

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TABORA DISTRICT REGISTRY)**

**AT TABORA**

**DC CRIMINAL APPEAL NO. 40 OF 2021**

*(From the decision of Urambo District Court, Criminal Case No. 186 of 2020)*

**SHIJA S/O BUKOMBE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 13/03/2023*

*Date of Judgment: 24/04/2023*

**KADILU, J.**

In the district court of Urambo, the appellant herein was convicted of **firstly**, rape contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R. E 2019] and **secondly**, impregnating a school girl contrary to Section 60A (3) of the Education Act [Cap 353 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016. It was alleged that on diverse dates and times between July and September, 2020 at Mpandamlowoka village within Urambo district in Tabora Region, the appellant unlawfully had carnal knowledge with the girl named 'MEP' aged 15 years old, a Standard IV pupil at Upele Primary School. As a result of the said rape, MEP got pregnancy.

Briefly, the record shows that at the time of incident, PW1 was living with her grandmother who was above 100 years. The appellant wanted to marry PW1, but the grandmother demanded very high bride price which the appellant could not afford. Then, the appellant and PW1 started to have sexual relationship. They had sexual intercourse in different occasions during the night in the bush and in the grandmother's residential house. In September 2020, PW1 was found to be pregnant. The matter was reported to the Village Executive Officer and later to the police hence, the appellant was arrested and charged with the above offences.

Before the district court of Urambo, the appellant pleaded not guilty, but at the conclusion of the trial, he was convicted as charged and sentenced to serve thirty (30) years imprisonment for each count. The sentences were to run concurrently. Aggrieved with both the conviction and sentence, he preferred the present appeal based on five (5) grounds as follows:

- 1. That, the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law.*
- 2. That, the age of the victim (PW1) was not cogently established by the prosecution in the charge sheet, PF3 and before the Magistrate who put her on oath during the testimony.*
- 3. That, Section 127 (7) of the Evidence Act [Cap. 6 R.E. 2019] was not complied with.*
- 4. That, evidence of PW1 and defence evidence taken together shows that PW1 was married to the appellant and not separated (though forced marriage) save that, dowry was not paid.*

*5. That, the defence evidence of the appellant was not considered by the trial court.*

When the appeal was called for hearing, the appellant appeared in person, unrepresented. He restated his grounds of appeal and prayed the court to allow the appeal, quash the conviction, set aside the sentence and order his release from prison. The respondent was represented by Mr. Robert Kumwembe, learned State Attorney. Mr. Robert started to argue the 2<sup>nd</sup> ground of appeal in which the appellant contended that age of the victim was not determined by the trial court. The learned State Attorney conceded to this ground and prayed the court to allow it.

He however contended that the appellant did not appeal against conviction and sentence on the 2<sup>nd</sup> count of impregnating a school girl. He thus urged the court not to entertain the appellant's submission on the 2<sup>nd</sup> count. He prayed the trial court's finding and sentence to be confirmed. The court denied the prayer by Mr. Robert not to allow the appellant to submit on the 2<sup>nd</sup> count because the petition of appeal is clear that the appellant is challenging the conviction and sentence. Therefore, the appellant was availed with an opportunity to submit on all grounds of appeal as presented in his petition of appeal.

The point for determination before me is whether the appeal is meritorious or not. In resolving this question, I will not discuss the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal as I consider the 1<sup>st</sup> ground to be the conclusion of the appeal itself and the parties are in agreement with regard to the second

ground of appeal. Concerning the 3<sup>rd</sup> ground of appeal, I am of the view that Section 127 (7) of the Evidence Act was misquoted in the appellant's petition of appeal as the provision is about the definition of the term 'rape.' I think Section 127 (6) of the Evidence Act is the appropriate provision since the appellant is complaining that the trial court erred in finding PW1 as witness of truth without recording the reasons in the proceedings. The provision stipulates:

*"... where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender age or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth."*

The appellant raised a complaint that the offence was not proved beyond reasonable doubt because evidence of PW1 was not trustworthy and there were numerous contradictions. I have perused the charge sheet and found it showing that PW1 was a pupil of Upele Primary school whereas the school attendance sheet indicates that she was a pupil at Mpandamlowoka primary school. Further, PW1 testified that she was a pupil of Upele Primary school while PW2 who was her teacher stated that he was working at Mpandamlowoka Primary school. Again, PW1 and PW2 testified that PW1 was taken to the hospital by the school authority, but the Doctor who

examined PW1 stated that PW1 was taken to the hospital by her grandmother.

In the PF3, the same Doctor indicated that PW1 was taken to the hospital by her grandfather's young brother. Furthermore, on page 9 of the trial court's proceedings PW1 told the court that she did not see the appellant's penis since they used to sex in the nights, but she knows that the appellant is not circumcised. During cross-examination by the appellant, PW2 told the court that to confirm fatherhood or parentage DNA test is usually a must. He said although PW1 was pregnant, he (PW2) was not sure that the appellant was responsible for the pregnancy.

The State Attorney was of the firm view that the offence was proved beyond all reasonable doubt because the testimony of PW1, victim of the offence proved that she was raped and the rape was done by the appellant who also made her pregnant. In ***Suleiman Makumba v R.***, (2006) TLR 278, it was held that true evidence of rape comes from the victim who proves the offence to the standard required. In the instant case, the appellant was charged with the offence of impregnating a school girl. The prosecution was supposed to prove that it is the appellant and nobody else who made PW1 pregnant. In the case of ***Peter Pilvester v R.***, Criminal Appeal No. 131 of 2020, High Court of Tanzania at Mwanza, it was stated:

*"What the prosecution was able to prove was that the victim was impregnated. It did not bring concrete evidence to prove that it was the accused, now the appellant, who caused such*

*pregnancy. That would have best been proved by scientific evidence, and in the circumstances of the case, the DNA test evidence was much appropriate to ascertain the fatherhood of the baby, which evidence, in turn would have proved a person liable for impregnating the victim."*

In absence of such evidence, it was unsafe for the trial court to find the appellant guilty of impregnating the victim. During the trial, the prosecution managed to prove that PW1 was pregnant. There is no doubt about this as testified by PW1 herself and the medical doctor. In considering the evidence careful, I find no evidence which proves that the appellant is the one who made PW1 pregnant in exclusion of all other men around the village. The prosecution ought to go further to prove scientifically that the appellant is the person who made PW1 pregnant. Lack of such evidence, I agree with the appellant that the offence was not proved beyond reasonable doubt.

PW1 testified that she was raped and impregnated by the appellant. Under the best evidence rule, her evidence may ground conviction if it is established that she was a credible witness. Basically, the offence of impregnating a school girl must be proved alongside with the sexual intercourse which in this case the allegations are that the appellant raped PW1. I have just held that it is doubtful that it is really the appellant who was responsible for that pregnancy. Despite the fact that there was proof that the girl was registered at Mpandamlowoka primary school with admission No. 3452, still the burden to prove the offence of rape and the incidental pregnancy remained to the prosecution.




This duty is two folds, first to prove that the offence was committed, and second to prove that it was the accused who committed that offence. See the case of **Maliki George Ngendakumana v R.**, Criminal Appeal No. 353 of 2014, Court of Appeal of Tanzania at Bukoba, (unreported).

Although in sexual offences the best evidence is that of the victim, the Court of Appeal has emphasized on the need to evaluate such evidence and that, conviction should be entered only where the court is satisfied that the victim's evidence is nothing but the truth. This was held in the case of **Mohamed Said v. R.**, Criminal Appeal No. 145 of 2017 as follows:

*"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general and Section 127 (7) of Cap. 6 in particular, and such compliance will lead to punishing the offenders only in deserving cases."*

As shown, the testimony of PW1 (the victim) was surrounded with contradictions which makes it unreliable. Consequently, I allow this ground of appeal and I see no reason to deal with other grounds of appeal. Since the prosecution failed to prove the charge against the appellant beyond reasonable doubt, I allow the appeal, quash the conviction and set aside the sentence. I order the appellant's immediate release from custody unless lawfully held for some other reasons.

**Order accordingly.**

  
**KADILU, M.J.,**  
**JUDGE**  
**24/04/2023**

Judgement delivered in Chamber on the 24<sup>th</sup> Day of April, 2023 in the presence of the Appellant and Mr. Joseph Mwambwalulu, State Attorney, for the Respondent.

  
**KADILU, M. J.**  
**JUDGE**  
**24/04/2023.**