

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**CRIMINAL APPEAL No.33 of 2021**

*(Arising from Meatu District Court Criminal Case no. 38/2020.)*

**EVODIUS <sup>s/o</sup> BALTHOLOMEW ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*24, March, 2022*

**A. MATUMA, J.**

The appellant stood charged in the District Court of Meatu at Mwanhuzi for rape contrary to **section 130(1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002** and impregnating a school girl contrary to **section 60 A (3) of the Education Act, Cap. 353 as amended by section 22 of the Written Laws Misc. Amendments Act no. 2 of 2016.**

He was alleged to have raped a school girl aged 17 years on 4<sup>th</sup> July, 2020 at about 11:00 hrs. He was convicted and sentenced to 30 years custodial term in each count which were ordered to run concurrently. The appellant was aggrieved with such conviction and sentence hence this appeal with seven grounds.

At the hearing of this appeal, the appellant was present in person while the respondent was represented by Jukael Jairo learned state attorney. The appellant opted the learned state attorney to start addressing the court and he responds thereafter. The learned state attorney when took the floor supported the appeal on the ground of credibility of the victim and contraction of material evidence on record.

He also pointed out some procedural irregularities when documentary exhibits to wit; PF3 of the victim exhibit P1 and the school admission and attendance register exhibit P2 were admitted in evidence but not read to reveal its contents.

For avoidance to prolong this judgment, I will not reproduce here the arguments made by the learned state attorney. I will rather be referring to it in the course of my determination of the appellant's complaints that he was convicted on a fabricated case and which was not proved beyond reasonable doubt.

In relation to material contraction of the prosecution case, I agree with Mr. Jairo leaned state attorney that indeed PW3 Fred Lyamsema the father of the victim and PW4 Mamelitha, the teacher and matron of the victim contradicted on when exactly the victim was detected pregnant.

According to PW3 he was phoned by the school on 7<sup>th</sup> July, 2020 at 13:00 hours and informed that her daughter has been tested positive (pregnant);-

*"On July, 7<sup>th</sup>, 2020 at 13:00 hrs I was phoned by the headmaster of Kimali Secondary School that all form 3 students were tested for pregnancy and that my daughter ~~was~~ tested positive"*

On the other hand, PW4 testified that they made the test on the 9<sup>th</sup> July, 2020;

"On July 9<sup>th</sup>, 2020 our school conducted the pregnancy test for all girls.

After that test we revealed 3 students were pregnant who

were....., ..... and .....(the victim)".

From the herein evidence of these witnesses, it is clear that the date upon which the pregnancy was detected to the victim is uncertain. On one hand she was already detected pregnant on the 7<sup>th</sup> July, 2020 according to PW3 from the information he received from the headmaster while on the other hand, according to PW4 (the school matron) the test was done on the 9<sup>th</sup> July, 2020. In that respect the school headmaster knew of the victim's pregnancy even before the test which was made by the school. How did the headmaster come acquainted that the victim in this case was pregnant is untold. It raises reasonable doubts on how the victim got impregnated.

But again, accordingly to the victim, she had sexual intercourse with the appellant for the first time on the 4<sup>th</sup> July, 2020 and had not have any sex with any other man before or after the 4<sup>th</sup> July, 2020.

In that regard, I agree with Mr. Jairo learned state attorney that it was impractical for the urine pregnancy to test positive in less than three days of the sexual act. The sexual act was on 4<sup>th</sup> July, 2020 at about 11:00hrs and on July 7<sup>th</sup>, 2020 at 13:00 hrs, the victim's father was called and informed of the pregnancy. That means the complete days were only two on the 5<sup>th</sup> and 6<sup>th</sup> July, and if we take the evidence of PW4 that the test was made on the 9<sup>th</sup> July, 2020, still the pregnancy was tested positive in less than five days.

On the other hand, PW2 Dr. Jeff Manyama made the test again on 14<sup>th</sup> July, 2020 at 13:40 hours where the victim was tested positive. This was almost ten days from the alleged sexual act. PW2 was not as a medical doctor lead to explain and elaborate for ***how early UPT*** can detect pregnancy. In the absence of such medical evidence on record, the argument that **UPT** cannot detect pregnancy in early two, three or five days from the date of the sexual act cannot be ignored. It was the prosecution to exhaust its case and not for the appellant to establish that UPT cannot test positive the pregnancy of two to five days as in the case here.

I therefore find that the contradictions as to when exactly the pregnancy test was made to the victim is material to the case as it is connected to the alleged date of the commission of the offence in ascertaining whether it is true the appellant impregnated the victim on the 4<sup>th</sup> July, 2020 or the victim was already pregnant before that date.

In the case of ***Jeremiah Shemweta versus Republic (1985) TLR 228***, it was held that the discrepancies in various accounts of the story by the prosecution witnesses give rise to some reasonable doubts about the guilty of the appellant. In the instant appeal, the discrepancies cannot be ignored. They are hereby resolved in favour of the appellant.

I also agree with the learned state attorney with the authority he cited to me that of ***Issa Hassan Uki versus Republic, Criminal Appeal no. 129 of 2017*** (CAT) to the effect that exhibit P1 and P2 the P3 and school admission form and attendance register respectively are liable to be expunged as they were not read to avail the appellant to cross examine against its contents.

In the case of ***Bavuzukuli s/o Mikanda v. The Republic (DC) Criminal Appeal no. 27 of 2020***, High Court at Kigoma, it was held,  
*"...documentary exhibits must be read to the accused person to accord him opportunity to know its contents for preparation of his focused defence as it was decided in the case of Robinson Mwanjsi & 3 others versus Republic (2003) TLC 218".*

In the instant appeal the appellant was denied opportunity to know the contents of exhibits P1 and P2 and thus a denial to have preparation of a focused defence. I accordingly expunge exhibit P1 and P2.

The potential remaining evidence is that of the victim herself who testified that she had sexual intercourse with the appellant on 4<sup>th</sup> July, 2020. That takes us to assess her credibility as nightly observed by the learned state attorney.

If she really had sexual intercourse with the appellant on the 4<sup>th</sup> July, 2020, it was not expected to have been tested positive in less than three days and or even four to five days through **UPT** methodology. Since the other evidence on record was positive to the effect that she was really pregnant and PW2 opined that the pregnancy was aged two weeks, then the victim got impregnated before 4<sup>th</sup> July, 2020 when she alleges to have met the appellant and have sexual intercourse. In that respect her statement that she had not have any sexual intercourse with any other man before 4<sup>th</sup> July, 2020 leaves much to be deserved on her credibility. The victim and her headmaster who knew that she was pregnant even before the school exercise to test all girls have some hidden true facts on who exactly impregnated the victim. I thus find the

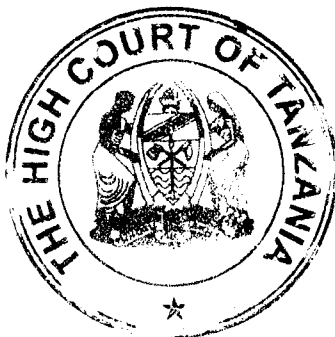
victim PW1 incredible and hesitate to act on her evidence against the appellant.

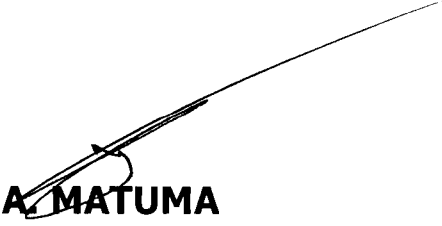
The evidence of an incredible witness cannot be acted upon as such might occasion injustices on the party of the appellant. With such analysis and reasoning, the charge of rape was also not proved for want of credibility of PW1 who was the victim of the offence.

I therefore allow this appeal as the prosecution case was not proved to the required standard in both counts.

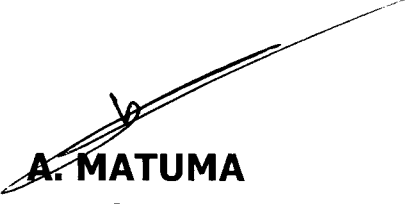
I order the appellant's immediate release from custody unless held for some other lawful cause.

It is so ordered.



  
**A. MATUMA**  
Judge  
25/03/2022

**Court:** Judgement delivered this 25<sup>th</sup> March, 2022 in the presence of the appellant in person and in the presence of Mr. Jukael Jairo learned state attorney. Right of further appeal explained.

  
**A. MATUMA**  
Judge  
25/03/2022