

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL No. 104 OF 2020

(Arising from the Resident Magistrate Court of Kagera at Bukoba in Criminal Case No. 279 of 2019)

ERICK FABIAN ----- APPELLANT

Versus

THE REPUBLIC----- RESPONDENT

JUDGMENT

Date of Judgment: 13.10.2022

Mwenda, J.

The appellant Erick Fabian was arrested and charged for rape contrary to section 130 (1) (2) (a) and section 131 (1) of the Penal Code [CAP. 16 R.E 2019] and for impregnating a school girl contrary to section 60(A) (3) of the Education Act [CAP 353 R.E 2002] as amended by section 22 of the Written Laws (Miscellaneous Amendment) (No. 2). After a full trial, the trial court found the appellant guilty for the offence of rape only and sentenced him to serve thirty (30) years jail imprisonment.

Being aggrieved with the Trial Court's decision the appellant preferred this appeal with five (5) grounds. For reasons that will be stated later, I am not going to reproduce them.

When this appeal was scheduled for hearing the appellant appeared in person without legal representation through virtual facility link from Bangwe Prison in Kigoma Region whereas the Republic marshalled Ms. Magili, learned state attorney.

When invited to submit in support of grounds of appeal, the appellant while reserving his rights for rejoinder, the appellant prayed this court to adopt his grounds of appeal to form part of his oral submissions.

In reply to the submission by the appellant, Ms. Magili, informed this court that the republic supports the conviction meted against the appellant by the trial court, and to do so, she said she was going to argue the 1st to 4th grounds of appeal collectively and the 5th ground separately.

With regard to the 1st to 4th grounds of appeal where the appellant complained in that the trial court, having found him not guilty for the offence of impregnating the victim due to prosecution's failure to conduct DNA test and tender the same in court then it ought to have also found him innocent in respect of the charge of rape, Ms. Magili submitted that impregnating the victim and rape are two different offences, the proof of which rely on different principles and as such failure to prove one offence does not entail failure to prove another one.

The learned State Attorney submitted that the charge of rape was proved against the appellant beyond reasonable doubt on the following reasons. She

said, since the appellant was charged for statutory rape then the following was to be proved, that is the age of the victim, that the victim was raped and her assailant's identification.

Regarding a proof of the victim's age, the learned state attorney submitted that the victim's mother (PW3) testified to the effect that her daughter was below the age of 18 years as she was born on 16th April 2005. In support to that fact, she tendered a clinic card which was admitted as exhibit P.3.

Regarding a proof of rape unto the victim, the learned counsel submitted that the prosecution's side relied on the victim's evidence. She said at page 13,14 and 15 of the typed proceedings, the victim testified that she was seduced and later agreed to be the appellant's girlfriend. The learned state attorney submitted further that the victim testified on how she and the appellant used to meet and make love with the appellant and especially how she felt pain at first time when they did it; but later they continued making love until when she discovered that she was pregnant. The learned state attorney submitted that in rape cases the best evidence is that of the victim and to support her argument she cited the case of NDIKUMANA PHILIPPO VS REPUBLIC, CRIMINAL APPEAL NO. 276 OF 2009(unreported).

Regarding identification of the victim's assailant, the learned state attorney submitted that the appellant was very familiar to the victim as the victim testified how they met and when did they start love affairs (which is from

February 2019 to July 2019). The learned state attorney submitted further in that the victim knew the appellant by his name and his place of work and his boss's name. she said with these facts, the victim managed to lead the police at the appellant's work place where he was arrested. With this submission, the learned state attorney was of the view that prosecution's side proved its case beyond reasonable doubt.

In respect to the 5th ground of appeal the learned counsel for the republic submitted that the appellant's complaint that exhibit P2 was not read to the parties is not true. She said at page 21 of the typed proceedings exhibit P.2 which is progressive report and attendance register were read and as such this ground unmerited. she concluded her submission with a prayer that this appeal be dismissed.

In rejoinder to the submission by the learned state attorney the appellant submitted that the victim had an affair with other men and he prayed this appeal to be allowed.

Having gone through the courts records as well as submission 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 is on the prosecution side and the standard of which is beyond reasonable doubt. This is per *SECTION 3(2) (A) OF THE EVIDENCE ACT [CAP 6 R.E 2019]* and the

precedents in *SAID HEMED V REPUBLIC [1987] TLR AND MOHAMED MATULA V REPUBLIC [1995] TLR 3*.

As it was submitted by the learned state attorney, the appellant was convicted for statutory rape. In a bid to prove the charge of rape, the victim (PW1) testified how she was approached and seduced by the appellant and later became her girlfriend. She testified how she started making love to the appellant and the way she felt pain on the first day of doing it but later she got used to it until when she discovered she was pregnant.

This witness also testified how she informed the police and her mother the person responsible for her pregnancy and how she volunteered to go at his work place (Magereza Canteen) to identify him.

Based on this evidence, the trial court was of the firm view that since the victim knew the appellant, and testified on how often they made love and the venue they used to do it, then the appellant is responsible for rape.

Before I tackle the issue raised above it is important to note that in rape cases the best evidence is that of the victim him or herself. This principle has been articulated in various authorities of this court and the Court of Appeal. In the case of *Selemani Makumba vs Republic [2006] TLR 384, CAT*, the Court held that;

"True evidence of rape has to come from the victim, if an adult, that there was penetration and

no consent; and in case of any other woman where consent is irrelevant that there was penetration.”

In the present case, the victim testified that she and appellant were lovers (boy and girlfriend). As it was rightly submitted by Ms. Magili, learned state attorney, since the victim testified that the appellant was her boyfriend, then the duty by the prosecution's side was to prove her age to know if she was a minor, that she was raped (penetration) and who is the person responsible for the said rape.

I have keenly gone through the trial court's records and came to an agreement with the Hon. Trial Magistrate that the victim (PW1) was credible witness. As I have stated earlier, this witness testified how the appellant approached and seduced her to be his girlfriend, the request which she consented. This witness also testified how she, at their first day when they made love, felt pain but later on got used to it and also how she notified her mother and the police that it was the appellant who was responsible for her pregnancy and later volunteered to lead the way towards his work place where the appellant was arrested.

On his part, the appellant challenged the trial court's findings in two ways. One, that since the trial court was of the view that the charge of impregnating the victim was not proved due to failure by the prosecution's side to conduct and tender DNA profiling tests results, then it (the court) ought to have also found the charge of rape as insufficiently proved. I have considered this complaint but

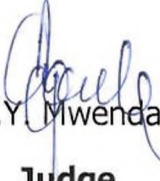
as it was rightly submitted by Ms. Magili, learned state attorney, the offence of rape and impregnating a school girl are distinguishable and each has its own ingredients and as such acquittal for impregnation a school girl did not weaken the charge of rape. Since there is a proof that the victim was a minor who testified how the appellant made love to her (penetration), the appellant who was her boyfriend whom she knew by his name, his work place and his boss's name, then this court finds no reasons to interfere with the trial court's findings.


Two, the appellant also challenged the trial court's findings for failure to consider that the victim was not her girlfriend as she had love affairs with other two men, one going by the name of Pius and the other by his career as milkman (muuza maziwa) and find him innocent. I have considered this argument and came to a conclusion that much as there is possibility that the victim might have had love affairs with other men, but with the cogent evidence tendered by the victim, this does not make him less guilty. As I have stated above, the pieces of evidence for consideration in a charge of statutory rape are proof that there was penetration and as revealed in the victim's testimony the appellant and the victim were lovers who made love on several occasions. Also another ingredient for consideration is a proof that the victim was a minor and based on PW3's evidence, (her mother) the victim was a minor born on 16th April 2005, and lastly is a proof that the appellant is the perpetrator of the crime and since he was identified by his name, work place and his boss's name and her (victim's) boyfriend; all evidence point accusing fingers unto the appellant.

From the foregoing observations this appeal lacks merits and it is hereby dismissed. The decision of the Resident Magistrate Court of Kagera at Bukoba in Criminal Case No. 279 of 2019 is hereby upheld.

Right of appeal fully explained.

It is so ordered.


A.Y. Mwenda
Judge
13.10.2022



This judgment is delivered in chamber under the seal of this court in the presence of the appellant Mr. Erick Fabian through virtual facility link and in the presence of Ms. Magili the learned State Attorney for the Republic.


A.Y. Mwenda
Judge
13.10.2022

