

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF SHINYANGA)
AT SHINYANGA**

CRIMINAL APPEAL NO.93 OF 2022

(Originating from Criminal Case No. 33 of 2022 of Shinyanga District Court)

HUSSEIN ABDALLAH..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14th April & 9th June 2023

MASSAM, J:

This is an appeal arising from Criminal case No. 33 of 2022 of the Shinyanga District Court where the appellant was charged with one count of offence of rape Contrary to section 130 (1) (2) (a) of the Penal Code [Cap 16 RE 2002].

The trial court went into full trial and found the prosecution proved the case beyond reasonable doubt and convicted the appellant in the offence he was charged sentenced to serve 30 years in imprisonment. The

appellant was aggrieved with conviction and sentence, he lodged his appeal with five grounds which reads: -

- (1) That the prosecution evidence was variance with the charge sheet.
- (2) That the medical Doctor, one Hamis Machiya having testified that when he examined a victim sometimes on 19/11/2021, such victim was 31 weeks pregnant; the Honourable Principle Resident Magistrate erred in law and fact in holding that the appellant raped the victim on 28/9/2022
- (3) That the Honourable Principal Magistrate erred in law and in fact in holding that the victim was credible and/reliable witness.
- (4) That the honourable Principle Resident Magistrate erred in law and in fact for relying on appellant's caution statement, Exhibit P2 which was admitted into evidence contrary to the law.
- (5) That the prosecution failed to prove the case against the accused/appellant beyond reasonable doubt.

The facts leading to this appeal are that, appellant on 14/03/2022 he was charged in Shinyanga District Court for allegation that on 28/09/2022 at Ugweto area within Shinyanga District in Shinyanga Region, the appellant did Carnal knowledge with victim. It was established that on the mentioned date the appellant went to the home of PW1 where he found the victim and started to seduce her to have sexual relationship and she agreed, they managed to have sexual intercourse for two times. After some days victim was discovered pregnant, PW1 reported the matter to the police station, the victim was taken to hospital, upon examined it was discovered that she was pregnant. Accused was arrested, upon interrogated, he admitted to commit the offence and arraigned to court to answer the charge.

It was the testimony of PW1 that the victim is her relative living with her since May 2021, on 17/11/2021 at about 13:00hrs, while she was coming back home from her job, she found the victim was a sleep and she had acne on her face and her lips were dry. Upon seen that she suspected the victim to be pregnant. So she reported the issue to Police, and was ordered to take her to hospital for medical examination, after examination it was confirmed that the victim was pregnant. When the victim asked, she

mention appellant to be responsible as she was having sexual intercourse with him.

PW2, (the victim) told the trial court that she was living at Bugweto with PW1, on 28/09/2021 appellant went to their home to bring milk which he was asked by PW1, she received the said milk when she wanted to close the door, appellant pulled her and asked her to have sexual intercourse, she once refused but appellant started to pull her inside and she was ordered to remove clothes, he removed his clothes and inserted his penis in her vagina, she said appellant raped her and left. After that happened, she did not tell anybody but one day she was feeling bad, she went to sleep. it was that day her sister (PW1) found her and asked, she was taken to hospital and be found pregnant.

The evidence of PW1 was corroborated with evidence of PW4 that the victim had pregnant. PW4 the medical doctor testified in the trial court to the effect that on 19/11/2021 he examined the victim and found she had pregnancy but there was no evidence of penetration within 72 hours.

In defense, appellant had a general denial that he was arrested and taken to Police station, he said while there he was beaten and found himself admitting to have sexual intercourse with victim as alleged. He

said the complainant fabricated the evidence. He also complained that the medical doctor said the victim was pregnant but no evidence that he was responsible of the alleged pregnancy.

After both sides closed their case, the trial court determined the matter in results the appellant found guilty to the alleged charge, he was convicted with the offence and punished to serve 30 years imprisonment, he was aggrieved on both conviction and the sentence hence he appealed to this court.

When this appeal called up for hearing, appellant had a legal service of Mr. Audax Constantine learned Advocate, whilst the respondent/ Republic, represented by Ms. Glory Ndondi learned State Attorney.

In support of the appellant's appeal, Mr. Audax first notified the court that he will argues the first and second grounds of appeal only and abandon the rest of grounds of appeal.

Submitting the first ground, Mr. Audax stated that according to the charge sheet appellant was charged with the rape to the victim of 16 years old. He said the evidence of PW1 at page 7-8 was to the effect that she suspected the said victim to be pregnant on 18/11/2021 she reported to

Police station so as to issue PF3, the said PF3 was issued and tendered by PW4 which the court admitted it as Exhibit P1.

In this ground, Mr. Audax moved on to submit that PW4 inspected the victim and found the victim with pregnancy of 31 weeks and one day. He argued that Exhibit P1 shown that victim missed menstruation since June 2021 while the offence alleged to be committed on 28/9/2021, he said PW1 her aim was to know if the victim was pregnancy and its duration. In this point he said it was their view that there was variance between the charge sheet and the evidence brought. With thus he said the charge sheet was not proved beyond reasonable doubt. He cited the case of **Frank Wilson vs. Republic**, Criminal Appeal No. 182 of 2010 Page 5 last paragraph. He prayed the court to allow the appeal, quash the conviction and set aside the sentence and appellant be set free.

In reply Ms. Ndoni supported the appeal and the submissions of the counsel for the appellant. Submitting in issue of charge sheet, she said that it is true there is variance of evidence of the date of commission of the offence which is 28/9/2021 which the said evidence differed with the exhibit P1 (PF3) tendered by PW4 and his testimony that on 19/11/2021 he inspected the victim and found out that victim was pregnancy with 31

weeks, but according to the evidence of PW4 and P1 so the offence was not happened on 28/9/2021 but the offence happened on 2/5/2021. Ms. Ndondi argued in support of the submissions of the appellant's counsel that the victim was not credible witness as she did not tell the court who raped her, with thus she agreed that the prosecution failed to prove the case beyond reasonable doubt.

Having considered the grounds of appeal, submissions by both counsels and passed through records and the trial judgment, the role of the court was to see if this appeal is merited.

In determination of this appeal I will confine myself with the guided cardinal principle that the first appellate court has duty bound to re-evaluate the evidence established in trial court as in the case **Faki Said Mtanda vs The Republic**, Criminal appeal No. 249 of 2014 (unreported) where it was stated that:

*".....a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, **the first appellate court, ought to have re-evaluated the entire evidence on record by reading it together and subjecting it to a***

critical scrutiny and if warranted arrive at its own conclusions of fact."

In the light of the above principle, the duty in me is to scrutiny re evaluate the evidence of both sides and come with findings of whether appellant committed the charged offence. The evidence to connect the appellant that he committed the offence as per charge sheet, is in the chain story narrated by prosecution's witnesses. For this matter in hand, the issue that the victim was raped by the appellant, the key witnesses are PW1 and PW2. The center evidence of rape of this matter is in testimony of the PW2 the victim. She proved the charge by testifying that on 28/09/2021 when she was at home at Bugweto, the appellant was sent by PW1 to take the milk for her to the said PW1's house where he found the victim. After the victim received the sent milk, appellant pulled the victim toward inside asking to have sexual intercourse with the victim. He removed off the victim's clothes and pushed her on the bed, then removed his clothes then inserted his penis in the victim's vagina and raped her.

It is her testimony that upon raped she did not tell any person until when started feeling bad and PW1 suspected the victim being pregnancy

and took her to hospital. That being the fact, the testimony of PW2 that she had sexual intercourse relationship, corroborate with evidence of PW1 who her evidence in connection the sexual relationship between the victim and the appellant. PW1 testimony in connection to the said relationship is to the effect that on 17/11/2021 at 13:00hrs is when she suspected the victim to have pregnancy after she found her sleeping and having acne on her face. On 19/09/2021 she reported the matter to Police on suspect of victim's pregnancy. She took the victim to Hospital where the victim was examined, the result confirmed the suspicions that the victim had contacted pregnancy. When asked the victim, she was told by the victim that she had sexual intercourse with the appellant in his house.

It is from this evidence that after the suspect that the victim had contacted pregnancy, the supplementary prove that the victim was pregnancy, is available in the testimony of PW4 who said on 19/11/2021 examined the victim and found her pregnant, of 31 weeks and found the victim had no penetration within 72 hours. After being seen the undisputed fact that the victim had pregnancy, now I pose with the question that whether the appellant raped the victim.

I have re evaluated the evidence adduced in trial court and considered the exhibits tendered together with the appellant's defence. First of all I tend to differ with argument of Mr. Audax that PW1 on 18/11/2021 after suspected the victim to be pregnant and take her to the hospital on 19/11/2021 and being inspected by PW4 and found the victim with pregnancy of 31 weeks and one day. It was the submission of Mr. Audax that Exhibit P1 shown that victim missed menstruation since June 2021 while the offence alleged to be committed on 28/9/2021.

More also Mr. Audax challenged that the aim of PW1 was to find out if the victim was pregnancy and its duration. His conclusion to this fact he said it was their view that there was variance between the charge sheet and the evidence brought, he said the charge sheet was not proved beyond reasonable doubt of which the State Attorney conceded this ground.

My point of departure from the point of Mr. Audax and concession of Ms. Glory is that, all of them they look they were challenging the issue of who impregnated the victim instead of challenging the charge of rape which said to be committed by the appellant on 28/09/2021. As the evidence in

record is clearly shown after PW1 suspected the victim that she was pregnancy, PW4 and exhibits P1 and P2 all suggested the same that on 19/11/2021 the victim was found pregnant. Mr. Audax disputed the fact in defending the appellant that if the charge disclosed that the victim was raped on 28/09/2021 while the medical report disclosed the victim had pregnancy of 31 weeks. So, Mr. Audax challenges is how comes a person having a sexual intercourse on 28/09/2021 when inspected on 19/11/2021 the result showing the pregnancy aged 31 weeks. The challenge of Mr. Audax and the concession by the State Attorney as I have said herein above that they like challenging issue of who impregnated the victim, but this issue is not the one which appellant was charged, The charge before the trial was rape which the prosecution proved the charge of rape which was proved by testimony of the victim that appellant inserted his penis in her vagina with thus evidence and facts, I cannot go contrary with the principle established in **Suleiman Makumba vs Republic**, [2006] TLR 379 which court stated 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 light of above principle basing on the victim's evidence is not alone, but also appellant admitted to have sexual intercourse with the victim as he detailed in exhibit P2, the caution statement, appellant admitted to have carnal knowledge with victim, as follows that;

.....mwishoni mwa mwezi wa 09/2021 majira ya mchana tulikutana naye tukafanya mapenzi kwenye chumba changu nyumbani kwetu hiyo ilikuwa mara ya kwanza kufanya mapenzi haikupita muda sana tulikutana tena kufanya nae mapenzi kwa mara ya pili tulikutania hapo hapo nyumbani kwetu ambapo nilipomwangalia tu macho yangu kwa wakati huoalionesha kuwa ni mjamzito hivyo basi nilikuwa najua kama ni mjamzito basi ni mtu mzima mwenzangu na siyo mtoto wa chini ya miaka 19.....

The admission words of the appellant in trial and the testimony of the victim in trial, prove that appellant was having sexual intercourse with the victim, though it has proved that appellant had sexual intercourse with the

victim is it enough to prove that the appellant raped the victim, for a number of reasons I doubt.

As I have demonstrated above that the prosecution succeeded to prove the fact that appellant did sexual intercourse with the victim and thus charged, my point of departure is that, as I have noted herein above that in caution statement appellant raised an issue of age of the victim by stating that he found the victim in pregnancy so he thought the victim is an adult with above 19 years old, as this issue stated in the caution statement, the prosecution was supposed to establish and prove the age of the victim that at the time the offence alleged to be committed, the victim was below 18, in a number of cases direct that in statutory rape case, proving an age of the victim is mandatory, in **Charles s/o Makapi Vs. R**, Criminal Appeal No. 85 of 2012 the Court held:-

"Taking into account that this is a statutory rape, it is important for the prosecution to give clear evidence of age of the victim. Failure of that will create doubt as to the real age of the victim in this alleged statutory rape.

I have directed my mind that the prosecution basing on the evidence in record specifically in caution statement of the appellant, testimony of PW4 plus exhibits P1 and P2 all suggested the same that on 19/11/2021 when the victim was suspected to be pregnant and inspected, the result proved that she was pregnant, of 31 weeks, basing on that result, the issue of age corroborate the statement of the appellant that when he met the victim on 28/9/2021, the victim had pregnancy.

I agree with statement of the appellant in exhibit P2 that the status of the victim of being pregnancy could not favour the appellant to notice the age of the victim that she is below 18 years unless otherwise appellant was told, but the record is silent, that being the case, appellant was not in position to notice the age of the victim because under normal circumstances if is not told, if a person finds any person with pregnancy, he/she may presume that the person with pregnancy is attained the age of majority hence capable to enter into relationship of that kind, the important thing is consent.

Further, whether the victim was consented to have sexual intercourse with the appellant, the circumstantial evidence dictates that, since the

victim purported to be raped on 28/9/2021 she was silent without informing PW1 or any person that she was raped and contacted pregnancy PW1 on her own efforts suspected the victim to have contacted pregnancy, on her suspect she decided to take the victim to hospital where examined and being found pregnancy. The question to me is, if the victim had no consent to have sexual intercourse with the appellant, why she decided to hide the act of rape until PW1 on her own notice that the victim had some changes in her body. Also the conduct of the victim to hide the fact that she was contacted pregnancy for almost six months until on 19/11/2021 and she never mentioned the responsible person rather only mentioned the appellant who she had sexual intercourse on 28/9/2021 while she had already in pregnancy, those are facts which dictate that the victim had enough maturity mind to hide anything from her under that circumstances, appellant could notice the age of the victim. With thus the prosecution ought to establish and prove if the victim attained the age of majority. Accordingly, I find no reason to consider other grounds of appeal which won't change the already arrived conclusion. In totality, I proceed to allow this appeal, quash the conviction and set aside the sentence meted by the

trial court, consequently I order an immediate release of the appellant from prison, unless otherwise lawfully held.

It is so ordered.

DATED at **SHINYANGA** this 09th day of June, 2023.

R.B. Massam
JUDGE
09/06/2023

COURT: Right of appeal explained.

