IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL No. 51 OF 2020

(Arising from the Resident Magistrate Court of Bukoba at Kagera in Criminal Case No. 48 of 2019)

METHOD KAGIYE @ SIKUJUA---------- APPELLANT

Versus

THE REPUBLIC---------- RESPONDENT

JUDGMENT

Date of Judgment: 08.07.2022

Mwenda, J.

The appellant Method Kagiye @ Sikujua was arrested and prosecuted at the Resident Magistrate Court of Bukoba at Kagera in Criminal Case No. 48 of 2019 for two counts, first for rape contrary to section 130 (1) (2) (e) and section 131 (1) of the Penal Code [CAP. 16 R.E 2019] and secondly for impregnating a secondary school girl contrary to section 60A of Education Act [CAP 353 R.E 2002]. After a full trial, the court found the appellant guilty of the charged offences and sentenced him to serve a term of thirty (30) years jail imprisonment for each count and which were ordered to run concurrently.

Aggrieved with the said decision of the appellant preferred this appeal with five (5) grounds of appeal.

When this appeal came for hearing the appellant appeared in person without legal representation whereas the Republic marshalled Mr. Emmanuel Kahigi the learned state attorney.

During the hearing of this appeal the appellant prayed this court to consider his grounds of appeal as listed in the petition of appeal.

Mr. kahigi the learned counsel for the respondent submitted that the Republic supports this appeal on two grounds. One failure to conduct DNA TEST and two contradictions between the proceedings and judgment. The learned State Attorney submitted that before the trial court the appellant prayed the DNA TEST to be conducted, a prayer which was granted. Having granted the said order, the records are silent as to whether the DNA TEST was conducted and according to him, this creates doubt on the prosecution's case.

On the contradictions between the proceedings and the judgment the learned state attorney submitted that during the hearing of this case the appellant defended himself and his judgment was delivered in his absence. He submitted that at page 24 of the typed proceedings the appellant defended himself but in the judgment at page 4 the trial magistrate did not consider his defence evidence on the ground that there was no defence to be considered as the accused was at large. He therefore prayed this appeal to be allowed by quashing the conviction and setting aside sentence entered against the appellant.

Having gone through courts records as well as the submissions by both parties, the issue for determination before this court is whether the prosecution's side proved its case beyond reasonable doubts.

It is elementary rule of law that the burden of proof in criminal cases lies on the prosecution's side and the standard of which is beyond reasonable doubts. See *SECTION 3(2) (A) OF THE EVIDENCE ACT [CAP 6 R.E 2019]* and the precedents in *SAID HEMED V REPUBLI [1987] TLR AND MOHAMED MATULA V REPUBLIC [1995] TLR 3.*

In the present matter, the appellant's conviction solely based on the testimony of PW4 (the Victim). PW4 testified that she had an affair with the appellant with whom they made love three times. She said she then became pregnant the fact which was proved during examination at Nyankele dispensary.

On his part the appellant denied having an affair with the victim, let alone having sexual intercourse with her. He thus prayed for issuance of an order to conduct DNA test, an order which was never complied.

For that matter, since the appellant is denying his involvement in the offences alleged, then the best way to prove the case against him was through conducting a DNA TEST to the victim and her child. In the case of *MASHAKA GERVAS @ KANYENYE V REPUBLIC CRIMINAL APPEAL NO. 159 OF 2020* (unreported) the court held inter alia that;

"In my view the prosecution was in position to conduct a DNA test to prove that the appellant was responsible for the pregnancy. I am saying so because time had already passed by and the baby was already born"

As I have stated above although the trial court issued an order that DNA test be conducted on 27th November 2019, nothing was done and with such failure the prosecution case is affected.

Again, in preparing his judgment, the trial court's magistrate did not consider the appellant's defence. He said he failed to do so because the appellant went at large before defending his case. Going by the record, this court noted that the appellant was present during defence no wonder he prayed DNA test to the victim and her child to be conducted.

Since it is evident that the appellant defended his case but the trial court magistrate failed to consider the same in his judgment then the said anomaly is fatal. See the case of LEONARD MWANASHAKA V REPUBLIC TLS [2016] CAT.

From the foregoing observations this court finds merit in the grounds of appeal as the prosecution's side failed to prove its case beyond reasonable doubts.

This is appeal is allowed by quashing the conviction and setting aside the sentence of 30 years imprisonment against the appellant in both counts. This court further orders an immediate release of the appellant from jail unless otherwise held for some other lawful reasons. It is so ordered.

Ordered accordingly.

A. Y. Mwenda

Judge

08.07.2022

Judgment delivered in chamber under the seal of this court in the presence of the Appellant and in the presence of Mr. Emmanuel Kahigi the learned counsel for the respondent.

A. Y. Mwenda

Judge

08.07.2022