

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(BUKOBA DISTRICT REGISTRY)  
AT BUKOBA**

**CRIMINAL APPEAL NO. 110 OF 2021**

*(Originating from Criminal Case No. 17 of 2021 of District Court of Muleba at Muleba)*

**ADAM ABDUL----- APPELLANT**

**VERSUS**

**REPUBLIC----- RESPONDENT**

**JUDGEMENT**

**Date of Last Order: 09/02/2022**

**Date of Judgment: 25/02/2022**

**Hon. A. E. Mwipopo, J.**

Adam Abdul, the appellant herein, has filed the present appeal against the decision of the Muleba District in Criminal Case No. 17 of 2021. The appellant was charged in the District Court for two Counts. The first count is for Rape offence contrary to section 130 (1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2019 and the second count is for the offence of impregnating a Primary School girl contrary to section 60A (1) and (3) of Education Act, Cap. 353, R.E. 2019. It was alleged that the appellant on October, 2020 at Mubunda Village, within Muleba District in Kagera Region, did unlawfully have sexual intercourse with E.A. (the name of the girl is concealed), a girl aged a girl aged 16 years who was a student of Mubuka Secondary School as result she did get pregnant while he knew that

she was a secondary school student. The trial Court convicted the appellant for the offence of rape and sentenced him to serve thirty (30) years imprisonment. In the second count of impregnating a school girl the appellant was acquitted.

Aggrieved by the decision of the trial Court, the Appellant filed the present Appeal against the said decision. In his petition of appeal, the Appellant has raised two grounds of appeal as provided hereunder:-

- 1. That, the trial Court erred in law and fact to convict and sentence the appellant for an offence of rape basing on the strengths of the prosecution's case which did not prove the case against the appellant beyond reasonable doubt.*
- 2. That, the trial magistrate erred both in law and in fact to disregard the defence of alibi on reasons that the appellant did not give notice to rely on alibi and that he did not prove that he was really in Mbeya.*

Mr. Projestus Mulokozi, advocate who appeared for the appellant, submitted on each of the ground of appeal. He submitted on the first ground of appeal that the victim of the offence was raped on 09.10.2020 but the matter was reported on 01.02.2021 which is 4 months later. The victim was found to be pregnant at the time when she was registered to join school. It is at this time the victim named the appellant as the one who raped her. He said that it is settled that failure to report the offence within reasonable time affects the credibility of the witness. He cited the case of **Gimbu Masele and Another v. Republic**, Criminal Appeal No. 491 of 2017, CAT at Tabora, (unreported), where at page 20 the court held that;

*"We are aware of the settled position that unexplained delay in arresting the appellant casts doubts on credibility of prosecution witnesses".*

He added that the failure to be registered at school has compelled the victim to reveal about the incident and she implicated the appellant after she was taken to Ward Executive Officer as it was stated by PW3. In such circumstances, the victim could have implicated anybody and it is dangerous to rely on such evidence. In the case of **Abiola Mohamed @ Simba v. Republic**, Criminal Appeal No. 291 of 2017, CAT at Arusha, (unreported), it was held at page 22 that the best evidence of sexual offence comes from the victim, however, there is need to subject the evidence of victim to scrutiny in order for courts to be satisfied that what the victim testify is nothing but the truth.

The counsel in scrutinizing the testimony of the victim said the victim stated that the appellant threatened to kill her if she is going to tell anybody, but the threat could not remain for 4 months. He is of the view that the victim was free and was capable of informing other people of what transpired. The victim testified that she did not raise alarm after the incident was complete. For that reason, the victim was free to inform other people.

The counsel of the appellant argued the prosecution failed to prove the age of the pregnancy which caused the victim not to be registered. The Clinical Officer

- PW4 answered that they didn't test the age of pregnancy of the victim when he was cross examined by the appellant. For that reason, the prosecution was supposed to prove the age of the pregnancy in order to connect the pregnancy to the appellant as there is possibility that the pregnancy was made by somebody else.

The appellant's counsel submitted on the identification of the appellant by the victim was not sufficient. He said that the victim in her testimony she said she met with the Appellant who was bodaboda driver when she hired him. Her evidence does not disclose for how long the whole incidence took place. The counsel said that the evidence is silent whether or not the victim knew the appellant before the incident and victim stated that after the incident she never saw the Appellant again. That she don't know any person living at Runazi and the appellant is living at Runazi. He said that all of these raises doubts in prosecution evidence on the identity of the appellant since the victim named the appellant as the person who raped her while they met for the first time during the incident.

On the second ground of appeal, the counsel for appellant said that the District Court did not consider Appellants defence of alibi for the reason that the appellant did not give notice and there is no proof that he was not present in the scene of crime. He cited the case of **Charles Sambon v. Republic**, [1990] TLR, page 39, where the Court of Appeal held that the court is not excluded from taking into account the defence of alibi before the prosecution closes its case. He said

the appellant called DW2 to prove that he know that the appellant was in Mbeya as they were communicating. There was no need to prove that he was in Mbeya by guest house receipt or bus ticket. There are different means of travelling to Mbeya. In the case of Rashid Ally v. Republic, [1987] TLR page 97 held that alibi has to introduce doubt in the prosecution's case and the accused person has no duty to prove the same.

The counsel added that there is irregularities in the proceeding. He said that there was change of Magistrate in page 24 of the proceedings where Hon. A.H. Mwetindwa – SRM took over the case on 08.07.2021 from Hon. M.A. Hamza – RM. Unfortunately, the predecessor Magistrate did not follow section 214 of CPA by asking the Appellant if he is comfortable with the taking over for the case to proceed or to recall witnesses who have testified for cross examination.

In response, Ms. Happiness Makungu, State Attorney appearing for the respondent objected the appeal. She said in respect of the first ground of appeal that the prosecution proved that the Appellant penetrated the victim and that the victim was aged below 18 years. This was proved by the victim herself who named the appellant as the person who raped her. The court believed this evidence and convicted the appellant accordingly. The true evidence of the rape was from the victim and this was proved. That, the testimony of PW2 proved that the victim was 17 years at the time of incident. The evidence was not challenged by the Appellant which means that it was admitted. To support the position, the appellant

cited the case of **Oroko Wankuru @ Mniko v. Republic**, Criminal Appeal No. 514 of 2019, CAT at Musoma, (unreported), at page 17 where it held that

*"We are aware that there is useful guidance in law that a person should not cross examine if he/she cannot contradict. But it is also a trite law that failure to cross examine a witness on an important matter ordinary implies the acceptance of truth of the witness evidence".*

She said that the trial court satisfied itself that the victim was aged 17 years when the offence was committed. It was her argument that prosecution evidence proved the offence without any doubts. The appellant was mentioned by the victim as the person who raped her when she was found to be pregnant after she failed to be registered. This was the right possible time to mention the appellant and the reason for not mentioning the appellant earlier was that the appellant threatened to kill her. She relied in the case of **Ally Ngozi v. Republic**, Criminal Appeal No. 16 of 2018, CAT at Dar Es salaam, (unreported), at page 20, where it was held that naming responsible person for rape after the victim was found to be pregnant is earliest possible time.

She distinguished the cited case by the appellant of **Limbu Masele and Another v. Republic, (Supra)**, that in the cited case there was no reason for failure to mention the responsible person at the earliest possible time while in the present case there is reason stated by the victim which is the threat to be killed.

The counsel for the respondent said that the victim testimony shows that they were together for sometime as when the victim boarded appellant's motorcycle they did stop at appellant's house where he took petrol jug before they proceed with the journey. As a result, the victim was able to take the police to the house where the appellant was living.

On the second ground, the counsel for the respondent said that it was not true that the defence of alibi was not considered. The judgment considered the Appellant's defence of alibi at page 11. It was stated the court held that the defence of alibi raised by the appellant did not shake prosecution case and there was failure of the Appellant to give notice to the prosecution on the defence of alibi. The defence of alibi raised by the Appellant did not shake the prosecution case. For that reason, the trial court rightly decided not to rely on the defence. In support of the point, the counsel cited the case of **Trazias Evarista @ Deusdedit Aaron v. Republic**, Criminal Appeal No. 188 of 2020, CAT at Bukoba, (unreported).

On the failure to afford opportunity to the appellant to recall witness who have testified for cross examination after another Magistrate took over the partly heard case, she said that the alleged procedure is not mandatory. Section 214 of the Criminal Procedure Act provides that the Magistrate who took over has to state if he think he may continue with the case. Thus, there was no irregularity.

In his rejoinder, the counsel for the appellant said that the failure of the appellant to cross examine the victim on her age does not make him the guilty of the offence. The appellant was charged for offence of rape and not the offence of the age of the victim. He distinguished the case of **Ally Gonzi v. Republic**, (Supra), cited by the Respondent counsel that in the cited case the victim was a lover of the accused person and they had several sexual occasions but in the present case the incident alleged occurred once. On the issue of victim's late reporting of the incident, he said that the same is raised at first appellant court while in the cited case the issue was raised for the 1<sup>st</sup> time in the second Appellate court (Court of Appeal). The victim named the appellant after she was threatened to be taken to WEO and not during registration as it was stated by the Republic.

The counsel for the appellant also distinguished the case of **Trazias Evarista v. Republic**, (Supra), cited by the Republic that in the cited case the accused person did not go further in supporting his defence of alibi while in this case the appellant called a witness in support of the alibi.

From submissions and the record of appeal, I'm going to determine each ground of appeal as provided in his both petition of appeal.

In the case at hand the appellant was charged and convicted for the offence of statutory rape under section 130 (1) and (2) (e) of the Penal Code, Cap. 16, R.E. 2019. In statutory rape, the prosecution has to prove the presence of



penetration and that the age of the victim was under 18 years. It is a settled principle that the best evidence in the sexual offences comes from the victim. The position was stated by Court of Appeal in number of cases including the case of **Selemani Makumba v. Republic, [2006] TLR, 379**, where it 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."*

As a general principle, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness. This position was stated by Court of appeal in **Goodluck Kyando vs Republic, [2006] TLR, 363**.

The appellant's first ground of appeal is that the trial Court convicted the appellant for an offence of rape basing on the strengths of the prosecution's case which did not prove the case against the appellant beyond reasonable doubt. The appellant's counsel in his submission he pointed out some of the doubts available in the prosecution evidence. It is the duty of the prosecution to prove its case beyond doubt according to law.

The counsel for the appellant argued that the failure to prove the age of victim's pregnancy raises doubt if the victim's pregnancy was caused by the appellant. His reason is that the age of pregnancy will connect the month when the incident took place and the age of the pregnancy when the victim was

examined. But, I do not agree with this appellant's assumption for the reason that the appellant was acquitted for the offence of impregnating school girl. The appellant was convicted for the offence of statutory rape which has little or no connection at all to the age of victim's pregnancy. The same is proved by the evidence on the presence of penetration and the age of victim to be under 18 years. Thus, there is no doubt raised by this point of absence of the evidence on the age of victim's pregnancy.

Another alleged doubt raised by the appellant is the act of the victim to delay to report the incident until she was found pregnant. This was four months after the alleged incident and she named the appellant as the responsible for the pregnancy after she was threatened to be taken to the Ward Executive Officer. The appellant's counsel was of opinion that in such circumstances there is possibility for the victim to name anybody to be responsible for the incident. The respondent in her submission was of the view that the victim named the appellant as the one who raped her at the right possible time after she was found to be pregnant.

I agree with both counsels that ability of the witness to name a suspect at the earliest opportunity is assurance of the reliability of the witness. The position was stated by the Court of Appeal in several decision including in the case of **Ally Ngozi v. Republic**, (supra), and **Limbu Masele and Another v. Republic**,

**(Supra)**, cited in the submission by both counsels. In the case of **Marwa Wangiti Mwita and Another vs Republic**, [2002] TLR 39 at page 43 this Court held:-

*"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

The evidence available in the record reveal that the victim named the appellant as the person who raped her after she was found to be pregnant. This was four months from the date she alleged the incident occurred. The victim's reason for not screaming is that the appellant had a knife. After he finished to have sexual intercourse with the victim the appellant threatened her that if she told anybody he will kill her. This evidence prove that there was threat from the appellant if the victim will scream or tell anybody after the incident. However, in the circumstances of this case, there is no evidence at all to show that the victim continued to be under threat from the appellant for all four months not to report about the incident. In the case of **Paschal Sele V. Republic, Criminal Appeal No. 23 of 2017**, Court of Appeal of Tanzania, at Tanga, (Unreported), it was held that the court has to satisfy itself on the credibility of the victim witness. This delay and complete failure to report is inviting this court to inquiry more about the credibility of the evidence of the victim to satisfy itself.

The appellant's counsel said that the identification of the appellant by the victim was not sufficient. In her reply, the respondent counsel said that there was sufficient time for the victim to identify the appellant and she even led the police to the appellant's house. Reading the evidence available in record, the victim testified that she met with the appellant who was bodaboda driver when she hired him to take her from Mubunda village to Kitoko village. In her evidence, the victim did not disclose for how long the whole incidence took place. The evidence is silent if the victim knew the appellant before the incident and the same could not be assumed. It is in record that after the incident the victim never saw the appellant again. The victim said in cross examination that she know appellant as Adam Abdul. PW1 also said in his testimony that the victim told her that the person responsible for the pregnancy is Adam of Kiebe Village and that the victim took them to the house of the appellant. This evidence indicate that the victim was knowing the appellant by his name. However, there is no evidence in record which show that the victim knew the appellant before the incident or thereafter. It is not known how the victim came to know the name of the appellant. This raises doubt on how she knew the appellant's name.

As there is doubt on the identification of the appellant, the same has to be resolved in the benefit of the appellant. Thus, I find that the prosecution failed to prove their case without doubt. Since the first ground of appeal has disposed of the matter, I'm not going to determine the remaining ground.

Therefore, the appeal has merits and I allow it. The conviction of the appellant by the trial Court is quashed. The sentence and order of the trial Court hereby is set aside. The appellant to be released from prison forthwith unless held for another lawful cause.



A.E. Mwipopo  
**Judge**  
25.02.2022

The Judgment was delivered today, this 25.02.2022 in chamber under the seal of this court in the presence of the Appellant, Respondent's counsel and Advocate Gisela Rugemalira holding brief for Appellant's counsel.



A. E. Mwipopo  
**Judge**  
25.02.2022