IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 79 OF 2021

(Arising from the District Court of Bariadi in Criminal Case No. 83 of 2020)

SALU KIDAVA .....APPLELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

16th August & 22th September, 2023.

S.M. KULITA, J.

This is an appeal from Bariadi District Court. The appellant herein was charged with two counts. The first count was Rape, contrary to the provisions of sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 RE 2019]. The 2nd count was Impregnating a School Girl, contrary to the provisions of sections 60A(3) of the Education Act, Cap 353 as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016. It is alleged that, on 11th December, 2018 at Nkuyu Village, within Itilima District

in Simiyu Region, the appellant herein had sexual intercourse with K.M. (Not her real name), a girl of 15 (fifteen) years who was a Standard VII pupil at Nkuyu Primary School. That the said act led to the impregnate of the said school girl.

Upon the matter being heard, the Appellant was found to have committed the said two offences as charged. Accordingly he was convicted and sentenced to serve the imprisonment term of 30 (thirty) years for each count.

That decision aggrieved the appellant, hence this appeal with 5 (five) grounds which can be summarized as follows; **one,** the trial court wrongly convicted the Appellant for the offence of Impregnating a School Girl with no proof that the victim was a pupil; **two**, the Medical Examination Report (PF3) was admitted contrary to the law; **three**, the issue of identification was not properly handled; **four,** the Clinical Officer who filled the PF3 was not called to testify; **five,** the trial Magistrate failed to evaluate the evidence of the witnesses who testified before the court.

The matter was argued through oral submissions. While the Respondent (Republic) is represented by Ms. Happy Chacha, State Attorney, the Appellant is unrepresented.

Submitting in support of the appeal the appellant prayed for the grounds that he has incorporated in his Memorandum of Appeal to be adopted as the submissions for his appeal. He concluded by praying for the appeal to be allowed, he be found not guilty and accordingly acquitted.

In the reply thereto, the Respondent's Counsel, Ms. Happy Chacha, State Attorney submitted in respect of the 1st ground of appeal that the evidence of the victim herself (PW2) and that of her mother (PW1) are sufficient to prove that the victim was a pupil. The counsel added that the Appellant never challenged this fact during trial which means that he admitted the same. To bolster her assertion she cited the case of **ISSA HASSAN UKI V. R, Criminal Appeal No. 129 of 2017, CAT at Mtwara** stating that in the said case it was held that failure of the Accused to cross-examine the witnesses implies his admission on the said particular fact. Hence the Appellant herein is estopped/precluded from denying the same.

Submitting on the 2nd ground of Appeal Ms. Chacha stated that the allegation by the Appellant that the PF3 was illegally admitted has no legal weight. She said that the lower court proceedings at page 20 transpire that, during her testimony the Doctor who had filled the PF3 was led by the Prosecutor to describe the document, PF3. He then identified it before the same was tendered to court as exhibit with no objection from the Accused (Appellant). The counsel further submitted that the said PF3, which was admitted to court as Exhibit P1 was accordingly read over before the court after the admission, which is among the procedural requirement.

The State Attorney admitted that, it is the Prosecutor who had sought to tender to court the said PF3 before the same was received and admitted to court as Exhibit. She said that, that is not fatal according to the Court of Appeal case namely **JOHN NGONDA V. R, Criminal Appeal No. 45 of 2020, CAT at Arusha** at page 14 while citing for approval, the case of **ABAS KONDO GEDE V. R, Criminal Appeal No. 472 of 2017** in which it was held that the admission of exhibit tendered by the Prosecutor is not fatal if nobody has been prejudiced, as long as the other procedures were properly adopted.

As for the 3rd ground the State Attorney submitted that the Appellant was properly identified at the scene by the victim as the act of sexual intercourse is used to be done closely between the male and female persons. Further the Counsel submitted that the record at page 15 of the proceedings transpire that the Appellant had been known to the appellant before. She also submitted that the Appellant had a mobile phone torch during the commission of the offence, hence PW2 was able to see him. Thus, she recognized him. For those reasons, the State Attorney was of the view that there was no possibility of mistaken identity by the victim.

The State Attorney disputed the 4th ground of appeal by stating that, it is not true that the Doctor who had medically examined the victim was not called to testify before the court during trial. She said that the said Doctor namely Mpelo Massawe turned up to court on 13/04/2021 and testified as PW3 as it can be so read at page 19-20 of the trial court proceedings.

Lastly, Ms. Happy Chacha, State Attorney replied the 5th ground of appeal which states that, the trial Magistrate failed to evaluate the evidence of the witnesses who testified before the court. In her reply submission she stated that, the trial Magistrate, in her judgment, rightly framed two issues to be determined as they can be seen at page 4-5 of the trial court's judgment.

The counsel further said that, the Magistrate answered them upon the analysis she had made on them. She said that in doing so the Magistrate considered the testimonies of all witnesses including the victim and the Appellant. She further stated that at last the Magistrate found the Appellant guilty on all two counts, hence convicted him.

The State Attorney, Ms. Happy Chacha concluded by praying for the appeal to be dismissed for having no merit. She sought for this appellate court to uphold the conviction and sentences that the District Court had imposed against the Appellant herein.

The Appellant, Salu Kidawa had no rejoinder. He just reiterated what he had stated in his submission in chief.

Having carefully gone through the trial court record, grounds of appeal and the submissions of both parties, I find the issue to be determined is whether the appeal is meritorious.

On the 1st ground the Appellant alleged that the trial court wrongly convicted the Appellant for the offence of Impregnating a School Girl with no proof that the victim was a pupil. My view on this is that, the evidence of the victim herself (PW2) and that of her mother (PW1) are sufficient to prove that the

victim was a pupil. The same applied to the testimony of PW4, a Police Officer who was the Investigator of the case. This witness testified to the effect that she visited Mkuyu Primary School in which the victim was studying and interviewed the Head Teacher. Actually there is no specific mode of evidence provided in the law as a proof for the fact that the victim was a pupil. Just facts of the case can determine it. Further, as it has been submitted by the counsel for the Republic that, as the Appellant never challenged this fact during trial, the implication is that he admitted that the victim was a pupil, hence precluded to challenge the same in appeal. This is a position of the law as per **ISSA HASSAN UKI (supra) V. R, Criminal Appeal No. 129 of 2017, CAT at Mtwara** in which it was held that failure of the Accused to cross-examine the witnesses on a particular fact implies his admission on that said fact. Hence the Appellant herein is estopped/precluded from denying the same during the appeal. I find this ground of appeal with no legal weight, hence dismissed.

As for the 4th ground of appeal that, the Clinical Officer who filled the PF3 was not called to testify, I find this ground unmeritorious too, as it is ample in the record that the said person turned up and testified before the trial court. According to the lower court record, the said Clinical Officer, namely

Mpelo Massawe who had medically examined the victim, turned up to court on 13/04/2021 and testified as PW3 as it can be so read at page 19-20 of the trial court's proceedings. This ground is dismissed as well for lack of merit.

Another ground that had been raised by the Appellant was that the Medical Examination Report (PF3) was admitted contrary to the law. This was the 2nd ground of appeal. Upon going through the record I have noticed that on 13/4/2021 when the said document was tendered to court by the Prosecution side, it is the Prosecutor, and not the witness (Clinical Officer) who had sought to tender it to court before the same being admitted by the court and marked as exhibit P1. The same person (Prosecutor) is the one who also read it before the court after the admission.

At page 20 of the lower court record the proceedings transpires that, the Doctor who had filled the PF3 was led by the Prosecutor to the extent of identifying it, before the same was tendered to court as exhibit by the prosecutor, with no objection from the Accused (Appellant). The record further transpire that the said PF3, which was admitted to court as Exhibit P1 was accordingly read over before the court after the admission, and it is the Prosecutor who did so. What I can see from the record is that all basic

requirements for the admission of documentary exhibit were adopted, save for the fact that the same was tendered and read over by the Prosecutor instead of the witness (PW3) who was the author.

The issue is whether the said irregularity by the trial court was fatal. In my view it is not. The reason behind is that nobody has been prejudiced for the said irregularity. Such fault does not go to the root of the case, hence curable under the Overriding Objective principle. In **JOHN NGONDA V. R, Criminal Appeal No. 45 of 2020, CAT at Arusha** at page 14 the Court of Appeal, while citing for approval, the case of **ABAS KONDO GEDE V. R, Criminal Appeal No. 472 of 2017, CAT at DSM** held that admission of exhibit tendered by the Prosecutor is not fatal, as long as the other procedures were properly adopted and nobody had been prejudiced. As narrated above that, save for the fact that the said exhibit P1 was tendered to court and read out by the prosecutor, all other procedures were accordingly adopted during trial, I treat the anomaly trifling, as it was not prejudicial to the Accused (Appellant). I thus find this ground unmeritorious too.

Turning to the 3rd ground that identification was not properly handled, as there was a possibility of mistaken identity by the victim, the record at page 15 of the lower court's proceedings transpire the victim (PW2) to have

testified that the incident happened at about 1900 hours which was early night, and that the assailant had a torch which enabled PW1 to identify him. However, it is my considered view that, basically the torch light is used to be directed to a place or object which is intended to be seen by the person who holds it. As for this matter, obvious the rapist intended not to light up himself, rather to light up the victim or something else in connection with the act of sexual intercourse with her. I have noticed in the record that the victim never specified as to whether it happened that the torch lights had ever been directed to the assailant himself, the act which could enable her to identify the Appellant visually. However, the fact that the assailant had been known to the victim before, it is my considered view that, the Appellant was properly identified at the scene by the victim, as the act of sexual intercourse is used to be done closely between the male and female persons.

Further the record at page 15 of the proceedings transpire that the victim had been knowing the victim before. She mentioned his name being Salu. For those reasons, PW2 recognized him.

According to **MUSSA SAGUDA V. R, Criminal Appeal No. 440 of 2017, CAT at Shinyanga** in the scenario that the assailant was known to the victim the issue to be determined is Recognition rather than Identification.

In the said case, while citing for approval the case of Court of Appeal of Tanzania namely **NICHOLAUS JAME URIO V. R, Criminal Appeal No. 244 of 2010 (CAT)** and the Kenyan Court of Appeal case of **KENGA CHEYA THOYA V. R, Criminal Appeal No. 375 of 2006** it was held;

> *"On our own evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by witness PW1 who knew him. This was clearly a case of recognition rather than identification. It has been observed severally by this court, recognition is more satisfactory more assuring and more reliable than that identification of a stranger."*

Similarly, in the case at hand, I have no hesitation to state that, in view of the evidence of PW2, this is a clear case of recognition than identification. The appellant cannot escape the fact that he was duly recognized by PW1 at the scene of crime in connection with the offence of rape which led to the causation of impregnate to the victim who was a child, studying in Standard VII, not to attend school.

As for the last ground of appeal that the trial Magistrate failed to evaluate the evidence of the witnesses who testified before the court, I have the

following observation; on this ground the Appellant tells this court that the case at the trial court was not proved beyond all reasonable doubts. In resolving this issue I have to go through the ingredients of the offences that had been charged.

Starting with the offence of "Rape", section 130(2)(e) of the Penal Code provides that, a male person commits the offence of rape if he has sexual intercourse with a girl or a woman with or without her consent, when she is under eighteen years of age. According to the Clinical Officer, Mpelo Massawe (PW3) who examined the victim and filled the PF3 the Victim was found pregnant when she medically examined her on 13/04/2021, which means that she had been carnally known by a male person. Further, the evidence in record reveals that there is no dispute that the victim was 15 (fifteen) years old when she had sexual intercourse. According to the victim (PW1) herself she was born on 29/4/2004. Her mother (PW1) said that she was 14 years old. Whatever it is, her age is under 18 years, hence, a male person's act of having sexual intercourse with her amounts to Rape. It has been submitted by the Republic and the record transpires that the Appellant herein is the one who is responsible for the victim's pregnancy. It means he is the one who has sexual intercourse with the victim. The said person was

mentioned by the victim herself who had been knowing him before. The principle of law is that the evidence of the victim is the most reliable in proving the Rape cases, see **SELEMAN MAKUMBA (supra)**. The record further transpires that the Appellant escaped after the incident in that 2018, he was arrested later, on 30/4/2019. This is according to PW4 and PW2.

Regarding the 2nd count which is Impregnating a School Girl, contrary to the provisions of sections 60A(3) of the Education Act, Cap 353 as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016. The fact that, it has been proved that the victim was a standard VII pupil at Nkuyu Primary School by the time the offence of Rape was committed, which led to the victim's pregnancy, this offence was successfully proved as well. As the person who had carnal knowledge with her is the Appellant, obvious he is the one who is responsible with it.

As for the DNA test, the Prosecution side had no evidence to prove as to what was the result. In her witness, the Investigation Officer (PW4) ended up with the testimony that, samples for that purposes had been taken to the Government Chemist, however, till the time she was testifying the results were not yet out. But it is the view of this court that, the DNA test is not a mandatory ground for determination on whether the suspect is the one

responsible for pregnancy. Hence, I find it unnecessary to rely upon it in determination of this matter.

These are the analysis that have been done by the trial court, and this court as well in stepping into its shoes as the 1st appellate court. I find them sufficient to convict the Appellant on all two counts.

The 5th and last ground of appeal is therefore unmeritorious, hence dismissed as well.

In upshot, I find this appeal with no legal weight, hence **dismissed**. Decision of the trial court on conviction and sentence are hereby upheld.

S.M. KULITA
JUDGE
22/09/2023