IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 58 OF 2020

(Arising from Criminal Case No 143/2018 of the District Court of Korogwe at Korogwe)

RAMADHANI KIJANGWA@ MSAJI.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Latifa Mansoor, J

Date of Judgement- 18th February 2022

A charge sheet was on 09th October 2018 lodged at the District Court of Korogwe at Korogwe against one **Ramadhani Kijangwa @ Msaji,** the Appellant, indicting him for **Impregnating a schoolgirl** which is contrary to section 60 A (3) of the Education Act [Cap 353 R.E. 2019] (Miscellaneous Amendment) No 02 of 2016.

Particulars of the offence were that; in between August 2017 and 25th January 2018 at Kerenge Makaburini area within Korogwe District in the Tanga Region, the accused did unlawfully impregnate one SY, a girl **aged 15 years old, a pupil of**

Makaburini Primary School. The appellant dissociated himself with the charges levelled against him hence the case was heard in full.

In building their case, the Republic arraigned a total of six witnesses Darusi B Kinana VEO(PW1), Zubeda S. Ali, the appellant's wife's sister (PW2), the victim (PW3), Victoria G. Bwindikithe teacher(PW4), Selemani Z. Mngoya, a medical doctor (PW5) and WP 6980 D/C Jenipher the investigator of the case (PW6). Two exhibits were tendered, a school attendance register and PF3, admitted as PE1 and PE2 respectively.

The defence side employed three witnesses to its rescue. The first being the accused himself (DW1), Mwanahawa Mohamed the appellant's wife (DW2) and Zubeda Ramadhani, the appellant's daughter (DW3).

Brief facts of the case adduced at the trial court are that the appellant and the victim resided in the same house. Their relationship was that of a grandfather-granddaughter. The chaos began on 25th January 2018 when Makaburini Primary School's administration decided to conduct a usual pregnancy testing for girl-students. 15 girls were suspected and therefore taken to

Magunga Government Hospital for thorough investigation. Upon being examined by PW5, the victim SY was found to be 20 weeks pregnant. A Police Form No. 3 was filled by PW5 to that effect. According to PW4, upon being informed about the pregnancy, the victim denied having had involved herself sexually with any man. The Village Executive Officer (PW1) and Village Chairperson were summoned to the school where the victim was compelled to mention the perpetrator. She again denied mentioning anyone. Following that, her guardians, PW2 inclusive, were called and at first the victim refused to mention who was responsible with her pregnancy, however she finally mentioned the appellant Ramadhani Kijangwa who is her grandfather, now the appellant as the one responsible. Thereafter the appellant was arrested and later arraigned to the District Court of Korogwe to face the charges at hand.

In his defence, the appellant entirely denied involvement in the crime stating that he raised the victim as his own granddaughter after having been abandoned by her parents since she was 05 years old. He has been responsible with her education until on 25th January 2018 when he got oral information that he was needed at Makaburini School. Upon reaching the school, he

found several people forcing the victim to mention him while beating her. It was his stance that the whole thing is cooked up against him by the VEO and one Zubeda who is his wife's sister. He lamented further that he has never undergone through any medical test to verify his paternity to the victim's child. His two witnesses had nothing material to add other than backing up the appellant's story that he was not involved in the crime. At the end of trial, Ramadhani Kijangwa was convicted and sentenced to 30 years imprisonment. This did not amuse him, hence this appeal.

The grounds set out in the appellant's "memorandum of appeal" are -

1. *That, the learned trial magistrate grossly both erred in law and in fact when she was distracted by the Act of the Victim (PW3) of remaining mute when asked on how was she able to be raped by her grandfather (The Appellant) during daytime while she was at school. This rendered her evidence to be doubtful.*

2. *That, the learned trial Magistrate grossly erred both in law and fact in failing to note that, the victim of the*

alleged offence (PW3) withheld the details of the alleged sexual encounter against her for quite a while and non-disclosing to anybody at the first early possible opportunity cannot attract the confidence or credibility of her evidence before the court of law.

3. *That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the appellant but failed to exhaustively assess and evaluate the entire evidence on record before entering the conviction against the appellant.*

4. *That, the learned trial Magistrate grossly misdirected herself (sic) and consequently erred in both law and fact in stating that there was no any kind of force used to compel the victim (PW3) to mention the one responsible with her pregnancy while in fact and according to the prosecution witnesses it is revealed that the victim (PW3) never mentioned the one responsible for her said pregnancy, until a hard try from some of the prosecution witnesses. Therefore, the PW3*

was not a free agent in mentioning the one responsible for her alleged pregnancy.

5. *That, the learned trial Magistrate grossly erred both in law and fact when she relied on a contradictory, uncorroborated, insufficient, incredible, and concocted prosecution evidence as a basis of convicting the appellant.*

6. *That, the learned trial Magistrate grossly erred both in law and fact in failing to find that the appellant's defence was strong, unchallenged, and fully corroborated hence its casted enough doubt to the prosecution case*

7. *That the learned trial Magistrate grossly erred both in law and fact in the prosecution did not prove their case beyond reasonable doubt.*

The Appellant prayed that this court quashes the conviction and sets aside the sentence imposed and leave him at liberty.

At the hearing of this appeal the Appellant appeared in person, unrepresented. Mr. Joseph Makene learned State Attorney

appeared for the Respondent/Republic. Hearing of this appeal was conducted by way of written submissions.

In his submission in support of appeal, the appellant first attacked the manner of recording evidence by the district court for non-compliance with Section 210 (1) (a) and (3) of the Criminal Procedure Act, Cap 20 (R.E 2002 by then). In this point he averred that the magistrate erred as he never read his evidence to him and record his comments on the recording of such evidence.

Submitting with respect to the first ground, the appellant asserted that it was wrong for the court to believe the evidence of the victim when she mostly remained mute when inquired about the incident. He clarified by referring to page 13-14 of the proceedings that when the accused cross examined the victim concerning the possibility of being sexually assaulted by the accused during daytime while she was mostly at school in daytime, but she remained mute. On the second ground, the appellant faults the trial court for not considering that the victim had never disclosed to anyone about the alleged offence until

when she was found to be pregnant also for not mentioning the appellant as the perpetrator at the earliest opportunity possible.

As regards to the third ground, the appellant criticised the prosecution evidence that it was weak and could not suffice to ground a conviction. Regarding the evidence that he was mentioned by the victim as the one who impregnated her, the appellant he faulted the court for not noticing that the victim was coerced to mention him as the one responsible with her pregnancy. He referred the court to the evidence of PW1 at page 08 of proceedings indicating that the victim was not ready to mention who impregnated her at first.

The appellant further asserted that the prosecution evidence was contradictory, uncorroborated, insufficient, incredible, and concocted therefore it could not form a basis of convicting the appellant. His reasons for asserting that was because no medical examination was conducted to prove that he is the one who impregnated the victim. The court relied only on oral evidence adduced in court, which was according to him contradicting, he cited the case of **Hemedi Saidi vs Mohamed Mbilu** (1984) T.L.R. 113 to this effect.

Submitting on the sixth ground, the appellant is criticising the trial Magistrate for allegedly not considering his defence evidence. Lastly the appellant reiterated that the case against him was not proved beyond reasonable doubt and, therefore, implored this court to allow the appeal and set him free.

The respondent/republic on its side totally supported the district court's decision and sentence, hence resisted the appeal. It was their stance that the case was proved beyond reasonable doubt. Mr. Makene started by reiterating the principle extracted in the case of **Selemani Makumba vs The Republic** (2006) TLR 379 which is like the wording of section 127 (6) of the Evidence Act, Cap 06 R.E 2002. The section provides

> *Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits,*

notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.

While responding to the grounds of appeal collectively, the respondent submitted that DNA examination could not be a conclusive proof of responsibility for pregnancy when the evidence adduced was enough to establish the offence. He cited the case of **Frank Onesmo vs The Republic, Criminal Appeal No 147 of 2019.** That was all.

Having gone through the appeal as lodged in this court by the appellant, I couldn't help noticing that the document initiating this appeal was titled "Memorandum of appeal". However, the Criminal Procedure Act requires that appeals are to be instituted by way of a petition of appeal. The section provides; -

359.-(1) Save as hereinafter provided, any person aggrieved by any finding, sentence or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made

under section 173 of this Act may appeal to the High Court and the subordinate court shall at the time when such finding, sentence or order is made or passed, inform that person of the period of time within which, if he wishes to appeal, he is required to give notice of his intention to appeal and to lodge his ***petition of appeal.*** (Emphasis is mine)

However, in the case of **Musa Mohamed v. Republic,** Criminal Appeal No. 216 of 2005 it was provided that; -

"One of the Maxims of Equity is that Equity treats as done that which ought to have been done'. Here as already said, the learned Resident Magistrate for all intents and purposes convicted the appellant and that is why he sentenced him, So, this Court should treat as done that which ought to have been done. That is, we take it that the Resident Magistrate convicted the appellant."

In a similar spirit and since it is without doubt that the intention of the appellant was to lodge an appeal to this court, the

memorandum of appeal filed will be considered as a petition of appeal for all purposes.

This is a first appeal. The duty of a first Appellate Court as expressed in the case of **Pandya v. R [1957] EA 336** is to re-appraise and re-evaluate the evidence presented before the trial court and the materials thereto and at times arrive to its own independent conclusion.

Impregnating a schoolgirl is an offence under section 60 A (3) of the Education Act [Cap. 353 R.E 2002] as amended by the Written Laws (Miscellaneous Amendments) Act, No. 02 of 2016. To prove the offence of impregnating a schoolgirl, the prosecution is under duty to prove three facts. The **first** is that the girl was found to be pregnant, **Second**, that the girl impregnated was attending a primary or secondary school at the time she was impregnated and **third,** the fact that the schoolgirl was impregnated by the accused.

This appeal has a backdrop which is out of the usual and normal. I say so because somehow the prosecution in this case did put a cart before a horse. The reason is not farfetched, pregnancy is one of the outcomes of a male and female performing sexual

intercourse. If the victim was 15 years of age when she was discovered pregnant then the first charge that the appellant ought to have been charged with would have been Rape. The prosecution chose to abandon the rape charges and charged the accused with the aftermaths of rape only. This alone may draw adverse inference against prosecution (**Azizi Abdallah V R (1991) TLR 71 (CAT).** Nevertheless, this court will deal with the appeal as brought before it only.

From the totality of the grounds of appeal raised by the appellant, the major claim is that prosecution did not prove its case beyond reasonable doubt at the trial court. The reasons why he avers so are; -

1. That the victim failed to mention the accused at the earliest possible time
2. That the victim mentioned the accused after being forced
3. That the DNA test was not conducted to prove paternity
4. That the accused was not cross examined on the fact that DNA test was not performed on him

Starting with the first limb, the appellant has tabled before this court the issue of delay in mentioning the assailant of the crime.

The respondent dodged replying to this matter in his written submission. It is now trite law that failure of a witness to name a suspect at the earliest opportunity vitiates the credibility of that witnesses' testimony. This was stated in a recent decision of **SADICK S/O HAMIS @ RUSHIKANA vs THE REPUBLIC,** CRIMINAL APPEAL NO. 381 CF 382 CF 383 OF 2017, where the Court of Appeal sitting at Tabora had the following to say; -

> *This Court has consistently held that failure on the part of a witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable. (See Marwa Wangiti Mwita and Another v. R., [2002] T.L.R. 39 and Joseph Mkumbwa & Another v. R., Criminal Appeal No. 94 of 2007 (unreported).*

In this case, proceedings show clearly that the victim did not mention the accused right away after being asked by her teachers, and later by PW1 and her guardians. At page 08 of the proceedings, while testifying, PW1 states; -

"I was together with the school discipline teacher and the head of the school where SY did not explain anything as to who was

responsible with the pregnancy. Through asking her with cooperation with her guardians she was not ready to explain or mention the one responsible with her pregnancy. So, I decided to prepare a letter for the matter to be reported at the police station. While in preparation and after SY saw that I was preparing to handover the matter to the police, she called her grandmother and explained to her that the one responsible with her pregnancy is Ramadhani Kijangwa" (end of quote)

A like version can be seen at page 12 of the proceedings when PW3 herself was testifying and at page 21 when PW4 was giving her evidence. There is nowhere that the victim stated that the appellant has ever threatened her not to mention him. This has tainted the credibility of PW3's evidence with doubts. In addition, there is also evidence that the teachers at the school used to task the victim for fetching water for them whereby she used to get back home late mostly at 1800 hrs. This alone sufficed to alert the learned magistrate that there could be a possibility that the accused is just implicated in the matter.

Moving to the second limb concerning force being used in coercing the victim to mention the appellant. The respondent

republic maintained that the mentioning was without any duress. Going through the record available, PW1 as quoted above stated clearly that PW3 mentioned the appellant after she (PW1) threatened her to report the matter to the police. Reasonably, the victim being a child of 15 years had to give a name to be safe in the circumstances. There is also evidence adduced by DW3, that the VEO used to go to the victim's residence and induce her into mentioning the appellant as the one who impregnated her. This evidence was not challenged by the prosecutor during cross examination. In my view, the District Court ought to have weighed this defence in relation to the prosecution evidence.

Concerning the DNA examination. I believe in a case like the present one where the main issue is whether the accused impregnated the victim and the only evidence available is the word of the victim against the accused, and no other witness is available to corroborate the claim that it is the Appellant, the only evidence that would have conclusively implicated the Appellant would have been DNA test results. The respondent cited the case of **Frank Onesmo vs The Republic** (supra) to contend that DNA test was not necessary.

I have gone through the cited case in **Frank Onesmo's case,** that is **Juma Mahamudu vs The Republic,** Criminal Appeal No 47 of 2013 and in my view the circumstances in that case are not the same as the one at hand. In that case, the matter was only rape and not pregnancy, in rape a mere fact that there was penetration, however slight could be enough to prove the offence. Penetration could be observed by other means apart from DNA test. However, in this case, the issue is paternity. While it might be true that the accused might have been sexually involved with the victim, but not every sexual encounter result into pregnancy. Also, Mahamudu's case originated in 2011 no wonder the court stated that there may not be sufficient DNA facilities that our country may possess.

Secondly, it is common human knowledge that the gestation period for a human foetus is between 36 to 40 weeks. On 25th January 2018 the victim was found to be 20 weeks according to the PF3. 40 weeks therefore ended on 14 June 2018. So, the latest date that the victim could give birth would be 14th June 2018. According to the proceedings brought, the first time the accused was taken to court was on 09th October 2018. The new-born baby was about four months by then. There wasn't any

effort to perform DNA test on the baby and the appellant to be certain on the allegation against him. This is pure negligence on the part of investigators. In my view, DNA test in this circumstance was of utmost importance, failure of which renders the prosecution evidence weak.

As if that is not enough, the PF3 was admitted in evidence completely contrary to law. It was never read out aloud in court to afford the appellant opportunity to learn its contents to be able to cross examine the witness who tendered it. This can be seen at page 28 of the proceedings. After the exhibit was admitted and marked as exhibit P2 the prosecution closed its evidence on that witness by stating the words "that is all" then cross examination followed.

It has been held by the Court of appeal in several times that failure to read the contents of an exhibit to the accused denies him/her the right to a fair trial. For instance, in the case of **SPRIAN JUSTINE TARIMO vs THE REPUBLIC**, CRIMINAL APPEAL NO. 226 OF 2007, the court stated:

> *It was a fatal flaw where the contents of Exhibit (PF-3) were not even read out to the appellant. So, the appellant*

was convicted based on evidence he was not made aware of although he was always in court throughout his trial.

Also, the case of **KURUBONE BAGIRIGWA & 3 OTHERS vs THE REPUBLIC, CRIMINAL APPEAL NO. 132 OF 2015** observed and I quote

"Failure to read the contents of cautioned statements of accused persons after being admitted is fatal. This is because although the record shows that, the statements were admitted without objection, both the maker and their co-accuseds had inherent right to know the contents of those statements if they were to effectively cross examine on them. We have to emphasise this because the right to adversarial proceedings which is one of the elements of fair hearing within Article 13 (6) (a) of our Constitution means that each party to a trial be it criminal or civil, must in principle could have knowledge of and comment on all evidence adduced or observations filed or made with a view to influencing the court's decision ".

The effect of such failure to read the contents of an exhibit has always been expunging of such exhibit from record. (See the

case of **Kurubone Bagirigwa** (Supra)). Having so expunged the PF3 for being improperly admitted in evidence, there remains no evidence supporting that the victim was pregnant let alone evidence pointing to appellant as the one who impregnated the girl. In the circumstance, I find no reason to adjudicate on the rest of the grounds of appeal.

The law is that the prosecution carries the burden of proof. This burden never shifts to the accused to prove his innocence. The accused is presumed innocent until proved guilty or until he pleads guilty. Prosecution must prove its case beyond reasonable doubt. From record, it appears that no investigation was carried out over the matter. The police didn't visit the scene of the alleged crime and investigate by collecting information from neighbours on the possibility of the crime as well as involving social welfare officers as the case involves a child.

On the evidence available, the evidence of the victim lacks corroboration. It was taken as gospel truth and used to convict the accused person. I am not unaware that in sexual offences, the best evidence is that of the victim as propounded by the respondent. This is the law under section 127 (4) of the Evidence

Act and the famous case of **Selemani Makumba vs Republic,** 2006 TLR No 379. However, the Court of appeal has as well directed that conviction should only be entered where the court is satisfied that victim's evidence is nothing but the truth.

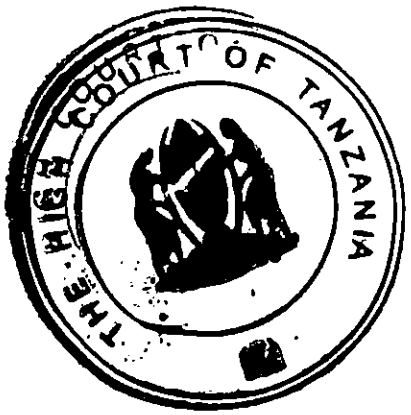
In the case of **Mohamed Said vs The Republic,** Criminal appeal No 145 of 2017, the court stated

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general and S. 127 (7) of Cap. 6, and that such compliance will lead to punishing the offenders only in deserving cases."*

Our courts should therefore warn themselves on the danger of mounting a conviction without corroboration. (See **Ndalahwa Shilanga & Another v. Republic,** Criminal Appeal No. 247 of 2008 (unreported))

In the result, I allow the appeal. The appellant's conviction and sentence are accordingly quashed. The Appellant shall be set free immediately unless he is lawfully held for any lawful cause.

DATED AND DELIVERED AT TANGA THIS 18TH DAY OF FEBRUARY 2022



L.MANSOOR

JUDGE

18/02/2022