THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 77 OF 2023

(Originating from the District Court of Rungwe District at Tukuyu, in Criminal Case No. 180 of 2016)

EMMANUEL BUKILE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 16/08/2023
Date of Judgement: 11/12/2023

NDUNGURU, J.

In the District Court of Rungwe District at Tukuyu (the trial Court), in criminal case No. 180 of 2016, EMMANUEL BUKILE (the appellant) was arraigned, convicted and sentenced to serve thirty years imprisonment for two counts of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the penal Code Cap. 16 RE 2002 (Now R:E 2022) and Impregnating a school girl contrary to section 4 (5) of the Education Act No. 25 of 1978 read together with para 5 of the Government Notice No. 385 of 2003.

It was alleged in the particulars of the offence regarding the first count that in August, 2015 until 15th day of June 2016 at different time at Katumba Village within Rungwe District in Mbeya Region the appellant had carnal knowledge with one UJM (name withheld to disguise her identity) a girl of 16 years. On the second count was stated that during same dates at the same place and time the appellant impregnated the same girl a student of form one at Lupoto Secondary School. The appellant denied the charge. The case went to a full trial. At the end, the trial Court was satisfied with the prosecution case it thus convicted the appellant and sentenced him as above introduced.

The evidence led to the appellant's conviction was that in 2015, the appellant and the victim had sexual relationship, the victim on the fateful date went to the appellant's house where both undressed their dresses and the appellant penetrated his penis into the private part of the victim. That they did so twice as the result the victim became pregnant. That the victim after four months of pregnancy informed the appellant about the situation where he proposed to abort, but she refused. Thereafter parents became aware of the situation when it was six months. When they asked the perpetrator, the victim mentioned the appellant and that she had never been in relationship with another man

so the matter was reported to the police the appellant was arrested and the victim was given PF3 to attend hospital for clinic, a clinic card was admitted as exhibit P1.

In his defence the appellant just faulted the evidence of the victim on the reason that she told the trial Court that it was her sister who couched her to say that he was her boyfriend. And that there was no medical proof that the victim was raped nor that the new baby's blood related to him. As I have said, however, the trial Court was satisfied by the prosecution case.

Dissatisfied, the appellant has referred the instant appeal raising five (5) grounds of appeal which can be conveniently rephrased as follows:

1. That the trial Court erred in law when convicted and sentenced the appellant without taking into account that the prosecution failed to prove the charge as per law.
2. The trial Court erred when failed to take into consideration that PW1 had never reported to any one about being raped and no DNA test was conducted to prove if the child was of the appellant.

3. That the charge was not proved against the appellant as the police issued PF3, a doctor issued a clinic card and the child born as the result of rape did not appear before the trial court.
4. That the appellant's cross examination questions to the prosecution witnesses were not recorded.
5. That the defence evidence was not considered.

During hearing of the appeal, the appellant appeared in person, unrepresented whereas Mr. Bajuta learned State Attorney represented the respondent/Republic.

When the appellant was invited to argue his appeal he asked the learned State Attorney to begin reserving his right to rejoin.

The learned State Attorney submitted opposing the appeal that the prosecution proved the case beyond reasonable doubt through the evidence of PW1. That since it was proved that the victim was a secondary school student and of 14 years as she herself proved and the evidence of her mother PW2 who said that she was born in 2002 the offence was proved since in statutory rape, consent of the victim is immaterial but the age. And that the evidence of the victim alone is sufficient to warrant conviction if the same is credible. To support his

contention, he cited the case of **Amin Ismail v. R.** Criminal Appeal No. 178 of 2015 CAT.

Also that the count of impregnating a school girl by PW3, school teacher where the victim was schooling and that he tendered a school attendance.

Mr. Bajuta submitted further that since the victim proved that she was in love affairs with the appellant and she was below 18 years the offence of rape was proved. About the complaint of DNA test, he argued that it is not a legal requirement. He relied on the case of **Aman Ally @ Joka v. R.** Criminal Appeal No. 353 of 2019 CAT

On the complaint tat certain persons were not called as witnesses, Mr. Bajuta argued that number of witnesses does not matter but quality and credibility of witnesses and that the evidence of PW1 was sufficient to warrant conviction.

On the ground that his question was not recorded Mr. Bajuta submitted that court records are presumed to reflect what took place. He relied on the case of **Khaji Manelo Benya v. R.** Criminal appeal No. 538 of 2008 CAT. Also that the appellant's defence evidence was

considered but did not shake the prosecution case. In conclusion he prayed the appeal to be dismissed.

In rejoinder, the appellant was brief that the case was concocted as there was no scientific proof. That the victim told the trial Court that she was couched by her sister. And that, the fact that the victim did not report to anybody until found pregnant shaken her credibility. The appellant prayed for his appeal to be allowed.

I have considered the grounds of appeal as presented by the appellant and the arguments by the learned State Attorney. The issue for determination is whether the appeal has merits.

Starting with the complaint in the 4th ground of appeal that the trial Court did not record questions which the appellant asked prosecution's witnesses. I am constrained to agree with the learned State Attorney that court records are presumed to reflect what took place. This also the position in regard of the law principle that, court records are presumed to be serious and genuine documents that cannot be easily impeached unless there is evidence to the contrary; see **Halfani Sudi v. Abieza Chichili,** [1998] TLR. 527. The appellant did not give any account as to why the trial Court records which does not

show questions asked by the appellant should not be believed. I thus dismiss this ground.

The next for consideration is whether the prosecution proved the charge against the appellant beyond reasonable doubt. Generally, in criminal cases like this, burden of proof lies upon the prosecution and it is beyond reasonable doubt. And it never shifts to the accused person. See the holding in **Pascal Yoya @Maganga vs Republic,** Criminal Appeal No. 248 of 2017 Court of Appeal of Tanzania (Unreported).

In this case the germane evidence is that of PW1 i.e the victim. She attested that she had sexed with the appellant twice. And that they started relationship in 2015. That her parents got aware of her being pregnant when she was six months' pregnancy. Als that she had never been in relationship with another man. It appears her age in the clinic card was different from what she told the trial Court thus she replied during examination in chief that it was her sister who advices her to write different in the clinic card.

Generally, I am abreast of a legal principle that, in sexual offences like the one at hand the best evidence is from the victim while other prosecution witnesses may give corroborative evidence. See **Selemani Makumba v. The Republic** [2006] T.L.R 379, **Galus Kitaya v. The**

Republic, Criminal Appeal No. 196 of 2015 and **Godi Kasenegala v. The Republic**, Criminal Appeal No. 10 of 2008 (both unreported). However, the victim's evidence will be relied upon to convict if the same is found credible. This is in line with section 127 (6) the Tanzania Evidence Act, Cap 6 R.E. 2022.

Deriving from the above principle in relation with the evidence of the victim I am not convinced that the victim was credible and a reliable witness. This is because, there is no account that when her parents became aware that she was pregnant she readily mentioned the appellant as the perpetrator. I have keenly scanned other evidence on the record, there is no evidence on when the appellant was arrested for these offences. As it was complained by the appellant no police appeared before the trial Court to testify as to when the matter was reported, who arrested the appellant and what he said thereafter. The police could have cleared the doubt as to whether the victim mentioned the appellant to be a perpetrator soon after the incidence or after being asked by her parents or guardian. I am of this query because the appellant was arraigned in the trial Court on 14/11/2016, which was about five months from when the victim was known to be pregnant i.e in June 2016 as per PW2.

My query is also due to being arrive of the position of law in **Jaribu Abdallah v. Republic** [2003] TLR 271 and **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39; In the latter, the CAT observed thus:

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry".*

Moreover, as it was complained by the appellant, the victim lied her age in the clinic card (i.e exhibit P1) on the reason that it was her sister who told her to lie. My query is, if she was able to lie about her age, why could be impossible to lie that she had never been in love affairs with other men.

Again, it should be remembered that at the time the appellant was arraigned in court, the victim has already delivered a baby and the alleged father of the baby (i.e the appellant) was denying his involvement. Why the trial Court did not order scientific proof. My observation is in line with that of the Court of Appeal of Tanzania in the

case of **Daud Rashid vs Republic** Criminal Appeal No. 97 of 2020 CAT, at Dar es Salaam (unreported) where the Court observed that:

> *"... since PW1 said she had already delivered a baby there could have been scientific proof that the appellant was the father and not any other."*

That being said and done in relation to the evidence marshalled by the prosecution, I find the charges against the appellant were not proved to the hilt.

As the result, I allow the appeal quash the conviction in both counts and set aside the sentence meted out to the appellant. I order the appellant's immediate release from prison unless he is held therein for another lawful cause.

It is so ordered.

D.B. NDUNGURU,

JUDGE

11/12/2023