THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 76 OF 2022

(Originating from the District Court of Chunya at Chunya Criminal Case No. 23 of 2021)

ABISAI s/o SAID ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 13/02/2023
Date of judgment: 06/03/2023

NGUNYALE, J.

The appellant ABISAI SAID was charged before the trial court with two counts namely; Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R. E 2019 and the offence of Impregnating a School Girl c/s 60 (1) (a) (2) of the Education Act No. 2 of 2016.

The facts which led to the filing of the respective charge sheet may simply be extracted from evidence before the trial court that PW1 testified that she was a student of form three at Makongorosi Secondary school and the appellant was well known to her as a neighbour and her lover. Around November 2020 they entered a sexual relationship with the appellant

whereby they had sexual intercourse in November and sometimes in December 2020 without preventives. Later she was found to be pregnant. The testimony of PW2 Charles Simon Hakimu the father of the victim was to the effect that her daughter PW1 was born on 3rd April 2006, therefore at the time of commission of the offence she was 15 years old. He suspected her daughter to be pregnant, upon asking her she conceded to the suspicious and she mentioned the appellant as the man responsible with the pregnancy. PW3 F 3098 D/Cpl Meshack testified to the effect that he interrogated the appellant who confessed to have been in sexual relationship with the victim but he never tendered a Caution Statement to that effect. PW4 Anthony Simon Masanyiwa a doctor testified that on 1st February 2021 he medically examined the victim and detected her to be five weeks pregnant.

The appellant was availed an opportunity for defence. In his defence as DW1 he completely disassociated with commission of the offence of rape and impregnating a school girl. He stated that after all he did not know the victim, he came to know her in court through this case. He prayed the court to dismiss the charges against him and set him free.

The trial Magistrate after having weighed the evidence on record he found that the defence case raised no doubt to the prosecution case which was

strong and watertight. Consequently, the appellant was convicted in both counts and he was condemned to serve thirty years imprisonment for each count and the sentence to run concurrently.

The appellant was aggrieved with conviction and sentence meted, he preferred the present appeal based on the following grounds of appeal; **one,** no any one out of PW1 who witnessed or seen the appellant raping, **two**, that clinic card was not tendered by a doctor PW4, **three**, PW4 had no qualification per section 240 (1) (2) and (3) of CPA to conduct medical examination to the victim, **four**, the evidence of PW1 lacked corroboration because the phone alleged she was given by the appellant was not tendered to prove that there existed communication between the appellant and the victim. **Five**, the court convicted the appellant without DNA test from the expert, **six**, the evidence of the appellant was ignored by the trial court, **seven**, the prosecution failed to prove the charge per law and **eight**, the trial court erred to rely on the testimony of PW3 without caution statement to prove if it was true that the appellant confessed to have committed the offences.

The appellant who was unrepresented was called on the date of hearing to amplify his grounds of appeal. briefly he stated that nobody witnessed

him raping the victim he prayed the court to adopt all his grounds of appeal necessary to allow the appeal.

The respondent was represented by Ms. Mwajabu Tengeneza learned Senior State Attorney who speared forces to resist the appeal. She opted to argue the 1st, 4th and 5th grounds of appeal together. He referred to section 127 (6) of the Evidence Act that evidence of the victim provided she is credible is enough to prove the offence of rape. The position of the law was elaborated in the case of **Suleman Makumba vs R** (2006) TLR 284 which states that true evidence of rape comes from the victim. She elaborated her stance by arguing that no other witness saw the appellant raping is irrelevant in this circumstance. On the complaint about DNA she stated that such evidence in not important per legal position of Tanzania because it is optional. To boulter her point she was quickly to cite the Court of Appeal case of **Robert Andondile Komba vs DPP,** Criminal Appeal No. 465 of 2017 (unreported) where it was emphasized that DNA test is not necessary so long as penetration is proved. The testimony of PW1 was very clear that she was having sex with the appellant without protectives thus she became pregnant and the age of the victim was proved by her father to be 15 years old because she was born on 3rd day of April 2006. Clinic card was not tendered because the victim had yet

started to attend clinic therefore PF3 tendered by PW4 was enough. On the qualification of the doctor Ms. Tengeneza simply stated that the complaint is an afterthought because the witness PW4 introduced himself as a doctor and the appellant never objected. The doctor PW4 has qualification per section 240 of CPA to conduct Medical Examination.

The six ground was on the complaint that the defence case was not considered. From the outset Ms. Tengeneza dismissed the argument as an afterthought because the trial Magistrate analysed very well the evidence before it and entered judgment. The Magistrate found that PW1 was consistency in her evidence that; he used to meet the appellant at the home of the friend of the appellant. The appellant said that he never knew the victim before but he came to know him in court. The trial Magistrate said that the argument about knowing each other is an afterthought because the appellant never cross examined about that fact during hearing. It was the view of the State Attorney that his defence was considered and found to have raised no doubt to the prosecution case. The case of **Martine Misara v R**, Criminal Appeal No. 428 of 2016 was cited to bolster the point that failure to cross examine on an important fact means admission to what has been said to be true.

In the 7th complain that the charge was not proved beyond reasonable doubt she submitted that the ground has no merit because both counts were proved to the required standard because PW1 proved that there was penetration done by the appellant and pregnancy was proved. The last ground also has no merit because caution statement was of no relevancy since the best evidence in rape cases comes from the victim. The evidence of the victim PW1 was enough to ground conviction.

Having heard the rival submissions, I will determine the complaints in the appeal one after another. In the first count the appellant complains that no other witness than PW1 witnessed him raping her. The appellant is correct that only PW1 speaks about what took place between her and the appellant at the scene of crime however that position is supported by law as submitted by the learned Senior State Attorney that in rape cases the evidence of the victim is enough to ground conviction provided the witness is credible. Now the important test is whether PW1 was a credible witness and reliable. The witness was competent and entitled to be believed. In legal practice, every witness is credible and reliable unless there are reasons to challenge this as held in the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 367 that: -

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good, and cogent reasons for not*

believing a witness. The prosecution called three witnesses, PW1, PW2, and PW3 to prove its case. Their testimony was not challenged. What is important is the credibility and reliability o f the evidence and not the number o f witnesses called on to testify."

In the case at hand PW1 testified clearly that the appellant is the one who introduced to him the issue of sexual relationship and they were having sex with him between November and December 2020. Even at the time when her parents suspected her to be pregnant she easily mentioned the appellant as a person responsible with raping her and making her pregnant. PW2 the father of the victim testified that when it was established that the victim was pregnant, they asked her as to who was responsible with the act and she mentioned the appellant. The consistency of her evidence makes the court to support the version of Ms. Tengeneza that PW1 was a credible witness whose evidence is enough to ground conviction as ruled in the case of **Suleman Makumba** (supra). Therefore the 1st, 2nd, 4th and 5th grounds of appeal are worth of being dismissed for lack of merit. PW4 as a Clinical Officer was a competent expert, after all the appellant had an opportunity to cross examine him about his qualification and competency of the PF3. PW4 is a Medical Practitioner recognized by section 3 of the Medical Professionals Act.

In the fifth ground of appeal the appellant complaint that the court convicted him without DNA test, in my view I think this ground should not

detain long the court for two good reasons as accurately submitted by the learned State Attorney. **One**, that in our legal system DNA test is optional in sexual offences and **two**, the fact that evidence of a victim alone can ground conviction is still a good law the ground of appeal becomes weak.

In another fight by the appellant, he complained in the sixth ground of appeal that his defence case was not considered in entering the final verdict. Ms. Tengeneza urged the court to dismiss this ground as baseless considering that the trial Magistrate adequately evaluated the evidence of the prosecution and the defence in his judgment. With respect, I agree with the learned Senior State Attorney, it is plain from the judgment of the trial court that the court indeed considered the evidence of the prosecution witnesses and appellant's defence. As I also perused the impugned judgment, the first appellate court dutifully evaluated the prosecution evidence of PW1, PW2, PW3 PW4 and DW1 to enter its decision. In my own re-evaluation of evidence, I found that PW1 clearly pointed a finger of guilty to the appellant that he is the one who raped her and made her pregnant, the evil exercise of having sex was done in November and December 2020. PW2 proved that the victim was 15 years old and PW4 testified to the effect that he examined the victim and he found her to be pregnant on 1/02/2021. The evidence on record proved

all ingredients of the offence of rape which are penetration by nobody else but the appellant and that the victim was below 18 years old. Therefore, the trial Magistrate correctly believed the prosecution evidence as worth of grounding conviction. He considered the defence evidence and found it wanting because it raised no doubt to the prosecution case as he stated at page 11 of the typed judgment. This ground of appeal has nothing substantial; it is wealthy of being dismissed as I hereby dismiss it.

I now come to ground seven of appeal where the appellant complain that the offences were not proved beyond all reasonable doubt. This ground is simple; from what has been endeavoured, the complaint has been clearly determined while dealing with the other grounds of appeal above. Ms. Tengeneza for the respondnet submitted that the offence of rape was proved beyond reasonable doubt by PW1 that she was raped by the appellant and pregnancy was proved. As I stated earlier this is not the ground to detain long because PW1 testified that she was having sex with the appellant. She knows the appellant very well as a neighbour. The fact that they knew each other was not objected by way of cross examination by the appellant during hearing. The appellant came to deny knowing the victim during defence hearing which has been ruled to be an afterthought.

In the case of **Martine Misara** (supra) it was emphasized that failure to cross examine on an important fact means admission to what has been said to be true. Taking all those in totality I am of the settled view that the offence was proved beyond all reasonable doubt the cardinal principal in criminal cases. The last ground of appeal will only be an academic exercise without any legal bearing because no caution statement was tendered as evidence.

In the end result I find no justification for interfering with the findings of guilty by the trial court that PW1 was raped and made pregnant by a person and the very person who committed the offences is the appellant. The appeal is dismissed entirely for lack of merit.

Dated at Mbeya this 6th day of March 2023.

D. P. Ngunyale
Judge

Judgment delivered this 6th day of March 2023 in presence of the appellant in person and the respondent represented by Rodgard Eliamani learned State Attorney.

D. P. Ngunyale
Judge