IN THE HIGH COURT OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

HC CRIMINAL APPEAL NO. 51 OF 2022

(Originating from Criminal Case No. 5 of 2022 at the District Court of Misungwi)

NDEBILE MUSSA@JOHN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 14/04/2023

Date of Judgment: 20/03/2023

Kamana J:

Aggrieved by the decision of the Misungwi District Court, Ndebile Mussa@John preferred this appeal challenging the conviction meted out against him for offences of Rape contrary to section 130(1)(2)(e) of the Penal Code, Cap.16 [RE.2019] and Impregnating a Primary School Girl contrary to section 60A(3) of the Education Act, Cap. 353 [RE.2002]. In each count, the Appellant was sentenced to spend thirty years in prison that were to be served concurrently.

Particulars of the first count were that the Appellant, on diverse dates and times between August, 2021 and December, 2021 had sexual intercourse with the victim XY (name withheld to conceal identity) a girl

aged fourteen years. About the second count, the Prosecution alleged that within the period stated herein, as a result of sexual intercourse, the Appellant put the victim in a family way.

After the full trial, as I stated, the Appellant was convicted of both counts and sentenced accordingly. Aggrieved by such conviction, the Appellant landed in this Court armed with three grounds as follows:

1. *That, the trial Court erred in law by convicting the Appellant based on allegations that were never proved beyond reasonable doubt as there was no supportive evidence such as DEOXYRIBONUCLEIC ACID (DNA) which is a scientific proof as to the paternity of the child.*
2. *That, the trial Court erred in law by failing to consider the defence adduced by the Appellant during the trial.*
3. *That, the trial Court misdirected itself by reaching the Judgment and convicting the Appellant while the Prosecution had generated apparent contradictions and inconsistencies in the matter.*

At the hearing, the Appellant was advocated by Mr. Nicholaus Majebele, learned Counsel. The Respondent had the services of Ms. Rehema Mbuya, learned Senior State Attorney.

Arguing the first ground of appeal, Mr. Majebele submitted that all four witnesses fielded by the Prosecution testified on the issue of pregnancy. He contended that the trial Court erred in convicting the Appellant of the two counts based on such evidence. He vehemently contended that the offence of impregnating a schoolgirl was not proved beyond reasonable doubt as there was no scientific proof in terms of DNA to prove paternity. To cement his arguments, the learned Counsel referred this Court to the persuasive decision of this Court in the case of **Joel Bulugu v. R**, Criminal Appeal No. 212 of 2020.

Concerning the second ground, the learned Counsel for the Appellant contended that the trial Court misdirected itself by not considering the defence evidence that the Appellant had never had sexual intercourse with the victim. Given that, Mr. Majebele contended that the said omission is fatal. He further submitted that the trial Magistrate shifted the burden of proof from the Prosecution to the Appellant which offended the cardinal principle of criminal justice which directs that the burden of proof lies with the Prosecution. To fortify his averments, the learned Counsel referred this Court to the case of **Soud Seif v. R**, Criminal Appeal No. 521 of 2016. The learned Counsel did argue the third ground.

Responding, Ms. Mbuya, learned State Attorney, with regard to ground one, partly conceded with the arguments relating to the absence of DNA in proving paternity. In that case, she opined that the second count of impregnating a schoolgirl was not proven beyond a reasonable doubt. However, the learned Senior State Attorney, citing the case of **Joel Bulugu (Supra)** contended that the offence of rape was proven beyond reasonable doubt as DNA is not a prerequisite for the offence to be proved.

In that regard, she submitted that since the victim named the Appellant as the perpetrator, that evidence is sufficient to establish the guilt on the part of the Appellant. In bolstering her arguments, the learned Senior State Attorney cited the celebrated case of **Selemani Makumba**, v. R, [2006] TLR 379.

On the second ground, Ms. Mbuya conceded to the arguments that the trial Court did not consider the evidence of the Appellant when defending his case during the trial. However, she was quick to argue that such an anomaly does not vitiate the Prosecution's case as this Court as the first appellate Court is clothed with powers to step into the shoes of the trial Court and consider the defence evidence.

Rejoining, Mr. Majebele did not dispute that the best evidence in sexual offences is the one provided by the victim. However, he opined

that relying on such evidence without the same being collaborated is dangerous. He reiterated his position that the only evidence which Prosecution relied upon to prove the offence of rape was the victim's pregnancy.

Sitting in the first appellate Court, I am bound to reanalyze, reevaluate and reconsider the evidence adduced during the trial and arrive at my own conclusion bearing in mind that the trial Court had the advantage of listening to and seeing witnesses and being able to assess their demeanor. I am comfortably doing this under the wings of the Court of Appeal in the decision of **Kaimu Said v. Republic**, Criminal Appeal No 391 of 2019 where the Court pronounced:

> *'We understand that it is settled law that a first appeal is in the form of a re-hearing as such the first appeal court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary.'*

In that case, in determining this appeal, I will focus on establishing whether the Prosecution had successfully discharged its duty of proving the two counts beyond a reasonable doubt.

Starting with the second count of impregnating a schoolgirl, I shake hands with the legal minds before me that the same was not

proved beyond a reasonable doubt. In the wake of science and technology, paternity must be established scientifically through DNA. A mere assertion of the victim that the Appellant is responsible for pregnancy cannot be taken blindly without scientific proof. In the case of **Hatibu Hashimu Hatibu v. R**, Criminal Appeal No. 225 of 2022, this Court observed:

> *'A mere allegation of PW1 that she was impregnated by the Appellant in absence of any scientific proof to that effect does not in any way convince me that the case against the Appellant with regard to that offence was proved beyond reasonable doubt. In our society where one child can be given a dozen of fathers, I do not take it safe to convict a person of that offense without scientific proof.'*
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> **See: Hermano Stephano v. Republic**, Criminal Case No.172 of 2021; **Joel Burugu (Supra)**.

As regards the first count of rape, I preface by stating that one of the ingredients of the offence of rape is the penetration of the penis into the vagina. In the circumstances of this case where the victim is a minor, the issue of consent is irrelevant. The victim's evidence was that the Appellant had sexual intercourse with her in the bushes. She told the

trial Court that she had never had sex with any person other than the Appellant. The victim's father Kalalwa James (PW1) and Mosi Salmini Musa (PW3) did not testify to have seen the victim copulating with the Appellant. Dr. Raymond Nyasebwa (PW4) who examined the victim formed an opinion that the victim's vagina has been penetrated since she was pregnant. As to who impregnated the victim, that was not possible for him to testify. On the other hand, the Appellant vehemently denied having sexual intercourse with the victim.

That being the case, the only evidence as to the offence of rape is that one provided by the victim. As rightly contended by Ms. Mbuya, the best evidence of sexual offences is the victim's evidence as accentuated in **Selemani Makumba's case (Supra)**.

Despite this position, this Court is of the view that the victim's evidence did not prove the offence of rape beyond a reasonable doubt. Specifically, the victim did not state that the Appellant's phallus did penetrate her vagina. It has been the position that for the offence of rape to be proved, it must be established that there was penetrative sexual intercourse involving the phallus and pudenda. In the case of **Mathayo Ngalya@Shaban v. R**, Criminal Appeal No.170 of 2006, the Court of Appeal stated:

*"**The essence of the offence of rape is penetration of the male organ into the vagina**. Sub-section (a) of section 130 (4) of the Penal Code Cap 16 as amended by the Sexual Offences (Special Provisions) Act 1998 provides:-*

"for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary for the offence." For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement and alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution

and the court to ensure that the witness gives the relevant evidence which proves the offence.' (Emphasis added).

See: **Nyamasheki Malima@Mengi v. R**, Criminal Appeal No. 177 of 2020.

In that case, it was of utmost importance for the Prosecution to establish that the Appellant's penis penetrated the victim's vagina for rape to stand.

While I take that position, I am aware that in certain circumstances the victim may fail to state in clear terms that the accused's penis did penetrate her vagina. This may be caused by age, culture, upbringing or any other circumstances. This has been elaborated in several cases such as the case of **Mathayo Laurence William Mollel v. R**, Criminal Appeal No. 53 of 2020 where the Court of Appeal cited with approval its decision in the case of **Joseph Leko v. Republic**, Criminal Appeal No. 124 of 2013 in which it was stated:

> *'Recent decisions of the Court show that what the court has to look at is the circumstances of each case including cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters. The cases of Minani Evaristi v. R, CRIMINAL APPEAL NO. 124 OF 2007 and Hassani Bakari v. R CRIMINAL APPEAL NO. 103 OF 2012 (both unreported) decided by this Court in February and June 2012 respectively are some of the*

recent development in the interpretation of section 130(4) (a) of the Penal Code.'

While I subscribe fully to that position, in the circumstances of this case where the victim is of fourteen years, I am convinced that she was capable of testifying unequivocally about what happened to her with regard to the offence of rape. With this shortfall on the part of the Prosecution's case, it is my considered view that the offence of rape against the Appellant was not proved to the standard required by the law.

For the foregoing reasons, I quash the conviction and set aside the sentence in respect of the first and second counts as they were not proved to the required criminal standards of proof. I order the immediate release of the Appellant from prison unless he is held for other lawful cause.

Right To Appeal Explained.

DATED at **MWANZA** this 20th March, 2023.

KS KAMANA

JUDGE