opposed this ground. She submitted that after the PF3 was admitted, PW4 read it and the appellant did not object.

On the sixth ground of appeal, where the appellant stated that the prosecution evidence was doubtful and did not prove the offence, Ms. Mkina submitted that the prosecution evidence was strong. She elaborated that;

Firstly; PW3 testified clearly how she was raped by the appellant. the learned State Attorney added that S. 130 (4) of Penal Code was applied with.

Secondly; PW3 also mentioned her age. She was 14 years and five months when she first had sex with the appellant. According to Ms. Mkina PW3 satisfied the requirement of S. 130 (1), (2) (e) and so the appellant was duly sentenced under section 131 (1) of the Penal Code.

The learned State Attorney went on to submit that since the best evidence is the evidence of the victim and PW3 was able to prove the charge of rape that led to pregnancy, her testimony is not doubtful. She cited the case of **Daffa Mbwana Kedi V. Republic**, Criminal Appeal No. 65 of 2017 CAT, Tanga (unreported), to the effect that the victim in rape cases is the best witness.

Ms. Mkina also submitted that the victim's evidence was corroborated by the cautioned statement of the appellant (Exhibit P3), wherein the appellant confessed to have sexual intercourse with the victim. The same was also corroborated by the testimony of PW4- Dr Mussa who proved that the victim was pregnant after being examined at hospital. Having submitted as above, the learned State Attorney prayed the count to uphold the judgment of the trial court. She prayed that the appeal be dismissed.

Looking at the grounds of appeal, the trial court proceedings and judgment, as well as the above submission, the main issue for determination is whether prosecution proved the charges against the appellant beyond reasonable doubt during trial.

The prosecution lined up six witnesses to prove that SHJ, being a student aged 14 years was raped by the appellant, and as result of rape she was impregnated. The incident is alleged to have happened between 15/12/2018 and 11/7/2019. According to the judgement of the trail court, the victim's testimony corroborated the appellant's cautioned statement (Exhibit P3), and based on the celebrated decision of the Court of Appeal in **Selemani Makumba v. Republic**, Criminal Appeal No. 94 of 1999 (Unreported), that the best evidence is the evidence of the victim, the charges were proved.

Being the first appellate court, I have re-examined the evidence adduced by the prosecution and the defence. It is clear that the conviction of the appellant was based on the testimony of the victim as corroborated by the appellant's cautioned statement.

In deed there was no any other evidence adduced which the prosecution could rely on in proving that the victim was raped and impregnated by the appellant except PW3's evidence. The rest of the testimonies couldn't. For this reason, I had to re-examine PW3's testimony to see if it was properly taken so as to fall within the ambit of the celebrated decision in **Selemani Makumba v. Republic (supra)**. Having been duly affirmed to speak the truth and having adduced evidence that was not controverted in substance by the appellant, PW3, the victim has been able to prove rape was committed by the appellant. In view of her testimony that she had not sexed with any other man apart from the appellant, and the

appellant himself confessing to have sexed with the victim (PW3) in his cautioned statement, I have no doubt again that the offences of rape and impregnating PW3 as a school girl was proved beyond treasonable doubt.

My findings are based on the following reasons; **Firstly**, the procedures for recording of evidence were duly complied with by the trial court. This include taking the oaths or affirmation by the witnesses, clearing documentary evidence before admission and reading out of the documentary evidence after admission in evidence, and conducting of an inquiry to ascertain if the cautioned statement of the appellant was recorded with the appellant being a free agent.

Secondly; the victim (PW3) was able to establish in her testimony the main ingredient of the offence of rape, which is penetration. As correctly observed by the trial court, consent needed not to be proved in view of the age of the victim, as per affidavit confirming her birth which was duly admitted in evidence.

The details on how the appellant approached the victim in her bedroom, how he undressed her and put his penis into her vagina have coherently been stated in evidence to leave no doubt that the victim was telling nothing but the truth. I hold this view guided by the decision in **Sulemani Makumba V. Republic (Supra).**

Thirdly; impregnation of the victim, though no DNA test was eventually done despite being ordered, was proved by the victim's testimony when she proved rape. The date of the first rape incident which was stated by PW3 to be December 2018 to February 2019, tallied with the victim's date of giving birth, which was October 2020.

Fourthly; the appeal has based on pointing out contradictions in the prosecution evidence. The main contradictions are on the age of the pregnancy (testimony of PW1 versus PW2 on one hand, and PW4 PW1 on the other) as well as the dates when the pupils were taken for pregnancy tests. The different dates mentioned by prosecution witnesses were, by and large, caused by lapses in human memory. However, the cited contradictions did not in any way affect the prosecution case. In **John Gilikoa v. Republic**, Criminal Appeal No. 31 of 1999, CAT, Mwanza, on how to address such shortfalls, the Court of Appeal observed: -

> *"The discrepancies were on details and they have been occasioned by the relatively long passage of time between those two statements and the giving evidence in Court and also by frailty of human memory".*

Fifthly; the typed proceedings of trial court show that the cautioned statement of the appellant was duly admitted in evidence, after an inquiry. Hence the confession contained in the cautioned statement is legally

admissible. In **Jumanne Ahmed Chivinja & Another V. Republic**, Criminal Appeal No. 371 of 2019, CAT, DSM, the Court of Appeal stated, at page 10 of the typed Judgment of the Court that:

> *"It has long been settled that a person who confess to a crime is the best witness, a position taken by the Court in many of its decisions such as* ***DPP vs. Nuru Gulamrasul*** *[1988] TLR 82 cited in* ***Diamon Malekela @ Maungaya vs. Republic****...".*

I have examined the said cautioned statement. The appellant confessed to have sex twice with PW3, the victim. He also confessed to have impregnated her. In the cautioned statement the appellant also stated his knowledge that the victim was a pupil at Kisisi Primary School. With this type of confession, the trial court could not decide otherwise but to convict the appellant for both offences, having been satisfied that the appellant confessed as a free agent.

Section 130 (1) (2) (e) of the Penal Code, being one of the provisions of the law under which the appellant was charged for rape, provides:

> *"(1) it is an offence for a male person to rape a girl or a woman".*

*"(2) a male person **commits the offence of rape if he has sexual intercourse with a girl or a woman** under circumstances falling under any of the following descriptions:*

(a)N/A

(b)N/A

(c)N/A

(d) N/A

*"(e) **with or without her consent when she is under eighteen years of age**, unless the woman is his wife who is fifteen or more years of age and is not separated from the man".*

Apparently, the year of the victim is significant in proving the offence under the preferred provision of the law and an affidavit of the victim was duly tendered in evidence, and its admission was not objected.

In **Shehe Ramadhan @Idd v. The Republic**, Criminal Appeal No. 82 of 2020, CAT, Tanga, the Court of Appeal had this to say on the question of age vis a vis consent in a similar rape case:

> *"As introduced above, the appellant was charged with rape of a girl under 18 years. **The offence of rape when committed to a girl under 18 years is complete when it is shown that there was sexual intercourse (see section 130(2)(e) of the Penal Code). It is immaterial whether the said girl consented or otherwise".*** [**Emphasis added**].

Being so guided by the above cited decision, I find that the evidence on record sufficiently proved both the offence of rape and impregnating a school girl against the appellant, beyond reasonable doubt, as firmly submitted by Ms. Mkina. Therefore, the decision of the trial court to convict the appellant and the attendant sentence of thirty (30) years imposed for the offence of rape in the first count, and five (5) years imprisonment, for the second count of impregnating a school girl, are accordingly upheld by this court.

In conclusion therefore, the appeal is dismissed for being devoid of merits.

Dated at **Dodoma** this **17th** of **August, 2022**

ABDI S. KAGOMBA

JUDGE