IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 2 OF 2023

(Appeal from the judgment of the Resident Magistrate Court of Arusha by Hon. D. J. MSOFE, PRM dated 14th December, 2022 in Criminal Case No. 98 of 2021)

SAMWEL ELIAS .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

26th July 11th October, 2023

GWAE, J

In this appeal, the Court is being requested to overturn the decision of the District Court of Arusha at Arusha (Trial Court) in Criminal Case No. 98 of 2021, which convicted the appellant, Samwel Elias. The appellant before the trial court stood charged with, prosecuted and convicted of the offence of rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16, Revised Edition, 2019.

Upon conviction, the trial court sentenced the appellant to the terms of thirty (30) years' imprisonment. Aggrieved by both conviction and the sentence, the appellant is before the court as his first bite to have the decision of trial court reversed on the following grounds;-

1. That, the prosecution did not prove the case against the appellant beyond reasonable as required by the law
2. That, the trial court erred in law by finding that the prosecution failed to prove the offence of impregnating the complainant but found the appellant guilty of the offence of rape.
3. That, the trial court erred in law by failing to evaluate and consider defence evidence

There were two counts that were flattened against the appellant, these were; **First** the offence of rape in which the appellant was convicted and sentenced as explained herein and **secondly**, impregnating a school girl contrary to section 60 A (3) of the Education Act, Cap 353, Revised Edition, 2002 as amended by section 22 of Act, No. 4 of 2016. Particulars of the said offence were to the effect that, on dates of May 2021 at Kimandolu area the District and Region, the accused now appellant did have sexual intercourse with one NWJ, a girl aged fourteen (14) years old and student at Kimasec Secondary as a result of such sexual intercourse on diversity dates, he impregnated the victim.

As earlier stated, the trial court was fully satisfied with the evidence adduced by the prosecution against the appellant in respect of the offence of rape unlike the offence in the 2nd count that the trial court found to

have not been proven on the basis that, there was no proof in the absence of pregnancy and DNA test. The trial court went holding that;

> *"For the second count on impregnating a student. On this offence it was alleged that the accused did have sexual intercourse with the victim herein a student of Kimasec School. On this, there is no proof that she was impregnated by the accused as in order to prove whether the accused was the one responsible for the pregnancy then victim ought to have pregnancy and DNA test was necessary. In the absence of the DNA evidence it leaves a doubt as to whether the accused was one responsible for the pregnancy."*

The substance of the prosecution evidence is to the effect that, the appellant is married to the victim's aunt and that; it was on 11th August 2021 when the victim was discovered to be impregnated during school examination of the female students' pregnancy status. The discovery of pregnancy was flagged by medical examination report (PE1). However, it was the allegation by the prosecution side that, subsequent to the medical examination confirming the victim's pregnancy, the victim underwent miscarriage. It was further the evidence by the prosecution that, the victim did not name the appellant as her rapist at the earliest opportunity until when she discovered to have been impregnated.

On the other hand, it was the appellant's defense that, he did not commit any offence to the victim except that, there was family dispute that, existed culminating into a fabrication of the criminal charge against him. He further contended that, there was no medical report establishing that, the victim was really impregnated. The appellant was able to call one witness, victim's grandmother (DW2), who testified that, the victim had love affairs with other persons. She added that, the victim was not impregnated since it was sufficiently proven that, at the time of trial she had no pregnancy.

Before the court, Mr. Pendael Pedro Munis, the learned advocate and Ms. Alice Mtenga, the learned state attorney, appeared representing the appellant and respondent respectively. The appeal was ordered to be disposed of by way of written submission.

Expounding, the 2nd ground of appeal herein, the appellant's counsel argued that, the victim remained silent quite a long period that is from May 2021 and August 2022 (More than 15 months). He then urged this court to refer to the judicial jurisprudence in **Athuman Hassan vs. the Republic**, Criminal Appeal No. 292 of 2017 (unreported), where the Court held;

"Our double is further coupled by the fact that PW1 did not inform anyone that she was raped by the appellant for the entire three months until when she was found pregnant. This again raises a question on her credibility".

The counsel for the appellant went on challenging the trial court's decision in that, the alleged miscarriage would have been proved by a medical practitioner.

It was further the appellant's complaint that, the evidence adduced by PW1, PW2 and PW4 is contradictory since it was vividly testified that the incidence occurred in May 2021 (PW1 and PW2) but was until 11th August 2022 (at page 8 of the typed judgment). According to the learned counsel for the appellant, the contradictions of dates were not occasioned by a mere slip of pen by the trial court and that had the defense evidence been considered the trial court conclusion would have been different. He then referred the court to the case of **Mohamed Said vs. the Republic**, Criminal Appeal No. 145 of 2017 (unreported) where section 127 (7) of the Tanzania Evidence Act, Cap 6, R.E, 2019 where conviction without corroboration in sexual offences may be entered as was judicially interpreted by the Court of Appeal.

In her response to the appellant's submission in relation to the 2nd ground of appeal, the learned state attorney argued that, an acquittal in

the offence of impregnating the victim could not automatically render n acquittal of the appellant for the offence of rape. She strongly argued that, the essential ingredients in the offence of rape namely; penetration (PW2's evidence) and victim's age below 18 years was satisfactory (evidence adduced by PW1 and PW2). She bolstered her submission with a decision of the Court of Appeal of Tanzania in the case of **Peter Bugumba vs. Republic,** Criminal Appeal No. 251 of 2019 (unreported-CAT).

The respondent's counsel went on arguing that the submission by the appellant's advocate is nothing but a total misdirection since it tends to establish principle with effect that once an accused is acquitted in one count or more counts he or she should not be convicted of another or other counts. **Ms. Mtenga** also pondered the case of **Mohamed** (supra) cited by the appellant's counsel on ground that, it is distinguishable from the latter adding that, each case should be decided depending on its circumstances and material evidence.

However, Ms. Mtenga admitted the complained difference of dates of the alleged discovery of the victim's pregnancy but she argued that the contradictions appearing from the evidence adduced by the prosecution witnesses did not prejudice the appellant taking into account the appellant did not raise any doubt during cross-examination.

It was further the submission by the respondent's counsel in respect of the appellant's complaint that, the trial court did not objectively analyse the defence evidence by stating that, the same was properly assessed by the trial court. Nevertheless, she urged this court to step into shoe of the trial court and ascertain whether or not, the defence raises any reasonable doubt.

Similarly, the respondent's counsel insisted that the best evidence in sexual offences is that of the victim and that the trial court was in the best position to assess the credibility of the victim. She thus cautioned this court as the first appellate court not to interfere with the findings of the trial court unless there are good reasons of doing so. She urged the court to refer to the case of **Aloyce Maridadi vs. Republic**, Criminal Appeal No. 208 of 2016 (unreported).

In his brief rejoinder, the counsel largely reiterated his submission in chief. He conversely added that, the victim's credibility is seriously questionable as she failed to report the alleged carnal knowledge by the appellant to any person until when she was purportedly found with two months' pregnancy. He finally stated that the trial court's decision would be properly founded if the victim's testimony was corroborated by medical report, a medical practitioner that, the victim had sexual intercourse with the appellant and that she earlier informed any relative or any other

person. He added that after the trial court holding that there were doubts left to be desired in respect of the 2nd count since pregnancy and DNA test were not part and parcel of the prosecution documentary evidence, it ought to have acquitted the appellant in the 1st count on the offence of rape.

Now to the determination of the appellant's grounds of appeal. I shall start with the 2nd ground since the 1st ground is on whether the prosecution evidence proved the offence of rape against the appellant to the required standard.

Court's determination on the **2nd ground** of the appellant's appeal, it is clear that, the appellant was acquitted of the offence of impregnating a school girl by the trial court. However, he was convicted of the offence of rape. As rightly submitted by the learned state attorney that, an acquittal or conviction of an accused person who stands charged with more than one count in a criminal charge does not necessarily lead to an acquittal or conviction by the trial court in other counts. That, being the court's finding, it follows therefore the appellant being found not guilty of the offence in the 2nd count, such finding did not automatically acquit him of the 2nd count.

Nonetheless, in our present criminal case, it was the offence of impregnating a schoolgirl, which culminated the alleged offence of rape against the appellant. Had it not been the school exercise of medical checking the pregnancy status of the school female students, the offence of rape could not have been charged against the appellant. Since, the genesis for the offence of rape against the appellant was impregnation, in my decided view, there was serious need to have proven the same unless the offence of rape is proven by the prosecution and not by scanty or flimsy evidence. This position of the law was stressed in **Nkanga Daudi vs. Republic,** Criminal Appeal No. 316 of 2013 (unreported) where the Court of Appeal of Tanzania had this to say:

> "*It is the principle of law that the burden of proof in criminal cases rest squarely on the shoulders of the prosecution side unless the law otherwise directs and that the accused has no duty of proving his innocence*".

In our present case, the evidence of the prosecution ought to be sufficiently strong for the offence that led to medical checkup of the victim's pregnancy status and subsequent charging of the appellant with the offence of rape as well as the offence of impregnation. Failure to adhere to strict proof in the administration of criminal justice otherwise

innocent persons who are accused of sexual offences may likely be convicted.

It is my view that, the pregnancy allegedly diagnosed by PW4, ought to have been proved during trial by not only it being physically seen but also its outcome being seen (child born out of the pregnancy in question or other pieces of evidence establishing that she was impregnated but she subsequently and unluckily underwent miscarriage. In our case, there was no such evidence during trial. Thus, apprehension of serious doubts as to the appellant's guilt on the 2nd count as was correctly found by the learned Senior Resident Magistrate. However, as the said impregnation was the product of the rape offence but the same was left unproven, therefore evidence adduced by the parties ought to have been objectively assessed by the trial court as rightly argued by the parties' counsel.

Now, as to **the 3rd ground of appeal** on the complained failure to properly analyze the evidence adduced by the parties during trial of the criminal charge against the appellant. Regarding the issue of alleged contradictions of the evidence adduced by the prosecution witnesses in relation to the date of occurrence, I do not see any contradictions on the date of the said medical checkup of the pregnancy status of the victim on 11th August 2021. I am of that, view unlike that of the appellant's counsel

simply because upon my perusal of the hand written proceedings as well as typed ones, the date of examination is indicated to be 11th August 2021 and not 11th August 2022 as wrongly argued by the appellant's counsel. Hence, it is clear from the trial court's record that, all prosecution witnesses lucidly testified that, the checkup exercised was conducted on 11th August **2021** and not in **2022.** Hence, indication of 11th August 2022 in the impugned trial court judgment as well as in the testimony by PW2 being date for medical examination in the judgment is a mere error that, did not occasion any miscarriage of justice. Since it is sufficiently adduced and depicted in both handwritten and typed proceedings that the pregnancy test was conducted on 11th August 2021.

There is also the complaint on the part of the appellant that, the victim's credibility is diluted by her conducts of not informing her relatives or any other person of being carnally known by the appellant, her uncle (PW1's brother in-law). I am alive that courts of law should not accept fanciful possibilities to ricochet justices if the prosecution evidence is so strong against an accused person as to leave only a remote possibility in his favour, which can be dismissed (See **Paulo and Shabani Benjamin vs. Republic**, Criminal Appeal No. 19 of 1993 (unreported-CAT). The requirement of mentioning or informing any relative or any person in authority of unlawful incidence at earliest possible is legally mandatory

unless sufficient reason (s) are given for its omission as was rightly emphasized by the Court of Appeal in **Mohamed Said vs. the Republic** (supra), cited by the appellant and vital parts being reproduced herein above.

Examining the evidence on record especially the evidence of PW2, (victim), it goes without saying that the offence of rape if it was actually committed it was between the dates of May 2021 and June 2021 as exposed by the victim's evidence. Perhaps it is apposite to have parts of the victim's evidence reproduced herein;

> (*On May 2021 my aunt told me I have to go to the shop situated at Kimandolu.. I went, he was on my back side and then took his urinating organ and put it to my vagina.....for the 2nd time, it was on June 2021. He told me that he wanted to do calculations based with the shop but what he did instead, he took his urinating organ and inserted it to me but it was after removing my clothes.....it was on **11.08.2022** on my side I was found with pregnancy of two months due to that we were taken to police. Pregnancy that I had, belongs to Samwel as no day that I sleep (sic) with other man except him... **I got miscarriage**, I don't remember the date but it was April.....I used to stay with my grandmother. From the said medication, I did not got (sic) any medication."*

While on one hand, I am alive of the principle that in sexual offences the true and best evidence comes from the victims of such offences since usually if not all the times, the sexual offences are committed in private areas and with aim at ensuring that nobody other than criminal and victim who observers the same. In **Selemani Makumba vs. Republic** (2006) TLR 379, it was stated;-

> *"It is settled law that a medical report even a DNA report is not conclusive proof on rape. It is settled law that the true and best evidence of rape has to come from the victim."*

See also **Edson Simon Mwombeki vs. the Republic**, Criminal Appeal No. 94 of 2016 (unreported-CAT).

Considering the legal position consistently emphasized by our courts including the above quoted cases but on the other hand, the courts should not ignore the possibility of convicting an innocent person following failure to objectively assess the evidence on record and on its totality.

Having examined the evidence adduced by the victim as well as the parties' submissions, there is serious complaint on the victim's failure to report or inform any relative of the said rape from May 2021 until when medical examination was executed as planned by the school authority on 11th August 2021. The victim has tried to explain reasons for her omission

to name her rapist to wit; promises to be financially assisted by the appellant together with her twin until when she mentioned the appellant as one responsible for the pregnancy. The appellant's failure to inform including her grandmother, DW2 whom she was living and other reasons that, I shall demonstrate herein below may raise doubts unless the trial court cautioned itself before placing its reliance on the evidence solely adduced by the victim, PW2

I have also examined the medical report tendered and received as PE1 and observed that, the same was intended for pregnancy examination and not rape. Thus, there is no corroborative evidence relating to the offence of rape since the evidence given by PW1, victim's father and not her mother wrongly understood by the counsel for the respondent, PW3 and PW4 did not incriminate the appellant in connection with the offence of rape except that of the victim, PW2.

I have further observed that, the charge reflects that the incidence occurred on the diverse dates of May 2021 however the testimony of the victim to the effect that, the same occurred for the first time on May 2021 and in June 2021. It is common understanding that the charge is a foundation of a criminal trial. It means therefore, any court admitting it from the prosecution should satisfy itself that it is drawn in compliance

with the law. It is common ground that, the evidence adduced during trial should not be at variance with the charge sheet. In **Abel Masikiti vs. Republic**, Criminal Appeal No. 24 of 2015 (unreported), the Court of Appeal in a similar situation, among complaints, was the variance of the date of the commission of the offence between the charge sheet and the evidence, had this to say: -

> *"In a number of cases in the past; this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal. Short of that* failure of justice will occur..."

Being guided by the above principle, it was therefore necessary for the trial court /prosecution to have amended the charge so to do away with uncertainty as to the date of the alleged offence. As per the testimony of the victim, the charge was therefore defective it is indicated that, the offence of rape was committed on diverse dates of May 2021 excluding dates of June 2021.

Applying the decision of the Court of Appeal in **Mohamed Said** (supra) when emphasizing the need by the trial court to caution itself on the application of section 127 (7) now (6) of TEA to convict an accused person of sexual offences. It cemented that, when the trial court relies wholly on the uncorroborated evidence of the victim of the sexual offences. There should be full court's satisfaction that, the evidence of the child or victim is watertight. The Court of Appeal went on stating;-

> *"Was PW1 of moral standards? According to the appellant, at Tunduru where she was living, PW1 had moved with a man and had quit school. This fact was not contradicted...If according to PW1 herself, the teachers and her fellow* ***pupils were calling her prostitute and shunning away from her, whether rightly or wrongly****.....A witness who tells lie on a material point should hardly be believed in respect of other points.....*
>
> *We think that it was not intended that the words of the victim of the sexual offences should* ***be taken as a gospel truth but her or his testimony should pass the test of truthfulness.*** *We have no doubt that; justice in cases of sexual offences requires strict compliance will lead punishing offenders only in deserving case....." (Emphasis supplied)*

In the case at hand, the evidence of the victim is seriously shakened by that of her grandmother, DW2 who testified that, her granddaughter used to have love affairs with others and not the appellant. Serious note has been given in the testimony of DW2 since she is entitled to credence and above all, she is the who was living together with victim. Worse still, she denied impregnation of her granddaughter. For clarity, I herein under reproduce DW's testimony;

> "*...she moved with other people not this one. This person is my in-law. I asked myself about the pregnancy, where is it, what they said is not true.*"

Therefore, I am of the considered view that, if the testimony of DW2 and that of the appellant who stated that, the charge against him was due to the existence of dispute in his family coupled with shortfalls as explained herein, was carefully considered by the trial court, a different conclusion might been arrived at.

Having found the above outlined facts to have not been sufficiently established by the evidence on the record, I am increasingly satisfied that the learned trial magistrate did not direct her mind of the defence as well as the fact that, in absence of the impregnation offence, the evidence of the victim remain uncorroborated. I so hold for an obvious reason that,

the alleged impregnation was the source of the criminal charge against the accused now appellant.

That said and done, I find merit in this appeal. Consequently, I allow it. The appellant shall be released immediately from prison unless withheld therein for other lawful cause

It is so ordered.

DATED and **DELIVERED** at **ARUSHA** this day of 11th October 2023

SGD: M. R. GWAE

JUDGE