IN THE HIGH COURT OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

DC CRIMINAL APPEAL NO. 68 OF 2023

(Appeal from the District Court of Kaliua at Kaliua, Criminal Case No. 172 of 2022)

MPEMBA DOTTO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Judgment: **10/05/2024**

Date of last order: **19.04.2024**

A.J. MAMBI, J.

In the District Court of Kaliua, the appellant was charged with two counts, namely rape c/s 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 [R.E 2022]. The appellant in the 2nd count was charged with an offence of impregnating a school girl c/s 60(3) of the Education Act Cap 353 as amended by act no 2/2016. He was convicted and sentenced to thirty years imprisonment.

Aggrieved, the appellant filed the petition of appeal preferring three grounds of appeal as follows;

1. That, the trial magistrate erred in law and in fact for failing to note that the act of PW1 remaining silence without disclosing the rape incident at

the earliest opportunity does not attract the confidence of her evidence. Refer the case of Ahmed Said Vs Republic. Criminal Appeal No 291/2015 CAT at Arusha (unreported).

2. That, the trial magistrate misdirected herself and consequently erred in law and in fact for failing to note that no DNA was conducted to ascertain/prove that the appellant is the one who impregnated PW1.
3. That, the prosecution failed to prove the offences against the appellant beyond all reasonable doubt.

During hearing, the appellant appeared unrepresented while the Republic was represented by the learned State Attorneys Mr. Nurdin Omar briefly submitted that the prosecution proved charge beyond reasonable doubt through PW1, PW2, PW3 and PW4. Mr. Nurdin Omar learned state attorney for the respondent submitted that they do not agree with the grounds of appeal. The learned state attorney submitted that PW1 (the victim) at the trial court testified that the appellant raped her on 12/8/2022 she was on her way home from school. He submitted that when the appellant met PW1 he stopped her but the appellant forced her so he inserted his penis to her vagina.

He argued that PW1 informed a friend called Prisca and unfortunately the parents of the victim were absent for a month thus on 29/9/2022 the victim was checked. The learned state attorney referred the decision of the court in GODSON D. KIMARO Vs REPUBLIC CRIMINAL APPEAL NO 54 OF 2019 (CAT) at page 12. He averred that the victim fully explained the reasons for delay. With regard to the ground number 2, the learned State Attorney submitted that though there were some errors on 2nd count on impregnating the victim where the charge was prepared under section 135(2) CPA, Cap 20 [R.E 2022]

instead of section 60 of the Education Act but the prosecution proved the charges against the accused. He was of the view that the prosecution through PW1 proved penetration. He argued that the age of the victim was proved as she was born on 2006 thus 16 years old. He referred the case of AMOUR HAMIS Vs REPUBLIC CRIMINAL APPEAL NO 322 OF 2021 CAT under page 9. He submitted that the best evidence in rape cases comes from the victim. The respondent prayed for the petition to be dismissed.

In response, the appellant briefly submitted that he relies on his grounds of appeal. He submitted that the matter was neither reported to the village authorities nor to the school. He contended that the victims' friend was not called to testify. He submitted that apart from that the prosecution failed to tender birth certificate to prove the age of the victim. He further argued that the testimony of PW2 and PW5's was contradicting to each other and thus the prosecution did not prove the case.

Having summarised submission from both the appellant and prosecution, this court is of the view that the main issue in this appeal is whether the prosecution proved the charges against him beyond reasonable doubt. This will also depend on timing of reporting the matter and the charge sheet. The appellant in his ground of appeal disputed the charge sheet where the prosecution appeared to admit that the charge sheet had minor errors.

As alluded the main grounds of appeal by the appellant are centred on the duty of the prosecution to prove the charges against him beyond reasonable doubt. The question is; did the prosecution prove the two counts that is rape and impregnating the victim against the appellant beyond reasonable doubt? It should also be noted that it is the primary duty of prosecution to prove the

criminal cases such as rape beyond reasonable doubt by proving to the court that the victim was actually raped by the accused and there was penetration or if the offence involved rape, then the ingredients or elements of rape must be fulfilled. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. The state or prosecution has the burden of proof in criminal cases. The prosecution therefore, had to establish beyond any reasonable doubt that it was the Appellant who raped PW1. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.***

Having carefully gone through the proceedings and judgment of the trial court, the grounds of appeal and submissions from both parties, I find the key issue is whether the prosecution proved the case against the appellant beyond reasonable doubts or not. The prosecution in their submission submitted that they rely on the evidence of the victim (PW1), PW2, PW3 and PW4. The best evidence in the matter at the trial court was that of the victim (PW4) who testified that she was raped and impregnated by the appellant. It is on the records that the victim claimed to be raped on 12/108/2022, however the victim kept quite without reporting till 29/09/2022 that is after almost one month when she was found pregnant. The victim at her testimony testified that she was raped by the appellant on 12/08/2022 and reported to the matter to her parents on 29/09/2022. The evidence of the victim is corroborated by her father (PW2) who had similar testimony that he was told by the victim she was raped on 12/08/2022, but again PW2 did not report immediately until 29/09/2022 when he reported to the police. Similarly, both

PW3 (The police officer WP 10588) and PW4 (The Doctor) testified that the incident was reported to them on 29/09/2022. Indeed, PW4 testified that the victim had 2 to 3 months pregnancy. The prosecution evidence show that the victim and the parents kept quite for almost one month later when she was pregnant that is when the incident was reported.

In my considered view the duration of one month was a long time for the witness to be more reliable on her evidence. The question to be asked here, is why the victim and her father just kept quiet until she became pregnant after one month when she decided to mention the appellant responsible and not to mention him earlier before she became pregnant? In my view the timing of victim's pregnancy and the timing of mentioning the appellant creates some doubts on the reliability of the victim's evidence. I wish to refer the decision of the court of Appeal in ***MARWA WANGOTI & ANOTHER VS REPUBLIC TRL 2002*** at page 39 where the court at page 43 observed that:

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

In our case at hand the trial court should consider and weigh the evidence of the witness basing on her *ability to name a suspect* at the earliest opportunist as an important assurance of her reliability as compared to her long time (one moth). Failure for the victim to do so (report incident earlier) should put a trial court to inquiry and satisfy itself if such delay affected the evidence or not.

I am aware that the most reliable evidence in this case in my considered view would be the victim (PW1) who was the girl of 16 years old. The question is; was the testimony of PW1 enough to convict the appellant on both charges? As I observed earlier that given the fact that it took more than one month until the victim named the appellant to be responsible for raping and impregnating her, it follows that the evidence of PW1 had no proper probative value in the case in hand and ought to be expunged from the record from the beginning at the trial court. Now if the evidence from the key witness that is the victim is expunged will there be other reliable evidence? As clearly observed by the court in ***AMANI FUNGABIKASI VERSUS THE REPUBLIC,*** Criminal Appeal No.270 of 2008 CAT (Unreported) that once such evidence is expunged there is no other material upon which the appellant could bear criminal responsibility for the offence in question. This is due to the fact that in rape cases, the best evidence comes from the victim.

It is without a doubt that the trial court's conviction was mainly based on the evidence of PW1 who was the victims of sixteen years old by the time she was giving her evidence. There is no doubt that as it had severally been held that the best evidence of rape comes from the victim. This was highlighted in the most celebrated rape case in ***SELEMANI MAKUMBA VS REPUBLIC [2006] TLR 384)*** where the court at page 379 held 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 woman where consent is irrelevant, that there was penetration."*

In this regard, the question to be asked is that; did the prosecution prove the case against the accused beyond reasonable doubt? Indeed, it is the primary

duty of prosecution to prove the criminal cases such as rape beyond reasonable doubt by proving to the court that the victim was actually raped by the accused and there was penetration. It was essential for the Republic which had charged the appellant with raping and impregnating PW1 on the material date to lead evidence showing exactly that PW1 was raped on one of the days in the period of one month between August and September 2022. See ***Ryoba Mariba @ Mungare v R, Criminal Appeal No. 74 of 2 003 (unreported)*** as discussed by the court of Appeal in ***ALFEO VALENTINO VERSUS THE REPUBLIC CRIMINAL APPEAL NO. 92 OF 2006.***

I agree with the appellant grounds of appeal that there is doubt that if the case against the appellant was proved beyond reasonable doubt. I am aware that the general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. This includes the burden to prove facts which justify the drawing of the inference from the facts proved to the exclusion of any reasonable hypothesis of innocence. Since the burden of proof in most issues in the case is beyond reasonable doubt, the guilt of the accused must be established beyond reasonable doubt. My findings from the trial court records have revealed that the prosecution had to establish beyond any reasonable doubt that it was the Appellant who raped and impregnated PW1. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.*** In our case, it appears the case against the appellant was entirely based on the evidence of PW1.

The records show that the prosecution has mainly relied on evidence of PW1 who was the child of 16 years and other three witnesses to prove a case in

which the trial court convicted the appellant without properly weighing the evidence and credibility of the witnesses. It is trite law that where a person is charged with serious offence of rape, it is of utmost importance that the prosecution 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 also the duty of the prosecution to make sure that the victims' names the accused at the earliest stage to avoid naming innocent persons due to the fact that human beings have tendency of forgetting some past things. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence. This can be reflected from the decision of the court in ***MATHAYO NGALYA @ SHABANI VERSUS REPUBLIC, CRIMINAL APPEAL NO. 170 OF 2006*** (unreported) where the court of Appeal held 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 ... provides; - 'for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence.'* ***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****".* [Emphasis supplied].

It is on the records that the prosecution did not make efforts and due diligence to clear all doubts on the duration of time from the first time the

victim was raped to the date of mentioning the accused/appellant. In my considered view, failure to do so left a lot of questions to be desired. That should benefit the appellant. It appears the accused was convicted basing on his defense or evidence weakness rather on the prosecution weakness. It is trait law that in criminal law the guilt of the accused is never gauged on the weakness of his defense, rather conviction shall be based on the strength of the prosecution's case. See ***Christina s/o Kale and Rwekaza s/o Benard vs Republic, TLR [1992***] at P.302. The standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case against the accused beyond reasonable doubts.

My analysis of evidence and findings has revealed that the prosecution did not prove the charges against the appellant at the trial court beyond reasonable doubts. For the above reasons, I am of the firm view that the guilt of the appellant was not proved beyond reasonable doubt, thus the prosecution had not established the guilt of the appellant beyond all reasonable doubt. I am satisfied that the evidence by the prosecution side was not strong enough to convict the appellant. I am of the settled view that there is a doubt if the guilt of the appellant was really established and proved beyond reasonable doubt.

All in all, the prosecution did not prove the charges against the appellant beyond reasonable doubt. Now, basing on my above reasons, I am of the settled view that the guilt of the appellant was not properly found at the trial court due to the fact that the trial court failed to observe some legal principles on the detriment of the appellant. In the premises, I quash the conviction and set aside the sentence imposed on the appellant and other subsequent orders.

In the interest of justice, I order that the appellant be released from prison forthwith unless he is held on other lawful cause. Order accordingly.

A.J. MAMBI

JUDGE

10/05/2024

Judgment delivered in Chambers this 10th day of May, 2024 in presence of both parties.

A.J. MAMBI

JUDGE

10/05/2024

Right of Appeal explained.

A.J. MAMBI

JUDGE

10/05/2024

THE HIGH COURT OF TANZANIA