IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(MBEYA SUB – REGISTRY)

AT MBEYA

CRIMINAL APPEAL No. 104 OF 2023

(Originating from the District Court of Mbarali, Criminal Case No. 198 of 2019 before Hon. T.R. Mlimba, RM dated 31.3.2020)

WAILES JOHN HONGOLE..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

13Th May & 18th June, 2024

POMO, J.

On 17.9.2019, the appellant was brought before the District Court of Mbarali at Rujewa on charges of rape as delineated under section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 Revised Edition 2002] (Now R.E. 2022), and the offence of impregnating a schoolgirl under section 60 A (3) of the Education Act, Cap 353, as amended by Act No. 2 of 2016. It is the charge that the appellant committed those offence against a school girl (name withheld to hide her identity) aged 17 years old a pupil at Idamba secondary school

At the conclusion of the trial on 31.3.2020, the appellant found guilty of the first count of rape and acquitted him of the second concerning impregnating a school girl. As a result, the court imposed a sentence of

30 years' imprisonment and ordered the appellant to pay compensation of TZS 500,000/= to the victim. Dissatisfied with this verdict, the appellant lodged an appeal with this court on the following grounds:

1. *That the trial court erred in law when convicted and sentenced the appellant without regarding that the prosecution failed to proof its charges as per law.*
2. *That the trial court erred in law when convicted and sentenced the appellant without regarding that failure to PW1 or PW3 to tender a clinic card to proof the pregnancy of PW1 the charges was not proved.*
3. *That the trial court erred in law when convicted and sentenced the appellant without regarding that the caution statement exhibit PE2 was not complied by the law.*
4. *That the trial court erred in law when convicted and sentenced the appellant without regarding that section 130 (4) (a) of the Criminal Procedure Act was not complied as there was no penetration to prove the offence of rape.*
5. *That the defence of the appellant ad not considered by the trial court.*

The appeal was argued through written submissions. The respondent was represented by Mr. Emmanuel Bashome, a learned State Attorney, while the appellant fended himself.

In his submissions on the appeal, the appellant appeared to have amalgamated his grounds of appeal. He contended that the prosecution had failed to prove the charge as required by law. He emphasized that the testimony of Rojina Mayembe (PW1), did not substantiate the allegations, particularly since there was no corroboration from community leaders, neighbours, or any other individuals regarding her claim of being pregnant as a result of rape. Furthermore, during cross-examination, PW1 indicated her intention to call the appellant's brother and his wife as witnesses, yet they were not presented in court. The appellant emphasized there is no explanation from the prosecution regarding their non-appearance as witnesses before the trial court

Continuing his argument, the appellant contended that the evidence provided by Angelica Mbote (PW2), was fraught with uncertainties. He questioned the credibility of her testimony, pointing out that if her account were indeed accurate, it would have been reported to community leaders, yet there was no corroboration from any of them. Specifically referencing page 6 of the proceedings, during cross-examination by the appellant, PW2 acknowledged that it was PW1 who guided her to the location where she claimed to have found the appellant. This raised doubts about the reliability of PW2's testimony.

He told the court that the evidence of Matilda Irumba (PW3) , a doctor who examined PW1 on 10.9.2019 examined the pregnancy only not otherwise and through UPT test she found PW1 two months pregnant meaning that the offence of rape was not considered in her examination due to the fact that pregnancy is not an ingredient of rape as per section 130 (4) (a) of the Penal Code. He submitted that if the said pregnant was a result of rape as per testimonies of PW1, PW2 and PW3 why there was not any document relating to such pregnancy tendered to proof the same. He questioned the fact of being found guilty for the offence of rape which was not proved as per law.

He further argued that the evidence presented by Matilda Irumba (PW3), a doctor who examined PW1 on 10.9.2019, focused solely on confirming the pregnancy without delving into other aspects. Through a UPT test, PW3 determined that PW1 was two months pregnant, indicating that the examination did not consider the possibility of rape, as pregnancy alone does not fulfill the criteria for proving rape according to section 130 (4) (a) of the Penal Code. The appellant questioned why, if the pregnancy was purportedly a result of rape, there were no documents related to such a pregnancy tendered as evidence. He raised concerns about being found guilty of a rape offence that was not substantiated in accordance with the law.

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Lastly, he said his defence was ignored by the trial court. He asked the court to allow the appeal and let the appellant free.

In reply to the appellant's submission, Mr. Bashome argued ground 1,2,3 and 4 collectively since they all basically fault the prosecutions failure to prove the case beyond reasonable doubt. He submitted that the appellant herein was charged with two counts, one being rape of a girl of 17 years old and another count being of impregnating a school girl. He said the appellant was acquitted on the count of impregnating a school girl and convicted of the count of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code. He averred that the ingredients provided under section 130 (1) (2) (e) of the Penal Code are that if a male person has sexual intercourse with a girl below 18 years of age with or without her consent then the act amounts to rape. Therefore, in this case, the prosecution had a duty to prove that the victim was below 18 years old and that the appellant had sexual intercourse with her.

He argued that several legal precedents have established that a person's age can be verified by a parent, guardian, medical practitioner, close relative, or the victims themselves. Referring to the Court of Appeal decision in **Jafari Musa vs DPP**, Criminal Appeal No. 234 of 2019 CAT at Mbeya (unreported) at page 9, asserting that this principle was upheld. Additionally, he pointed out that PW2, the victim's grandmother, explicitly

stated that the victim was born on 1.7.2003, making her 16 years old at the time of commission of the offence. He emphasized that the appellant did not contest this fact during cross-examination or in his defense. Therefore, he concluded that the prosecution successfully established the first element of the offence beyond a reasonable doubt.

He continued to argue that the second issue, regarding whether the appellant engaged in sexual intercourse with the victim, was also convincingly proven. He cited the testimonies of PW1, the victim, PW3, the medical doctor, and the appellant's cautioned statement as evidence. In support of his argument, he referenced the case of **Sulemani Makumba vs Republic,** [2006] TLR 379, which established that the primary evidence of rape must come from the victim. In the present case, the victim explicitly stated that she and the appellant lived together as husband and wife, and that he was responsible for her pregnancy. Additionally, PW3 confirmed through medical examination that PW1 was pregnant. Moreover, the appellant's cautioned statement, which was admitted into evidence without objection, corroborated PW1's testimony. He emphasized that the appellant did not cross-examine the officer, PW4, who took his statement. To support this contention, he referred to the case of **Samwel Abraham @ Chuma vs. Republic**, Criminal Appeal

No. 531 of 202 CAT at Dar es Salaam (Unreported) at page 9, where the court held that failure to cross-examine a witness who is making specific allegations implies acceptance of those allegations.

He asserted that the appellant criticized the prosecution for not summoning his relatives and village leaders to confirm whether he lived with the victim. However, he argued that these witnesses were irrelevant for establishing the elements of the offence and likely wouldn't provide any new information beyond what the prosecution's witnesses had already presented. Referring to section 143 of the Tanzania Evidence Act, Cap 6 Revised Edition 2022, he stressed that the prosecution is not obligated to present a specific number of witnesses; rather, the focus should be on the quality, relevance, and reliability of the witnesses' evidence presented. If the appellant believed these witnesses were crucial, he had the freedom to call them to testify in his defense. To support this argument, he cited the case of **Amini Ismail vs. Republic**, Criminal Appeal No. 178 of 2015, CAT at Tabora (Unreported) at page 11.

In addressing the fifth ground of appeal, the appellant criticized the trial magistrate for not considering his defense. While acknowledging this omission in the trial magistrate's judgment, he noted that precedents dictate that the appellate court must assume the role of the trial court in such instances, analyzing the appellant's defense and reaching its own

conclusions. He argued that the appellant's defense failed to undermine the prosecution's case, as it merely consisted of blanket denials without providing any substantial evidence to refute the prosecution's allegations. Consequently, he concluded that the appeal lacked merit.

It is a trite law that the Burden of proof in criminal cases is on the prosecution to prove the case against the accused person beyond reasonable doubt, the burden never shifts no matter what. See **Said Laliji Vs. Republic,** Criminal Appeal No. 255 of 2008 CAT at, **Athumani Bakari Vs. Republic,** Criminal Appeal No. 284 of 2008 CAT (both unreported).

I have taken into consideration the grounds of appeal of the appellant, however, the main issue to be determined by this court is whether the appellant is the one who raped PW1.

It is a well-established principle by this Court that the best evidence of rape comes from the victim herself. See**: Selemani Makumba vs. Republic** [2006] T. L. R. 379. The same principle is restated in various cases including **Hans Mkumbo vs. Republic**, Criminal Appeal No. 124 of 2007 and **Shimirimana Isaya and Another vs. Republic**, Criminal Appeal No. 459 and 494 of 2002 CAT (both unreported); among many more.

In the present case, is it correct to apply the principle of the best evidence? I have reviewed the testimony of PW1, who informed the court that she moved to Ruiwa in January 2019 to live with the appellant. They rented a house and lived as husband and wife for seven months until July, 2019 when the appellant's parents came and took her home. PW1 further stated that she was taken to the police station and subsequently to the hospital, where it was revealed that she was two months pregnant. The question now arises: based on PW1's evidence, was the offense proved?

In the case of **Godi Kasenegela vs Republic**, Criminal Appeal No. 10 of 2008 CAT at Iringa (unreported), at page 12, the court held thus: -

> *"Under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of eighteen years without her consent. Two, having sexual intercourse with a girl of the age of eighteen years and below with or without her consent (statutory rape). In either case, one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of Penetration i.e. the penetration, even to the slightest degree, of the penis into the vagina: see,* ***Masomi Kibusi V Republic****, Criminal Appeal No. 75 of 2005 (unreported)."*

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In this case, PW1 did not explicitly state that she had any sexual relations with the appellant; she only mentioned that they lived together as husband and wife. In my view, this does not constitute the offence of rape in the context of penetration. PW1 did not narrate any instance of penetration, which is a crucial element in proving the offence of rape.

Moreover, according to PW1, she lived with the appellant for seven months. However, no witnesses corroborated this fact. PW2 testified that they suspected the appellant because he was her shamba boy who left without notice. PW3, the medical doctor, was only asked to examine PW1 to determine if she was pregnant; there was no corroboration of penetration.

PW4, the police officer, stated that the appellant confessed to having lived with PW1 for three months, but it is unclear from which month this period started. According to the alleged victim's testimony, she lived with the appellant for seven months. If we consider PW4's testimony, it remains unknown where PW1 was during the remaining months of her disappearance. Furthermore, it is surprising that if PW1 was taken home in July, they waited until October to go to the hospital. This delay raises questions about the sequence of events.

As I have stated earlier, the burden of proof lies with the prosecution and never shifts to the accused. I am aware that the trial magistrate used the cautioned statement of the accused to corroborate PW1's evidence, but PW1's statement did not prove the offence. Moreover, a cautioned statement should be considered in its entirety, not in parts. If the accused stated that he lived with PW1 for three months while PW1 claimed they lived together for seven months, this is contradictory. Additionally, PW1 did not mention penetration. Therefore, the prosecution cannot rely solely on the accused's statement to prove their case, as this would imply shifting the burden of proof to the accused. Consequently, the prosecution failed to prove the case beyond a reasonable doubt.

All said and done, I find this appeal is merited and allow it. I thus set aside the conviction; sentence and order thereto and acquit the Appellant of the offences charged. Further, I order the appellant be released from custody forthwith unless is otherwise held therein for other lawful cause. It is so ordered

Right of Appeal fully explained

DATED at MBEYA on this 18th day of JUNE, 2024

MUSA K. POMO

JUDGE

18/06/2024

Judgment delivered in in chamber on this 18th June, 2024 in presence of the Appellant and Mr. George Ngwembe, learned State Attorney for the Respondent republic.

MUSA K. POMO

JUDGE

18/06/2024