IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 141 OF 2022

RASHID SULEIMAN ISMAIL @FRANK ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Arising from the decision of the District Court of Dar es Salaam at Kivukoni in Criminal Case No. 613 of 2019)

JUDGMENT

6th March & 26th May, 2023

KISANYA, J.:

The appellant, Rashid Suleiman Ismail @Frank was charged before the Resident Magistrate's Court of Dar es Salaam at Kivukoni with two counts namely; rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16, R.E. 2002 (now R.E. 2022); and impregnating a school girl contrary to section 60A (3) of the Education Act as amended by Act No. 4 of 2016.

It was alleged in the particulars of the first count that on diverse dates between 28th September, 2019 and October, 2019 at Kitunda Relini area within Ilala District in Dar es Salaam Region, the appellant did have carnal knowledge of one, ISJ (name withheld to disguise her identity), a girl aged 16 years. As for the second count, it was stated that, on the

dates and place referred to the in the first count, the appellant did impregnate the said ISJ, a standard six pupil of 16 years.

During trial, the prosecution side marshaled four witnesses of whom IJS (also referred to as "the victim") was amongst them and she testified as PW2. Other witnesses were, the victim's guardian one, Alexander Israel Sanga (PW2); a medical doctor of Kimara Health Centre, Dickson Masale (PW3); the victim's teacher, Gwakisa Mwasumbi (PW4); and investigator namely E7764 D/C Alphonce (PW5). Further to the above, the prosecution relied on four exhibits to wit, birth certificate of the victim (Exhibit PE1), medical examination report-PF3 (Exhibit PE2), certified copy of the attendance register (Exhibit PE3), statement of the appellant's landlady one, Aisha Athumani (Exhibit PE4).

Pursuant to the record, the background facts of the case are simple and straight forward and can be briefly stated as follows: The victim was born on 21/09/2003. She was among the children who were living with PW1 at Kimara King'ngo within Dar es Salaam. In 2019, the victim was a standard VI of Kingo'ngo Primary School. It was her testimony that on, in 2018, she encountered the appellant who introduced himself as a vendor of spare part and jewels at Mnazi Mmoja and that the latter offered to help her. It was her evidence that, on 28/09/2019, she met the

appellant who successfully seduced and took her to Kitunda area, Dar es Salaam, where they lived together as a husband and wife for one month. They were living in a single room in the house to which belonged to Aisha Athuman (also referred to as "the landlady"). According to the victim, she had sexual intercourse during the period of her stay with the appellant. However, she decided to return back to her uncle (PW1) and told him that she was staying with a man at Kibaha.

On his part, PW1 testified that the victim was a standard six pupil of King'ongo Primary School. It was his evidence that the victim went missing on 28th September, 2019 and that she returned home on 23rd October, 2019. He interrogated her, the victim disclosed that she was living with one Ismail at Kitunda and that she led them to the appellant's room. PW1 went on testifying that, on 24th September, 2019, the victim was taken to Kimara Health Centre where she was examined by PW4.

It is reflected in the evidence of PW1, PW2 and PW4 after the medical tests, the victim was found with pregnancy. PW3 expounded that the victim was found not virgin and that her private parts had bruises with no virginity. He tendered a PF3 which was admitted in evidence as Exhibit P3.

The victim teacher (PW4) supported the evidence of PW1 and PW2, that, the victim was in standard six at King'ongo Primary School. She further tendered the attendance register (Exhibit PE1) which showed that the victim did not go to school in September, October and November, 2019.

The investigator of this case testified as PW5. In the course of investigating the matter, he visited the crime scene (appellant's room) and went to the victim's school. At the appellant's room, PW5 recorded statement of the landlady who confirmed to him that the victim and the accused person had lived together. The said statement was admitted in evidence under section 34B of the Evidence Act, Cap. 6, R.E. 2019 (now R.E. 2022) on the ground that her attendance could not be procured due to sickness.

In his defence, the appellant denied to have committed the offence. He told the court that he was arrested on 24th September, 2019 at 0500 hour on allegation of having living with the victim. The appellant further stated that he had no love affair with the victim and that despite of urging them to conduct an examination on whether he was responsible for the pregnancy the police officer failed to do so.

After consideration of the evidence before it, the trial court found the appellant guilty and convicted him on both counts. Ultimately, the appellant was sentenced to thirty (30) years imprisonment respectively. The sentences were ordered to run concurrently.

Undaunted, the appellant has appealed to this Court. He premised his protest on the following five grounds:

1. *That the learned trial magistrate erred in law and fact in convicting the appellant when there was nothing to prove beyond all reasonable doubt that the appellant was the one who impregnated PW2 (the victim).*
2. *That the learned trial magistrate erred in law and fact in convicting the appellants basing on the evidence of PW2 (victim) which was incredible, improbable and unreliable as unreasonably failed to explain why she did not tell the landlady or other tenants in the house that he was being raped by the appellant.*
3. *That the learned trial magistrate erred in law and fact in convicting the appellant without sufficiently and critically evaluate, analyze, assess weight and consider the defence evidence which raised a reasonable doubt on the prosecution case.*
4. *That, the learned trial magistrate erred in law and fact in convicting the appellants basing on Exhibit P4*

(statement of Aishi Athumani) which was wrongly tendered and admitted in court.

5. *That, the learned trial magistrate erred in law and fact in convicting the appellants in a case where the prosecution failed to prove its charge against the appellant beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person without representation while, the respondent/Republic was represented by Mr. Hellen Moshi, learned Senior State Attorney.

When called upon to elaborate on the grounds of appeal, the appellants prayed for this Court to consider the grounds. He told the Court that he was adopting the contents of his petition of appeal. He further urged the Court to consider the case of **Daudi Rashid vs R**, Criminal Appeal No. 95 of 2020 (unreported) and **Butongwa John vs R**, Criminal Appeal No. 450 of 2017 (unreported). The appellant concluded by asking this Court to quash the conviction and set aside the sentence meted upon him.

Responding, Ms. Moshi prefaced her submission by declaring her stance that she was not supporting the appeal. The learned counsel addressed together the first, second and fifth grounds. She submitted that both counts were proved beyond all reasonable doubts and that the

evidence of each witness corroborated each other. She expounded that, PW1 testified how the victim went missing from 28th September, 2019 to 23rd October, 2019, while the victim (PW2) stated that during that period she was with the appellant who had sexual intercourse with her. The learned State Attorney further submitted that on returning home, the victim led the police to appellant's house and that, PW3 confirmed that the victim was found with pregnancy and bruises in her vagina. Considering further that the victim was 16 years, Ms. Moshi was of the view that the prosecution case was proved beyond all reasonable doubt.

As for the third ground of appeal, the learned State Attorney submitted the appellant defence was duly considered at page 5,6 and 9 of the judgment and that the trial magistrate was satisfied that the said defence did not raise reasonable doubt in the prosecution case.

With respect to the fourth ground appeal, Ms. Moshi conceded that the statement of Aisha (the landlady) was admitted in contravention of section 34B of the Evidence Act (supra). Her submission was based on the ground that the prosecution did not prove that the said Aisha was sick to the extent of failing to appear before the trial court. However, she was of the view that even if Exhibit P4 is expunged from the record, the remaining evidence is sufficient to prove the offence laid against the

appellant. The learned State Attorney concluded by moving this Court to dismiss the appeal for want of merit.

I have examined the record, petition of appeal, contending submission and the law. The main issue is whether the appeal has merit.

I shall start by addressing the fourth ground. The appellant contends that the statement of Aisha Athumani (Exhibit P4) was wrongly tendered and admitted in evidence. Pursuant to the record, Exhibit P4 was admitted under section 34B of the Evidence Act which provides for conditions of admitting a statement of the witness whose attendance cannot be procured without undue delay. The conditions set out by the law are:

> *a) where its maker is not called as a witness, if he is dead or* ***unfit by reason of bodily or mental condition to attend as a witness,*** *or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;*
> *b) if the statement is, or purports to be, signed by the person who made it;*
> *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

d) *if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;*

e) *if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence:*
Provided that, the court shall determine the relevance of any objection;

f) *if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read"* (Emphasize supplied)

It is settled position of law that the above conditions must be met cumulatively to warrant admission of statement. See for instance the case of **Vicent Ilomo vs R,** Criminal Appeal No. 337, CAT at Iringa (unreported) in which the Court of Appeal held:

"Admissibility of statements under Section 34 B (2) of the Evidence Act was discussed at length in the case of

***Elias Melani Kivuyo V. Republic**, Criminal Appeal No. 40 of 2014 (unreported) in the course of which the Court observed that conditions (a) to (f) under Section 34 B (2) of that Act must be met cumulatively."*

In the present case, Exhibit PE4 was admitted on the ground its author (Aisha Athumani) was unfit by reason of bodily condition to attend as a witness. However, as rightly conceded by the learned State Attorney, medical evidence was not tendered in evidence to prove the assertion that Aisha Athumani was seriously sick. In the absence of medical evidence, I find no evidence to support the investigator's oral testimony (PW5) that Aisha Athumani was sick to the extent of failing to appear as a witness. It follows that the first condition set out section 34B (2)(e) of the Evidence Act was not met. Thus, I find merit in the fourth ground that, Exhibit P1 was wrongly admitted in evidence. It is accordingly expunged from the record.

Next for consideration is the first, second and fifth grounds of appeal. I agree with the learned State Attorney that, the said grounds are interrelated. They can be determined by considering one issue, whether the prosecution case was proved beyond all reasonable doubts.

Starting with the second count of impregnating a school girl which was preferred under section 60A (3) of the Education Act as amended by

Act No. 4 of 2016. According to the said provision, the offence of impregnating a schoolgirl is proved by establishing two elements. One the girl was impregnated when she was attending either primary or secondary school; and two, the schoolgirl was impregnated by the accused person. [See the case of **Maneno s/o Natibwa Francis @ Babio vs R**, Criminal Appeal No. 35 of 2021 (unreported)].

On the first ingredient, PW1, PW2 and PW4 testified that the victim was a standard six pupil of Kingong'o Primary School within Ubungo Municipality. PW4 is the teacher of the said School. He tendered in evidence the school attendance register (Exhibit P3) which shows that the appellant absconded from the school in October and November, 2019. Therefore, the first ingredient was proved.

The second ingredient gives rise to the issue whether the victim was impregnated by the appellant. At the outset, the assertion that the victim was pregnant is reflected in the evidence of PW1, the victim (PW2), the medical doctor (PW3) who examined the victim and PF3 (Exhibit PE2). According to PW3 and Exhibit PE2, the pregnancy test conducted on 24th October, 2019 revealed that the victim was pregnant. On the second part of this ingredient, I have noticed that the victim named the appellant as the one responsible for the pregnancy. Her evidence was based on the

fact that she had sexual intercourse with the appellant from 29th September, 2019 to 23rd October, 2019. However, PW3 did not testify on the duration of the pregnancy. Also, such fact does not feature in Exhibit PE2. As the appellant denied to have impregnated the victim, evidence on the duration of pregnancy would have enlighten the court on whether the victim became pregnant when she stayed with the appellant from 28th September to 23rd October, 2019. It is my considered view that the said doubt must be resolved in favour of the appellant. I therefore hold that the second count was not proved.

Reverting to the first count rape, the record bears it out that the charge was laid under section 130(1)(2)(e) and 131(1) of the Penal Code. The offence under the said provision is commonly known as statutory rape. It is proved by establishing that, there was penetration and the fact that the victim of rape was below 18 years.

In the instant case, evidence on the victim's age is reflected in the evidence of PW2 (the victim) who stated on oath that she was born on 21st September, 2003. This evidence is supported by the testimony of the victim's uncle (PW1) who was living with the victim. The appellant did not cross-examine PW1 and PW2 on the victim's age. Basing on the evidence of PW1 and PW2, the victim was 16 years from 28th September, 2019 to

24th October, 2019 stated in the charge as the dates of commission of the offence. On that account, I hold the view that the prosecution proved the first ingredient of statutory rape, that the victim was 16 years old as stated in the charge sheet.

Apart from the victim's age, the prosecution was duty bound to prove penetration which is the essence of rape. The law is settled and I need not cite any authority that penetration, however slight is sufficient to constitute intercourse. In that respect, the prosecution is expected to lead evidence of penetration. It is trite law that the best evidence of rape comes from the victim herself. One of the authorities on that position is the case of **Seleman Mkumba vs R** [2006] TLR 379 in which the Court of Appeal held that:

> *"A medical, report or the evidence of a doctor, may help to show that there was sexual Intercourse but it does not prove that there was rape, that is not consented sex, even if bruises, are observed in the female sexual organ. True evidence of rape has to come from the victim, if adult that, there was penetration and no, consent, and in case of any other, woman consent is irrelevant, that there was/penetration."*

Being guided by the above position of law, I was inclined to review the victim's evidence (PW2). For easy of reference, I find it apt to reproduce the relevant part of PW2's evidence as hereunder:

> *"On 28/09/2018, I went to Frank @Ismail at Mnazi Mmoja and thereafter proceeded to Kitunda. It was at 1700 hours. We arrived at Kitunda at 18:00 hours. We met his landlady where he rented. The accused is the one who told me that she was the landlady. While on route to Kitunda, the accused told me that on arrival, if anyone asked my relationship with the accused, I should tell them that he is my brother.*
>
> *The accused told the landlady that I'm his sister. Upon arrival, he bought me some food. At night, I slept there because the accused told me to wait until he gets the money I asked him. It was faire (sic) to go to my mother in Njombe. I stayed with Frank for one month. We lived as husband and wife. We lived in a single room. He used to force me to have sexual intercourse, doing sex (kufanya mapenzi). We had sexual intercourse every day. Before, I had not had sexual intercourse with another man. In the first day I felt pain with some blood discharge. I stayed that long as the accused said he was waiting for his time to receive money from a rotation that he had been engaged in.*

I decided to go back home to Kimara (home) upon arrival my father asked me where I was. I told him that I was staying with a man in Kitunda. He informed my other relatives. We then went to Kimara Police Station. Thereafter, we proceeded to Kitunda Police Station…I led them to go Kitunda to the accused's residence."

During cross-examination, the victim was not asked on the issue of having sex with the appellant on the said dates and her pregnancy. The cross-examination went as follows:

"At the house, we were living with other people. I just decided not to report the accused's conduct/act. That is all."

Basing on the evidence of PW1, it is clear that there was penetration into the victim's vagina during the time which the victim and appellant stayed together, and that the appellant was the perpetrator.

As rightly observed by the learned State Attorney, the victim's evidence was corroborated by the evidence of PW1 who stated how the victim went missing and led them to the victim's house. Further to this, the victim was examined by PW4 who opined that the victim was penetrated and that she was found with pregnancy.

All the above considered, I have no flicker of doubt that the offence of rape was duly proved.

It was the appellant's complaint in the second ground that the victim gave incredible, implausible and unreliable evidence because she failed to explain why she did not tell the landlady or other tenants that she was being raped by the appellant. Indeed, when cross-examined the victim stated that she just decided not to report the appellant's conduct. However, I have considered the victim's evidence in chief that the appellant had told him to tell the landlady and other people that he (the appellant) was his brother. In the circumstances, the appellant gave plausible explanation of not disclosing that the appellant's conduct to the landlady and other people. It was after returning to PW1's house when the victim revealed what had happened to her. Thus, the first ground of complaint lacks merit.

On the third ground of appeal, the appellant faults the trial court for failure to evaluate, analyzed and consider his defence. Reading from page 7 and 8 of the judgment, I agree with Ms. Moshi that the appellant's evidence was duly considered. For instance, the learned trial magistrate was not convinced with the appellant's testimony that he knew the victim when the latter (victim) used to visit her friends (girls) who were staying

with him in the same house. The learned trial magistrate held the view that the appellant ought to have summoned the said girls as his witness. Considering that the victim (PW2) testified that she was living with the appellant, I agree with the trial court that the appellant ought to have brought evidence to support his contention that the victim was visiting her friends. That aside, the question whether the victim used to visit her friends at the appellant's house was not to put to her during cross-examination. In the circumstances, the third ground of appeal is unmerited as well.

In the event, the appeal is partly allowed and partly dismissed as follows: *One,* the appellant's conviction on the second count of impregnating a school girl is quashed and the sentence meted upon him is set aside. *Two,* the Court upholds the appellant's conviction and sentence on the first count of rape.

It is so ordered.

DATED at DAR ES SALAAM this 26th day May, 2023.

S.E. KISANYA
JUDGE