

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE SUB REGISTRY OF KIGOMA)**

AT KIGOMA

DC CRIMINAL APPEAL NO.1 OF 2023

**(ARISING FROM KASULU DISTRICT COURT IN ORIGINAL
CRIMINAL CASE NO.49 OF 2022)**

JEREMIA S/O SAMWEL APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: 10.07.2023

Date of Judgement: 14.07.2023

JUDGEMENT

MAGOIGA. J.

In the district court of Kasulu (trial Court), the appellant, **JEREMIA s/o SAMWEL** was arraigned for two counts of: **one**, Rape contrary to sections 130(1) (2) (e) and 131(1) of the Penal Code [Cap 16 R.E. 2019 and, **two**, Impregnating school girl contrary to section 60A (3) of Education Act [Cap 353 R.E.2002] as amended by section 22 of the Written Laws (Miscellaneous Amendment No.2) Act of 2016.

After full trial, the trial court found the two counts proved and consequently convicted and sentenced the appellant to serve custodial sentence of 30 and 3 years for each count respectively.



Aggrieved by both conviction and sentence, the appellant preferred this appeal to this court armed with four amended grounds of appeal, couched in the following language, namely:

1. That the trial court magistrate erred both in law and facts in convicting the appellant on the offence of rape which was not proved beyond reasonable doubt;
2. That the trial court erred in both law and facts in convicting the appellant on the offence of impregnating a school girl an offence which was not proved beyond reasonable doubt;
3. That the trial court denied the appellant's fair trial as exhibit P2-the Attendance Register was not read out in court after being cleared for its admission;
4. That the trial court accorded no weight on the appellant's defense of alibi.

On the strength of the above grounds, the appellant prayed that his appeal be allowed, conviction and sentenced be set aside and set him free.

The brief facts as gathered from the charge sheet are that on unknown date in June, 2021 at Kalunga street within Kasulu district, in Kigoma region, the appellant did rape Agnella Berege (pseudo name) a form two



girl at Mavuno Girls Secondary School aged 18 years old and unlawful impregnated her causing her to fail to attend school regularly.

When this appeal was called on for hearing, the appellant appeared through video conference from Bangwe prison and was represented by Mr. Moses Rwegoshora learned advocate ready for hearing. On the other hand, the Republic was represented by Mr. Pancras Ligombi, learned State Attorney.

Mr. Rwegoshora submitting on grounds number 1 told the court that, the case for the prosecution was not proved beyond reasonable doubt. According to Mr. Rwegoshora, PW1 did not explain why she took six months to report the incidence in the absence of any threats. Also, it was argued that, according to PW1, the incidence took place during night but PW1 never explained the extent of light which enabled her to correctly identify the appellant. In support of the above stance, cited the case of **Joel Jones Mrutu Vs. Republic, Criminal Appeal No 25 of 2019 (HC) Moshi sub registry**, in which it was held that, failure of the victim to mention the accused person at an earlier opportunity time, the court is entitled to draw adverse inference against the victim.

Not only that, but also that, according to the evidence on record, PW5 testified at page 20 of the typed proceedings that she received case file on 17/01/2022 with no suspect. Further, the learned advocate pointed



out that penetration was not proved because at page 12 the appellant prayed for DNA test was not done without any explanation.

For the above doubts, the learned advocate for the appellant prayed that this court allow this ground.

On the second ground, the learned advocate argued that the second offence was not proved beyond reasonable doubt on the same reasons as given in ground number one and added that the only evidence is that exhibit P2 but which was admitted but not read and as such prejudiced the appellant. To bolt up his point cited the case of **Maneno Matibwa Francis Vs. Republic, Criminal case No.35 of 2021 CAT (DSM)** in which it was held that failure to read an exhibit after is cleared for its admission render the trial prejudicial to the accused person and cause miscarriage of justice. On that note, the learned advocate for the appellant invited the court to expunge it from the court record.


According to Mr. Rwegoshora, once exhibit P2 is expunged from the court record, no other evidence that the victim was a school girl. On the oral account of the witnesses, which by itself do not prove that it was the appellant alone who committed the offences charged. Further Mr. Rwegoshora argued that the appellant requested for DNA test and the court ordered so but without reasons same was not done. This very much casted doubts to the prosecution case. In support of the above stance,

the learned advocate cited the case of **Peter Bugumba @ Cherahani Vs. Republic, Criminal appeal No.251 of 2019 CAT (Mwanza)** in which it was held that:

"Miss Mwadenya is correct that the appellant implored the trial court right way after PW1 has testified for DNA paternity test to be conducted and order to that effect was issued by the trial court. We cannot help but wonder why no explanation was given on record, as to why the trial proceeded and concluded without the aforesaid order being complied with."

The Court of Appeal, thus, concluded that it was prejudicial to the appellant's case and created doubts to the prosecution case.

On the same vein, Mr. Rwegoshora invited this court to find the same situation applies in this appeal because at page 12 the appellant among other prayed for DNA paternity test but which was not done and no explanation was offered in the proceedings. On the above submissions, Mr. Rwegoshora invited to be considered alongside with the third ground. On the last ground of appeal, the main complaint by the learned advocate for the appellant was that the trial court did not consider the defence of alibi and no reasons were given for its rejection despite supported with evidence.



On the totality of the above grounds argued, Mr. Rwegoshora strongly urged this court to allow this appeal by setting aside the conviction, and custodial sentence imposed against the appellant and set him free.

On the part of the respondent, the Republic, Mr. Ligombi, learned State Attorney readily told the court that he supports the appeal on all grounds of appeal raised and argued, the authorities cited alongside with prayers to allow the appeal and order for release of the appellant.

Having heard the submissions by the learned legal minds for the parties and having myself gone through the trial record proceedings and judgement which revolves around that the case for the respondent was not proved beyond reasonable doubt and, without much ado, I entirely agree with the learned legal minds for parties that for the reasons argued, the case against the appellant was not proved at all to the required standard of prove in criminal cases. I will add that, according to the typed proceedings in this appeal, in particular, at page 10, PW1 told the court that she had a phone which she was communicating with the appellant but without telling the numbers of the appellant and hers so as to connect him with the offences and continued threats and allegations of abortion not proved at all.

Another reasons, I may add is that the appellant was charged with impregnating the school girl the victim way back in June 2021 but when

she testified it was June next year, which means the child in dispute was born but no proof was tendered to show that the child had any relationship with the appellant. At least a DNA test requested by the appellant but denied could have proved that, the already born child was the putative son or daughter of the appellant. In the absence of all these, as correctly argued by the legal minds for parties in this appeal, a case for Republic was not proved at all.

That said and done, I allow this appeal, and consequently I set aside conviction and sentence metted out against the appellant and order his immediately released from prison unless held otherwise for another lawful cause.

It is so ordered.

Dated at Kigoma this 14th day of July, 2023.



A handwritten signature in dark ink, consisting of a series of vertical strokes followed by a horizontal line and a small flourish at the end.

S. M. MAGOIGA

JUDGE

14/07/2023.