IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

DC. CRIMINAL APPEAL NO 7 OF 2022

(Originating from Criminal Case No. 18 of 2021 in the District Court of Tabora.)

MUSSA S/O RICHARD @ RASHID ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 14/08/2023

Date of Delivery: 14/09/2023

MATUMA, J.

The appellant herein ***Mussa s/o Richard @ Rashid*** stood charged in the District Court of Tabora for two offences to wit; ***Impregnating a school girl*** contrary to section 60A (3) of the Education Act Cap 353 R.E 2002 and ***Rape*** contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code.

It was alleged that on unknown dates between 1st October and 30th November 2020 at Izimbili village, Kalunde ward within Tabora District, the appellant did have carnal knowledge and impregnated the victim a 14-year-old girl who was referred to as ***Z*** for the sake of hiding her identity. After a full trial, the appellant was found guilty, convicted for both counts and sentenced to serve thirty (30) years imprisonment in each count but the sentences were ordered to run concurrently.

Aggrieved by the said conviction and sentence, the appellant is now before this court armed with four grounds of appeal which are coached in a layman's manner but they tend to establish the following complaints;

1. *That the prosecution case was not proved beyond reasonable doubts as required by law.*
2. *That the credibility of the victim was questionable for having not disclosed the crime for nearly four months.*
3. *That the defense evidence to the effect that the victim (PW2) at Police had exonerated the appellant from the alleged crimes and named one Samuel as the responsible perpetrator of both the rape and pregnancy was not addressed and determined by the trial court.*

At the hearing of this appeal, the appellant was present in person while the respondent was represented by Orester Kemilembe and Nurdini Mmary learned State Attorneys. The appellant preferred the learned State Attorneys to make their submissions first.

It was M/s Orester Kemilembe learned State Attorney who took the floor and addressed the court to the effect that they were supporting the appeal of the appellant in respect to the conviction and sentence in the first count of impregnating a school girl but they were opposing the appeal in respect of the offence of Rape.

She argued that for the offence of impregnating a school girl to stand, the prosecutions ought to have proved three factors namely; ***That the victim is really a pupil or student, that it is true the victim is pregnant*** and ***that it was the accused who impregnated the said school girl.*** The learned State Attorney then submitted that in this case the prosecution managed to prove only two factors that of the victim

being a school girl and that she was pregnant but they failed to prove that it was the appellant who impregnated her.

The learned State Attorney to backup her arguments she cited to me the decision in the case of ***Joel Bulugu vs The Republic, Criminal Appeal No. 212/2020***, Tiganga, J at page 6-7 to the effect that scientific investigation was required in the circumstances of this case to prove that the pregnancy really belonged to the appellant.

In regards to the offence of rape, the learned state attorney submitted that the same was proved by the prosecution beyond any reasonable doubts because rape is proved by penetration and lack of consent or with the consent where consent is immaterial. She argued that penetration was proved by the doctor's evidence. In respect of the delay of the victim to disclose the crime, the learned state attorney argued that such delay was due to the appellant's threat to the victim as she personally testified.

In respect of the complaint of the appellant that his defense relating to the initially named suspect one Samwel was not considered, the learned State Attorney ignored the same as being without any merits. She then prayed that the Appellant's appeal in respect of the offence of Rape be dismissed.

The appellant in reply did not address the appeal in respect of his conviction and sentence in the first count but joined hands with the learned State Attorney who supported him against the conviction and sentence thereof. He however stood against the learned State Attorney on the offence of rape and insisted that he did not rape the victim. He then prayed for his grounds of appeal to be considered and his appeal be allowed.

After having listened to the submissions of both parties and carefully considered the grounds of appeal and the records of the lower Court, it is now my turn to determine this appeal.

Starting with the conviction and sentence of the appellant for the offence of impregnating the school girl, I agree with both parties that this offence was not proved to the required standard. Apart from the fact that scientific evidence relating to the pregnancy in question was necessary in the circumstances of this case as rightly argued by the learned State Attorney, the computation of the pregnancy's age as from the date of the alleged rape to the date when the victim was finally examined negates the possibility of the appellant being responsible of the said pregnancy. According to the victim's evidence she was raped by the appellant on the 28th November, 2020 at 08:00 hours in the morning and it is when she conceived the pregnancy.

On the other hand, the victim was medically examined on the 1st March, 2021 by Dr. Fales Joshua (PW4) who established that by that time the victim was four months' pregnant. The PF3 exhibit P2 also establishes that the pregnancy's age was four months by the 1st March, 2021. In the circumstances from the date of the alleged rape 28/11/2020 to 01/03/2021 is almost three months only. The evidence that the victim was four months' pregnant as by 1st March, 2021 presupposes that the victim conceived the pregnancy at the last days of October, 2020 or early November, 2020 whose essence is that the appellant is not responsible of the said pregnancy. That is why scientific evidence to establish whether the appellant was responsible to the pregnancy was necessary. I therefore find that the prosecution did not prove beyond reasonable doubts that the appellant impregnated the victim. Consequently, I allow the appeal in respect of the first count and acquit the appellant of that offence and set

aside the sentence of thirty (30) years meted against him in respect of that offence.

I am now addressing the third complaint by the appellant in his appeal as put herein above. In the said complaint the appellant complains that the trial Court did not address his defense to the effect that the victim (PW2) exonerated him at the local authority and at Police by naming one Samwel as the responsible man for both the rape and pregnancy. The chairman ordered the arrest of the said Samwel but the victim and her mother asked the chairman not to arrest Samwel and that when they reached at Police the victim insisted that he was not responsible of the pregnancy but still he was beaten and incriminated for the offence he did not commit. The learned state attorney did not consider this defense as having any merit.

On my perusal of the lower court's records I find that this appellant's defense was not cross examined by the prosecution. When the trial court invited the prosecutor one Mwakalinga learned State attorney to cross examine the appellant, he expressed that he had no questions for cross examination. As a matter of law, a fact not cross examined is taken to have been proved and the party who fails to cross examine a witness on a certain fact is deemed to have accepted that fact and will be estopped from asking the trial court to disbelieve the witness on the said fact. See the case of ***Nyerere Nyegue vs Republic, Criminal Appeal No. 67 of 2010***.

Unfortunately, this unchallenged defense by the appellant was not considered at all by the trial court. It is thus my duty as the first appellate court to re-evaluate the evidence and consider the same.

In the absence of the evidence of local chairman and or that of the "Mgambo" who were the initial officers to handle the matter at the village

level and arrest the suspects and in the absence of the evidence of the police officer who attended the victim and recorded her statement and the fact that the appellant was not cross examined, the evidence of the appellant to the effect that the victim exonerated him from the offences remains unchallenged. I therefore draw an adverse inference against the prosecution case for failure to bring in evidence those witnesses who were material to contradict the appellant's defense. Failure to arraign them in the witness dock denied the appellant an opportunity to cross examine them on the fact which would have assisted the trial court to determine the real scenario of the matter on whether or not the victim had previously named some one else other than the appellant as the perpetrator of the crimes and assess the credibility of the victim's evidence accordingly.

In the case of ***Aziz Abdalla vs Republic [1991] T.L.R 71***, the court speaking on the fate of failure of the party to call a material witness held that;

> *"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witness who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

I find that the chairman, "*mgambd*" and police officer were material witnesses who would have clarified to the Court on whether PW2 mentioned Samwel as the culprit as against the appellant or not. Failure to call them left doubt to the prosecution case in lines of the unchallenged defense evidence supra. I am aware that under section 143 of the Evidence Act, Cap. 6 R.E 2019 the prosecution are not under any legal obligation to call each and every witness to testify

but may choose only those whom they think suffices to prove their case. It is however the law that the prosecution cannot take refuge under such provision to avoid calling the material witnesses. This is the position in various cases including that of ***Samwel Japhet Kahaya versus Republic***, *Criminal Appeal No. 40 of 2017* in which the Court of Appeal of Tanzania at Arusha held;

> *"Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since* ***if a party to a case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act".***

In the circumstances I find that there was someone else incriminated of the offences herein other than the appellant and failure of the prosecution to clear the fact leaves some reasonable doubts in the prosecution case.

That takes me to the question whether the prosecution case was proved beyond reasonable doubts. It is on record from the victim's evidence that both offences were committed against her on the same day which was on 28/11/2020 during morning hours. Unfortunately, the charge sheet was drafted in a fishing manner in both counts when it alleges the offences to have been committed on; ***"unknown dates between 1st day of October, 2020 and 30th day of November, 2020".*** The manner in which the charges were coached signifies the reality of the appellants complaint that there is someone else behind the crime because the victim did not claim to have committed sexual intercourse with the appellant on several occasions. Also the charges seems were drafted to fit the findings of the doctor and the contents of

the PF3 to the effect that the pregnancy was aged four months as against the victim's evidence which if considered to the effect that the appellant had sexual intercourse with her, the pregnancy would have been found to be of only three months. The charge sheet was thus drafted to suit the contents of the PF3 and not the evidence of the victim. In that respect it is justifiable to rule out as I do hereby do that the charge sheet was at variance with the evidence on record and therefore it was not proved to the required standard.

Not only that but also it is undisputed fact that the victim did not disclose the incident for four months. She decided to disclose the incident after she fell sick while at school and taken to hospital where she was detected to be pregnant. The reason given for the delay as argued by the learned state attorney is that the accused now the appellant had threatened the victim that she should not inform anybody of the incident or else she would be slaughtered.

On my part I do not accede to the argument that there was threat which could have been relevant to the victim to stay mute for all that period. The threat if any was relevant at the time of the commission of the offence. But when the victim was finally released and went away from the accused (now the appellant), she was no longer in danger of being harmed had she reported the incident. As days passed and later months, the threat if any was becoming weaker and weaker. There is no justification or explanation given on how the threat if really was made persisted at the whole period as from 28/11/2020 to 25/02/2021.

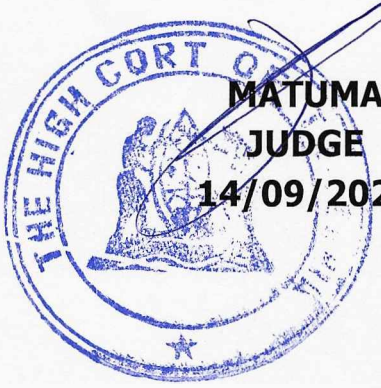
The Court of Appeal of Tanzania in the case of ***The Director of Public of prosecutions vs Simon Mashauri, Criminal Appeal No. 394 of 2017*** held that unreasonable explanation for the delay to report the crime raises doubts as to the credibility and reliability

of the victim witness. I find that case relevant to the circumstances of this case because the victim herein after the alleged rape on 28/11/2020 kept quiet, continued to attend her school and interacting other pupils without reporting the incident, interacted her parents and neighbours for such all period without reporting the incident but when she was detected pregnant she did not hesitate to disclose the ordeal. If there was any threat, we could expect the witnesses to tell the court that when they asked her, she hesitated to explain the event and upon further inquiry she explained the threat and after assuring her safety it is when she decided to explain everything. In the absence of such evidence, the threat alleged are without any substance and I accordingly dismiss the same. The victim therefore suffers the consequences of delay to report the crime which affects her credibility.

With the herein above explained shortcomings, the doubts are resolved in favour of the appellant. I thus find that the prosecution case against the appellant in second count of rape was as well not proved beyond any reasonable doubts. I allow the appeal. The appellant's conviction is hereby quashed and the sentence meted against him is set aside. I order the immediate release of the appellant from custody unless otherwise held for some any other lawful course. The right of further appeal is hereby explained to whoever aggrieved with this decision.

MATUMA
JUDGE
14/09/2023

COURT; Judgment delivered in presence of the appellant in person and Aneth Makunja State Attorney for the respondent.



MATUMA
JUDGE
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