IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO.158 OF 2021

(Original Criminal Case No. 319 of 2020 of the District Court of Serengeti at Mugumu)

WAMBURA SUKURU @ NYANG'OMBORI ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

17th & 22nd May, 2022

M. L. KOMBA, J.:

This is the decision against an appeal by Wambura s/o Sukuru who was convicted over three offences; rape contrary to section 130(1) and (2)(e) and 131(1) both of the Penal Code, [Cap 16 R.E 2019, now R.E. 2022]. Second offence was impregnating a school girl contrary to section 60 (A) (3) of the Education Act [353 R. E. 2002] as amended in 2016 and the third offence is preventing a school girl from attending school regularly contrary to section 4 (2) of GN No. 280 of 2002 when read together with the Education Act, [Cap 353 R. E 2002]. The appellant was sentenced to thirty years imprisonment for the first and second offence while for the third offence was sentenced to six months imprisonment.

It was alleged in the particulars of offence that on unknown dates between the month of March and July 2020 at Mugumu area within Serengeti the appellant had canal knowledge to a school going girl aged 13 years old who was a pupil of Kambarage "B" Primary School and impregnated her as a result she was not attending school regularly.

Accused denied a charge and denial attracted full trial. Under the testimony prosecutor relied on three prosecution witnesses (PW1, PW3 and PW4 and Exh. PE1 and PE5, exhibits the trial Magistrate was convinced that the offence against the appellant was proved beyond reasonable doubt and convicted the appellant. Unsatisfied by the conviction and sentence the appellant fronted to this court with six grounds which are;

1. *That, the prosecution side erred in law and procedure when failed to prove beyond reasonable doubt the specific date the victim leaves the school while there provided attendance Register as exhibit.*
2. *That, the trial court erred in law and fact to rely on prosecution evidence which does not connect the appellant with the fact in issue.*
3. *That, the evidence adduced by PW1 and PW4 is contradictory in nature and leaves subspecies hence the trial court erred in law and procedure to rely on that evidence.*

4. *That, the trial court erred in law and fact when relied on evidence adduced by PW3 one Albert S/O Kasanga which was contradictory in nature. He narrated nothing at where he tested the victim, his competence and if the appellant his the one impregnated the victim.*
5. *That, the trial court erred in law and fact when relied on PE.5 as an exhibit of proving that the appellant had love affair with the victim. The said exhibit proves the death of the victim and not otherwise.*
6. *That, the prosecution side erred in law and fact when failed to produce before the trial court a Guest Register from Furaha Guest House to prove that the appellant used the said Guest House to meet with the victim for love affairs.*

During hearing date, the appellant was remotely connected from Mugumu Prison, unrepresented while Republic was represented by Mr. Nico Malekela and Natujwa Bakari both State Attorneys.

When invited to argue his appeal, the appellant requested this court to adopt petition of appeal as filed and that he did not wish to submit any more but reserved his right of rejoinder. Petition adopted.

Mr. Malekela when given time to address the court he first registered their position that Republic is against the appeal. He prayed to join all six grounds

and submit them together focusing the appellant complaint that he was convicted on insufficient evidence.

It was his submission that the claim for guest house register was afterthought as the appellant did not raise that issue during trial and that at page 30 of the proceedings there are explanation of the victim statement and at page 31 Exh. PE5 was tendered and appellant did not object and therefore, claiming that the victim did not explain circumstances as to why victim and appellant met, this was not **cross examined during trial.** Exh. PE5 was victim statement and that appellant did not cross examine when PE5 was admitted and he refers this court to the case of **Nyerere Nyague vs. Republic,** Criminal Appeal No. 67 of 2010 (unreported) that a part which did not cross examine on material things which the witness testified the court should consider that testimony to be true.

About insufficient evidence it was his submission that the evidence was intact and prosecution managed to prove the case beyond reasonable doubt. He relied on the decision that the best evidence is one which come from the victim as was said in case of **Selemani Makumba vs. Republic** (2006), TLR, 379.

About the complaint of the appellant that doctor fails to prove that it is the appellant who raped the victim State Attorney refers this court to the case of the **Seleman Makumba** (Supra) that the medical report helped to show that there was a sexual intercourse but did not prove there was a rape. Furthermore, he prayed this court to visit at page 17 of the proceedings where the death certificate of the victim was tendered which showed that victim dead 18/12/2020 that's why prosecution tendered the Exh PE5 which was admitted without objection.

He concluded that the offence was proved beyond reasonable doubt basing on Exh P5 and it was correct for the appellant to be sentenced and he pray this court to uphold the lower court conviction.

When given time for rejoinder, the appellant submitted that the case needed thorough examination including DNA test in order to verify that he (the appellant) was the one who was responsible for that offence.

After being well associated with the petition of appeal and submission by State Attorney, it is my time now to determine whether the appeal is meritorious.

In doing so, I will combine all grounds in order to prove whether the offence was proved beyond reasonable doubt as it is the most requirement in all criminal charges that a person is not guilty of a criminal offence because his defense is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt. See In **John Makolebela vs. Kulwa Makolobela and Eric Juma @ Tanganyika** [2002] T.L.R. 296

The appellant apart from the Education Act related offences, was charged and convicted of offence of rape to contrary to section 130(1) and (2)(e) and 131(1) both of the Penal Code, Cap 16 R. E 2019 and consequently sentenced to 30 years in prison. For clarity and quick reference, I wish to reproduce the sections thus:

> *130.-(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

131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

From the above quotation, in order to prove the offence to the required standards, which the appellant was charged, the court need to prove that the victim is a girl below 18 years, the appellant is a male, credibility of witnesses and that admission of evidence in accordance to the law and the same are collaborated.

From the evidence composed by prosecution, PW3 and exhibit PE4 show that the victims lost her virginity and she was pregnant so there is no doubt that, under the law she was raped. Exh. PE2 and PE3 show that she was a school going girl. **One thing to be proved is that it is the appellant who actually impregnated the victim.**

Before I move a step further to determine this case, I find it is important to recall some important principles in criminal justice extracted from law and practice. In criminal cases, it is a cardinal principle that it is upon the

prosecution side to prove their case beyond reasonable doubt as per section 3 (2) (a) of the Law of Evidence Act [Cap 6 R. E. 2022]. What it meant by proving beyond reasonable, to put it simply, is that the prosecution evidence must be strongly as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence. See **Samson Matiga vs. Republic**, Criminal Appeal No. 205 of 2007, CAT at Mtwara (unreported).

Lets see how prosecution made their case. PW1 who is the mother of the victim while under oath informed the trial court that she asked her daughter why she don't want to attend the school, she did not prove what was the answer and decided to report to PW2 where she was given a letter and went to Mugumu Police Station. She said after interrogation at police the victim told police that she was pregnant and it was the appellant who impregnated her.

PW2 (teacher) informed the trial court that victim's mother told him that she was suspected her daughter to be pregnant. Later on the victim confessed to her teacher that she was pregnant. Reference is made to page 20 of the proceedings.

PW4 is a police officer, WP 5665 D/C Sijali, who informed the court that while she was at her working station (Dawati la Jinsia) she received PW1 accompanied by the victim and that PW1 was complaining that her daughter (victim) was pregnant and she has stopped to attend the school. PW4 then interrogated the victim who informed her to be pregnant and she mention that it was the appellant who impregnated her.

I find variance from the above narration from prosecution witnesses. What time exactly PW1 know that her daughter is pregnant. PW1 paused that she knows the pregnancy of her daughter while she was at police, PW1 further informed the trial court that victim confessed about her pregnancy after interrogation at police station further more, PW2 and PW4, a police officer informed the trial court that it was PW1 who told them about pregnancy of her daughter.

This being statutory rape, the confirmation of the pregnancy to victim is important. Identified contradiction is not minor as it can answer a question when the victim was suspected to be pregnant bearing in mind that the offence charged with the appellant does not require consent nor use of force to be confirmed. As I said, it is statutory rape. PW1 knew the status of her daughter to be pregnant and decided not to reveal that status. A witness

who tells a lie on a material point should hardly be believed in respect of other points. See **Zakaria Jackson Magayo vs. The Republic,** Criminal Appeal No. 411 of 2018, CAT at Dar es salaam.

Another issue is identification of the appellant. There is none among the prosecution who identified the appellant. The record shows PW4 informed the court that appellant was arrested on 20/10/2020 and he was charged. None of the witnesses informed the court that he was familiar with the accused (now appellant) rather than PW1 during re-examination by the prosecutor where she informed the court that the appellant was mentioned by the victim. Question which was unanswered is how does the prosecution know that Sukuru mentioned by the victim in Exh PE5 is the one charged of the offence. This question has no answer. Identification of the accused was supposed to be done prior to dock recognition. There is no evidence that the victim identified the appellant to be the person she referred when she mentioned him at the police. And that there is no evidence that on what circumstances the prosecution verified that the person mentioned by the victim is real the appellant and not other person.

I am in agreement with State Attorney that the best evidence in rape cases or offences involving sexual intercourse is from the victim as it is in the case

of **Selemani Makuba** (supra). Before dwelling much in that, let me utilize this time to analyse Exh PE5 which is said to be a witness statement.

When read the exhibit it indicates to be made under section 34B (2) (c) of the Evidence Act, [Cap 6 R. E. 2019]. The party of the Evidence Act which the section is placed is **PART IV STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES**. The following words goes like this;

> *'34.Statements, written, electronic or oral, of relevant facts made by a person who is dead or unknown, or who cannot be found, or who cannot be summoned owing to his entitlement to diplomatic immunity, privilege or other similar reason, or who can be summoned but refuses voluntarily to appear before the court as a witness, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court to be unreasonable, are themselves admissible in the following cases...'*
>
> *34B.-(1) .....*
>
> *(2) A written or electronic statement may only be admissible under this section-*
>
> *(a) .....*
>
> *(b) .....*

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

Am asking myself how comes that on 06/07/2020 prosecution predicted the death of the victim or to put it in other words, how was it possible for the prosecution to take statement under the said section which shows that the witness is dead or unknown or cannot be found, or cannot be summoned. This discussion is online with the knowledge that in rape cases the best evidence come from the victim. Prosecution shows from the beginning that they were not ready to call this key witness to testify in court.

To my understanding, on that material date (06/07/2020) and there after all possible witnesses made their statement in police in the cause of investigation and later on, investigator select relevant witnesses or potential witness depending on the circumstances of the case. When it comes to the knowledge of investigator that one of intended witness is dead in due cause of investigation or cannot be found is when section 34 B is invoking by tendering what was recorded during investigation. The issue is different from the appeal at hand where from the very first day prosecution intended to

hide the victim. Why am I saying so, it is due to the fact that her statement was recorded knowing they will not call her in court. That is the understand of this court. It was upon the prosecution now to disapprove this understanding.

What are the effect of relying on Exh PE5 which was wrongly procured and tendered, statement written therein cannot be questioned and verification becomes impossible although the author declared to be true. One of the important issues in cases like the one at hand is naming and identification of the accused. That was not done.

Moreover, one of the requirements needed to be adhered in the said form is that, number of pages in that form should be recorded and each page must be signed. Reading the exhibit at hand I find number of pages were not recorded and the statement maker did not sign or initial on each page as directed. All these are irregularity which make the entire Exhibit to lack qualities of it to be good evidence.

It is trite that the exhibit which is wrongly procured its remedy is for it be discarded as I hereby do. See **Shabani Hamisi vs. Republic,** Criminal Appeal No. 146 "A" of 2017 CAT at Tabora. Now having expunged Exhibit PE5, the question that follows is whether there is any cogent evidence to

sustain the conviction of the appellant. I have stated herein that the prosecution case was built upon three witnesses, namely PW1, PW3 and PW4, and two exhibits, the witness statement which I have expunged and PF3. PF3 cannot prove the offence against the appellant and so do the rest of the evidence which is hearsay which cannot prove the criminal offence to the required standards as not acceptable under section 61 and 62 of the Evidence Act.

I find merit in this appeal. The offence was not proved beyond reasonable doubt as required under the law. I accordingly, quash the conviction and set aside sentence and an order for payment of compensation. I order for immediate release of the appellant, **WAMBURA SUKURU @ NYANG'OMBORI**, from prison unless he is otherwise lawfully held.

Dated at **MUSOMA** this 22th Day of May, 2023

M. L. KOMBA
JUDGE

Judgement delivered in chamber in the presence of the appellant who was remotely connected from Mugumu Prison and in the absence of representative of the Republic.

M. L. KOMBA
JUDGE
22/05/2023