IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

DC CRIMINAL APPEAL NO. 72 OF 2023

(Originating from Kaliua District Court in Criminal Case no. 52 of 2023)

IDRISA S/O ALLY..APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

Date of Last Order: 26/02/2024

Date of Delivery: 2/05/2024

MANGO, J.

The Appellant herein ***Idrisa Ally*** stood charged before the District Court of Kaliua for two offences to wit; ***Rape*** contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code [Cap 16 R.E 2022] and ***impregnating a school girl*** contrary to section 60A (3) of the Education Act Cap 353 R.E 2002

It was alleged that on diverse dates between 1st December 2022 and February 2023 at Kaliua within Kaliua District in Tabora Region, the Appellant did have carnal knowledge and impregnated a 14-year-old girl who in this judgement will be referred as MN to protect her dignity. The charge indicates that MN was studying at Kaliua primary school. After a full trial, the Appellant was found guilty of the two

counts. The trial Court convicted the Appellant for both counts and sentenced him to serve thirty (30) years imprisonment in each count. The sentences were ordered to run concurrently. The trial court also ordered the accused to pay the victim compensation of Tshs. 300,000/=.

Aggrieved by the said conviction and sentence, the Appellant is now before this court with four grounds of appeal that;

1. *The prosecution case was not proved against the appellant beyond reasonable doubt as required by law.*
2. *The appellant's defence was not considered on merit by the trial magistrate at the time of composing the judgment.*
3. *Exhibit P1, the PF3 allegedly filed by the doctor was wrongly tendered by PW3, a police officer and wrongly admitted before the court.*
4. *Penetration as required by law was not cogently established as the doctor who examined and filled the PF3 was not summoned.*

During hearing of this appeal, the Appellant appeared in person while the Republic was represented by Mr Charles Magonza learned State Attorney. When the Court invited the Appellant to submit in respect of the grounds of appeal, he only prayed to adopt his grounds of appeal to be his submission.

Mr. Magonza supported the appeal on the ground that the prosecution case was not proved bon the required standard. He opted to start with the 3rd and 4th grounds of appeal collectively, he submitted that the doctor who examined the victim was neither

summoned nor were the provisions of section 240(3) complied with by the trial Court. He further stated that, no reason was advanced as to why a doctor as an expert was not summoned to tender the PF3 instead of PW3, a police officer who is not a medical expert.

On the first and second grounds of appeal Mr. Magonza asserted that, the prosecution case was not proved beyond reasonable doubt as the victim failed to establish penetration as required by law. He further contended that, since the victim is a child of tender age, the court failed to establish her general understanding regarding to oath or promising to tell the truth, he referred to the case of **Athumani Musa vs Republic** (Criminal Appeal 1 of 2022) [2022] TZHC 13300 (3 October 2022).

Mr. Magonza pointed out other weaknesses in the prosecution's case such as the fact that. PW2 identified exhibit P1, the PF3, before it was admitted as evidence and lack of DNA test to establish the connection between the victim's pregnancy and the person alleged to have caused the pregnancy. He referred to the case of **Joel Jones Mrutu vs Republic** (Criminal Appeal 25 of 2019) [2021] TZHC 3593 (10 June 2021) in which my brother, Mwenempazi J insisted on the necessity of DNA test in cases involving impregnating a school girl especially where the accused denies charges as in the case at hand. The learned State Attorney concluded that the prosecution failed to prove the case against the Appellant beyond reasonable doubts. The Appellant had nothing to rejoin.

I have considered Court record, grounds of appeal together with submission made by the State Attorney. The grounds of appeal

indicate that the main issue in this appeal is whether the case against the Appellant was proved on the required standards. In that regard, I will start with the first ground of appeal in which the Appellant challenges the prosecution for failure to prove the case against him beyond reasonable doubt.

The nature of offences preferred against the Appellant required the prosecution to prove penetration in order to establish the offence of rape; pregnancy and that the status of a victim as a school girl to prove the offence of impregnating a school girl. The prosecution did not attempt anyhow to prove the offence of impregnating a school girl. Record of this appeal does not contain any evidence regarding the status of the victim as a school girl. Ordinarily evidence such as school register, school attendance register would have established that the victim was a school girl. No any kind of such evidence was produced by the prosecution. All pieces of evidence in record were targeted at establishing the offence of rape leaving the offence of impregnating a school girl unattended. In such circumstances, I find the prosecution has failed to establish commission of the offence of impregnating a school girl.

On the offence of rape, Court record contains testimonies of three witnesses and one documentary evidence to wit, the PF3. Among the three witnesses, direct evidence implicating the Appellant is found only in the testimony of the victim (PW1). PW2, the victim's father and PW3, the police officer who investigated the crime, did not manage to prove any of the ingredients of the offence of rape. I hold so because PW2 narrated how the victim confessed to have stolen the

money and give the appellant whom they had sexual affairs. His evidence contains mere allegations which were not anyhow proved. PW3 merely testified on the issue of medical examination of the victim which was not actually conducted by her. Thus, the testimonies of the two witnesses did not assist the prosecution in proving the case against the Appellant.

The only evidence that remains is that of the victim. It is a well-established principle that in sexual offences, evidence of the victim is a good evidence to be relied by the Court to enter conviction against an accused person. See the case of **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006). The victim testified to the effect that, she has a sexual relationship with the Appellant and they used to have sexual intercourse several times. She narrated that, the relationship began on December 2022 when she visited the Appellants home. She stated that, on the particular day, the Appellant ordered her to undress and he also took off his clothes. He then inserted his penis in her vagina. She stated that, from that day, they proceeded to have sexual intercourse whenever they wish. According to PW2, the victim was 14 years old when the offence was allegedly committed, thus, incapable of granting free consent to enter into sexual relationship. With such evidence, it may be concluded that the victim was raped by the Appellant. However, circumstances under which the victim revealed her sexual relationship with the Appellant creates doubts as to whether the Appellant raped the victim.

Record of the appeal at hand show that, PW1 disclosed her sexual affairs with the Appellant after she was approached by his uncle for loss of money. She confessed to have stolen the money and she allegedly gave the money to the Appellant. Aside from sexual relationship, the victim's testimony reveals also that, she was a dancer in a dance group known as "Vashi" which is owned by the Appellant. In such circumstances, it is not clear as to whether the two had a sexual relationship as alleged by the victim or he was merely implicated due the alleged loss of money. With such doubts, it is unsafe to rely on the victim's testimony to affirm his conviction without considering other pieces of evidence in record.

Another piece of evidence that would have supported the Appellant's conviction is the PF3 which indicates that the victim had a pregnancy aged 6-8 weeks. Unfortunately, the document was not tendered and admitted properly. As correctly observed by the learned State Attorney, the PF3 was tendered by the police officer (PW3), who investigated the case. The doctor who examined the victim was not summoned as witness and the Court did not inform the Appellant of his right to have the doctor summoned for cross examination on the contents of the PF3 as provided under section 240(3) of the Criminal Procedure Act. In the case of **Selemani Mwitu vs Republic** (Criminal Appeal No. 90 of 2000) [2006] TZCA 154 (3 July 2006), the Court of Appeal of Tanzania disregarded the contents of the PF3 for among other reasons, non-compliance with the provisions of section 240(3) of the Criminal Procedure Act.

In addition to non- compliance with section 240(3) of the Criminal Procedure Act, the contents of the PF3 were not read after its admission as it appears at page 13 of the typed proceedings. The effect of failure to read documents admitted as evidence is to have the document expunged from record as it was observed by the Court of Appeal in the case of **Lack s/o Kilingani vs Republic (Criminal Appeal 402 of 2015) [2016] TZCA 688 (29 July 2016).** I also expunge the PF3 from record of this matter for non-compliance with section 240(3) and failure to cause the document to be read after itas admission as evidence.

Another piece of evidence which would have established the Appellants criminal liability, if any, is the DNA examination which would have establish relationship between the alleged pregnancy of the victim and the Appellant. Unfortunately no DNA test was taken. Thus, there is no evidence that proves the Appellant's responsibility with the victim's pregnancy which would have proved that it was the Appellant who raped the victim.

With the above explained shortcomings, the doubts are resolved in favor of the appellant. I thus, agree with the State Attorney that, the prosecution failed to prove the case against the Appellant beyond reasonable doubts. For that reason, I allow the appeal.

The Appellant's conviction is hereby quashed and the sentence meted against him is set aside. I order the immediate release of the Appellant from custody unless, held for other lawful reasons. The

right of further appeal is hereby explained to whoever aggrieved with this decision.

Dated at Tabora this 2nd day of May 2024

Z. D. MANGO

JUDGE