IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

D.C CRIMINAL APPEAL NO. 177 OF 2020

(Originating from Criminal Case No.327 of 2018 at Singida District Court)

ELIBARIKI MARTINE .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

27/4/2022 & 25/5/2022

KAGOMBA, J

The appellant, ELIBARIKI MARTINE, being aggrieved by the decision of the District Court of Singida at Singida delivered on 13th day of May, 2019 (henceforth "trial court") has filed his Petition of Appeal praying for the court to reverse the judgment of the trial court and to order that the sentence and punishment imposed on the appellant be quashed. The appeal is based on the following five grounds:

1. That, the trial court erred in law and fact to find that PW1 (the victim) is credible witness while her evidence was recorded in total violation of section 127(2) of the Evidence Act, Cap 6 R.E 2019.

2. That, the trial court erred in law and fact in admitting and acting upon exhibits in convicting the appellant with the offence charged.

3. That, the trial court erred in law and fact in convicting the appellant while the prosecution did not prove the case against him beyond reasonable doubt.

4. That, the trial court erred in law and fact by considering prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defense evidence.

5. That, the trial court erred in law and fact for imposing sentence without affording appellant opportunity to give factors which should have been considered by the trial court in mitigating the sentence that was imposed on him.

At the trial court, the appellant was arraigned with two counts. The first one was Rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code [Cap 16 RE 2002] (henceforth "Penal Code"). The second count was Impregnating a school girl contrary to section 60A of the Education Act, Cap 353 as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016. It was alleged, with regard to the first count, that the appellant on unknown dates between January to July, 2018, at Unyinga area, Unyinga Ward, Unyankumi Division within District and Region of Singida did have sexual intercourse with one Janefrida

D/O Ibrahim, a girl of fourteen (14) years old and a Standard Six (VI) Pupil at Unyianga Primary School.

With regard to the second count it was alleged the appellant on unknown dates between January to July, 2018, at Unyinga area, Unyianga Ward, Unyankumi Division within the District and Region of Singida did impregnate one Janefrida D/O Ibrahim, a girl of fourteen (14) years old and a Standard Six (VI) Pupil at Unyianga Primary School.

During trail, the appellant denied the allegations in both counts. The trial was conducted and the trial court found him guilty for both offences and convicted him accordingly. The appellant was sentenced to serve thirty years imprisonment for the first count and five years' imprisonment for the second count. The trial court ordered the sentences to run concurrently. As the right of appeal was explained to the appellant, the appellant has decided to exercise the same by filing this appeal.

On the date of hearing of the appeal, the appellant was represented by Mr. Lucas Alto Komba, learned advocate while Ms. Judith Mwakyusa, learned Senior State Attorney, appeared for the respondent. At the commencement of hearing, Mr. Komba prayed to drop the fourth and fifth grounds of appeal. He opted to argue on the first, second and third grounds of appeal only.

Submitting on the first ground of appeal, Mr. Komba told this court that according to records the child victim adduced her evidence under oath. However, nothing in proceedings of the trial court shows that the child victim was asked questions by the court to test if she was in a position to appreciate the nature of an oath as required by section 127(2) of the Evidence Act, [Cap 6 RE 2019]. He further submitted that by recording the evidence of the child without conducting the said test, such evidence is deemed to be wrongly taken and should be expunged from court records. The learned advocate supported his argument by the decision Court of Appeal in **Issa Salum Nambaluka v. The Republic**, Criminal Appeal No. 272 of 2018, CAT, Mtwara. Based on this decision, the learned advocate prayed the court to expunge the testimony of the child victim for being illegally recorded.

On the second ground of appeal, Mr. Komba submitted that certain exhibits, namely; the cautioned statement (Exhibit P1); an affidavit on the age of the victim (Exhibit P2); PF3 as well as a Clinic Card (Exhibit P3) and attendance register (Exhibit P4) were not read in court upon admission. Referring to **Steven Salvatory v. The Republic**, Criminal Appeal No. 275 of 2018, CAT, Mtwara, he prayed for expunging of these exhibits.

With regard to the third and last ground of appeal, Mr. Komba submitted that the prosecution failed to prove the case against the appellant beyond reasonable doubt. He argued that after expunging the illegally recorded evidence and exhibits, the prosecution case will naturally collapse.

Mr. Komba also argued that from the time the appellant is alleged to have sex with the victim, it only took five months for the victim to deliver her baby. He argued that in absence of a DNA test, it is doubtful if it was the appellant who impregnated her. For all these reasons, Mr. Komba prayed the appeal to be allowed.

In demonstration of professionalism, Ms. Judith Mwakyusa, the learned Senior State Attorney faced the truth with courage. She conceded and declared to be at one with the learned advocate for the appellant on all what appeared to be undeniable facts. She conceded to the fact that the child victim's evidence was recorded in contravention of section 127(2) of the Evidence Act and the Exhibits P2, P3 and P4 were not read in court as mandatorily required by law.

However, Ms. Mwakyusa firmly resisted the inclusion of the cautioned statement (Exhibit P1) under the category of unread exhibits. She said, after perusal of the court file, she found that Exhibit P1 was duly read in court, and it should thus be speared the wrath of the law. She therefore supported the prayer to expunge the testimony of the victim and exhibits which were not legally admitted in evidence as mentioned by the learned advocate for the appellant, save for Exhibit P1.

On the third and last ground, Ms. Mwakyusa conceded that after expunging the testimony of PW1 and the accompanying exhibits, the offence of impregnating the school girl could not be proved beyond reasonable

doubt. She was however, adamant that the offence of rape was proved beyond reasonable doubt, for which she opposed the appeal. She gave a reason for her position. She said, besides the expunging of the testimony of PW1 and some of the exhibits, there still existed sufficient evidence to convict the appellant for the first count of rape.

Ms. Mwakyusa, relied on Exhibit P1 (cautioned statement) and Exhibit P5 (extrajudicial statement), both being statements of the appellant. She argued that, when these exhibits were being tendered during trial, the appellant did not object and in both exhibits the appellant confessed to have sexual intercourse with PW1 several times.

It was further argued by the learned Senior State Attorney that during interrogation at Police Station, PW1 told PW3, a Police, that she had sexual relationship with the appellant. For this reason, Ms. Mwakyusa argued that the testimony of PW3 corroborated the cautioned statement and extrajudicial statement of the appellant. She prayed the court to find the testimony of PW3 credible. She cited a decision of the Court of Appeal in **Andrew Charles v. The Republic**, Criminal Appeal No. 576 of 2017, CAT, Dodoma, whereby some of the evidence was expunged, yet the Court of Appeal supported the conviction by using other available evidence such as cautioned statement and extrajudicial statement. She urged this court to seek inspiration from the cited decision of the Court of Appeal to find the appellant guilty in respect of the offence of rape on the basis of the available evidence.

Digressing from the submitted grounds of appeal, Ms. Mwakyusa alerted the court that the State Attorney who prepared the charge did insert a numeral "1" by pen, so that one of the sections of the law under which the charge is preferred, which was inadvertently typed as section "30", would correctly read "130". She told the court that the proper practice, after the said the State Attorney had inserted the number by pen, would be to append his signature to show that the added number was inserted by him, but no such signature is appended.

Ms. Mwakyusa explained that for lack of that endorsing signature, it would imply that the appellant was charged of an offence contrary to section 30 instead of 130. For this reason, she prayed the court to consider that section 30 does not establish the offence of rape under the Penal Code. However, the particulars of the offence clearly state that the offence of rape, the time the offence occurred, the victim and her age. Ms. Mwakyusa argued that under such circumstances, the particulars of the offence were understood by the appellant despite the said inadvertent error. She added that, the appellant having understood the charge against him, he was able to defend himself well against the count of rape as shown on page 23 of the proceedings. For this reason, she argued that the appellant was not prejudiced by the error and she prayed this court to find it so.

In his short rejoinder, Mr. Komba reiterated his submission in chief particularly the point that prosecution failed to prove the case beyond

reasonable doubt. He also argued that a copy of proceedings served upon the appellant shows that Exhibit P1 was not read in court during admission.

On the changed section number, Mr. Komba submitted that the appellant was charged under a wrong section of the law. He prayed the court to quash conviction for the wrong charged offence. This was the end of the submissions for both parties.

I have gone through the records of the trial court to verify what was submitted before me regarding the admission of the testimony of PW1 as well as the admission of Exhibits P2, P3 and P4. I am satisfied that these pieces of evidence were unlawfully admitted. As the minds of counsels for both sides converged on this fact, I shall waste no time to deliberate any further or cite an authority to prove that the admission of those pieces of evidence was wrong in law. I therefore proceed to expunge the said evidence from records accordingly.

Having expunged the outcast evidence, I should start by saying that I am at one with both counsels that the remaining evidence on record shall not sustain conviction for the second count of impregnating a school girl. The expunged attendance register was to show that the victim is a school girl. The expunged PF 3 and clinic card carried the medical results that the victim was pregnant and eventual delivery. It is the medical report (PF 3) which was to be relied upon in proving pregnancy, particularly in its early weeks. The expunged exhibits therefore vital to prove that the appellant

impregnated the victim, an offence preferred in the second count. Obviously, without such evidence prosecution can not prove the said count to the required standard. For this reason, **I find the appellant not guilty of impregnating a school girl as charged in the second count**.

The issues for determination are two: **firstly**; whether Exhibit P1, the cautioned statement of the appellant, was duly admitted in evidence during trial. **Secondly**; whether the prosecution proved the offence of rape beyond reasonable doubt.

With regards to the first issue, while Ms. Mwakyusa submitted that Exhibit P1 was duly read in court hence duly admitted, Mr. Komba rejoined that according to the copy of proceedings served upon the appellant, the said Exhibit P1 was not read in court. To determine the first issue, I have thoroughly perused the trial court's proceedings to establish whether Exhibit P1 was read in court. Records reveals that the said exhibit was tendered by PW3 as appearing on page 10 of the typed proceedings. It is true as submitted by Mr. Komba that the copy of typed proceedings supplied to the parties does not show that the exhibit was read in court. However, having read the original handwritten proceedings of the trial court, the exhibit is clearly shown to have been read in court and all other procedures pertaining to its admission were duly observed by the trail court. Accordingly, I find that Exhibit P1 was duly read in court during trial and its admission in evidence is therefore lawful. This suffices to dispose of the first issue in this appeal.

On the second issue, whether the prosecution proved the offence of rape beyond reasonable doubt, Ms. Mwakyusa had relied on the unexpunged evidence particularly the cautioned statement (Exhibit P1) and the extrajudicial statement (Exhibit P5). She argued that such statements were corroborated by the testimony of PW3 who recorded the cautioned statement. Let's examine what obtains from the records in relation to Ms. Mwakyusa's submission.

The typed proceedings of trial court show on page 15 that the extrajudicial statement was also duly admitted in evidence. As rightly submitted by Ms. Mwakyusa, the appellant did not object when the two confessional statements were being tendered in court. This being the case, both confessional statements of the appellant stand unimpeached. In **Jumanne Ahmed Chivinja & Another V. Republic**, Criminal Appeal No. 371 of 2019, CAT, DSM, the Court of Appeal stated, at page 10 of the typed Judgment of the Court that:

> *"It has long been settled that a person who confess to a crime is the best witness, a position taken by the Court in many of its decisions such as* ***DPP vs. Nuru Gulamrasul*** *[1988] TLR 82 cited in* ***Diamon Malekela @ Maungaya vs. Republic****...".*

I have examined the two confessional statements. Beginning with Exhibit P1, the appellant confessed to have sex twice with PW1, the victim.

He says, he did not rape her but seduced her until she finally agreed and that they had sex for the first time in January 2018. That, he had sex with a girl of tender age in compliance with the instructions given by his witchdoctor one Ruhumbika who stays in Tabora so as to get rich. The appellant further confirms in his cautioned statement that the victim was fourteen years of age, being the right age for the purposes of becoming rich as per the said instructions. In the Extrajudicial statement of the appellant, the appellant again confessed to have done sexual intercourse with the victim. He said that the victim consented.

Section 130 (1) (2) (e) of the Penal Code, being one of the provisions of the law under which the appellant was charged for rape, provides:

"(1) it is an offence for a male person to rape a girl or a woman".

"(2) a male person **commits the offence of rape if he has sexual intercourse with a girl or a woman** under circumstances falling under any of the following descriptions:

(a).....

(b).....

(c).....

(d) .....

"(e) **with or without her consent when she is under eighteen years of age**, unless the woman is his wife who is fifteen or more years of age and is not separated from the man".

Apparently, the year of the victim is significant in proving the offence under the preferred provision of the law. I am mindful of the fact that an affidavit that was intended to prove the age of the victim has been expunged from the record. However, in the submissions by both counsels the age of the victim was not disputed and has never been a point of contention. A further assurance is given by Exhibit P1, wherein the appellant confessed that the victim was fourteen years of age. Certainly, it is not disputed that the victim was under the age of 18. In both confessional statements the appellant has raised an argument that he seduced the victim until she consented to a sexual intercourse. It may be that the appellant thinks he has a sound defence in the illusioned consent by the victim.

In **Shehe Ramadhan @Idd v. The Republic**, Criminal Appeal No. 82 of 2020, CAT, Tanga, the Court of Appeal had this to say on the question of age vis a vis consent in a similar rape case:

> "As introduced above, the appellant was charged with rape of a girl under 18 years. **The offence of rape when committed to a girl under 18 years is complete when it is shown that there was sexual intercourse (see section 130(2)(e) of the Penal Code). It is immaterial whether the said girl consented or otherwise"**. [**Emphasis added**].

Being so guided by the Court of Appeal, I find the evidence on record sufficient to prove the offence of rape against the appellant, beyond

reasonable doubt, as firmly submitted by Ms. Mwakyusa. Therefore, the decision of the trial court to convict the appellant and the attendant sentence of thirty (30) years imposed for the offence of rape in the first count is accordingly upheld by this court.

As I have already said in this judgment the allegation that the appellant impregnated a school girl has not been proved at the required standard for lack of sufficient evidence. The conviction entered against him on the second count and its corresponding sentence are hereby respectively quashed and set aside. For this reason, the appeal partially succeeds, to the extent that the appellant is not guilty for the offence of impregnating a school girl.

Order accordingly.

Dated at **Dodoma** this **25th** of **May, 2022**

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA

JUDGE