IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 225 OF 2022

(Originating from Criminal Case No. 189 of 2020 in the District Court of Temeke at Temeke)

HATIBU HASHIMU HATIBU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 27/09/2022

Date of Judgment: 03/102022

Kamana, J:

The Appellant one **Hatibu Hashimu Hatibu** was arraigned before the District Court of Temeke at Temeke charged with two counts. The first count was rape contrary to section 130(1)(2)(e) and 131(2) of the Penal Code, Cap.16 [RE.2002]. It was alleged by the Prosecution that between August, 2019 and March, 2020 around Kongowe, Toangoma area, the Appellant did have carnal knowledge of a girl aged 15 years.

The second was impregnating a school girl contrary to section 60A (3) of the Education Act, Cap. 353 [RE.2002] as amended by Act No. 4 of

2016. It was alleged by the Prosecution that between August, 2019 and March, 2020 around Kongowe, Toangoma area, the Appellant put in a family way a school girl of Vikindu Secondary School.

The Appellant pleaded not guilty to both counts which necessitated the matter to be determined in a full trial. After the trial, the Appellant was found guilty and consequently convicted of both counts and sentenced to imprisonment for a term of thirty years for each count which were ordered to be served concurrently.

Aggrieved by such conviction and sentence, the Appellant preferred this Appeal armed with nine grounds of appeal. At the hearing of the Appeal, the Appellant was advocated by Mr. Abdallah Mnyila, learned Counsel whilst the Respondent had the services of Ms. Cecilia Mkonongo, learned Senior State Attorney. For the purpose of this Judgment, I will not delve much on the grounds of appeal for the reasons which will feature in the course of this Judgment.

At the outset, Ms. Mkonongo, learned State Attorney drew the attention of this Court that the Appellant was not properly convicted. In view of that, she submitted that the proper procedure is to remit the matter to the trial Court for conviction. The learned Senior State Attorney reasoned that this Court should not entertain the appeal as there is no

appeal before it since the Appellant was not legally convicted. She went further by contending that the sentence meted out against the Appellant was illegal. In substantiating her position, the learned Senior State Attorney referred this Court to the decision of the Court of Appeal in the case of **Emmanuel Kabelele v. Republic**, Criminal Appeal No.419 of 2015 (Unreported) where the Court quoted with approval its decision in the case of **Matola S/O Kajuni and Two Others v. Republic**, Criminal Appeals No. 145,146 and 147 of 2011 (Unreported) as follows:

> *'Failure by a trial subordinate Court to enter conviction is fatal and incurable irregularity which will render such judgment a nullity and before the High Court no appeal can stem therefrom.'*

Responding to the point raised by the Respondent, Mr. Mnyila, learned Counsel teamed up with her learned Sister Ms. Mkonongo. The former was of the view that non conviction of the Appellant was supposed to be the ground of appeal and prayed the Court to include it as a ground of appeal. He contended that for the failure of the trial Court to convict, the Appellant was prejudiced as he is serving the sentence which was illegal ab initio.

However, the legal minds before me parted ways on the course to be taken by this Court with regard to the raised issue. Whilst the learned State Attorney was for remittal of the case to the trial Court for it to enter conviction, her counterpart was for the acquittal of the Appellant.

With due respect deserved to the legal minds, I have a different view so far as to which course should this Court takes in respect of non conviction. Without much ado, I am inclined to take the path which was opted by the Court of Appeal in the case of **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006 (Unreported) where the Court of Appeal observed thus:

> *'In the light of the above decisions, we are of the considered view that no injustice has been occasioned by the inadvertence of the judge to enter a conviction before passing sentence. In view of the above named decisions, the irregularities can be cured under section 388 of the Criminal Procedure Act. Therefore, in exercise of our revisional powers under section 4 (2) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) we hereby 'treat as done that ought to have been done' by entering a conviction.'*

Inspired by that position of the Court of Appeal, I invoke revisional powers of this Court to treat as done that ought to have been done by entering conviction. The reasoning for taking this course is the fact that I do not see why this appeal which is at the hearing stage be remitted to the trial Court on account of non conviction which in effect was an error committed by the Court and out of that error no one has been prejudiced.

Reverting to the appeal, in the course of hearing the same, the learned Counsel for both parties for another time came to an agreement that ground eight of the appeal should be allowed. On that ground, Mr. Mnyila, learned Counsel contended that the trial Magistrate denied the Appellant his fundamental right of calling defence witnesses while he had informed the Court that he would call them.

It was submitted by both legal minds that the Appellant was prejudiced by the trial Court for not accorded him an opportunity to defend his case through the would be witnesses. It was their position, to which I subscribe, that the whole trial, proceedings and judgment were vitiated and as a result the process at the trial Court was a nullity.

In subscribing to this position, I am aware that amongst the cardinal principles of natural justice is a right to fair hearing *(audi alteram*

partem) which entails, amongst other things, that a person should not be deprived of his rights unless such person is accorded the opportunity to present his case. The Court of Appeal in the case of **DPP v. Yassin Hassan @Mrope**, Criminal Appeal No.202 of 2019 quoted with approval its observation in the case of **Abbas Sherally and Another v. Abdul S.H.M Fazalboy**, Civil Application No.33 of 2002 (Unreported) as follows:

> *'"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified,*** *even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.' (Emphasis added).*

It is evident in the records that the trial Magistrate *suo motto* closed the defence case without hearing defence witnesses. This is an infringement of the rules of natural justice which cannot be tolerated by the courts of law.

Therefore, in the exercise of revisional powers conferred upon this Court, I hold that the proceedings and the decision reached thereon a nullity. Consequently, the conviction of both counts is forthwith quashed and the sentences meted out against the Appellant are set aside.

On the way forward, the legal minds before me sharply differed. The learned Senior State Attorney contended that since the case against the Appellant was built on strong evidence, there is a need for the Appellant to be heard and justice to take its own course. In essence, she requested this Court to order a retrial. On the other hand, Mr. Mnyila, learned Counsel strongly opposed the position taken by his counterpart. He submitted that since the Prosecution's case against his client was weak, retrial will be used to fill the gaps in Prosecution's evidence and that will occasion injustice to the Appellant. He contended that the accused should be set free.

In deciding which course to take, my compass will be the best interests of justice through which I will navigate. At this juncture, it is inevitable to invite the case of **Fatehali Manji v. Republic** [1966] E.A.343 which was also cited by Ms. Mkonongo, learned Senior State Attorney which emphasised the importance of observing interest of justice before

ordering retrial. In that case, Sir Clement de Lestang, the then acting President of the Court of Appeal stated:

> *'In general a retrial will be ordered only when the original trial was defective or illegal ; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial ; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstance and an order of retrial should only be made where the Interests of Justice require it and should not be ordered where it is likely to cause injustice to the accused person.'*

As a matter of general principle, retrial is ordered when the original trial is held to be defective or illegal. There is no doubt that the original trial was defective as the same has been the position stipulated herein. However, that principle is not operative when the interests of justice

dictate otherwise especially in the circumstances in which a retrial is likely to cause injustice to the accused person. The injustice which is contemplated to happen when the Court orders retrial is to give the Prosecution an opportunity to fill gaps in its evidence.

That being the case, as the first appellate Court, this Court has a duty to reevaluate the evidence adduced in the trial Court by the Prosecution with a view to ascertaining if such evidence proved beyond reasonable doubts charges against the Appellant. In view of that, I reevaluated the Prosecution's evidence so as to satisfy myself if it is in the best interests of justice to order a retrial in the circumstances of the case at hand. Surely, I have not been convinced as such.

With regard to the second count of impregnating a school girl contrary to section 60A (3) of the Education Act, Cap. 363, I am of the considered view that the Prosecution failed to prove that offence beyond reasonable doubt. As rightly contended by Mr. Mnyila, learned Counsel for the Appellant, there is no proof that links the Appellant with the offence of impregnating a school girl. In convicting him, the trial Court based on the evidence of PW1 named XX (name withheld to conceal her identity), her father YY as PW2 (name withheld to conceal the identity of

PW1), Mr. Franco Mfasa PW3 (Clinical Officer) and WP3539 DCPL Grentina PW4.

From the records, PW1 testified that the Appellant was responsible for putting her in a family way. In his evidence, PW2 came to know the pregnancy of his daughter after being told by PW3 (Clinical Officer) and as to who was responsible PW2 was told by his daughter PW1. PW3 testified that after conducting tests he discovered that PW1 was fourteen weeks pregnant. PW4 who investigated the matter came to know about the pregnancy after receiving PF3 which was filled by PW3.

It is my position that the evidence of PW3 and PF3 admitted during the trial did establish only fact that PW1 was fourteen weeks pregnant. PW3 and PF3 did not establish that the Appellant was responsible for pregnancy.

The evidence of PW2 solely was hearsay evidence based on what he has been told by his daughter PW1 that the Appellant is responsible for pregnancy. Likewise, the evidence of PW4 to the effect that PW1 was pregnant was based on PF3.

In such circumstances, so far as the linkage between the Appellant and the offence of impregnating PW1 is concerned, the evidence of PW2,

PW3 and PW4 cannot used to convict the Appellant. The only evidence which can be relied on is the evidence of PW1 who testified to have been impregnated by the Appellant. However, this Court asked itself whether such kind of evidence is sufficient enough to convict the Appellant beyond reasonable doubt. The answer was negative.

Firstly, according to the records, PW1 testified that since August, 2019 she had been having sexual intercourse with the Appellant for many times. She told the trial Court that one day in February, 2020 she went to the accused person and while there they made love without using condoms. She said:

> *'One day in February, 2020 I went to the accused's place at Ponde and we had sexual intercourse on Form II, we did not use contraceptive (condom)….'*

This to me suggests that PW1 while having sexual intercourse with the Appellant, according to her, were using condoms except on that particular day in February, 2020. I take that position because in her evidence she did not testify whether they were using condoms or otherwise in the many times they were making love except that particular day. In that case, I conclude that it is on that particular day when, according to her, was put into a family way.

However, when she was examined sometimes in March,2020, PW1 was found to be fourteen weeks pregnant. This was testified by PW3 and evidenced in PF3 which was tendered before and admitted by the court. The evidence of PW3 and PF3 suggest that PW1 was impregnated sometimes in November, 2019. If one takes that the evidence of PW3 and PF3 as correct, he finds that in February, 2020 when PW1 alleged to have sexual intercourse with the Appellant without using condoms was already three months pregnant. In such circumstances, PW1 was expected to deliver around August, 2020. So, in that case, who impregnated PW1 taking in consideration that they were using condoms until that particular day in February? By delivering, according to her testimony, on 18th October, 2020, one may conclude that PW1 was impregnated in February, 2020 as she alleged.

However, given the circumstances where the medical proof and testimony of PW1 (the victim) differ substantially, one would expect the Prosecution to tender a birth certificate or any other document which proves that PW1 delivered a baby on 18th, October,2020 which is nine months since when she alleged to have sexual intercourse with the Appellant without condom or any other date which proves that PW1 was fourteen weeks pregnant when she was tested in March, 2020. In the

absence of that proof, I do not see any connection between the alleged offence and the Appellant.

Secondly, in the wake of science and technology, a proof that one has impregnated a school girl is simple to establish through the use of DNA. Since the Appellant was there before the Court, PW1 was there and the baby delivered by PW1 was also there, I do not see why Prosecution in a bid to prove its case failed to use DNA to establish paternity of the child. A mere allegation of PW1 that she was impregnated by the Appellant in absence of any scientific proof to that effect does not in any way convince me that the case against the Appellant with regard to that offence was proved beyond reasonable doubt. In our society where one child can be given a dozen of fathers, I do not take it safe to convict a person of that offence without a scientific proof.

At this point, I am persuaded by the position taken by *Mgonya, J* in the case of **Hermano Stephano v. Republic**, Criminal Case No.172 of 2021 (Unreported) in which the Court faced a similar situation and observed the following:

> *'From the omission as stated above, it is my form view that the learned Magistrate at the trial court misdirected himself and came to the conclusion that*

the Appellant was guilty of the offence and convicted him erroneously for lack of evidence to prove the offence charged. Under the circumstances, the DNA test of which is the scientific test was not avoidable.'

From the reasons stated hereinabove, it is my conviction that the Prosecution failed to prove the offence of impregnating a school girl beyond reasonable doubt.

On the offence of rape contrary to section 130(1)(2)(e) and 131(2) of the Penal Code, Cap.16, I am of the settled mind that the alleged victim was beyond the age of eighteen in which she is incapable of consenting. I am also aware that in sexual offences the best evidence is the victim's evidence. This position have been stated in various case laws including the celebrated one of **Selemani Makumba v. R** [2006] TLR 379.

In the case at hand, a proof of penetration of the Appellant's phallus into PW1's vagina must be proved. It is a settled law in this country that for an offence of rape to be proved there must be established that there was a penetration of penis into one's vagina and in the case in which a woman is under eighteen years the issue of consent is immaterial. According to section 130(4)(a) of the Penal Code, Cap. 16 for the

purpose of proving the offence of rape, penetration however slight is sufficient to constitute rape.

From the records, PW1 testified that sometimes in August,2019 after being approached by the Appellant she went with him accompanied by his friend to the Appellant's friend's place. Thereat, the Appellant's friend was "gentleman'" by excusing himself probably to create conducive environment for the Appellant to make love with PW1. While inside, the Appellant asked PW1 to jump into bed with him. Thereafter, PW1 undressed herself and likewise the Appellant. After being the way they were born, PW1 lied down facing upwards whilst her legs were south and north. While she was in that posture, the Appellant inserted deeply his phallus in her vagina. She felt pain as it was her first day to copulate. After that experience, she continued to have sex with the Appellant for so many times including when she was six months pregnant.

From this piece of evidence, one may be convinced that there was penetration envisaged by the law to prove the offence of rape. However, PW2 and PW4 did not testify to have seen that penetration taking place not only on that day but also on any other day. On his part, PW2 testified that after PW1 returned home late he asked her where she was coming from. PW1 replied that she was coming from the Appellant's

house who was her boyfriend. Thereafter, he took her to the Appellant's house which, at the time of testification, he admitted that he does not know where it is and talked with the Appellant's family on the incident whereby the family pleaded that the matter be solved at home. However, PW2 reported the matter to Maturubai Police Station which was followed by the arrest of the Appellant, issuance of PF3 and medical investigation. From this evidence, it is crystal clear that the evidence of PW2 that PW1 hinted to him that she had sexual intercourse with the Appellant is hearsay evidence.

On her part, PW4 testified that on 11th day of March, 2020 while at her office, she was assigned to investigate a rape case. The file of that case informed him that the accused person was in custody since 10th day of March, 2020. It was her testimony that she interrogated PW1 and gave her PF3. During the interrogation, PW1 revealed that she had sexual relationship with the Appellant since 2019. According to this witness, PW1 told her that the Appellant approached her when she was coming from school and after agreeing to his request she was taken to the Appellant's friend's house where they had sexual intercourse with the Appellant. Later according to PW4, PW1 was taken home by a motor cycle.

PW4 testified that she interrogated the victim's friend who admitted to have seen the Appellant picking up the victim at the school. Further, in her testimony, PW4 told the trial Court that she interrogated the Appellant who confessed to have sexual relationship with the victim though he denied to know if the victim was pregnant. Likewise, the evidence of PW4 do not establish whether there was penetration in the eyes of section 130(4)(a) of the Penal Code. Most of her testimony based on what she claimed to have been told by PW1, the Appellant and the PW1's friend who was not named or called to testify.

With regard to the evidence of PW3 (Clinical Officer), it was his testimony that while at his office (Mbagala Rangi Tatu Hospital) on 11th day of March,2020, PW2 and PW1 came with a PF3 whereby the former alleged that her daughter PW1 has been raped. He testified that he conducted examination and found her with fourteen weeks pregnancy. Further, in the course of examination, he detected that PW1 had no bruises, no virgin and no sign of force entry into her vagina.

The evidence adduced by PW3 on the face of it established that PW1's vagina has been penetrated by a phallus. I observe that because under normal circumstances, one cannot have pregnancy without being penetrated however slight.

After going through the evidence of witnesses paraded by the Prosecution, it is my observation that the evidence of PW2, PW3 and PW4 did not establish whether the phallus owned and managed by the Appellant penetrated into PW1's vagina. Both testimonies, excluding the PW3's, are based on what they have been told by PW1.

Reading the evidence of PW4 between the lines, she testified that she interrogated the Appellant who confessed to have sexual relationship with PW1. In a serious case like this one, that confession, if it was there, was exclusive evidence for the Prosecution to nail the Appellant. I am flabbergasted on why Detective Corporal Grentina PW4, an experienced Police Officer, did not write such a confession as a cautioned statement which would have been tendered to support the Prosecution's case though I am of the understanding that the Prosecution is at liberty to choose who to testify and which exhibit to tender in support of its case. Further, the testimony that PW1's friend admitted to have seen the Appellant picking her at school is irrelevant in proving this case as such unnamed friend was not called to testify. Even if she would have been called to testify, such testimony does not prove the offence of rape taking into consideration that the Appellant was *bodaboda* and picking people whether at school or anywhere was part of his job.

As I stated earlier, the evidence of PW3 though materially established that PW1 has been penetrated, his evidence did not directly link the Appellant. Such kind of evidence could be useful if it was established that the Appellant was the one who inserted his phallus into PW1's vagina. For instance, if Prosecution could use DNA and prove that the Appellant is a father of the child, definitely the offence of rape could have been proved beyond reasonable doubt.

Despite the principle laid in **Selemani Makumba's case**, there are developments with regard to that principle which I fully subscribe. In the case of **Mohamed Said v. Republic,** Criminal Appeal No. 147 of 2017 (Unreported), the Court of Appeal cautioned that though the best evidence in sexual offences is the one of the victim, such evidence should not be taken without careful analysis as to its truthfulness. The Court stated:

> *'We think that it was never intended that the word of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness.....'*

I am further warned by the persuasive case of **Ntambala Fred v. Uganda**, Criminal Appeal No. 34 of 2015 in which the Supreme Court of Uganda stated that:

> *'In cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases, girls and women do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all.'*

In re-evaluating the evidence in the present context with a view to establishing whether PW1 was a credible witness, the Court did not interfere with the issues relating to her credibility so far as her demeanour is concerned. This is due to the fact that the trial Court was the one which saw PW1 while adducing her evidence and in view of that it was better placed to assess the credibility of the witness. The appellate Court like this one can reevaluate the evidence in the line of testing coherence of the evidence adduced by the witness and

considering the evidence of the witness in relation to the evidence of other witnesses. This position was lucidly enunciated by the Court of Appeal in the case of **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2000 (unreported) where the Court of Appeal pronounced the following:

> *'The credibility of witness is the monopoly of the trial court but only in so far as the demeanour is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including the accused person.'*

In the examination in chief, PW1 testified that on the first day to have sexual intercourse with the Appellant, she was taken to the Appellant's friend's room where coitus took place. She further testified that sometimes in February, 2020 she went to the Appellant's place called Ponde and while there they made love without condom. On cross examination, this witness testified that the Appellant used to keep her in other people's rooms. From this evidence it is not clear where the scene

of crime was since in examination in chief it seems that the scene was both at the friend's room and at the Appellant's place while on the cross examination the scene of crime was at other people's rooms. Looking at the coherence of the PW1 in this aspect, it is apparent that there was none as she testified differently so far as the scene of crime was concerned. If the Appellant used to take her to other people's rooms as she testified in cross examination, why in examination in chief she told the trial Court that in February, 2020 she made love in the Appellant's place?

With this discrepancy in her testimony with regard to a scene of crime, I do not think that PW1 is a trustworthy witness.

In the absence of any other evidence, I am of the view that the Prosecution failed to prove the offence of rape beyond reasonable doubt. In concluding this, I am guided by the principle that the accused should be convicted of an offence on the basis of the strength of the Prosecution case and not on the weakness of the defence case as it was stated in the case of **Mohamed Haruna @Mtupeni and Another v. Republic**, Criminal Appeal No. 25 of 2007. In that case, the Court of Appeal stated:

'Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.'

Consequently, I order for immediate release of the Appellant from prison custody for both two counts unless he is held for some other lawful cause. It is so ordered. Right to appeal explained.

DATED at **DAR ES SALAAM** this 3rd day of October,2022.

KS KAMANA

JUDGE

Delivered at Dar es Salaam in Chambers this 3rd day of October, 2022 in the presence of both Parties.