IN THE HIGH COURT OF TANZANIA

TABORA SUB-REGISTRY

CRIMINAL APPEAL NO. 76 OF 2023

(Originating from Criminal Case No. 46 of 2022 of Uyui District Court)

JACOB MATHEO @ FIMBONYUMA ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

13/11/2023 & 08/12/2023

MANGO, J:

The appellant Jacob s/o Matheo @ Fimbonyuma was indicted in the Uyui District Court for the offences of Rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 R.E 2019 and Impregnating School Girl contrary to section 60A(3) of the Education Act Cap 353 as amended by Act No. 2 of 2016.

It was alleged by the prosecution that at an unknown time between April to September 2022 in Nzubuka Village within Uyui District, the appellant raped a 16 years old girl who in this judgment shall be referred to as XYZ. Further, the prosecution alleged that at the same timeframe, the appellant impregnated her.

The appellant was tried and convicted on the first count of rape and sentenced to serve 30 years imprisonment. Dissatisfied by the decision of the District Court, he appealed to this Court against conviction and sentence on the following grounds.

1. *That, the prosecution side did not prove the case beyond reasonable doubt as required by law.*

2. *That, the learned Trial Magistrate erred in law and fact to uphold the conviction against the appellant based on the Cautioned Statement which was wrongly admitted as was not read aloud in Court and it was recorded out of time.*
3. *That, the learned Trial Magistrate erred in law and fact to convict the appellant on weak and contradictory evidence as PW4 and PW5 on which school did the victim belonged to Nzubuka Primary School and Ibelamilundi Secondary School.*
4. *That the proof of penetration is questionable as it was not proved.*
5. *That the victim (PW1) failed to name a suspect at the earliest opportunity.*

Based on the above-listed grounds the appellant prays this Court to allow the appeal, quash the conviction, set aside the sentence and order for his release from prison custody.

At the hearing of the appeal the appellant appeared in person and fended for himself whereas the respondent was represented by Ms. Idda Lugakingira learned State Attorney. The appeal was argued orally.

The appellant adopted the grounds of appeal to form his submission and prayed the Court to consider the same.

Submitting on the first ground of appeal Ms Idda stated that the appellant was charged with two offences, rape and impregnating a school girl. She argued that, it was proved that the appellant and the victim had a sexual relationship for a long time. In this, she referred the Court to the testimony of the victim (PW1), a girl below 18 years old who testified to the effect that, she had a sexual relationship with the accused and she was pregnant. Ms

Idda prayed the Court to disregard the first ground of appeal for being meritless.

As for the second ground of appeal where the appellant challenged the admission of the cautioned statement, Ms Idda submitted that, the cautioned statement was read over by PW5 as it appears on page 27 of the proceedings. Regarding the allegation that the statement was recorded beyond the prescribed time limit, Ms Idda submitted that, the statement does not indicate the time when the appellant was arrested therefore, she prayed the Court to expunge the said statement from the record and uphold the conviction based on the testimonies of PW1 and the Doctor.

Submitting on the alleged contradiction of evidence between PW4 and PW5 and the two attendance registers, the learned attorney stated that the trial Court did not rely on the two documents rather it relied on the testimonies of PW1(the victim) and that of PW3(the doctor) as reflected in the judgment.

Regarding the contention that the prosecution did not prove penetration Ms Idda submitted that, the victim stated expressly that she had a sexual relationship with the appellant since June 2021, they had sexual intercourse on various dates and the doctor who examined the victim stated that she had no hymen. Referring the Court to the case of **Seleman Makumba vs R** (2006) TLR 384 Ms Idda insisted that the best evidence in rape cases comes from the victim.

Winding up on the last ground of appeal regarding failure to name the perpetrator of the crime at the earliest opportunity Ms Idda submitted that, she mentioned the appellant immediately after being found pregnant, she mentioned him to the teacher who

examined her and later to the mother, on that basis, the learned attorney prayed the Court to dismiss the appeal.

I have given deserving consideration to the appellant's grounds of appeal and the submissions made in favour and against the appeal. I will start with the issue in the first ground of the appeal that the prosecution did not prove the case beyond reasonable doubt.

It is important to note that, according to section 3(2) (a) of the Evidence Act Cap 6 R.E 2022 in criminal matters, a fact is said to be proved when the Court is satisfied by the prosecution beyond reasonable doubt that such fact exists. That is to say, the guilt of the accused person must be established beyond reasonable doubt and such duty lie to the prosecution except where other law provides otherwise.

In analysing the first ground of appeal I will merge it with the concern raised on the fifth ground of appeal that the victim failed to name the appellant at the earliest opportunity, the foundation of my analysis will be set on the decision of the Court of Appeal of Tanzania in ***Marwa Wangiti Mwita and Another vs Republic [2002] TLR 39*** where it was stated that

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

In the case at hand, the truth of the matter is apparent on the record of the trial Court; when the victim was first discovered

to be pregnant by her teacher, during interrogation she never mentioned the appellant to be the person responsible for the pregnancy, the victim stated to her teacher that she got pregnant at Singida when she went for leave.

The proceeding continues that, when the victim's mother arrived at school upon being summoned by the teacher, she refused to accept what the victim had told her teachers and insisted that she knew the person who impregnated her daughter and that when her daughter went to Singida she was already pregnant. This piece of evidence does not tally with the victim's oral evidence adduced before the trial Court.

Again, in his defence, the appellant told the trial Court that when they were in the VEO's office, the victim was asked as to who was responsible for the pregnancy but she never mentioned him until they threatened her to give answers that they desired.

I have gone through the testimonies and exhibits tendered before the trial Court, no evidence was brought to show that the person named by the victim to have had an affair with in Singida was the appellant. There is also no evidence that the appellant ever travelled to Singida to meet the victim, nor is there any evidence connecting the appellant to the alleged affair in Singida, the victim's delay in identifying the appellant raises doubts about the accuracy and credibility of her claim. On this, I am constrained to agree with the appellant that the prosecution case was not proved beyond reasonable doubt.

On the second ground of a ppeal, the appellant faulted the trial magistrate for entering a conviction based on a wrongly admitted cautioned statement. As rightly submitted by the learned

State Attorney, indeed, the record of the trial court do not indicate when the appellant was arrested and no witness was called during the trial to testify as to when the appellant was arrested so that the four-hour limit set under section 51 of the CPA Could be counted.

The absence of such vital information makes the whole statement doubtful of its admissibility, and the question of whether the police officer who recorded the same followed the four-hour rule provided by the law was not answered in the trial Court. Having found that the cautioned statement of the appellant was against the requirements of law I have no other option than to expunge it from the record as I hereby do.

Regarding the third ground of appeal which concerned the contradiction of evidence by PW4 and PW5, I understand that not every inconsistency or contradiction in the prosecution's evidence will necessarily lead to the failure of their case.

I have gone through the testimonies of PW4 and PW5 I found no contradiction as stated by the appellant; PW4 one Sabrina Jumanne testified in Court that she is a teacher at Nzubuka Primary School and PW5 G2269 D/Cpl Rajabu who was an investigator of the case tendered an attendance register of Nzubuka Primary School (exhibit P3). From that observation, I did not see anywhere Ibelamilundi secondary school mentioned by the two witnesses to make up the alleged contradiction. For that reason, I find no merit on the third ground of appeal.

On ground number four the appellant alleged that the element of penetration was not proved by the prosecution. In ***Selemani Makumba vs Republic (Criminal Appeal 94 of 1999)***

[2006] TZCA 96 (21 August 2006) the Court of Appeal of Tanzania stated that:

> *"true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other women where consent is irrelevant that there was penetration"*

Blending the above-quoted paragraph with facts of the case at hand, it goes without saying that for there to be rape there must be penetration. Exhibit P1 which is the Medical Examination Report shows that the victim was sent to Uyui Hospital for pregnancy screening, the test was conducted through the Urinary Pregnancy Test (UTP) and the results were positive as she was found to be three months pregnant and hymen was perforated.

Section 130(4) of the Penal Code R.E 2022 requires that to prove the offence of rape penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. In ***Godi Kasenegala vs Republic (Criminal Appeal 10 of 2008) [2010] TZCA 5 (2 September 2010)*** the Court of Appeal of Tanzania emphasized that: -

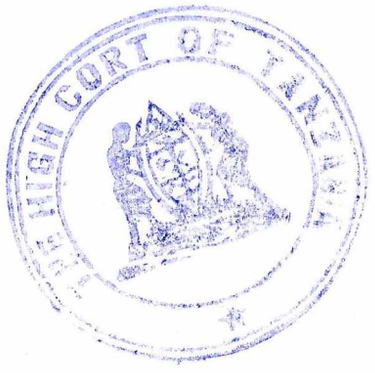
> *"For the offence of rape, it is of the utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the Court to ensure that the witness gives the relevant evidence which proves the offence"*

In his defence the appellant denied having an affair with the victim and emphasized that the victim only mentioned him after being threatened by a Village Executive Officer and her mother. Combining this defence with the victim's failure to identify the perpetrator in front of her teacher raises doubts about the actual truth of who committed the act of rape.

Additionally, PW3 the doctor who examined the victim stated that he found the victim to be three months pregnant with perforated hymen without explicitly stating sexual activity. His evidence does not directly link the appellant to casing the conditions he found the victim with.

That said and done, I allow the appeal, the finding and sentence meted against the appellant are hereby set aside. The appellant should immediately be released from prison custody unless he is held for other lawful reason.

It is so ordered



Z. D. MANGO

JUDGE

08/12/2023