IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 103 OF 2023

(Original criminal Case No. 377 of 2022 of the District Court of Temeke at Temeke)

SHARIF SADIKI TANDILA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

27/10/2023 & 07/11/2023

DING'OHI, J.

The Appellant, **SHARIF SADIK TANDILA**, stood charged, in the District Court of Temeke at Temeke, for the following counts:

1st Rape contrary to section 130(1) (2) (e) and section 131 of the Penal Code Cap. 16 R: E 2019.

It was alleged that, on the diverse dates between 7th May 2022 and 23rd June 2022 at Mtoni kwa Azizi Ally area within Temeke District in Dar es salaam Region the appellant did have carnal knowledge with the victim (herein to be referred as SH), a girl aged 15 years.

2nd Impregnating a school girl contrary to section 60A (3) of the Education Act, Cap. 353 R: E 2019.

It was alleged that on diverse dates between 7th may,2022 to 23rd day May, 2022 the appellant did impregnating SH (herein after to be referred to as the victim) a student of Kurasini Secondary School.

Briefly, the prosecution case as against the Appellant herein, at the trial court went that, between 7th may, 2022 and 23rd May, 20222, the Victim was not found at the home of her parents. After being found, she explained that she was living with the accused person at his home in sexual relations. The victim was taken to the hospital and upon examination was found pregnant.

At the end of the trial, the trial court was satisfied that the prosecution side had proved the charge on both counts. The appellant was accordingly convicted. He was sentenced to serve thirty years (30) imprisonment for the 1st count and two (2) years imprisonment for the 2nd count. The sentences were ordered to run concurrently.

Aggrieved with the conviction and sentences, the Appellant came before this court by this appeal armed with the following grounds:

1. *That, the learned trial magistrate erred in law and fact in convicting the appellant when there was no cogent and/or sufficient evidence to prove that (Pw1) was a school girl beyond reasonable doubt as neither attendance book (register) nor a teacher was called to testify in court to prove the facts in issue.*

2. *That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of Pw1 (victim) which was barely improbable/implausible, incredible and doubtful as she did not explain why she joined hand with the appellant to live as a wife and husband and whether or not Pw1 told the appellant the truth of her age and life.*

3. *That, the learned trial magistrate erred in law and fact in convicting the appellant when there was no cogent evidence from Pw1, Pw2 and Pw3 to prove that Pw1 (victim) disappeared from her homestead for 46 days and that she was at the appellant's room as asserted by Pw1 (Victim).*

4. *That, the learned trail Magistrate erred in law and fact in convicting the appellant without testing the truthfulness of Pw1's testimony and weighing with that of the appellant in order to determine the sanative issues of ACTUS REUS and MENS REA the omission which resulted to a serious error amounting miscarriage of justice and constituted a mistrial.*

5. *That, the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution failed to prove and/or establish the appellants apprehension beyond reasonable doubt as the testimony of Pw1, Pw2 and Pw3 did not clearly explain the trap they used to arrest the appellant but contradicted themselves, and hence not arresting militiamen and/or any local leader was called to testify in court the omission which case doubt on the prosecution case.*

6. *That, the learned trial magistrate erred in law and fact in convicting the appellant in a case which was not proved beyond reasonable doubt against the appellant that he had knowledge of victim's age and/or the victim (Pw1) and the appellant knew each other before the material date.*

The appellant prays this court to allow his appeal; quash the conviction and set aside the sentences imposed upon him and, he be released from prison.

At the hearing of this appeal the appellant drove himself, unrepresented. The Respondent Republic was represented by Mr. Adolf Kisima, the Learned State Attorney.

The Appellant being a layperson had no much to submit in support of his grounds of appeal. He prayed the court to adopt the grounds of appeal as stated in the Memorandum of Appeal.

In reply submissions, Mr. Adolf Kisima for the Respondent submitted that this appeal by the Appellant have no merit. He conversed that, going by the records, the evidence leaves no doubt that the Appellant committed the offences charged and that he was properly convicted.

It is the learned State Attorney submissions that, in his defense, the appellant claimed that the victim was his lover but if the evidence of the prosecution witnesses (Pw1, Pw2, and Pw3) is taken together, proves that the Pw1 was a school girl aged 15 years old.

According to the Learned State Attorney, the Pw1 clearly told the trial court that she was a secondary school student and she stopped the school after being impregnated by the present accused person. He went on submitting that the Pw1 explained all circumstances on how the victim met the appellant and took her to his home where they lived together for 46 days.

According to the Learned State Attorney, the argument by the Appellant that the victim was his lover does not disprove the evidence that the said victim was a student. That, the evidence by the prosecution side was not shaken as the Appellant failed to cross-examine the victim who was the important witness in that sexual offence. He cited the case of **Athumani Rahudi v. Republic,** criminal Appeal No. 264 of 2016 to bolster his argument. In that case the Court of Appeal did show the effect of the failure to cross examine the important witness. It observed that;

> *"...where a party fails to cross examine a witness on a certain matter; he is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

He also argued that in sexual offences the evidence of the victim alone is sufficient to prove the offence. He cited the case of **Yuda John v. Republic** Criminal Appeal No. 238 of 2017 CAT at Arusha (Unreported) where it was observed that the evidence of the victim is safe be relied upon by the court to sustain conviction in rape cases.

He further cited the case of **Yohana Saidi @Bwire v. Republic,** Criminal Appeal No. 2020 of 2018 HCT at Dar es salaam (Unreported)

quoted in the case of **Selemani Makumba v. Republic,** [2006] T.L.R. 379. In the later case, it was observed that;

"The true evidence of rape has to come from the victim..."

Finally, the learned State Attorney had the view that, since the evidence of the Pw1 and Pw2 was corroborated with that of the Pw4, and the same was not shaken by the defense side, the conviction was proper. He prayed that the appeal be dismissed.

The appellant in his rejoinder, like in submissions in chief, had nothing more to add. He opted to maintain what he said when called to make submissions in chief, adding that, he was convicted and sentenced on his ignorance in law.

I have carefully gone through submissions by both sides. I have considered all. Principally, the appellant does not dispute that he had sexual relations with the victim of this case and he happened to live with her under the same roof in sexual relations. However, the Appellant disputes that the victim is aged 15 years.

I will be very brief and straight forward as most of the facts in this case are not in dispute. For example, it is not strongly disputed that the Appellant and the victim were living together in sexual relations from 7th May, 2022 to 23rd June, 2022. The appellant's main and probably, considerable complaint in this appeal is that he was convicted and sentenced in absence of cogent and/or sufficient evidence to prove that the PW1 was raped and was a school girl aged 15 years. He said, no attendance book (register) was tendered or that no teacher of the school was called to testify before the court to prove those facts.

I have considered that complaint. It is my settled view that parents of the victims of rape are the best witnesses to prove the age of their children.

In the case of **SHANI CHAMWELA SELEMANI *versus* REPUBLIC,** CRIMINAL APPEAL NO. 481 OF 2021, the Court of Appeal had the following to say as regard to proof of the age of the victim of rape;

> *"We wish to restate the settled position of the law as it was done by the first appellate Judge that, the age of the victim in a court of law can be proved by a parent, victim (as the case here), relative, medical practitioner or, where available, by production of Birth certificate."*

In this case, the age of the victim was proved by the **PW2 FADHILA ALLY ATHUMANI,** mother of the victim, who also tendered the birth certificate of the victim. The birth certificate was admitted by the trial court without objection. It was marked Exhibit P1.

Under the circumstances, the Appellant's complaint as to the age of the victim is without base. It is hereby thrown away.

Basing on the evidence in the trial court's record, I will agree with the Respondent's submissions that the Appellant was properly held responsible for the rape committed against the victim. As I have observed somewhere herein above, the Appellant himself does not dispute that he had sexual relations with the victim. The law is very clear that the consent is immaterial in rape cases involving the victim who is under 18 years.

Under the circumstances, I find that the appellant was properly convicted of the offence of rape in the first count. The sentence of 30 years in jail imposed on the appellant for the 1st count is undisturbed. As to the second count of impregnating a school girl, I find that there is a breakage of the chain of evidence against him. Apart from the fact that the Appellant stayed with the victim under the same roof for about 46 days, there is no proof that the victim was impregnated. The allegation of abortion is not supported by any reliable and/or tangible evidence.

It follows therefore that, appeal against the conviction and sentence on the first count is dismissed.

As to the second count of impregnating a school girl, the charge was not adequately proved. The appeal on that count is allowed. Consequently, the conviction and sentence of two years in jail imposed by the trial court on that count is quashed and set aside.

Appeal partly allowed.

THE HIGH COURT OF TANZANIA

S. R. Ding'ohi

JUDGE

07.11.2023

COURT: Judgment delivered this 7th day of November, 2023, in the presence of Mr. Kisima Adolf, the learned State Attorney, for the Republic and in the presence of Appellant in person.

S. R. Ding'ohi

JUDGE

07.11.2023