IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL No. 51 OF 2023

(Originating from Mpanda District Court in Criminal Case No. 58/2020)

JUMA KWIMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MWENEMPAZI, J

The appellant herein was arraigned before the Mpanda District Court for two counts, firstly being rape contrary to Section 130(1), 2(e) and 131(1) of the Penal Code Cap 16 R. E. 2002.

It was alleged by the prosecution side's that, on unknown dates of September, 2019 at Kamakuka village within Mpanda District in Katavi Region, the appellant did have sexual intercourse with the victim (name withheld) aged 16 years old.

The second count is impregnating a school girl contrary to Section 60A (3) of the Education Act Cap 353 R. E. (2002) as amended by Section 22 of the Written Laws (Miscellaneous Amendments) Act No. 02 of 2016.

It is the prosecution side's case that, on unknown dates of September, 2019 at Kamakuka village within Mpanda District in Katavi Region the appellant did impregnate the victim (name withheld) a standard five pupil of Kamakuka Primary School.

As the charge was read before the appellant at the trial court, the appellant pleaded not guilty but at the end of the trial he was found guilty and hence convicted and was sentenced to serve thirty years imprisonment for both counts and pay compensation to the victim Tshs. 1,000,000/= (one million shillings).

Aggrieved by that decision, the appellant opted for this appeal which consists of two grounds which are as reconstructed hereunder;

1. *That, the learned Magistrate erred in law and fact by convicting the appellant in a case of no sufficing evidences.*
2. *That, the trial court erred at law and fact by convicting the appellant without taking in account that the evidences testified by the prosecution witnesses (DW2*

and DW3) were hearsay evidences which was not required by law.

From the grounds above, the appellant prays for this Court to enter judgment on his favour and order for his release from custody.

The hearing of this appeal was conducted orally, whereas the appellant had no legal representation and therefore he appeared for himself, while the respondent, Republic was represented by Ms. Neema Nyagawa learned State Attorney.

The appellant submitted first that he is ready to proceed with the hearing and that he prays for his grounds of appeal to be considered and that the appeal be allowed.

In response, the learned State Attorney for the respondent submitted that, because there were two counts of offence, the prosecution had the duty to prove two ingredients, which are;

i. *Age of the victim*
ii. *whether there was sexual intercourse.*

She stated that, it is obvious at page 8 of the proceedings during hearing, PW1 testified that she is 16 years old and PW2 also at page 11 testified that the victim was born on 06/04/2004 in which during the time of hearing the case, the victim was 16 years old. She

added that, at page 20 last paragraph, PW4 testified that the victim was 16 years as he was attending her. Therefore, the learned counsel insisted that the prosecution side proved the victim's age.

She proceeded to submit that, the prosecution also proved as to whether there was sexual intercourse between the victim and the appellant whereas, the victim at page 9 of the proceedings testified that on September, 2019 when she went to fetch fire wood while alone, she met the appellant and he seduced her, she refused and while she was passing him, the appellant chased her and caught her and fell her down. That, he then undressed her and had sexual intercourse with her and she suffered pain as he was doing the act. She added that, at home the victim did not tell anyone because she was threatened to be beaten with the appellant.

The learned counsel insisted that, it is clear the appellant had sexual intercourse with the victim in September, 2019. That, this point is supported by the evidence of PW2 that after observing changes, she questioned her and it was proved that the victim was pregnant and the responsible person was said to be the appellant.

The learned counsel insisted that, the victim herself is the only person who can prove the person who had sex with her. She referred this court

to the case of **Yust Lala vs Republic,** Criminal Appeal No. 337 of 2015 Court of Appeal of Tanzania at Arusha. She said, in this case, the facts are similar to the case at hand as rape was discovered due to pregnancy as seen at page 10, where the court of appeal held that lapse of time, brings doubt on the credence of evidence. That, although the victim alleged, she was threatened to be slaughtered still there is a doubt that they were still together. Ms. Nyagawa then submitted that, PW1 testified that she was raped on September, 2019, but since it was discovered in March, 2020, lapse of time does not deprive the victim to tell the parents. She insists that her side doubts the evidence by PW1. And that, they support the first ground of appeal. She added that, on the second count it is also doubtful, that the appellant impregnated the girl. She explained that, they find the evidence necessary was that of the victim under the circumstances they are supporting the appeal.

The appellant had no any rejoinder to make. And therefore, it is this court's determination as to ***whether this appeal is meritous before this court.***

Nevertheless, the respondent has supported this appeal and it is my fortified holding that its conclusion should not detain much of this court's

precious time. While I proceed to determine the case, the appellant's first ground of appeal should suffice to dispose this appeal amicably.

As rightly submitted by the learned State Attorney that the prosecution side had proved the age of the victim, I do agree with her that, up to thid juncture, age of the victim during the act as alleged is not disputed that she was 16 years of age.

Despite the fact that it is now trite that, in sexual offences the best evidence comes from the victim herself as it was held **Selemani Makumba vs Republic [2006] TLR 149.** However, I should remark that it is not always the case that such evidence is taken as wholesome, believed and acted upon to convict an accused person without considering other evidence and circumstances of the case.

According to PW1, she opted to be quiet, but the testimony of the school teacher, PW3 reveals on March, 2020 the victim was expelled from school as she was found to be pregnant. This testimony was corroborated by the testimony of PW4 the medical expert who examined the victim. In his testimony he said on the 7th of April, 2020 he attended a girl aged 16 years of age whereas after conducting ultra sound, it was revealed that the victim was pregnant and the age of the pregnancy is 28 weeks. Lastly, PW2 the father of the victim testified that on March

2020 his daughter was suspected to be pregnant as claimed by her school teachers and therefore they went to report to the police station where they were given PF3 (Exhibit P2) and later attended the hospital where it was confirmed that the victim was pregnant.

At this juncture, it is also undisputed that seven months ago, that is on September, the victim had sexual intercourse, comparing to her testimony, it was a forceful sexual act done by the appellant as she knew him before. But she did not tell anyone of the shameful act as she threatened by the appellant to be beaten if she tells anyone.

Here I again agree with the submission made by the learned State Attorney as she cited the case of **Yust Lala vs Republic** *(supra)* and insisted that in the cited case, the court of appeal held that lapse of time, brings doubt on the credence of evidence. That, although the victim alleged, she was threatened to be slaughtered still there is a doubt that they were still together.

It is undoubtedly true that the lapse of time does not deprive the victim to tell the parents of the shameful act. For seven months, at some point, the victim would have uttered a word to anyone as she testified that she knew the appellant before but she never testified that there were interactions between her and the appellant which would have made her

be afraid to report the incidence to anyone in which it would have made this court believe that indeed the threat impose to her (PW1) as alleged made her be quiet for seven months until when it was discovered by her school teachers.

It is now a commonplace that failure of the victim to name the culprit at the earliest opportunity creates doubt on the prosecution case. This position was stated in **Marwa Wangiti Mwita and Another vs Republic [2002] TLR 39.**

In **Mohamed Said vs The Republic,** Criminal Appeal No. 145 of 2017 CAT – Iringa (unreported), in which it was held that: -

> *"The words of the victim of sexual offence should not be taken as gospel truth, but her or his testimony should pass the test of truthfulness".*

Considering the records of appeal before me, I do hold that the prosecution side did not prove that it was indeed the appellant who had unlawfully penetrated the victim and impregnant her, since I too doubt the testimony of the victim that she was threatened by the appellant not to utter a word about the incidence and she managed to stay quiet for seven months.

In the case of **Shabani Daudi vs Republic,** Criminal Appeal No. 28 of 2000 (unreported) the Court held that:

> *"...the credibility of a witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of the witness can also be determined in two other ways:* ***one****, when assessing the coherence of the testimony of that witness.* ***Two****, when the testimony of that witness is considered in relation with the evidence of other witnesses,* ***including the accused.****"*
>
> [Emphasis added]

Considering the appellant's defence that he was taken to Kamakuka hamlet chairman's office as he was told that he has grazed on the farm of the complainant of which by that time was the father of the victim. The appellant insisted that, as he refused to have grazed on the complainant's farm, that is when he was accused of impregnating a school girl. That, he was also told to give out Tsh. 2,500,000/= to finish up the allegations of impregnating the school girl, but as he and his mother claimed that they don't have such kind of money, the appellant was then taken to Mpanda police station, and later to the trial court and charged for rape and impregnating a school girl.

It was in my expectation that in the absence of a credible and reliable evidence to prove the offence of rape against the appellant beyond reasonable doubt, the prosecution side would have prayed for leave of the trial court for the DNA test to be conducted in order to prove their case.

The Court of Appeal in the case of **Rasul Hemed vs Republic,** Criminal Appeal No. 202 of 2012 (unreported) held: -

> *"We wish to also point out here that we do not agree with Miss Hyera that there was required to be DNA evidence in the circumstances of this case to establish whether it was the appellant who raped PW1 The reason is clear that such evidence would be irrelevant here because the issue before the court was rape. In our view, DNA evidence would be relevant where the concern of the court was to determine paternity rather than rape. In the circumstances."*

In view of the above holding, I know that a DNA test is not a necessary ingredient in establishing rape offences as the key ingredient is **penetration** as earlier noted. The issue should be, apart from the absence of the DNA test, was there other credible and reliable evidence

to prove the offence of rape against the appellant beyond reasonable doubt. In light of the evidence adduced this was missing.

It is my fortified holding that, although the DNA evidence is not necessary to prove a charge of rape, but in a situation such as in this present case, where there was a miserable delay in reporting the matter, I think the DNA evidence would have helped to clear the missing link. The DNA evidence would have assisted the prosecution case in order to eliminate the dangers of mistaken convictions on the offence of impregnating the victim, and its absence leaves the case significantly disconnected and doubtful.

The duty of the prosecution side to prove the case beyond reasonable doubt is universal. In **Woodmington vs DPP** (1935) AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused.

As I drop off, I find this appeal to have merits as the prosecution side did not prove their case against the appellant to the required standard of the law.

I therefore proceed to allow this appeal in its entirety and in that, I order the immediate release of the appellant from custody unless he is being held therein for another lawful cause.

Ordered accordingly.

T. M. MWENEMPAZI

JUDGE