IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL No. 15 OF 2022

(*Originating from Criminal Case No. 29of 2021of the Meatu District Court*)

JAPHET MIKASI MITINJE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

21st February& 31st March 2023

MASSAM, J:

This is an appeal emanates from Criminal case No. 29of 2023 from Meatu District Court where the appellant one Japhet Mikasi Mitinje was charged with two counts of rape contrary to sections 130 (1) (2) (e), 131 (1) of the Penal Code [Cap 16 RE 2019] and Impregnating a School Girl Contrary to section 60 A (3) of the Education Act Cap 33 No. of 2016. When the charge sheet read over to the appellant/accused person, he

disputed to commit the offence on both counts. After a full trial he was found guilty, convicted and sentenced to serve 30 years imprisonment.

The brief facts leading to this appeal are that from the month of December 2020 to February 2021 at Isengwa Village within Meatu District in Simiyu Region appellant did have intercourse with the victim Girl with 17 years who was in form 11 at Itinje Secondary School, as a result of sexual intercourse appellant impregnated her.

On July 2021 the victim changed behavior she became fraught, she was suspected to be pregnant. The suspect lead to her parent to take her for pregnancy examination. She was diagnosed at Meatu District Hospital and the result come with the findings that she was pregnant. When she was questioned who's responsible for that pregnancy, she mentioned the appellant. later appellant was arrested for being having sexual intercourse with the victim which caused pregnancy to the said victim. Appellant was arraigned to Meatu District court where he was charged with the two stated above counts which he disputed.

To proving the charge, prosecution side called 4 witnesses with two exhibits. Appellant had one witness, himself with no exhibit.

In essence and the substance of the prosecution case as obtained from the trial records indicate that, a victim (PW1) is a girl born on 12/09/2004 and at a time she was testifying the evidence she had 17 years old Form she was 11 schooling at Itinje Secondary School. She informed the court that she was impregnated by the appellant after they had been in intimacy friendship since December 2020 to February 2021. Where they were cohabiting at the home of the appellant. She said appellant approached her to have sexual relation, on December 2020 appellant called the victim while they were at Isengwa Church where appellant told her he was fallen in love with her, in response, she told him she even her loves him.

She revealed that they went to the appellant's home entered inside the room, they started a romans by the appellant touching the victim then slept on the bed. Later they stripped off their clothes remained in nude, appellant told the victim to allow him to enter between her thigh and penetrate his penis into her vigina, she felt pain and oozed with blood. Appellant poured his grains into her vigina thereafter she did not go her menstruation period. She said she informed her mother and the appellant

that she is missing her menstruation, when she was taken to Meatu District Hospital for medical test, the result was positive with pregnancy.

PW 2 the father of the victim testified in trial that while he was in Singida he got information from her wife telling him that his daughter (the victim) was impregnated, he decided to go back to his home, while there he questioned the victim, the victim told him that appellant is responsible for her pregnancy he went to the school of the victim where he informed the head master, the head master told him to report the matter to Police.

PW3 the clinical Officer at Meatu District Hospital on his evidence testified before the trial court that on 7/7/2021 he was on duty at Meatu District Hospital, the victim in a company of the Police Officer one WP Khadija. He was told that the victim was raped so he was asked to examine her, after examination he discovered that the victim had pregnancy of eight months, but he said he did not know who was responsible with the pregnancy.

PW4 the head master of Itinje Secondary School testified to the effect that on 3/7/2021 at 19:00 hrs he was called to meet a parent of the victim, on that meeting he was informed by the said parent that victim is impregnated. He said they arranged to take the victim to Hospital. The

result from the hospital proved that the victim had pregnant. PW4 proved that the victim was a student of his school by tendering attendance register which was admitted as exhibit P2.

Appellant in defense, refused to have relationship with victim though he said he was meeting with her in the church and he never altered words of love to her. It was on 7/7/2021 when he was arrested by Police in connection with case. When the respective cases on both sides were closed, the presiding learned trial Magistrate having evaluated the evidence, he found appellant guilty and convicted him as charged based on the PW1 evidence together with corroboration of evidence of PW2, PW3, PW4 which prove that the victim was impregnated and she was a school girl. Therefore, the appellant convicted on both counts.

Aggrieved by both, the conviction and sentence, the appellant has come to this Court, he lodged a memorandum of appeal comprising four grounds of appeal.

1. *That the trial learned Magistrate erred in law and facts to convict and sentence the appellant without taking into consideration that, the prosecution side failed to establish its case beyond reasonable doubt.*

2. *That learned Magistrate erred in law and fact by convicting and sentencing the appellant on contradictory evidence of the prosecution side.*
3. *That, the trial learned Magistrate erred in law by convicting and sentencing on the offence of impregnating the fact that no DNA test conducted to prove on offence.*
4. *That the trial Learned Magistrate erred in law and fact by entertaining the matter in absence of social welfare Officer.*

When the appeal was called on for hearing, the appellant was representedby Maria Mwaselela, learned counsel. The respondent Republic was represented by Ms. Glory Ndondi, learned State Attorney.

Before started her submissions, Ms. Mwaselela prayed the court to abandon the 4th ground and the same argued the 1st and 2nd jointly and the 3rd ground argued separately.

Submitting for 1st and 2ndgrounds, she stated that the trial Magistrate erred in law by convicting the appellant without strong evidence as per section 3 (2) (A) of TEA Cap 6, 2022. She also said that the evidence

testified was contradictory one as per page 7 where Pw1 (the victim) testified that she started relationship with the appellant from December 2020 to February 2021 when she found that she was missing her menstruation, but she reported the matter on May, 2021.

On the other hand she contended that PW2 said that he was informed the pregnancy of his daughter on July 2021 via phone it was two months after his wife came to know about the issue, but the said mother of the victim was not called before the court to testify and answer some of the questions which would be put on her.

She went on faulting the conviction by stating that PW1 at page 8 was cross examined, she told the court that she doesn't remember exactly date when she was having sex with the appellant, she said the issue creates contradiction in the evidence.

Another contradiction of the evidence, said that the act of the victim to fail to report the incidence at the early stage and failure to mention appellant at earlystage cause contradiction. In support her argument she referred the court the case of **Elisha Edward vs Republic**, CAT Criminal Appeal No. 33 of 2019.

The 2nd issue of inconsistence and contradiction, she submitted that the evidence of PW1 and PW2 wanted credibility, in this issue she cited that case of **Butogwa John vs Republic**, Criminal Appeal No. 450 of 2017.

The 3rd issue that the prosecution failed to call important witness the mother of the victim, she contended that failure of that creates doubts. Again, the prosecution evidence show that they were given PF3 for investigation, but no Policeman called to prove that PW1 was given PF3, she thought the case of **Elisha Edward vs Republic**, (supra) is relevancy to support this issue as would talk about how the incidence happened, the date of arrest, how that arrest conducted, name of the investigator. Prayed the court to consider his grounds of appeal and set appellant free.

On the issue that appellant impregnated the victim, Ms. Mwaselala submitted that the prosecution did fail to bring the strong evidence which connect the appellant as per section 3 (2) of the TEA. She argued that the trial Magistrate erred in law and facts to convict and sentence the appellant as there was no DNA test conducted as the evidence show that before the prosecution closed their case, the victim was already given birth, they had chance to satisfy themselves who was the father of the said born child and to prove the 2nd count of impregnating a school girl. She said the case of

Mohamed Salim Mpupa vs Republic, Criminal Appeal No. 159 of 2020. On that she said the court stated that when it appear the impregnating the school girl and when the child was already born and the case is yet closed, the DNA test is important to prove that appellant is the father and he was the one who raped the victim as in **Nurdin James @ Kabogo vs Republic,** Criminal Appeal No. 38 of 2021.

In response, Ms. Glory opposed the appeal and supported the appellant's conviction by stating that prosecution proved the charge against the appellant. In reply to the 1st ground, she submitted that the prosecution side proved the charge of rape as the PW1 and PW2 did prove the age of the victim as they testified that the victim was under age of 17 years old. She argued that at page 7, PW1 proved the element of penetration as she said that she had a close relationship with the appellant from December 2020 to February 2021. Appellant did have sexual intercourse with appellant as he penetrated his penis to her vagina and continued to have sexual intercourse later she missed menstruation. She informed her mother and she had never had sexual intercourse with anybody.

In support to her submission on the sexual offence, she referred the court to look the case of **Seleman Makumba vs Republic**, [2006] T.L.R 379 where the court stated that best evidence in sexual offences come from the victim. she said that evidence is credible as per section 127 (7) of the TEA. She informed the court that the evidence of PW1 shown that she consented but the law provides that consent of a child is immaterial, again evidence of PW1 corroborated with PW3 clinical Officer who said that he checked PW1 and found that she was pregnant. With thus evidence she said PW1 and PW2 proved that charge of rape and impregnating the school girl.

On issue that PW1 was a school girl, she submitted that PW1 evidence corroborated with the evidence of PW4 who in his testimony informed the court that the victim was a student at Itinje Secondary School and he supported his evidence by tendering the admission and attendance registers.

On issue that the victim failed to name an appellant at early stage, she contended that the cited case of **Eisha Edward vs Republic,** (supra) is distinguishable as it was not easy for the victim to inform her parents but she informed the appellant at the early stage that she was pregnant also

she consented that's why she did not mentioned the appellant. She submitted that PW1 found herself pregnant, she reported to her mother on May 2021, and after her father got information on July 2021 from his wife as he was in Singida. She said the evidence have no contradiction shown.

She further counter attacked the issue that the important witnesses like the victim's mother, arresting Police Officers were not called to testify in the court, she argued that section 143 of TEA did not force to give many witnesses to prove the case, she said failure to call those witnesses was not fatal.

Replying on the issue of DNA, Ms. Glory submitted that there is no law which force them to conduct the DNA test but the prosecution was supposed to prove that PW1 had sexual intercourse. She stated that PW1 on page 8 testified that on 19/8/2021 and on 7/7/2021 are the times when victim was discovered that she was pregnant and there is no exhibit which show when the victim gave birth but testified when she was impregnated and appellant was responsible for the said pregnancy. With thus, prayed the court to dismiss appeal and upheld the trial court decision.

In rejoinder submission, Ms Mwaselela reiterated what she submitted in chief that prosecution failed to connect the appellant on issue of rape and pregnancy that appellant impregnated the victim.

On my part, having carefully considered the grounds of appeal, the submissions made by theparties' learned counsels and examined the record before me, I think, the burning issue for my consideration is ***whether the prosecution proved its case beyond reasonable doubt***.

There is no doubt that the prosecution case relied heavily on PW1's evidence as there was nobody who witnessed when the offence was committed. Therefore, in resolving this appeal, I will base on the basic principles governing that best evidence on sexual offences come from the victim, as well discussed in the case of **Seleman Makumba Vs. The Republic,** [2006] TLR 25. Where it was observed that: -

*"**True evidence of rape has to come from the victim,** if an adult, that there was penetration and no consent, and **in case of any other woman where consent is irrelevant, that there was penetration.** In the case under consideration the victim, Ayes, **said the appellant inserted his male organ into her female organ.** That was penetration and since she had not consented to the act that was rape*

not withstanding that no doctor gave evidence and no PF3 was put in evidence."

Starting with the jointly 1st and 2ndgrounds of appeal, Ms. Mwaselela challenged that the trial Magistrate erred in law by convicting the appellant without compliance with requirement of section 3 (2) of the Evidence Act Cap 6 as she said the evidence testified by prosecution witnesses were contradictory one. She mentioned three contradictions that, PW1 testified that she started a relationship with the appellant from December 2020 to February 2021 when she found that she was missing her menstruation, and she then reported the situation to her mother on May, 2021, and on July 2021 her mother informed PW2 that their daughter had pregnant. Two, she lamented that the mother of PW1 and the Police Officer who investigated the matter were not called to court to testify the mother of the victim as the first person to be reported the matter. And the third contradiction is that the victim failed to name the appellant at the earliest stage of which she said that the failure on the part of witness to name a suspect at the earliest stage renders the evidence of that witness with highly suspect and unreliable.

It is from those purported contradictions counsel for the appellant thought the prosecution side failed to prove the first count of the charge. As far as the issue of contradiction raised by the counsel for the appellant, I am duty bound to first determine the said contradiction then move forward to the main issue at hand. It is true the law requires that where there is alleged contradictions and inconsistencies of evidence in the case the Court has a duty to examine them and establish whether they are minor or material and whether they go to the root of the case as in the case of **Mohamed Said Matula vs. R,** [1995] TLR. 3 in the following words:

"..*where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter*"

In subscribing the principles in the mentioned case above I have tried to address the issue of contradictions as follows; the fact that PW1 after started their relationship with the appellant form December 2020 to February 2021 later the victim found herself is missing menstruation she

came to report the situation to her mother on May and her mother informed PW2 on July 2021. I don't see any contradiction here, what I see is, the relationship as per PW1, emanate from December 2020 to February 2021, nothing contradicted the court to make the trial court not to understand the event that the victim after having relation with appellant, on May 2021 she came to realize that she was pregnant. Failure to realize at earliest stage or report the matter at later stage cannot make a fact to be contradictory, though nothing factors established by PW1 that she was prevented her to inform her mother, the same cannot be blamed or found it contradiction, issue of pregnancy is an issue of biological factors which need scientific proof, what so ever to note that the victim had having pregnancy at early stage or later, to me the important thing for the court to understand is, the victim contacted pregnancy and on May, 2021 reported to her mother.

The second contradiction that the mother of the victim being a first person to be informed, the said mother of the victim and Police investigators were not called to testify before the court. It is true that the said mother of the victim was the first person to be informed by the victim that she contracted pregnancy by the appellant, she was the very person

who informed PW2 that PW1 was impregnated and the same the police who investigated the matter were all not called before the court to testify the evidence, but was it the must for them to be called to testify the evidence, of course mother of the victim was a source of information who led PW2 to report the issue to school and later to Police, but their evidence could not add anything value than the evidence of PW1, PW2 and PW3 who in their evidence proved that victim contracted pregnancy, what was testified by PW1, PW2, and PW3 were enough to establish that the victim was pregnant. I agree with Ms. Glory that the law is very clear in terms of **section 143 of the Evidence Act**, Cap 6 R.E. 2022, there is no specific number of witnesses required for the prosecution to prove any fact, the case law in **Yohanes Msigwa vs Republic,**[1990] TLR 148. Subscribed the same that what is important is the quality of the evidence and not the numerical value or specific witness.

Now I move forward to third contradiction. Ms. Mwaselela contention that PW1 failed to name appellant at the early stage that who impregnated her as per **Elia Edward vs Republic,** (supra) it is as per cited case at page 12 as quoted that;

"Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts, such witnesses have always had their credibility to the extent of having their evidence discounted."

Basing on the quoted directives above, I had once again read the proceedings of the trial to look what PW1 testified. At page 7 of the trial record revealed the testimony of PW1 to the effect that, the victim and the appellant they continued to do sex till February 2021, PW1 told the appellant/accused that she was not menstruating. She said on May 2021 she told her mother, her mother told her that was not menstruating because she was pregnant. Her mother told her father who by then was in Singida who after coming back he took the victim to school then to Hospital and Police station, while at Police station PW2 questioned the victim who was fraught, the victim said is Japhet (appellant). This is the stage the victim named the appellant, so naming an appellant at the police station too was an earliest stage.

Upon determined the issue of contradictions now I move forward to cardinal issue that whether the prosecution proved the case that appellant committed the charged counts. Ms. Mwasesela challenged the trial court in

the view that trial Magistrate failed to comply with the requirement of section 3 (2) of the TEA in convicting the appellant but State Attorney, on her part had in contrary view that the prosecution proved the case in a standard required, as for the nature of the offence, she said the best evidence comes from the victim. She supported her arguments with case of **Seleman Makumba vs Republic,** (supra).

Indeed, this appeal emanates from a rape case against the appellant which the act alleged to cause pregnancy to the victim. In considering this ground and the nature of the said offences, it is trite law that the prosecution must prove the substance established in the case of **Seleman Makumba**, for the court's deep concern as now I do, is to look if the testimony of the victim qualifies the ingredients and elements to prove the said committed offence. As correctly to prove the charges against the appellant two things the prosecution ought to have been established at a trial. First, that, there was rape and second, the appellant is the one who raped the victim. For purposes of the first element, it had to be proved that there was penetration of the appellant's male organ inserted into the victim's vagina as provided for under the provision of section 130(4) of the Penal Code which states thus:

130.-(4) For the purposes of proving the offence of rape-

(a) ***penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*** *and*

(b) ***evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent***.

Having highlighted the above provisions, I now move to look the evidence appearing in the proceedings as narrated by a victim (PW1). The testimony testified as quoted as hereunder that;

> *...I was impregnated by the accuse after we had been intimacy friendship since December 2020 and February 2021 we were cohabiting at their home-Isengwa. The first time to begin relationship was when I was at the church, the accused approached me to have sexual relation. He told me he love me. I told him I am a student. We left/departed each other. Later on the same month of December 2020 he called me when I was out of the church Isangwa. He once again told me to have fallen in love with me. I also told him that "in fact even me I love you" we went at their home and entered inside his ghetho (his room).*

When inside his ghetto he began a romans by touching me and later stripped me off to naked, and he stripped off his clothes to nude. We then slept on bed. He told me to allow him enter between my thighs and penetrated his penis into my vagina. I felt pain and oozed with blood. He poured his grains into my vagina I did not go to menstruation period. It was on December, 2020. We continued to do sex till February 2021. I told the accused that I was not menstruation.

It is from the above quoted testimony of PW1 Ms. Glory insisted that the prosecution proved the element of penetration as the victim informed the court that she had close relationship with the appellant from December 2020 to May 2021. He said PW1 told the court that appellant did penetrate his penis to her vagina. Ms. Glory dwelled his minds in the principle established in the case of Suleiman Makumba (supra) as many of us take the case as guiding principle that in cases of sexual offences, best evidence must come from the victim, though the said guidance not we need to be taken it lightly, the court need to scrutiny the evidence of the victim and the said evidence must come into satisfaction that a manhood inserted into the vagina of the victim. It is well stated in the case of **Mathayo Ngalya**

@ Shaban vs. Republic, Criminal Appeal no 2006 (unreported) 15 the court held that

"*the essence of the offence rape is penetration of the male organ into vagina, That for the offence of rape it is out most important to lead evidence of penetration and not simply to give general statement alleging that rape was committed without elaborating what took place".*

Is not enough, I am also convinced and well learning student of a Court Appeal's directives in**Mohamed Said vs R**. Criminal Appeal No. 145 of 2017 CAT at Iringa, the Court at page 16 cited the case of the Supreme Court of Philippines in the case of **PEOPLE OF THE PHILIPPINES V. BENJAMIN A. ELMANCIL**, G. R. No. 234951, dated March, 2019. The Court held:

"In reviewing rape cases, this Court has constantly been guided by three principles, to wit: (1) on accusation of rape can be make with facility; difficult to prove but more difficult for the person accused though innocent to disprove; ***(2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be***

scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence*. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted solely on the basis thereof."*

In the light of the authority above, is the testimony of PW1 fit the lines of the above case. I have evaluated the testimony of PW1 and see if her evidence proved that appellant inserted his penis into the vagina of the victim to prove the penetration or a rape. Reading between the line I found that though the victim and the appellant had intimacy relationship where it has proved that they reach a time they slept on a bed and stripped their cloths, but the testimony of PW1 was not enough to prove that appellant did penetrate his penis into the vagina of the victim. PW1 told the court that after they stripped off their clothes, appellant asked to allow him enter between her thighs and penetrated his penis into her vagina. The statement clearly show the request of the appellant requesting from the

victim so that he could penetrate his penis, after that request nothing said that the victim accepted the request, or nothing stated that after appellant asked to do so, the victim allowed the request and thereafter appellant inserted the manhood into the vagina of the victim. I quote the words of the victim purporting to have penetrated;

> *When inside his ghetto he began a romans by touching me and later stripped me off to naked, and he stripped off his clothes to nude.* ***We then slept on bed. He told me to allow him enter between my thighs and penetrated his penis into my vagina****. I felt pain and oozed with blood.*

PW1 on other words said that," He *poured his grains into my vagina. I did not go to menstruation period".* what is grains in eyes of law, can the said grain cause a female miss her menstruation, this question was supposed to be cleared by the prosecution at the trial. On those words on form of request that appellant asking to enter the thighs of the victim are not satisfactory words to prove that appellant inserted his penis into the vigina of the victim. Again, the words he poured grains into my vigina is not clear if the said grains of being poured in the female organ may cause the pregnancy.

Nevertheless, the evidence of PW1 that she was raped, was supposed to be corroborated by the evidence PW3 the clinical officer at Meatu District Hospital. In his testimony, informed the court that on 7/7/2021 while he was on duty, the victim in a company of Police Officer one WP Hadija that the victim had been raped, he was asked to examine the victim. He testified that he examined her and discovered that the victim had pregnancy of eight months. He filled a PF3 which the court admitted as exhibit P1. I had careful reading the testimony of PW3 who noted that he was told to test if the victim was raped and contracted pregnancy, his evidence is to the effect that he only tested pregnancy and nothing words suggested that PW3 tested the victim and found raped. It is indeed the evidence of PW3 corroborate evidence that the victim contracted pregnancy but nothing to corroborate rape.

More also, Exhibit P1 (PF3 with case File No. MEA/RB/ /2021which referred to Hospital headed with instruction words that "*KUMPA MIMBA MWANAFUNZI*" the General information of the said PF3 provides that ***History of Raping and sexual of genital organ female.. indicated...No any bruise***, as I have said the testimony of PW3 and the exhibit PF1 are silent if the victim tested her virginal to prove the

penetration rather they proved the pregnancy. To me is unsatisfactory in a sense that PW3 never tested a victim to prove if she had any penetration, I say so because sexual intercourse is not the only way for a female to conceive pregnancy rather in this current World, there are several ways for female to receive and conceive pregnancy. It can be by way of sexual intercourse or by way of IN VITRO FERTILIZATION (IVF) which need not manhood penetration.

I stand with Ms Mwaselela on her submission that as long as it had said the victim had pregnant by any means she could give birth after giving birth the prosecution had a chance to conduct a DNA test to a born child for a purpose of satisfying themselves if the DNA of the appellant matches to that of the said born child, if the result of DNA could matched between the blood of the child and that of the appellant, that could be evidence to corroborate the evidence of the victim to prove that appellant raped the victim and impregnated her.

With those findings, the question of who impregnated the victim as alleged in the charge sheet remain uncertainty, the charge sheet states that the appellant on unknown date and month off February, 2021 appellant did have intercourse with the victim and impregnated a school

girl the evidence is doubted as PW1 failed to prove penetration as well as PW3 and exhibit P1 failed to established that the victim was raped, rather the facts remain with evidence that the victim found with pregnancy.

With those findings and the reasons stated herein above, I proceed to say that the prosecution failed to prove that appellant raped and impregnated the victim. with thus I allow the appeal, quash and set aside the appellant's conviction. The sentence of 30 years imprisonment is set aside, appellant should be taken free forthwith unless for any legal cause.

It is so ordered.

DATED at **SHINYANGA** this 31st day of March, 2023.

THE HIGH COURT OF TANZANIA

R.B Massam
JUDGE
31/03/2023

COURT: Right of appeal explained.