

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB-REGISTRY
AT SHINYANGA**

CRIMINAL APPEAL NO. 138 OF 2023

(Arising from Criminal Case No. 21 of 2023 of Bariadi District Court)

KIJA SAGUDA.....APPELANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

27th February 2024 & 22nd March, 2024

MASSAM J.:

In the District Court of Bariadi at Bariadi the appellant was charged with three counts of abduction contrary to Section 134 of the Penal Code [CAP 16 RE. 2019] rape contrary to Sections 130 (1), (2) (e) and 131 (1) of the Penal Code [CAP 16 RE. 2019] and impregnating a school girl contrary to Regulation 60 A (3) of the Education Act Cap 353 as amended by section 22 of the written laws (Miscellaneous Amendments) Act No 2 of 2016.

It was alleged in the charge sheet that, on the 26th February, 2021 at Nyakabindi village within Bariadi District and Simiyu region the appellant took one NK against the will of her parents and on diverse dates on the year 2020, February and March 2021 at Nyakabindi village

and Byuna village did have sexual intercourse with one NK who was a student at Nyakabindi Primary School and impregnated her.

To prove its case, the prosecution fielded five prosecution witnesses and three exhibits. A brief account of the evidence which led to the conviction of the appellant is briefly as follows: the victim who was a standard six at Nyakabindi primary school met the accused on 26.2.2020 along the road where the accused asked the victim to be his lover alluring her to escape from home, at first the victim denied but on the second time she agreed and on that day the victim went home and collected her cloths and went at Byuna village with the appellant at his sister's home.

On that same date at night the accused told the victim to undress and he undressed too and had sexual intercourse two times. On the other hand, her brother-in-law (PWI) upon being notified by his wife about the disappearance of the victim he notified the school and reported the same at Nyakabindi police station, and on 14/03/2021 they received information that the victim was at Byuna village in the house of one Nkuba Segese and on the same date accompanied by *sungusungu* they went at night and found the victim sleeping with the accused person and arrested him.

In his defence the accused denied to have committed the crime alleged by the prosecution claiming that he had a conflict with Athumani Abdallah (PW1) who framed him this case.

Having accepted the prosecution's version to be true, the trial court convicted the appellant and sentenced him to imprisonment for seven years in respect of the first count of abduction, thirty years for the second count of rape and thirty years for the third count of impregnating a school child. The sentences were ordered to run concurrently.

Aggrieved, the appellant appealed to this court with five grounds to wit the prosecution case was not proved beyond reasonable doubt and that the trial court proceedings were tainted with gross incurable irregularities.

At the hearing of this appeal, the appellant appeared in person while the respondent was represented by Mr. Goodluck Saguye, learned State Attorney.

When invited to argue his appeal, the appellant said that he is not satisfied with the sentence given by the trial court and prays this court to consider his grounds of appeal.

On the other hand, the learned state attorney stated that he is not supporting this appeal and he support the conviction and sentence given. Also he added that in replying to this appeal he will consolidate ground 1 and 4, 3 and 5 and ground 2 will urge it separately.

Arguing the 1 and 4 ground, he explained that the prosecution brought five material witnesses as per Section 110 of the Evidence Act, and PW1 proved that the victim was born on 2005 which makes her 15 years old by the time of the incidence. He added that PW1 proved that they found the accused with the victim and the victim proved to have sexual intercourse with the accused who impregnated her, he also submitted that PW3 the teacher proved that the victim was his student registered with registration number 5162, and that medical expert after examining the victim proved that she was pregnant.

He proceeded that PW5 wrote the accused's caution statement (Exhibit P3) admitting to have committed the offences and the same was not objected by the accused, and that all witnesses proved that it was the accused who committed the offence.

On the 3 and 5 ground the appellant complained that the evidence by PW2 was weak, unreliable, and that she was not competent witness to testify, but in his reply he submitted that PW2 was a victim who

testified to be 15 years old, when they met till the day of their arrest. He urged that in sexual offences the best evidence comes from the victim as was elaborated in the case of **Selemani Makumba v R**, TLR 379, **Augustino Kanyaga Nyamoga and others Vs R, 1994**, TLR, page 16, and Criminal appeal No 63 of 1990, and that there were no contradiction and that the trial court analyzed and evaluated the evidence hence his conviction.

On the 2nd ground that the trial courts proceedings had incurable irregularities, he submitted that this ground is merely allegations and should not be entertained because the proceedings were properly taken and there are no irregularities. He prayed this court to dismiss this appeal and the decision of the trial court to remain undisturbed.

On his rejoinder the appellant prayed this court to disregard the respondent's submission and consider his grounds of appeal and left him free.

Having carefully considered the arguments of the parties, the issue is **whether the offences against the appellant were proved beyond reasonable doubt**. In determining this issue what is important is to examine whether the prosecution proved all the ingredients forming the charged counts.

To start with, ground no 1 ,3 ,4 and 5 grounds basing on the fact that the prosecution side did not prove their case beyond reasonable doubt. To start with the first count of abduction, PW1 testified that on 26/02/2021 he was notified by his wife that the victim was missing, and later the appellant was found with the victim sleeping, in the charge also it is said that the victim was abducted on 26/02/2021 .The evidence of Pw1 is supported with the victim's evidence which is found at page 11 of the trial proceedings where she testified that the appellant told her **"anitoroshe anipeleke kwa dada yake"** she denied at first but late they escaped together. The provision of section 134 of the Penal Code, Cap.16. The section reads:

"any person who unlawfully takes an unmarried woman under the age of sixteen years out of the custody or protection of her parent or other person having lawful care or charge of her and against the will of the parent or of that person is guilty of an offence."

Coming to the second count of rape from the evidence the victim stated that she met the appellant on 26/2/2020 who told him to go with her to his sister's place by Byuna village. She added that after went there they had sexual intercourse twice the said night, after two days when they were sleeping they were caught by PW1,they were taken to

nyakibimbi police station and she was given PF3 for medical checkup and after been examined she was found pregnant, this was supported by the evidence of PW4 the clinical officer who admitted to examine the victim and found her pregnant and she filled her PF3 which was admitted as exhibit P 2, victim started that she was at the age of 15 years when the appellant had sexual intercourse with her. Also victim added that before abducted and raped by the appellant she was living with her sister and brother-in-law (PW1), whom on the issue of age he testified that the victim was born on 2005 and the same was testified by PW4 the clinical officer who examined her, according to the case of **Edson Simon Mwombeki vs. Republic** Criminal Appeal No.94 of 2016 (unreported), **Isaya Renatus Vs. R**, Criminal Appeal No. 54 of 2015, and the case of **Festo Lucas @ Baba Faraja @ Baba Kulwa Vs Republic**, Criminal Appeal No. 27 of 2022, where the court observed that age of the victim in rape cases can be proved by either parent, relative, medical practitioner or birth certificate, if available. In that essence the offence of rape was properly proved by the prosecution.

On the third count of impregnating a school girl, it's from the prosecution evidence that the victim was a standard six student at Nyakabindi Primary School, this evidence was given by PW1, the victim

her self at page 11 of the proceedings who said that:” **I was a student of Nyakabindi primary school in standard 6**” the same was also supported by PW3 the head teacher of Nyakabindi Primary school who proved the victim to be his student with registration No. 5162 he also tendered attendance register as (Exhibit P1).He confirmed that victim was no longer his student after been impregnated. According to the evidence given this court find out that the prosecution proved that the victim was indeed a student and stoped attending to school after been impregnated.

It is a settled law that, in sexual offence cases that the best evidence came from the victim who is better placed to explain how and when she was raped and the person responsible. See **Selemani Makumba Vs Republic** [2006] TLR 379and **Edson Simon Mwombeki Vs Republic**, Criminal Appeal No. 94 of2016 (unreported).

In that regard, having revisited the evidence of PW2 I am contented that, victim was a credible witness and clear in testifying how she was approached by the appellant on first and second time wanting to take her at his sister’s house, she further testified that the appellant did have sexual intercourse with her, as reflected at page 11 of the trial proceedings

*".....Accused told me to undress and I remained naked, he also put off his cloths, then I slept on the floor and came on top of me, **nililalia mgongo** then he inserted his penis into my vagina, then the accused started to fuck me, he finished and repeat it again..."*

Moreover, PW2 mentioned the appellant at the earliest moment that it was him who impregnated her and she knew him before as he was their neighbour. Refer to the case of **Patrick Sanga vs The Republic, Criminal Appeal No. 213 of 2008. CA (unreported)** Also in **Marwa Wangiti Mwita and Another vs. Republic (2002) TLR 39** where it was held that,

".....the ability of a witness to mention a suspect at the earliest opportunity is an all-important assurance of his reliability "

With that observation, the appellant was well identified that he was the one who had sexual intercourse with the victim.

Apart from the victim's version which allowing her to be believed by the court, her testimony was corroborated by the cautioned statement which was admitted as exhibit P3, wherein he admitted to the offences but claimed to be unaware if the victim was a student.

On his defence at page 29, the appellant contended that PW1 is framing this case to him because they have dispute over a piece of land and that he did not commit the offences, I find this defence as an afterthought because the appellant did not cross examine PW1 on that issue when testifying, It is a trite law that when a party fail to cross-examine a witness on a particular area of his evidence, is deemed to accept that evidence, Refer the case of **Tungu Ngasa @Mwashi Tungu Vs The Republic, Criminal Appeal No 291 of 2019 CAT (Unreported)**.

Moreover, the appellant testified that they had conflict over the land dispute and that he reported the conflict to their hamlet and that they have been reconciled over it several times, which to my understanding it was known to many around their neighbourhood but, he could not bring even a single witness to testify on that account. In view of what I have endeavoured I find ground 1,3,4, and 5 with no merit.

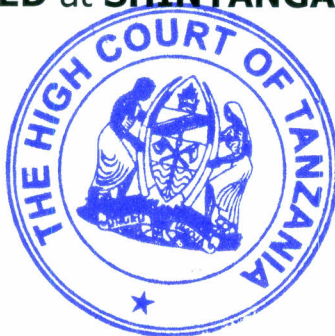
In respect to the 2th ground, the appellant submitted that the trial court proceedings were tinted with gross and incurable irregularities, the appellant being the layperson did not argue as to how the court's proceedings were tinted with gross and incurable irregularities, but this

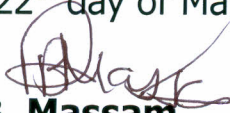
court have make detailed perusal of the trial court's proceedings to ascertain the irregularities committed, unfortunately for the appellant the trial magistrate was keen in recording the evidence and in admitting exhibits. I therefore agree with the respondent's counsel that this ground is mere allegation and I hereby find it without merit.

Subsequently, I am satisfied that the case against the appellant was proved beyond all reasonable doubts as was discussed in case of **Magendo Paul & Another v. Republic (1993) TLR 219** and that, he was properly convicted. Consequently, the appeal is here by dismissed for lack of merit. The decision of the trial court is hereby upheld.

It is ordered.

DATED at **SHINYANGA** this 22th day of March, 2024.




R.B. Massam
JUDGE
22/03/2024