IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB - REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 91 OF 2022

(Originating from Criminal case No. 127 of 2021 of the District Court of Sengerema at Sengerema)

DAVID ALBERT----------APPELLANT

VERSUS

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

JUDGMENT

Last Order: 16.12.2022
Judgment: 23.02.2023

M.MNYUKWA, J.

The appellant, DAVID ALBERT was charged and arraigned before the District Court of Sengerema at Sengerema for two counts. First count he was charged with the offence of Rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code Cap. 16 RE: 2019 (now RE: 2022). The prosecution alleged that, on the 03rd August 2021 at about 19.00hrs at Bukokwa Village within Sengerema District at Mwanza region the appellant David s/o Albert did have carnal knowledge with a young girl aged sixteen (16) years, a form two student at Bukokwa Secondary School

who, for purposes of concealing her identity will be referred to, in this judgment, as the victim.

On the second count, he was charged with impregnating a school girl c/s 60A of the Education Act Cap. 353 RE: 2002 as amended by Written Laws (Misc. Amendment) Act No. 04 of 2016. It was alleged that, on 03rd August 2021 at about 19 hrs at Bukokwa Village within Sengerema District in Mwanza region, the appellant did have sexual intercourse and impregnant a school girl aged 16 years, a form two student at Bukokwa Secondary School who, for purposes of concealing her identity will be referred to, in this judgment, as the victim.

At the trial, the accused pleaded not guilty to the charge and the prosecution called a total of 5 witnesses and the accused defended himself on oath. After the trial, the accused was found guilty on both counts and accordingly convicted followed by a statutory minimum sentence of thirty (30) years imprisonment for each count to run concurrently. Dissatisfied, the accused has lodged the present appeal before this court appealing against the conviction and the sentence on both counts as follows: -

1. *THAT, the trial magistrate erred in law and fact to convict me while the prosecution side unreasonably failed to tender any witness from where allegedly we (PW1 and*

DW1) were residing to corroborate the fictious story of PWI. I do not undermine S.143 of TEA (Cap 6, RE:2019) but due to the circumstances of the instant case there was a need of summoning those material witness (es).

2. *THAT, the trial magistrate grossly erred in law and fact to convict me without considering the case is fabricated and sometime the court should ask itself a now days the school lady of 16 years is matured enough sometimes may plant the case against anybody to clear the shame from her parent and society that the unborn child has no father, so always they used to be desperate and the problem is the court has no second sight.*
3. *THAT, the lower court erred in law and fact for convicting by relying on Exh. PI which was not audibly read to me soon after being admitted, this is untenable procedural irregularities.*
4. *THAT, the lower court misdirected in law and fact to convict me for the 2nd count considering no DNA evidence was tendered by prosecution side to prove if is true I impregnated PW1.*
5. *THAT, the trial magistrate erred in law and fact to convict me by relying upon PW4 as corroborative evidence without considering that the girl of 16 years might had been in a long history of sexual occurrence till she desperately decided to look for whom is going to die with.*

6. *THAT, this case was not thoroughly investigated due to the fact that are highlighted in point no 1 and 4.*
7. *THAT. during judgment digesting the trial court failed to reason out as to why did not consider my defence.*
8. *THAT, therefore no doubt a lady might not carry pregnant without penetration in a normal way but they failed to prove if the one penetrated is me or anybody else.*
9. *THAT, I do not pen off without saying that, prosecution side failed to prove the offence beyond all reasonable doubt.*

At the hearing, the appellant prayed before the court to add another two grounds to the prayer which was granted and the two added grounds read: -

1. *That the age of the victim was not proved before the trial court.*
2. *That the age of the pregnancy was not proved as there was a contradictory statement between the victim and the medical doctor.*

When the appeal was called for hearing, the appellant appeared in person unrepresented and Ms. Sabina Choghoghwe represented the respondent, the Republic and she supported the conviction and sentence.

Ms. Sabina was the first to submit and she started by supporting the sentence and conviction. Submitting on the 1st additional ground, Ms

Sabina avers that the age of the victim was proved by her mother who is PW2 as shown on page 13 of the trial court proceedings. Supporting her argument she cited the case of **Wambura Kiginga vs R Crimainal** Appeal No. 301 of 2018 where the Court of Appeal of Tanzania stated that the age of the victim can be proved by a mother or a guardian.

On the 1st ground of the appellant's petition that he states the prosecution unreasonably failed to call any witness from where allegedly PW1 and DW1 were residing to corroborate evidence of PW1, Ms Sabina insisted that, in sexual offences the best evidence is from the victim. Supporting her argument, she referred to page 10 of the trial's court proceedings that the victim explained what had transpired and also in reference to the case of **Seleman Makumba vs Republic** 2006 TLR 363, she insisted that the principle is set that for the sexual offence cases, the best evidence comes from the victim. She therefore prays this ground to be dismissed.

On the 2nd ground that the court erred in convicting the appellant without considering that the case was fabricated, Ms Sabina refuted the allegation and submitted that the court believed the evidence of PW1 and there was no dispute between the appellant and PW2, the mother of the

victim and the appellant failed to cross examine her. She prays this ground be dismissed.

On the 3rd ground of appeal, that exhibit PI was not audibly read to the appellant after being admitted, Ms. Sabina refuted the claims referring to page 25 of the trial court proceedings which shows that it was read after admitted as exhibit.

On the 4th ground that DNA was not conducted. Replying, Ms. Sabina admitted that the DNA was not conducted but PW1 testified before the court that she did not have any sexual intercourse with another person except with the appellant. She insisted that PW1 evidence was credible and it was correct for the court to convict the appellant.

On the 5th ground which he argued together with the 2nd additional ground and 8th ground of appeal, Ms. Sabina avers that the appellant alleges that the age of the pregnancy was not proved for the appellant claims that there was a contradiction between the victim and the doctor. Referring to page 24 of the trial proceedings, she reveals that PW4 testified that PW1 was 12 weeks pregnant while on 04.01.2021 PW1 testified that she was 5 months pregnant. She went on that, the age of the pregnancy was not an issue for the issue was the presence of the

pregnancy which is a result of sexual intercourse between the appellant and PW1. She therefore prays the grounds to be dismissed.

On the 6th ground that the case was not properly investigated, Ms. Sabina reiterates her submissions in ground 1 and 4 insisting that the case was properly investigated and proved beyond reasonable doubts on the prosecution side.

On the 7th ground of appeal that the trial court did not consider the appellant defence, Ms. Sabina referred this court on page 11 of the trial court judgment that the appellant defence was considered and she therefore prays this ground to be dismissed.

On the 9th ground that the prosecution case was not proved to the standard required, Ms. Sabina insisted that the prosecution managed to prove their case to the standard required by considering the evidence of PW1 who is a victim and best witness as shown on page 9 and 10 of the proceedings and the evidence of PW1 is corroborated with the evidence of PW2 and PW4. She therefore retires by praying the appeal to be dismissed for want of merit.

Submitting on his grounds of appeal, the appellant first prays this court to adopt his grounds of appeal to form part of his submissions and this court to do justice.

The appellant insisted that the prosecution evidence was contradictory. Referring to the evidence of PW1, he claims that while the victim claims that she was five months pregnant, from the date of the incident that is on 03.08.2021 to the date she testified which was almost 6 months. He insisted that the evidence of PW1, a victim and that of the doctor PW4 is contradictory therefore cannot be relied upon to convict the appellant.

The appellant reacted on the evidence of PW5 who testified that the victim was registered in school that she was born on 27.04.2004 while PW2 a mother of the victim stated that the victim was born on 05.11.2005. He insisted that the age of the victim was not properly proved. He went on that PW1 was not a student from 29.09.2021 the evidence which was also supported by PW5. He therefore prays the court to do justice and allow the appeal.

As it is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden to prove the case beyond a reasonable doubt and the accused only needs to raise some reasonable doubt on the prosecution evidence. In **Mohamed Haruna @ Mtupeni & Another v Republic,** Criminal Appeal No. 25 of 2007 the Court stated that: -

"Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

See the cases of **Woolmington v. Director of Public Prosecutions** [1935] AC 462; and **Nyabohe Nyagwisi Nyagwisi vs Republic** Criminal Appeal 243 of 2020, **Vitalis Joseph vs Republic** Criminal Appeal No. 384 of 2021.

The central issue to the grounds of this appeal is, the appellant is contesting the prosecution evidence to the extent that the case was not proved to the required standard. From the outset of the grounds of appeal, therefore, I am now placed with a legal duty to determine *whether the prosecution case was proved and whether the proof was beyond reasonable doubts.*

As it appears that the appellant was charged and convicted with two counts, starting with the 1st count whereas the appellant was charged with the offence of rape contrary to section 130(1) and (2) (e) of the Penal Code, Cap 16 R.E 2019. Based on the allegation that the victim was below the age of 18 years and therefore could not form consent, the

prosecution is placed on a duty to first prove the victim was below the age of 18 years. See **Robert Andondile Komba vs DPP**, Criminal Appeal No. 465 of 2017, **Edson Simon Mwombeki v. Republic,** Criminal Appeal No. 94 of 2016 and **Alyoce Maridadi v. Republic,** Criminal Appeal No. 208 of 2016.

In the present appeal, the appellant claims that the prosecution case was not proved to the standard required as for the 1st offence of rape, the evidence on the age of the victim contradicts. The appellant refers to the evidence of PW2, a mother of the victim who testified that the victim was born on 05.11.2005 which contradicts the evidence of PW5 who testified that when PW1 was registered in school, it was shown that she was born on 27.04.2004. On the age of the victim, the court of appeal in the case of **Solomon Mazala v. Republic,** Criminal Appeal No. 136 of 2012, which was quoted with authority in the case of **Raphael Ideje @Mwanahapa vs The Director of Public Prosecutions** Criminal Appeal No. 230 Of 2019 (decided on 22 Feb 2022) it was held that:

> *"The cited provision of law makes it mandatory that before a conviction is grounded in terms of section 130(2)(e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the offence..."*

(See also: **Alyoce Maridadi v. Republuc,** Criminal Appeal No. 208 of 2016 and **Alex Ndendya v. Republuc,** Criminal Appeal No. 340 of 2017 (all unreported) **Rutoyo Richard v Republic,** Criminal Appeal No 114 of 2017, CAT at Mwanza)

In this appeal, the records shows that the age of the victim was stated by the parent PW2 that the victim was born in 05.11.2005, which make her from the date the alleged offence was committed to be of the age of 16. The appellant claims that PW2 and PW5 evidence on the age of the victim contradicts. As stated in the case of **Isaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 CAT (unreported), that:

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130(l)(2)(e)...the evidence as to proof of age may be given by the victim relative, parent; a medical practitioner or where available, by the production of a birth certificate."*

As stated by the court of Appeal in **Makonyo John @ Kibuna vs Republic** Criminal Appeal No. 305 Of 2018 that, where a party raises an issue that there were inconsistences or contradictions in the evidence implicating him, the duty of the trial court is to address the contradictions and determine whether they are minor or major contradictions. If the court makes a finding that the contradictions are minor and

inconsequential, it may go ahead to rely on the evidence as tendered. However, if it finds that the inconsistences go to the root of the case to the extent of shaking its very substratum, the trial court cannot take such evidence as credible or reliable. See also **Mohamed Matula v. Republuc,** [1995] T.L.R. 3 and **John Gilikola v. Republuc,** Criminal Appeal No. 31 of 1999 (unreported). In this appeal, the age was stated by PW2 a parent who is at a better position to know the age of PW1 as against the PW5 who reads from the school records. As it appears, variation of dates still does not establish that the victim was above 18 years old. In that regard, the contradiction is a minor that does not shaky the reliability of evidence of PW2 on the age of the victim.

On the 1st ground of appeal that the prosecution unreasonably failed to tender any witness from where allegedly PW1 and DW1 were residing to corroborate evidence of PW1, Ms Sabina insisted that in sexual offences the best evidence is from the victim. Going to the records, PW1 narrated how the alleged offence was committed and the court found her credible and her evidence was relied upon in convicting the appellant. As stated in the cited case of **Seleman Makumba vs Republic** 2006 TLR 363, that the best evidence in sexual cases comes from the victim. I therefore find this ground with no merit.

On the 2nd ground the appellant claims that the court erred in convicting the appellant without considering that the case was fabricated. Ms Sabina refuted the allegation and submitted that the court believed the evidence of PW1 and there was no dispute between the appellant and PW2. As I perused the records, PW1 testified and her evidence was corroborated by PW2, PW3, PW4, PW5 and PW6. This ground is wanting and therefore dismissed.

On the 3rd ground of appeal, the appellant claims that exhibit PI was not audibly read after being admitted. As refuted for by Ms. Sabina referring to page 25 of the trial court proceedings it shows that the same was read after being admitted as exhibit. Therefore, this ground has no merit, therefore dismissed.

On the 4th ground of appeal the appellant claim that the trial court misdirect in convicting him on the 2nd count without proof of DNA that if it was him who impregnate PW1. It is on record that DNA was not conducted and it was PW1 who testified before the court that it was the appellant who impregnated her. My mind is settled that law that a medical report which is an expert opinion cannot override the oral testimony of a victim who testified that it is the appellant who rape her which resulted into impregnating her. Since the proof by DNA test is not a legal

requirement nor the practice in our jurisdiction in sexual offences cases, I find this ground to be baseless and I hereby dismissed it for lack of merit.

On the 5th ground that court erred convicting the appellant based on the evidence of PW4, which contradict with that of PW1 on the age of the pregnancy. Ms Sabina insisted that the age of the pregnancy was not an issue for the issue was the presence of the pregnancy which is a result of sexual intercourse between the appellant and PW1. As I have earlier stated above, contradictions by witnesses cannot be avoided, what a court is required to address is if the contradiction goes to the root of the case. See **Emanuel Josephat V Republic,** Criminal Appeal No. 323 of 2016. The variance of the dates of the pregnancy is minor contradictions which does not go to the roots of the case. I therefore find this ground with no merit.

On the 6th ground the appellant claims that the case was not properly investigated while Ms. Sabina reiterates her submissions in ground 1 and 4 insisting that the case was properly investigated. Based on what is on records, the prosecution managed to parade 6 witnesses who testified on the case means that the case was investigated and therefore this ground lacks merit.

On the 7th ground that the trial court did not consider the appellant defence, as submitted for by Ms. Sabina, the records are clear that the appellant defence was considered as it appears on page 11 of the trial court judgment therefore this ground lacks merit.

On the 9th ground that the prosecution case was not proved to the standard required, Ms. Sabina insisted that the prosecution managed to prove its case. As it is on records, PW1 testified as shown on page 9 and 10 of the proceedings, the evidence which is corroborated with the evidence of PW2 and PW4.

In that end, I find the prosecution case intact and in fine, I find no justification to interfere with the findings of the trial court below. Accordingly, I find the appeal devoid of merit and it is hereby dismissed in its entirety.

It is so ordered.

M.MNYUKWA

JUDGE

23/02/2023

The right of appeal is explained to the parties.

M.MNYUKWA

JUDGE

23/02/2023

Court: Judgement delivered on 23th February 2023 in the presence of both parties.

M.MNYUKWA

JUDGE

23/02/2023