IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 06 OF 2021

(Originating from the decision of the District Court of Kilombero, at Ifakara in Criminal Case No. 219 of 2020)

RAMADHAN CHUGULU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

26th Aug. & 6th October, 2022

CHABA, J.

The appeal is against the judgment of the District Court of Kilombero at Ifakara in which the appellant herein was arraigned for two counts of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code [Cap. 16 R.E 2002] now (Revised Edition 2022) and prohibit impregnating of a secondary school student contrary to section 60A (i) and (3) of the Education Act, Cap. 353 as amended by Written Laws (Miscellaneous Amendment) Act No. 4 of 2016. After a full trial, the appellant was convicted and sentenced to serve thirty (30) years imprisonment for the 1st Count of rape and was acquitted on the 2nd Count.

The background of the matter is to the effect that in January 2019 at about 20:00 hours and January 2020 at unknown dates at Kapolo village Ifakara within the District of Kilombero in Morogoro Region, the appellant

did have sexual intercourse with a girl aged 17 years old and a student at Kibaoni Secondary School whom for the purpose of hiding her identity she will be referred to as FS or victim.

When the charge was read over and explained to the appellant, he pleaded not guilty to the charge. His plea paved the way for the side of the prosecution to call their key witnesses to adduce their testimonies in support of the charge. During the trial, the respondent paraded] two witnesses to prove their case.

The first witness was the complainant (FS) who testified that she knew the appellant / accused for a long time as they were lovers. She went on testifying that one day in the month of January 2019 at about 20:00 hours while on the way to a certain shop she met the appellant along the road at one place known as CCM. The appellant told her that he was in love with her loves and promised that will be taking her to school every day and will cover her needs by giving her some money to use at school. On the next day, they met just around the playground and agreed that could meet at the same place the next day. On the following day, the two met at the same place at around 19:00 hours. From there they moved to the appellant's house at Kikwawira Tangini where the appellant was residing with his grandfather. Thereby they enjoyed themselves by making sexual intercourse (Tulifanya ngono, tulifanya mapenzi). FS stayed there for about three days. According to FS, they were making sexual intercourse three times a day but without using any protective gear, particularly condoms. When she returned home, her father wanted to know where she had been for those three days. Her answer was to the effect that she was at her aunt's house.

FS and the appellant continued to have a sexual relationship for sometimes and the two were meeting in an incomplete house from 18:00 to 21:00 hours.

Around December 2019 FS's mother discovered that was pregnant. FS was told to find and call the appellant. The appellant respondent went to the homestead of FS while in the company of his brother one Morosad. Upon inquiring about the tragedy, the appellant admitted that he was responsible with the pregnancy. He told the victim's parents would come back and have further discussions. However, the victim's father immediately reported the matter to the suburb chairman who summoned the appellant to appear to his office for an interview. When the appellant received the summons, his family told FS that once could reach at the residence of the suburb chairperson, had to deny the appellant and state that she was impregnated by another person. Her evidence shows that she conceded to hid the appellant so as to rescue him as she was further warned that once could mention the names of the appellant and jailed, no one could step into the shoes of the appellant and provide for the necessities or basic needs.

Upon reaching at the suburb chairperson, FS denied the appellant and mentioned another person to be responsible with the pregnancy. Afterwards, the appellant and his family promised the victim's family that could meet and deliberate on the matter and see way forward. But alas they didn't honor their promises. Seen that the victim's father had no other option other than reporting the matter to the chairman who issued a letter so that the same could forwarded to the nearest police station. At police station the victim's father was given a PF3 for medical examination. When they reached at

hospital, FS was medically examined and found pregnant. As everything was out, FS she disclosed that the appellant was responsible with the pregnant and further stated that he was the first man to make sexual intercourse with him. Until the time appeared as a witness, she had a child whose father's names are Ramadhan Chugulu, the appellant. She told the trial court that if at all could not be impregnated would have been in form one.

The second witness was the victim's father who featured as PW.2. His testimony shows that he was informed by his wife that FS was pregnant and the responsible person was the appellant. Upon receiving that information, he reported the matter to the suburb chairperson. Thereafter, the appellant was summoned for an interview in respect of the said allegation. He denied the allegation and FS mentioned someone else as responsible for the pregnancy. Upon returning back to their homestead, FS told her parents that she was told by the appellant's family not to mention the appellant so as to rescue him from facing legal action. Later on, the appellant and his family visited his home and the appellant admitted that he was involved to impregnate the victim. They agreed to resolve the matter at the family level and promised to take care of the child. But were informed that it was too late as already legal action was in place. Therefore, from there the two families lost communication.

The third and last witness was the medical doctor whose workstation was at Kibaoni Health Center. He told the trial court that on 13/05/2020 he received FS while in possession of the PF3. Upon conducting a medical examination, it was discovered that FS was pregnant. He tendered in

evidence the said PF3 and the same was admitted and marked as Exhibit PE1.

In defence, the appellant who testified as DW.1 denied all allegations by entering a plea of not guilty to the charge. He averred that FS already had been engaged by the person who made her pregnant on 20/03/2021 (FS tayari alishatolewa pos ana mtu aliyempa mimba). He mentioned his name as Emma Lugomboka. He further told the trial court that this man by name of Emma Lugombola is living with the victim and it is known to everybody in the village. The clinical card of the child is also in the possession of this man.

After a full trial, the trial court was satisfied that the prosecution had amply proved its case beyond a reasonable doubt. Consequently, the appellant was found guilty, convicted, and sentenced as alluded to above. Dissatisfied, the appellant preferred the instant appeal armed with seven (7) grievances which are as follows:

1. *That, Your Honourable Judge, there appeared errors on face of records that affected the root of the case and consequently affected appellant to suffer conviction and sentence for the offence which I did not commit. Your Honourable judge, the trial Magistrate has grossly erred in Law and upon Facts when not recording my evidence and the answers made by PWI during cross examination as a result the said mistake was used as beating stick on my side during the Judgement. Section 210 (3) of the Criminal Procedure Act Cap 20 R.E 2019 reads*

   "the magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over be read over to him. the magistrate shall record any comments which the witness may make concerning his evidence, "

   What transpired at pg 15 of the proceedings is a mere procedure but not a reality. Nothing was read over to appellant during the trial.

2. *That. Your Honourable Judge, there were Extra Judicial Statements made by PWI before the local leader at our locality mentioning Emma Ligomboka as the one who impregnated her and during the trial, I submitted the said document to be used in my defense. Despite the fact that. DW2 one RAMADHANI RAMADHANI LIHAPA and DW3 one RAPHAEL MOSES NYONI collaborated what transpired in the document, the trial magistrate didn't consider it at all. The said document is not found or mentioned in judgement. This is fatal, and affected reasoning of the trial magistrate in her judgement against appellant. This creates doubts on conviction against appellant. Honourable Judge, am not submitting new evidence but praying leave of this court for the said document to form part of this appeal (DI),*

3. *That. Your Honourable Judge, the evidence of PW2 one Swedy Hassan Thomas at pages 8-10 of the Proceedings are purely hearsay. The Trial Magistrate erred too to admit such kind of evidence which contravenes sections 61 and 62 of the Evidence Act Cap 6 R.E 2019. There is no point the witness seems to be competent as all information's were narrated to him by someone else. 1 pray such evidence be expunged from records*

4. *That. Your Honourable Judge, the evidence of PW3 one M WANAIDI SALEHE is to the effect that PWI is pregnant according to PF3 but she couldn't mention how long the pregnancy is as of 13/05/2020. This creates doubts as to whether appellant is concerned on the evil act or not. Honourable Judge, it is the Prosecutions obligation to ensure that they prove the case beyond doubts but in this case, there are a number of doubts whereby the trial magistrate erred in determination.*

5. *That, your Honourable Judge, the probable cause for pregnancy is rape. The trial Magistrate erred in law and facts when refusing to grant my prayer of conducting DNA test at pg 8 of the proceedings to realize if am concerned with the matter. At pg 16 of the judgement, the trial magistrate has put it clear that since no DNA test was conducted then she cann"t bind herself that the child belongs to the accused(appellant). If the reasoning is that pregnancy was not caused by appellant, why not the one who caused pregnancy is the one who raped PWI?*

6. *That, your Honourable Judge, there existed jealousy between the two families, that of Victim and family of appellant. Considering the age of*

PWI as estimated to be 17 years, it is easy to be coached by her parents and state whatever told that's why she narrated the truth before the local leaders and later on gave a different story before the court. This can be seen in the evidence of DWI, DW2 and DW3 and in cross examination of prosecution witnesses.

7. *That, Your Honourable Judge, no caution statements were taken from accused person as required by the law, and appellant had not given room to scrutinize the statement of prosecution witnesses so that I could prepare my defense accordingly. All these are fatal and affected the root of the case creating doubts in conviction of appellant.*

At the hearing of this appeal, the appellant appeared in person, and unrepresented whereas the Respondent / Republic was represented by Ms. Elizabeth Malya, learned State Attorney.

When the appellant was called on to amplify his grounds of appeal, he just prayed this court to consider his appeal and find him not guilty of the offence he stands charged. On her part, the learned State Attorney strongly opposed all grounds of appeal fronted by the appellant. She further stated that she supported both conviction and sentence meted out by the trial court.

As regards the first ground, Ms. Malya submitted that section 210 (3) of the Criminal Procedure Act [Cap. 20 R.E 2022] (the CPA) covers a witness who adduced his/her evidence before the trial court. She submits that upon going through the trial court proceedings, she found that the witness did not request the court to read audibly the contents recorded at trial. She referred to this court at page 15 of the typed trial court proceedings and stated that something was done against the procedural law, but quickly highlighted that section 388 of the CPA can be invoked to cure the omission or irregularity. To reinforce her argument, she referred this court to the case **Shaban**

Haruna @ Dr. Mwagilo v. Republic, Criminal Appeal No. 396 B of 2017 CAT, at pages 13-14 and opined that this ground has no merit.

On the 2nd ground, the learned State Attorney contended that it has no merit on the ground that the proceedings at trial as shown at pages 17-18 unveil that the extrajudicial statement was considered as though it was a mere statement. She underlined that indeed, there was no genuine document. She prayed the court to apply the provision of the law under section 369 of the CPA if the need arises.

On the 3rd ground, Ms. Malya contended that section 127 (1) of the Evidence Act [Cap. 6 R.E 2019] is clear that every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or his irrational answers to those questions by reasons of tender age, extreme old age, disease whether body or mind or any other similar cause. She continued that PW2 was a proper and right witness. Being a parent to the victim, she appeared before the court and explained what happened to the victim. She submitted that this ground is devoid of merit.

On the 4th ground, she accentuated that the same is baseless as the trial magistrate convicted the appellant only for the offence of rape. On the 2nd Count, that is impregnating a school girl was acquitted.

Regarding 5th ground, Ms. Malya argued that in respect of the offence of rape, it is trite law that the best evidence comes from the victim. She invited the court to refer the case of **Seleman Makumba v. R (2006) TLR 384** as the guiding principle. She continued that, since the victim told the

trial court that she was meeting the appellant and made sexual intercourse, and further mentioned the places as exhibited at pages 7-10 of the typed trial court proceedings, her evidence is trust worth. She cited the case of **Magina Kubilu @ John v. The Republic,** Criminal Appeal No. 564 of 2016 CAT Shinyanga, at page 17 and averred that the issue of penetration can be proved orally by the victim and other witnesses without an expert opinion or oral evidence by experts. She added after all, the appellant did not cross examine the victim on this fact. She underlined that, the law is clear that failure to cross examine the victim on the relevant part of evidence is equally as the appellant has consented to what the victim stated. She referred the court to the case of **Martin Misara v. R,** Criminal Appeal No. 428 of 2016, CAT at page 8 to substantiate her argument. She concluded by stating that this ground of appeal has nothing useful and should be ignored.

In respect of 6th ground, Ms. Malya asserted that FS told the trial court that she was warned by the appellant's parents that had to refuse mentioning the names of the appellant for one reason that if could be jailed, perhaps could not enjoy maintenance from the appellant and her son could due to lack of basic needs. She referred this court at 8 of the trial court proceedings when the appellant was cross examined. She added that the issue of jealous has no place in this case and that it is an afterthought. She prayed the court to dismiss this ground for lacking merit.

As to the 7th ground, she averred that the police officers have the duty to record the statement of a suspect. She believed that the cautioned statement of the appellant was read over and explained to him because when the preliminary hearing was conducted the appellant agreed only three

facts but denied to have involved to commit the offence of rape. She highlighted that under section 9 (3) of CPA, information relating to commission of offence must be given orally or in writing. Though the trial court proceedings are silent whether the law was complied with or otherwise, but such omission did not cause any injustice on the side of the appellant because still the appellant had an opportunity to cross examine the prosecution witnesses. In her opinion, section 9 (3) of the CPA had nothing to add from the grounds of appeal fronted by the appellant. Again, she prayed the court to dismiss this ground.

In his brief rejoinder, the appellant did not have much to say other than insisting that the trial magistrate convicted him with the offence of rape whereas FS was impregnated by another man. He submits further that being a layperson who is not conversant with the law, he prayed this court find him not guilty and accordingly acquit him on the 1st Count of rape.

I have objectively considered both oral submissions advanced by the appellant and State Attorney and the grounds of appeal in the light of trial court proceedings and judgement of the court. In my view, the central issue for consideration, determination and decision thereon is whether this appeal is meritorious.

As noted above, I had ample time to objectively scrutinize the entire evidence advanced by the prosecution witnesses. In the course, I have learnt that the only piece of evidence implicated the appellant with the first the offence of rape and finally acted upon by the trial court was the testimony of the victim (FS). The trial court believed FS largely based on the principle that the best evidence comes from the victim. However, the question that

arises here is this, did the evidence given by the prosecution witnesses before the trial court successfully proved the commission of offence on the standards required by the law?

Admittedly, it is settled principle of the law that in sexual offences the best evidence is that of the victim as it was expounded by the Court of Appeal in the case **Selemani Makumba vs. Republic,** (2006) T.L.R 379. However, this principle has been extended by the Court of Appeal in her recent decision in the case of **Majaliwa Ihemo vs. Republic,** Criminal Appeal No. 197 of 2020 (Unreported), where their Lordships held among other things that:

> *"...In sexual related trials, the best evidence is that of the victim as per our decision in Selemani Makumba vs. R, [2006] TLR 379. We however, hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point..."*

As gleaned from the trial court records, two different persons were mentioned by the victim, who featured as PW1 at trial, to be the persons responsible for her pregnancy. These persons are the appellant and one Emma Ligomboka. She told the trial court that she mentioned the later because the appellant's grandfather told her that when she reaches at the suburb chairperson, should not accept that the appellant was the one who impregnated her. Therefore, to rescue him from being prosecuted and perhaps jailed, it was a must to mention the names of someone else. She was frightened by the appellant's family that once could mention the

appellant and found guilty of the offence, no one could provide the necessities and or basic needs. With this piece of evidence, one may ask if the credibility of a witness (FS) was unshaken. Upon considering her testimony, the circumstance of this case, and the apparent contradictions of her testimony in respect of a person who was actually involved in the rape and impregnating the victim, there is no other evidence that was adduced to clear the doubt that can be relied on. This piece of evidence is full of doubt and it creates uncertainties.

Moreover, the unsatisfactory feature is compounded by the fact that the trial court refused to grant the appellant's prayer that had to undergo a DNA test to clear the ambiguity of the newborn. In my opinion, due to the advancement of technology medical proof was inevitable to clear the surrounding ambiguities through DNA tests. Such a piece of evidence would have assisted the trial court to arrive at a fair and just decision and leave no doubt as to the conviction of the appellant. If the DNA test would have conducted under the auspice of medical proof, two major results were anticipated to be ensured. One, if the paternity test was to prove positive, then the appellant was, without doubt, be subjected to conviction; Two, if the results could be negative, automatically the appellant had to be acquitted.

In the circumstance of this case, the learned trial magistrate no doubt misdirected himself upon convicting the appellant without having cogent evidence as required by law. It is a cardinal principle of law that in criminal trials the standard of proof is beyond reasonable doubt as it was underscored

by the court in the case of **Yusuph Abdallah Ally V. R,** Criminal Appeal No. 300 of 2009 (Unreported). The Court held inter-alia that:

> *"To prove a prosecution case beyond reasonable doubt means, simply, is that the prosecution evidence must be strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person and not any other, as the one who committed the offence".*

As I observed earlier, it is uncertain whether the appellant or Emma Ligomboka raped the victim and finally caused her to become pregnant. The law says any if there is any doubt, the court must decide in favour of the appellant. From the viewpoint, the case was not proved within the realm of standards and I may add that the principle of burden of proof in a criminal trial was in the circumstance wrongly applied to warrant the conviction of the appellant.

In the upshot, I am satisfied that the prosecution failed to prove their case against the appellant on the standards required in the criminal trial. Consequently, this appeal is hereby allowed. The conviction entered and sentence meted by the appellant in respect to the 1st Count of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code [Cap. 16 R.E 2002] now (Revised Edition 2022) are quashed and set aside. I thus, order the immediate release of the appellant, Ramadhan Chugulu from prison custody, unless he is otherwise lawfully held. **Order Accordingly.**

DATED at **MOROGORO** this 6th day of October 2022.

M. J. CHABA

JUDGE

06/10/2022

Court:

Delivered at my hand and Seal of the Court in Chambers this 6th day of October, 2022 in the presence of Mr. Jumanne Milanzi, learned State Attorney and the Appellant who appeared in persons, and unrepresented.

M. J. CHABA

JUDGE

06/10/2022

Right of Appeal to the Court of Appeal of Tanzania fully explained.

M. J. CHABA

JUDGE

06/10/2022