IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL NO.98 OF 2021

(Arising from Criminal Case No. 36 of 2021 at the Bariadi District Court dated 25 October,2021)

MASHAKA BUSENGWA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

22nd and 30th September,2022

L.HEMED, J

At the District Court of Bariadi (the trial Court), the appellant, Mashaka Busengwa, was charged and convicted of two offences, of rape contrary to section 130(1) & (2)(e) and section 131(1) of the Penal Code, [Cap 16 R.E 2019]; and the offence of impregnating a school girl contrary to section 60A (3) of the Education Act, Cap 353. He was sentenced to a term of thirty years in prison for each offence.

It was alleged that on the 19th December 2020 at Dutwa village, within Bariadi District in Simiyu Region, the appellant did have sexual intercourse with a girl of sixteen (16) years old (for purposes of concealing her identity, I shall refer the girl as simply "the victim") and as a result he did impregnate "the victim" who by then was a Form three Student at Kilabela Secondary School. The prosecution case at the trial court was built from the evidence of five witnesses including the victim herself (PW2), her father Mbage Ligu (PW1), Daisnis Nyakwata (PW3) the medical practitioner, Paluo Boniphace (PW4) the headmaster of Kilabela secondary School and WP 9162 DC Nyakolema (PW5).

Briefly, the prosecution evidence can be summarized as follows. PW1, the father of the victim, who informed the trial court that in December 2020 his daughter was feeling stomach pain and headache, he took her to the hospital where she was examined and was found with UTI and was given pills, she was not found well. PW1 asked his wife to examine the victim properly where she was found to have symptoms of pregnancy. The victim was taken to hospital where she was examined and found pregnant. When she was asked who was responsible for the pregnancy, she told him (PW1) that it was Mashaka Busegwa, the appellant. The victim (PW 2)

informed the court that she met with the appellant on the way to the market when the appellant told her that he loved her and she agreed to go with him to his home where they had sexual intercourse. PW3, the medical practitioner who examined her found her with three months pregnancy. PW4, the headmaster of Kilabela Secondary School testified that the victim was a Form III student at his school with registration number 623. Where as PW5 testified that she was informed by PW2 that on 19/12/2020, she was sent by her mother to buy school skirt on the way she met with the appellant who approached her and wanted to have sex with her, the victim agreed. They went to the guest house where she had sex with the appellant. The result of the said sex she became pregnant.

In his defense the appellant denied the allegation where he said that he was arrested on 16th April 2021 at the market place and was taken at the police station and later to court as was charged with the offence of rape and impregnating a school girl, the offence he denied to have committed.

In its judgment, the trial court convicted the appellant relying mostly on the evidence of the victim as the best evidence in sexual offences. In the opinion of the trial magistrate the evidence of the victim in the case at

hand was credible and thus it needed no corroboration. The trial court concluded its findings that the appellant had sex with the victim and that since the victim was 16 years old, it amounted to rape as per section 130(1)(2)(e) of the Penal Code Cap 16. The Court also found that the pregnancy of the victim was a result of the said rape hence amounting to the offence of impregnating a student. The appellant was thus sentenced to 30 years imprisonment for each count. The Appellant was aggrieved by the conviction and sentence hence the present appeal on the following rounds: -

1. *That.the learned trial magistrate erred in law and fact by failure to evaluate the evidence of the witness who testifies before the court I committed the said offence (sic)*
2. *that, the trial magistrate erred in law and fact to pass sentence in necessary evidence therefore even a head master of Mwashamba secondary school did not come before the court to testify that she was a student at that school(sic)*
3. *that, clinical officer who filled and PF3 did not come before the court to prove the allegation. (sic)*

4. *That, the learned trial magistrate erred in low and fact bay passing a conviction and sentence of 30 years relied on witness of pw2 without looked out DNA test which can help or evaluate an evidence and remove any doubt. (sic)*
5. *That, learned magistrate erred in low and fact when admitted PF3 as exhibit contrary to low. (sic)*

On the hearing date, the appellant who appeared in person submitted that he trusts his grounds of appeal that they carry weight and asked the Court to consider them and release him from prisons.

Submitting to counter the appeal, Ms. Wapumbulya Shani, learned state attorney stated as to ground 1, that the trial court properly weighed evidence adduced before it, which proved the case against the appellant. She invited the Court to the decision in the case of **Selemani Makamba vs R** (2006) TLR 384 where it was held that in rape cases, good evidence is that from the victim. She submitted that in the matter at hand the victim had testified that she had sexual intercourse with the appellant.

She further submitted that the case at hand involved a girl who is under 18 years, thus the consent of the victim is immaterial as was discussed in

the case of **Kazimili Samwel vs R,** Criminal Appeal No.570 of 2006 (CAT) unreported. Ms.Shani added that the age of the victim was proved to establish the offence of statutory rape and out of the said rape the appellant impregnated the victim who was a student girl (as per PW1, PW2 and PW4).

Regarding ground two and three, Ms. Shani submitted that the headmaster of Kilabela Secondary School to which the victim was attending appeared to testify before the trial court that the victim was a student. She also added that even medical practitioner who examined the victim testified in court to that effect.

As to ground four whether it was proper to convict the appellant without DNA evidence, Ms. Shani was of the view that the evidence adduced in court was enough to convict the appellant. She submitted that the absence of DNA evidence could not in any way affect the prosecution case. According to her the DNA evidence in rape cases in our jurisdiction is not our practice nor it is the requirement of the law. She cited the case of **Robert Andolile Komba vs DPP,** Criminal Appeal No.465 of 2017 (unreported) to support her argument.

Regarding ground 5 on the way PF 3 was admitted, Ms. Shani submitted that PF3 was tendered in accordance with the provisions of the law and was admitted as exhibit P1 and was legally admitted into evidence. She thus asked the court to disregard all the grounds of appeal and proceed to dismiss the entire appeal.

When the appellant was called upon to make a rejoinder submission, he did no more than reiterate his denial and prayed that he be released from prison.

Having heard from the submissions made by the appellant and the learned state attorney to support and/or to counter the appeal, let me start to dispose of quickly ground 2,3 and 5. Regarding ground 2, the appellant is complaining that the trial magistrate convicted and sentenced him without the evidence of the headmaster of Mwasamba Secondary School. I am of the firm opinion that ground 2 was raised under misconception because the proceedings clearly show that the headmaster of Kilabela Secondary School appeared before the trial court and testified as PW4. The evidence of the headmaster from Mwasamba Secondary School was of no

relevance because Pw2 was not a student of the school mentioned in the memorandum of appeal.

On ground 3 and 5 the appellant has asserted that the clinical officer who filled PF3 did not come to court to prove what was referred to be 'allegations' and that PF3 was admitted in contravention of the law. I have gone through the records of the trial court and found that the said clinical officer appeared in court and testified as PW3 and she is the one who tendered the contested PF3. I have observed that when PF3 was tendered for admission into evidence the appellant could not object. It is thus my firm opinion that the admission of PF3 was in accordance with the laid down procedures for admission of exhibits. Therefore, grounds 3 and 5 fail.

Ground 1 and 4 are interrelated as they are on whether the evidence adduced sufficed to convict and sentence the appellant for the count of rape and impregnating a school girl. According to evidence on record, particularly the evidence adduced by PW5, one WP Nyakolema, the police officer who investigated the case, on 19/12/2020, the victim was sent by her mother to buy school skirt. At Dutwa she met with the Appellant who approached her and wanted to have sex with her, she agreed. Then they

went to guesthouse where she had sex with the appellant. In the case of statutory rape like the one at hand, where the appellant did not force the victim (PW2) in having sex with her, it is important to prove the age of the victim before convicting the accused (the appellant). The purpose of proving the age of the victim is to ascertain if the victim had capacity of consenting sex. The significance of proving the age of the victim in statutory rape cases was emphasized by the Court of Appeal of Tanzania in the case of **Robert Andondile Komba vs DPP** Criminal Appeal No.465 of 2017, where it held that (at p.18):-

> *"Not only that, but in cases of statutory rape, age is an important ingredient of the offence which must be proved. We are not prepared to hold that citing of age of the victim is akin to providing it..."*

In the present case, I have seen nowhere in the judgment the trial magistrate discussing on how the age of the victim was established. The age of the victim has been cited in the Amended Charge, specifically in the particulars of the offence in the first Count. The question is whether it is sufficient to establish the age of the victim. The answer to the question

was put forward by the Court of Appeal of Tanzania in the case of **Andrea Francis v Republic**, Criminal appeal No.173 of 2014 (unreported) where the Court stated: -

> *"...it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age."*

In the present case nothing was tendered, like birth certificate to establish the age of the victim. I am aware that the Court of Appeal of Tanzania in the case of **Haruna Mtasiwa v Republic**, Criminal Appeal No.206 of 2018 held that; *"where the mother has testified on the age of the victim, a birth certificate is not required to prove the age of that victim."* The Court proceeded to hold further that; *in the absence of birth certificate, age may be proved by the parents or a medical practitioner.*

According to the records of the trial court, the mother of the victim was not called to testify. The only parent who appeared in court to give testimony was the father of the victim (PW1) who in his evidence never

testified on the age of the victim by tracing, perhaps, the date on which the victim born. The second witness who was competent to testify on the age of the victim was the medical practitioner (PW3), unfortunately in her evidence never said anything on the age of the victim. It follows, therefore, that there was no proof of statutory rape because there was no proof of the victim's age.

As to the second count of impregnating a student girl, it is important to establish whether evidence on record was sufficient to convict the Appellant for the offence of impregnating a student girl. In her submissions to counter the appeal, Ms. Shani learned state attorney, submitted that the evidence adduced during trial was enough to convict the appellant. In her opinion she said the absence of DNA evidence could not in any way affect the prosecution case. She submitted citing the decision of the Court of Appeal in **Robert Andolile Komba vs DPP** *(supra)* that DNA evidence in rape cases in our jurisdiction is not our practice nor it is the requirement of the law.

I have no hesitation to go along with the learned state attorney's view that in rape cases, DNA is neither a legal requirement nor the practice

in our jurisdiction in proving rape cases. However, I am of the view that for purposes of proving the offence of **impregnating a school girl**, under section 60A (3) of the Education Act. Cap 353, it is important to establish whether the person charged is responsible for the pregnancy in question. DNA technology is one of the modern ways of proving if someone is responsible for the pregnancy, after all, in Tanzania we have even enacted a specific legislation, the Human DNA Regulation Act, 2009 (Act No. 8 of 2009) for that purpose.

Therefore, in the circumstance of this case, where the statutory rape was not proved, it was important to prove scientifically that the appellant was the cause of the pregnancy of the school girl (PW2). The only scientific proof was by the use of DNA technology. In the premises I do not hesitate to hold that it was not proved beyond reasonable doubts that the appellant was responsible for impregnating the victim (PW2).

From the foregoing, I allow the appeal, I quash the judgment, set aside conviction and sentence and order the appellant's immediate release if he is not otherwise lawfully held.

DATED at **SHINYANGA** this 30th day of September, 2022

L.Hemed
JUDGE
30/9/2022

The Judgment is delivered this 30th day of September,2022 in the presence of the Appellant appearing in person and Ms.Wapumbulya Shani, State Attorney for the Republic.

Right of Appeal explained in fully.

THE HIGH COURT OF TANZANIA

L.Hemed
JUDGE
30/9/2022