

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB REGISTRY**

AT SHINYANGA

CRIMINAL APPEAL NO. 75 OF 2023

(Original Criminal Case No. 122 of 2023, before District Court of Kahama at Kahama)

MUSSA LUHENDE.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

27th February, & 22nd March 2024

MASSAM, J.

The appellant, namely Mussa Luhende was impeached before the District Court of Kahama at Kahama in Criminal Case No. 122 of 2023, facing two counts, namely, Rape Contrary to Section 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 R: E 2022, and impregnating school girl Contrary to section 60A (3) of the Education Act [Cap 353] as amended by the written Laws (Miscellaneous Amendment act No. 02 of 2016.

It was alleged that, between 18th day of February and 26th day of March 2023, at Mhuge village in Ushetu District Council within Kahama District, the appellant had sexual intercourse with a young girl aged 17 years old and impregnated her.

Thereafter, the appellant abducted the victim and on 26th day of March 2023 and she was found with the appellant living together.

The appellant was taken to Nyamilangano police station for interrogation, while the victim was availed with PF3 for medical examination which revealed that she was pregnant. After investigation, the appellant was taken to court and the charge was read over to him who denied to have committed these offences.

At the trial, the prosecution succeeded to prove the charge against the appellant, and subsequently, was convicted and sentenced to serve 30 years imprisonment for the first count and five years imprisonment for the second count and the sentence has to run concurrently.

Dissatisfied with both the conviction and sentence imposed by the trial court, the appellant filed this appeal containing six grounds of appeal as embodied from the petition of appeal and prayed to this court to allow this appeal and be released from imprisonment.

On hearing, this appeal was heard orally, and the appellant appeared in person, unrepresented while the respondent was represented by Mr. Godluck Saguye learned State Attorney.

Arguing in support of his grounds of appeal, the appellant prayed for the court to consider his grounds of appeal as they have merit and to set him free.

On his response, the learned State Attorney for the respondent strongly opposed the appeal and support both conviction and sentence imposed by the trial court. In his reply to the ground of appeal brought by appellant he opted to argue ground 1 and 3 jointly while grounds number 2, 4, and 5 to urge them separately. He submitted inter alia that, as per the contents of grounds number one and three as complained by the appellant that, he was wrongly convicted and sentenced since the evidence adduced was not supporting the conviction, he reasoned that, it is the requirement of section 229(1) of the Criminal Procedure Act, [Cap 20 R;E 2022] that, whenever the accused person objected the offence, the witnesses are to be called to prove the offences, hence in this case all witnesses were called to prove the case to the required standard against the appellant and this is according to the evidence of PW2 at Pg 11-12 of the court proceedings who was the victim who testified that she was a student at Mweri secondary but she stopped on March 2023 after been pregnant, and she was form three. He also submitted that; it is trite law

that the best evidence is that of the victim as per the case of **Isaya Renatus V. R.** at Page 10

Further, to that he submitted that, the evidence of Pw1 revealed that, the victim was pregnant after she had examined her and filled Pf3 which revealed the results of examination and therefore these grounds have no merit.

Submitting on ground number two as criticised by the appellant that, the conviction was based on weak evidence since there was no birth certificate or any exhibit tendered to proof that the victim was 17 years old, he contended that, since this is a statutory rape, the age of the victim required to be proved by either parents, guardian, relatives or medical practitioner and not documentary evidence, and this is according to the evidence testified by PW2 at Pg 11 who testified to have 17 years, and PW3 the father of the victim at Pg 13 who revealed the age of the victim to be 17 years as she was born on July, 2005. He referred this court to the case of **Isaya Renatus Versus Republic** (supra) at Pg 8-9 so the age of the victim was well proved henceforth this ground needs to be dismissed for want of merit.

With regards to the fourth ground that the appellant was given harsh punishment without the consideration of his evidence, it was from the

respondent that, as per the requirement of section 131 (1) of the Penal code, the punishment given was according to the law. So the said ground was found with no merit.

Further to that, on 5th ground of appeal the appellant complained that he was convicted by hearsay evidence in replying the same he submitted by stating that, the appellant was convicted on the strength of the evidence adduced by the prosecution as the victim properly managed to testify that she had sexual intercourse with the appellant, after he promised to marry her, the appellant abducted her to his sister's house at keza Igulungu village her evidence was corroborated by Pw3 the father of the victim who testified that on 18/2/2023 in the morning is when he found out that the victim was abducted by the appellant to Keza Igululu to his sister's house. He added that they succeeded to arrest the appellant and victim who were living together, so the evidence of Pw2 and Pw3 was enough to prove the charge against the appellant Therefore he prayed to this court to dismiss this appeal.

In brief rejoinder the appellant had nothing useful to submit but rather he prayed to this court to consider his grounds of appeal and left him free.

Having heard the submissions from both sides, this court will now make a determination on the merit of this appeal, and the issue before this court for resolution is **whether those offences have been proved beyond reasonable doubt.**

In determining this issue what is important is to examine whether the prosecution proved all the ingredients forming both offences.

To commence with the offence of rape, since it is statutory rape the key elements which differentiates it from other offences is that prosecution required to prove the age of the victim, in view of the clear provisions **of section 130 (1) and 2(e) of the Penal Code**, Cap. 16 R.E. 2019. Again prosecution is required to prove penetration and identification if the appellant if he was the one who committed the said offences. For a girl to meet the requirements for protection of the law under that provision, satisfactory evidence has to be offered to establish the age of the victim properly.

Back to the grounds submitted by the appellant, this court will choose to argue grounds number 1,2,3 and 5 mutually as they have the same significance, while ground number 4 will be argued separately.

With the first sets grounds, it was from the appellant that, the prosecution did not prove the offences beyond reasonable doubt as the evidence adduced by the prosecution was totally hearsay these grounds

were replied negatively by the respondent that, they managed to prove all the offences to the required standard. To begin with the issue of **age**, the prosecution was bound to prove that the victim was below the age of 18 years when the alleged offence was committed since age in statutory rape is essential element, and must be proved beyond reasonable doubt since it goes to the root of the case and determine the whole issue of sentence. Again, the law places the age of the victim as mandatory for the whole offence of rape hence it has to be properly proved.

There are numbers of cases which makes clarification on the issue of age including the case of **Isaya Renatus V. R. Criminal Appeal No. 54 of 2015**, it was clarified at Pg 8-9 that;

"the age of the victim can be proved by either parent, relative, medical practitioner or birth certificate if available"

The position was clearly debated in the case of **Festo Lucas @Baba Faraja @ Baba Kulwa V. R**, Criminal Appeal No. 27 of 2022, that,

"The proof of age must be concrete, viable and reliable, General statement cannot be accepted at this era of statutory rape."

From the above observations, it was from the respondent that, the age of the victim was properly proved. After going through the Court

proceedings preferably at Pg 11 PW1, the victim pointed out to have 17 years, her father (PW3) at Pg 14 testified that, the victim has 17 years, again PW1, a medical practitioner pointed out that, when she received the victim for examination, she was 17 years old, and this was per the medical report she prepared, to wit, exhibit P1. From the above evidence, this court is of the view that, since those three witnesses proved that the victim was 17 years, including PW3 and PW1 who qualified and recognized by the law that they are capable of proving the age of the victim, and as per the requirement of the above cases, I may say that, the age of the victim was properly proved by the prosecution as each witness pointed out that, the victim was 17 years old.

Therefore, the complaint by the appellant that there must be a production of birth certificate or any certificate to prove the age of the victim was of no importance since the evidence tendered by itself support each other, and birth certificate as per the case of **Festo Lucas (supra)** may only be brought if available. See also the case of **Juspini Daniel Sikazwe Vs. DPP**, Criminal Appeal No. 519 of 2019 [2021]TZCA58(26 February 2021) which elaborated that:

" The victim's age could be proved by other means than the birth certificate ...one of such means for proving the age is through the witnesses own oral evidence"

Coming to another ingredients, that is penetration, It is clear from the case of **Mathayo Ngalya @ Shabani V Republic**, Criminal Appeal No. 170 of 2006 (unreported), that,

"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penal Code , Cap 16 R.E 2022 provides; for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence.' It's providing that,

For the offence of rape, it is of 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".

From the above citation, the evidence tendered by the prosecution revealed that, PW2, the victim testified at Pg 11-12 of the court proceedings that, she properly knows the appellant for four years as he was their house helper, again, while at home on 18/02/2023 at night they had sex, thereafter the appellant abducted her and went to Keza Igungulu Village, and they also had sexual intercourse for a week. The evidence of PW3 at Pg 13, also exposed that, on 26/03/2023 after the disappearance

of PW2, he received information that, she was at Keza with the appellant and they were living together.

Further to that, the evidence of PW1 reveals that, the victim after she had been examined, she was found to be pregnant that also was supported by exhibit P1 which is examination report proving that after the victim been examined she was found pregnant. Therefore, it is from the above testimony by the PW1, and PW3 and exhibit P1 which were corroborated by the story of the Victim with regard to penetration which led to pregnancy.

Moreover, the evidence tendered by Pw2 and Pw3 revealed that, the appellant was properly identified by PW2 as they used to live together. Yet again, I am well blessed with the case of **Isaya Renatus (supra)** at Pg 10 that, the best evidence is that of the victim. Thus, even if there is no other evidence in corroboration, the evidence of the victim of sexual offence, if found credible, can by itself meter a conviction as per the provision of section **127 (6) of the Evidence Act, Cap 6 R.E. 2019**, and also the famous case of **Selemani Makumba v.Republic**, [2006] T.L.R 379, and **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008, CAT and **Galus Kitaya v. The Republic**, Criminal Appeal No. 196 of 2015.

On the other hand, this court is forced to say that, the so-called best evidence shall qualify to be the best only if, it has been accurately collaborated to establish the offence of rape. Hence in this case, the evidence of PW2 was appropriately corroborated by PW1, and PW3 and demonstrated that, it was the appellant who pregnant the victim.

Moreover, the appellant complained that the sentence imposed to him was too excessive without proper consideration of his defense. The provision of section 131. -(1) provides that,

“ Any person who commits rape is, except in the cases provided for in the renumbered subsection

(2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

Thus, from the above provisions, what was imposed by the trial magistrate was in accordance to the law, although in his evidence the appellant admitted to have been committed those offences and prays for forgiveness, the proviso binds the court to minimize the sentence subsequently the punishment is a statutory verdict and the court has no

discretion to decide it in other way. Again, his defense was properly considered that is why the court reached into that conclusion.

On the other hand, while discussing count number one, to wit, the offence of rape, I found it to be affirmative and it is evidenced that, the victim was impregnated, and yet, exhibits P3 revealed that, she was a student at Mwale secondary school, the evidence which was supported by PW5, (the teacher) and the evidence of PW3 at Pg. 13 of the court proceedings thus makes the second count to have been proved as well.

Guided with the above analysis this court is convinced to say that, the prosecution properly managed to discharge their duties and prove their case beyond reasonable doubt. Accordingly, I find this appeal without merit and it is hereby dismissed entirety. The conviction and sentence given by trial court is hereby upheld .It is so ordered.

DATED at SHINYANGA this 22nd day of March, 2024




R.B Massam

JUDGE

22/03/2024