IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL CASE NO. 23 OF 2021

(Originating from Misc. Tabora Resident Magistrate Court in Criminal Case No. 60/2020)

RWAKI S/O ZACHARIA.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date: 21/02/2022 – 25/3/2022

BAHATI SALEMA, J.:

In the Resident Magistrate Court of Tabora at Tabora, the appellant, **RWAKI S/O ZACHARIA**, was arraigned, tried, and found guilty of the offence of impregnating a schoolgirl. The charge indicated that the offence was impregnating a school girl c/s 60 A (3) of the Education Act, Cap. 353 as amended by the Written Laws (Miscellaneous Amendment) Act No.2 of 2016. The appellant denied the charge, whereupon the prosecution paraded four witnesses. At the end of the trial, the trial

court was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt, the conviction was entered.

The appellant is dissatisfied with the conviction and sentence. He is appealing before this court raising six grounds in the memorandum of appeal as hereunder reproduced;

1. *That, the offence against the appellant was not proved beyond reasonable doubt as required by law since PW1 was not a qualified doctor who was duty-bound to examine the case at hand in that exhibit P1 the PF3 was baseless.*

2. *That, the appellant was denied a fair trial as both exhibits, the PF3 (exhibit PF3) and the attendance register (exhibit P2) were not read in court in the hearing of the appellant to reveal their contents. The omission of which renders the respective exhibits liable to be expunged. See Robinson* ***Mwanjisi @ Others Vs. Republic [2003]*** *TLR 218.*

3. *That, the appellant was wrongly convicted on very shaky and unreliable evidence of recognition of PW1, PW2, PW3 and PW4.*

4. *That, the appellant's defence was not considered at all by the learned trial magistrate when composing the judgment.*

5. *That there is no investigator in this case who came to testify in court to support the evidence of PW1 and exhibit P1.*

6. *That, the sentence imposed is manifestly excessive as the offence for which the appellant was convicted does not carry a minimum sentence. See Section 170 (1) (a) of the Criminal Procedure Act, Cap 20 [R.E 2019] and Section 40 of the Magistrate Courts Act, Cap. 11 [R.E 2002]. Also see* ***Tabu Fukwa vs. Republic*** *[1988] TLR 48 and* ***Dauson Athanaz Vs. Republic****, Criminal Appeal No. 285 of 2015, CAT (Unreported).*

Before discussing these grounds of appeal, it would be refreshing to briefly state the facts which prompted the prosecution of the appellant. The particulars of the offence were that on diverse dates and times between January and February, 2020, at Kigwahno village and Bukumbi Ward within the District and Region of Uyui, the appellant did have carnal knowledge of one E d/o J, (names in initials), a girl aged 16 years. She was in standard VI at Kigwahnona primary school.

In that regard, the prosecution brought four witnesses going by the names of Ramadhani Issa (PW1), E d/o J (names in initials), Maria Lutamla (PW3), and Lidya Jonathan (PW4).

In their evidence, PW1 stated that he is a human doctor who examined the victim (PW2) at Ishihimulwa Dispensary and was found to have a

five months pregnancy. This piece of evidence was supported by PW2, who testified that she was sent to the hospital in July, 2020 for a pregnancy test and the doctor's report revealed that she was pregnant. Due to that she stopped schooling at Kighwahona. She went on saying that the accused lied to her and then the two had sexual intercourse thrice at the bush. PW3, the victim's grandmother, stated that her granddaughter mentioned Rwaki s/o Zacharia and PW4 confirmed that PW2 was a student at Kighwahona primary school at standard VI, and now she is no longer a student because of her pregnancy.

The appellant dissociated himself from the alleged offence. At the end of the trial, the trial court was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt. A conviction was entered for thirty (30) years of imprisonment.

At the hearing of the appeal, the appellant was unrepresented, whereas the respondent Republic was represented by state attorneys, Mr. John Mkonyi and Ms. Jainess Kihwelo.

Upon being called to argue his appeal, the appellant prayed to this court for the respondent to begin first.

In his submission, the State Attorney out rightly did not support the appeal. On the first ground, the respondent submitted that the prosecution has proved beyond doubt that it is not true that the doctor

was unqualified. The doctor was a qualified, as shown on page 6 of the proceedings. It is nowhere disputed that he was not a medical doctor. He stated that this ground is without foundation.

As to the second ground, the respondent submitted that the attendance register, PF3, which was tendered in court as exhibits, were read before the court as revealed in the proceedings.

On the third ground, he submitted that PW1 examined the victim (PW2) and verified that she was pregnant. PW2 (victim) stated that she was impregnated by the accused person. The evidence of PW3 was corroborated by PW2, who stated that the victim was impregnated by the accused. The teacher went with the register to prove that she was a student at that school.

On the fourth ground of appeal, he stated that on the judgment, the trial magistrate considered the evidence.

In respect of the fifth ground of appeal that there was no investigator in this case who came and testified in court to support the evidence of PW1 and Exhibit P1, the respondent succumbed that this was not a requirement of law. Section 143 of the Evidence Act, Cap.6 provides that no particular number of witnesses shall, in any case, be required for the proof of any fact. The important thing is that elements of the offence are substantiated.

Turning to the sixth ground of appeal in respect of the sentence imposed is manifestly excessive, the respondent pointed out that it was a reasonable sentence for impregnating the student. Therefore, he prayed that this appeal be dismissed as being unmerited.

In response, the appellant submitted that as to the first ground, there was no DNA to substantiate who was the real father. The doctor failed to establish whether the alleged pregnant girl was related to the appellant.

On the second ground, the exhibits were never read to the appellant.

On the third ground of appeal, he stated that the name of the victim was first mentioned as Maria Lutamla, but again they mentioned Esther Joseph. However, the victim stated she was Esther Joseph.

On the fourth ground, the appellant stated that the trial magistrate did not consider the defence side when composing the judgment. His evidence was never considered.

On the fifth ground, he told the court that the investigator of the case never came to testify in court to support his evidence of PW1 and exhibit P1.

On the sixth ground of appeal, he submitted that the sentence was too severe. He prayed to the court to set him free as he was innocent.

Having heard the submissions of both sides, in the course of determining these grounds, the crucial issue in this appeal is whether the prosecution has proved their case against the appellant beyond reasonable doubt.

It is the cardinal principle of the criminal justice system in Tanzania that the prosecution bears the burden of proving its case beyond reasonable doubt. See the cases of **Daimu Daimu Rashid @ Double D Vs.R,** Criminal Appeal No. 5 of 2018 (CAT-unreported) and **Samson Matinga Vs. R,** Criminal Appeal No. 205 of 2007 (CAT-unreported).

As to the first and third grounds, which will be consolidated, the State Attorney submitted that the offence was proved beyond reasonable doubt since the victim mentioned the appellant, there was corroboration by PW2 and PW3, and the attendance register was tendered by a school teacher. PW1 examined the victim and verified that she was pregnant. PW2 (victim) stated that she was impregnated by the accused person. The evidence of PW3 was corroborated by PW2, who stated that the victim was impregnated. The teacher went with the register to confirm that the victim was a student of standard VI.

Sections 110 and 111, read together with section 3(2)(a) of the Evidence Act Cap. 6 [R.E 2019], provide that the prosecution is required to prove the criminal cases to the standard of beyond reasonable

doubt. This duty has two folds: first to prove that the offence was committed, and second to prove that it was the accused who committed that offence. In **Maliki George Ngendakumana versus the Republic**, Criminal Appeal No. 353 of 2014, CAT- Bukoba (unreported).

This court, having perused through the court record, noted that the prosecution was able to prove on the first that the victim was impregnated; nevertheless, the prosecution failed to bring tangible evidence to prove that it was the appellant who caused such pregnancy. That would have best been proved by scientific evidence, and in the circumstances of the case, the DNA test evidence was much more appropriate to ascertain the fatherhood of the child, which evidence, in turn, would have made the person liable for impregnating the victim.

I am of the view that in the absence of this kind of evidence, it was unsafe to find the appellant guilty of impregnating the victim. As it can be said that just like the offence of rape, the offence of impregnating a schoolgirl was not proved beyond reasonable doubt against the appellant. The absence of that important piece of evidence creates doubt as to whether the appellant was indeed responsible, considering the fact that he was not found guilty of rape.

As it was appropriately submitted by the appellant that the clinical doctor failed to prove the offence of impregnating a school girl since he did not mention who was responsible. No evidence was tendered to prove that it was the accused person.

On the second ground, this court, upon perusing court records, noted that the exhibits tendered before the court were readout. Hence, this ground has no merit.

Furthermore, on the fourth ground, having examined closely, I noted that on page 3 of the judgment, the trial magistrate considered the evidence and concluded that the accused's defence was an afterthought. This also fails.

On the fifth ground, the court concurs with the respondent's argument that there is no such requirement in law under section 143 of the Evidence Act, Cap. 6 that requires the number of witnesses. The significance is that elements of the offence are substantiated. In any case, there is no particular number of witnesses required to prove a particular fact and this is clearly stated under section 143 of the Evidence Act, Cap.6 [R.E 2019], which was echoed in the case of **Bakari Hamis Lingambe v. Republic**, Criminal Appeal No. 161 of 2014 (unreported). Moreover, it is the prosecution that enjoys the discretion

to choose which witnesses to call. In Abdallah Kondo v. Republic, Criminal Appeal No. 322 of 2015 (unreported), the Court stated that:

> *"..It is the prosecution which has the right to choose which witness to call to give evidence in support of the charge..."*

This ground has no merit since the prosecution has the discretion to choose which witnesses to call.

Having clearly indicated on the first and third grounds of appeal, I find that the trial court misdirected itself by relying on evidence that did not prove the important ingredient of the offence. It was compulsory for the prosecution in criminal cases to prove the cases beyond reasonable doubt. This appeal is therefore allowed, the conviction is quashed, and the sentence is set aside. The appellant is to be released unless otherwise he is lawfully held.

A.BAHATI SALEMA

JUDGE

25/3/2022

Judgement delivered under my hand and Seal of the court in Chamber this 25th day March, 2022 in the presence of both parties.