

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 125 OF 2021

(Arising from Criminal Case No 264 of 2020 in the District Court of Serengeti at
Mugumu)

ADAM S/O MIKAEL @ MATERA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

2nd & 31st August 2022

F. H. Mahimbali, J.

The appellant in this case was sentenced to serve a custodial sentence of 30 years in jail upon his conviction of the two offences namely; rape and impregnating school girl.

It was alleged by the prosecution that on unknown dates of March and May 2020 at Ramungórori village within Serengeti District in Mara Region, had carnal knowledge of one girl aged 16 years and thereafter impregnated her. The appellant disputed the charges levelled against him.

The prosecution brought a total of five witnesses to in establishing the charge against the appellant and in the course tendered three exhibits. PW1 – Nicholaus Sabai @ Mahemba, who is the guardian of the victim girl (grand father), told the trial court how on 6th June, 2020 she got information that the victim girl had fainted while at school (Remngórori Primary School) . He rushed to school and taken her to hospital where she was diagnosed to be pregnant. When they interrogated her with the headmaster as who was responsible with the said pregnancy, she quickly mentioned the appellant. The victim was then taken to police and the PF3 was dully filled.

The victim girl in her testimony (PW2), told the trial court that she is 16 years old and a standard seven pupil at Ramungórori Primary School. She testified how she had been having sexual intercourse with the appellant in the months of March and May 2020 and that on 6th June 2020 while at school she fainted. When sent to hospital, she was diagnosed as being pregnant. She mentioned the appellant as it is the only man who had been having sexual intercourse with during the months of March and May 2020.

On his part, Josiah Emmanuel (Pw3) testified that he is a teacher at Ramungórori Primary School where the victim girl was schooling. He

knew the girl as her student and that on the date the said girl fainted, he was on duty and assisted to attend the girl together with other teachers.

Victoria Mwijarubi (Nursing Officer), testified as PW4. In her testimony, she stated how on 9th July 2020 while at Kenyana Dispensary, she attended the victim girl (Pw2) and examined her and noticed that the victim girl was HIV negative, but pregnant of 16 weeks. She filled PF3 which was admitted as exhibit PE2.

F.6443 D/SGT Pius testified how he investigated the case and interrogated amongst others the victim girl and the appellant. He tendered clinic attendance of the victim girl – exhibit PE3.

In his defense testimony, the appellant denied the charge and that he never knew the victim girl carnally.

Upon hearing the case, the trial court ultimately convicted the appellant in the duo offences and sentenced him to 30 years imprisonment for each count. The findings of the trial court did not amuse the appellant, thus the basis of this appeal:

- 1. That, the prosecution side erred in laws and procedure when failed to tender before the trial court a birth*

certificate of the said victim to prove that the victim aged 16 years as the key element of the fact in issue.

- 2. That, the trial court erred in laws and procedure when relied on circumstantial evidence adduced by prosecution side hence conviction and sentence of the appellant.*
- 3. That, the prosecution side erred in law and fact when failed to tender before the trial court medical evidence to prove that the appellant was the one who impregnated the victim.*

During the hearing of the appeal, the appellant represented himself whereas the respondent was fully represented by Mr. Frank Nchanilla, learned state attorney. In his submission for the appeal, the appellant first prayed this court to adopt his grounds of appeal and prayed that his appeal be allowed and that he be set free. In addition, he prayed that the PW2's evidence is weak as there is no reason why her young brother (Sabai) could not come to court for his testimony. That also the testimony of PW2 (victim) was not analysed properly. He argued that there is no evidence that he had sexual intercourse with the victim girl and thus prayed that the appeal be allowed.

In rebutting the appeal on the first ground of appeal concerning the age of the victim, he submitted that as per the case of **Makende**

Simon vs Republic, Criminal Appeal No 412 of 2017, CAT at Mwanza, at pages 16-17 (first paragraph), age of the victim can be proved either by victim, relative, parent, Doctor or by presentation of birth certificate. Thus, birth certificate is not the only proof of establishing birth of a person. As per page 16, the victim testified to be 16 years. Likewise at page 18 during cross examination the appellant could not cross examine that fact of age of the victim.

With the second ground of appeal, considering the evidence of the persecution via PW1 –PW5, there is nothing of circumstantial evidence. The key witness is PW2 (pages 16 -18 of the typed proceedings). She testified clearly how they did sexual intercourse sexed in March 2020, April 2020, May 2020. At page 18 of the typed proceedings, the PW2 says clearly how the said rape was being committed. Since as per law the victim of rape being of 16 years, the issue of consent is not required and it is immaterial (see section 130 (2) (e) of the penal code). The case of **Selemani Makumba vs Republic (2003) TLR 203.**, true evidence of rape has to come from the victim herself. He submitted that what PW2 testified is direct evidence.

As per testimony of PW4 and exhibit PE1 (page 33 of the proceedings), he opined that PW4 was exposed to sexual intercourse in several times.

That alone collaborated with the PW2's testimony that she was carnally known.

With the third ground of appeal, Mr. Frank Nchanilla admitted that there is no DNA test done in this case and that it was important. However, he submitted that DNA test could only establish the parentage fact of the appellant and PW2's baby. However, medical evidence is not per se a proof of conceiving. Since PW2 had testified that she was carnally known by the appellant and that had not known other men, and that she named the appellant on the first interrogation, he submitted that this Court be persuaded that the appellant is responsible with the said pregnancy relying on the results of PF3, testimony of PW2, PW5 and PW4.

With the issue of Sabai Raymond not being called as witness, he submitted that as per testimony of the case, this Sabai Raymond had not witnessed anything other than only seeing him talking with the victim. That alone was not an offence. In essence, he submitted that he had nothing material to testify. He prayed that the appeal be dismissed.

I have digested the arguments, submissions and the evidence in record. The issue for consideration is whether the appeal is merited.

With the first ground of appeal, I agree with Mr. Frank Nchanilla that age of the victim/person can be established by the testimony of the person himself or herself, parent, guardian, doctor etc (**Makende Simon vs Republic**, Criminal Appeal No 412 of 2017, CAT at Mwanza, at pages 16-17). Thus, birth certificate is not the only proof of establishing birth of a person. As per page 16, the victim testified to be 16 years, that was sufficient unless the appellant had raised a concern on the victim's age inconsistent with that known by the victim herself. As per proceedings of this Court, there is nothing established to counter the position. This ground of appeal therefore fails.

Regarding to the second ground of appeal as per record of this case, there is nothing of circumstantial evidence. All that was stated by PW1, PW2, PW3 and PW4 is nothing but direct evidence. PW1 is the guardian of the victim girl, testified how he received the news of the victim girl falling down. He rushed to school and attended her. PW2 is the victim girl, she testified how she fainted, diagnosed with pregnancy and that upon first interrogation, she named the appellant as the responsible man she had known carnally. PW3 is the school teacher. He testified how he knew the victim as his pupil and how he escorted her to hospital for examination and later reported to the local leader (VEO) for

purposing of arresting the appellant. PW4 is Nursing Officer. She examined the victim girl and that she was 16 weeks' pregnant by July 2020. I wonder if there is any circumstantial evidence here.

In consideration of the third ground of appeal, I agree with the appellant that on the issue of impregnating school girl, it involves parentage. It is not necessarily that a person convicted of rape should be responsible of pregnancy. These are two different things. Since rape involves penetration, and it doesn't matter whether there was deep penetration and ejaculation. Penetration however slight, is sufficient to constitute sexual intercourse necessary for the offence **(section 130(4) (a) of the Penal Code and Akizimana Syrivester V. The Republic**, Criminal Appeal, No. 181 of 2007, Court of Appeal at Mwanza). It was therefore important for that issue of parentage to be specifically established. With this ground of appeal, I concur with the appellant that there was supposed to be DNA test. A mere saying that the victim had sexual intercourse with the appellant, by itself does not constitute impregnating. That said, appeal on third ground is allowed.

In totality, in considering the testimony of PW2 at page 18 of the typed proceedings, the victim girl testified that, she had been doing sexual intercourse with ADAM. On this she stated that the appellant

went on top of her chest while both of them were undressed, and she exemplified: *"nikapanua miguu akaniingizia uume wake kwenye kuma yangu kisha anasukuma ndani niliumia akakataa kutoa alipo maliza damu zilitoka).*

Since best evidence in rape cases come from the prosecutrix (the case of **Selemani Makumba(Supra))** PW2's evidence on this is credible and trustable. In digest to the defense testimony that he didn't have carnal knowledge with the victim girl, it is a mere denial. The prosecution evidence is ample, tight and believable against the appellant.

That said, the appeal is allowed in the second count of impregnating school girl, whereas the appeal in the first count lacks merit and it is hereby dismissed. Conviction and sentence meted out by the trial court are hereby upheld and confirmed.

DATED at MUSOMA this 31st day of August, 2022.



F.H. Mahimbali
JUDGE

Court: Judgment delivered this 31st day of August, 2022 in the absence of both parties.

F.H. Mahimbali
JUDGE