IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., RUMANYIKA J.A., And MDEMU, J.A.)

CRIMINAL APPEAL NO. 210 OF 2020

LAURENT JOHN ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Ismail, J.)

Dated the 30th day of March, 2020

in

Criminal Appeal Case No. 18 of 2020

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JUDGMENT OF THE COURT

7th & 14th December, 2023

RUMANYIKA, JA:.

Before Kwimba District Court, in Mwanza Region, the appellant, Laurent John was charged on two counts: Rape and Impregnating a school girl, contrary to sections 130 (2) (e) and 131 (1) of the Penal Code and 60A (3) of the Education Act, respectively. While he was convicted and sentenced to serve a term of thirty years in custody, for the offence of rape only, he was acquitted of the other offence.

It was alleged that, on 05/03/2019 at about 19:00 hrs at Irumba Village within Kwimba District, the appellant unlawfully had carnal

knowledge of a school girl, aged fifteen years. We shall refer her to as "the victim", in order to preserve her modesty. That the appellant had seduced the victim, and he had her carnal knowledge, on four different occasions and then she conceived.

The victim testified as PW1. That she had love affair with the appellant from December, 2018 and that they had sexual intercourse twice in February, 2019, in the bushes, after which he paid her TZS. 5,000/= in return, and finally she conceived. She named the appellant to be responsible for the pregnancy. PW2 was the victim's teacher, who identified her to be pupil Number No. 3242 in the School Register. But, upon being suspected and examined by a medic and found to be pregnant, consequently, she dropped out of the school. PW3 is the victim's mother who confirmed the doctor's findings that, the victim was pregnant. PW4 is a police investigator, who recorded also the statement of PW5 and collected the respective school's attendance register, as exhibits. PW5 is a medical doctor who examined the victim and found her to be five months pregnant, as per copy of the PF3 (Exhibit P1).

The appellant denied the charges. In his defence, he was unusually brief. He denied the liability and asked for a DNA test and analysis, to establish the paternity of the unborn child.

Upon hearing the parties, the trial court was convinced that, the prosecution case had been proved beyond reasonable doubt, on the 1st count of rape. Accordingly, the appellant was convicted and sentenced, having been acquitted, in respect of the 2nd count, as hinted earlier. Being aggrieved by this decision, he unsuccessfully appealed to the High Court of Tanzania. Still aggrieved, he has preferred the present appeal.

At the hearing of this appeal, the appellant appeared in person unrepresented whereas Ms. Mwanahawa Changale, learned State Attorney, represented the respondent Republic.

The appellant had two sets of memoranda of appeal, raising five points of grievance in the substantive memorandum, reading as follows: **one,** that the victim was not proved to be underage, **two,** neither penetration nor lack of the victim's consent was proved, to establish the commission of the alleged offence, **three**, that the prosecution's evidence was neither credible nor free from material contradictions, and it lacked corroboration, **four**, that the prosecution case was not proved beyond reasonable and **five,** that both the conviction and sentence were not supported by the evidence on record.

Moreover, at the hearing, the appellant sought the Court's indulgency to accept his supplementary memorandum of appeal of two grounds. In

terms of rule 81 (1) of the Tanzania Court of Appeal Rules, 2019 we granted his prayer. The two points are: **one**, that the respective preliminary hearing was flawed, and **two**, that there is irregular succession of trial magistrates.

The appellant urged the Court to allow Ms. Changale to take the floor first and submit while reserving a right to reply, should the need arise.

Ms. Changale began by opposing the appeal. She supported the conviction and sentence. On the 1st ground, she acknowledged that, none of the first four prosecution witnesses, in their evidence, mentioned the victim's age, in order to establish the essential ingredient of statutory rape. However, she argued, the victim's age could be inferred, in the circumstances, in terms of section 122 of the Evidence Act. She cited our decision in **Leonard Sakata v. R**, Criminal Appeal No. 235 of 2019 (unreported) to reinforce her point. However, upon being probed by the Court on this aspect of evidence, Ms. Changale was of the view that, yet still PW2 was a reliable witness because, as by that time, she was a class six pupil in a primary school, hence, under eighteen. With that fact in mind, she argued, one should have taken judicial notice. Ms. Changale therefore added that, the victim's consent to the sexual intercourse, if any, was immaterial.

About the 2nd ground of appeal, on whether penetration was proved or not, Ms. Changale urged us to consider the victim as a witness of truth, hence, the best witness. She cited the Court's decision in **Selemani Makumba v. R** [2006] T.L.R 379, to bolster her point.

Regarding the 3rd ground of appeal, Ms. Changale contended that, the trial court was better placed and therefore, it assessed the demeanour of the witnesses properly, including that of the victim, and cannot be faulted.

Lastly, is the appellant's 4th ground of complaint on proof or otherwise of the prosecution case, which Ms. Changale asserted that was well done to the standard require.

Having been probed by the Court, on the age of the victim, Ms. Changale asserted that, both the PF3 (Exh. P1) and the charge sheet showed it to be fifteen years, and that the appellant did not challenge these facts. In conclusion, the learned State Attorney prayed for an order dismissing the entire appeal.

In rejoinder, the appellant adopted his substantive memorandum of appeal, contending that, there was no proof of forced sexual intercourse at all, let alone the prosecution evidence which was tainted with material contradictions.

With regard to the grounds in his supplementary memorandum of appeal, he contended that, the trial court's proceedings and judgment were vitiated, as the respective preliminary hearing was carried out contrary to section 192 of the Criminal Procedure Act (the Act). Further, he asserted that, the case, in the trial court had changed hands between Musaroche and Mtete, both learned Resident Magistrates, without recording the reasons for the change. According to him, this omission contravened the mandatory provisions of section 214 of the Act.

In response, Ms. Changale asserted that, the appellant's complaint is a misconception of the law, as Musaroche had handled the preliminaries of the case, including plea taking and a preliminary hearing whereas Mtete heard the case and concluded it substantively. She contended that, there is no violation of the law.

The said two points in the appellant's supplementary memorandum of appeal need not to detain us for two main reasons: **one**, essentially, a preliminary hearing which is conducted under section 192 of the Act is only meant for the trial court, at the earliest opportunity possible to sort out undisputed facts, for which no proof is required. The exercise only accelerates the respective trials, and **two**, we have reviewed the record of appeal, and are satisfied that, Musaroche the learned Resident Magistrate

had only conducted the preliminary proceedings from 24/07/2019 up to 10/09/2019 when he concluded the exercise, as is shown at pages 1-5 of the record. And then, her fellow, Mtete, learned Resident Magistrate took over. He recorded the evidence, composed the judgment and pronounced it, as appearing at pages 22-26 of the record of appeal, on 15/01/2020. Therefore, the issues of violation of sections 192 and 214 of the Act, resulting to a miscarriage of justice, cannot arise. The two grounds of appeal are dismissed.

Considering the record of appeal, and having heard the parties' submission, the issue before us for consideration is whether, the prosecution did prove the offence of rape beyond reasonable doubt.

The appellant and the victim might have sexual intercourse between December 2018 and February 2019, several times and repeatedly, as lovers, as alleged. It is very unfortunate that, the appellant in his evidence, did not seriously dispute this fact, that he had sexual intercourse with PW1. He simply insisted to have DNA test carried out, to prove the paternity of the unborn child. The victim's averments that the two were lovers, and that they had sexual intercourse on about four different occasions, as appearing at page 6 of the record of appeal were not materially contradicted.

It is settled law that, the best evidence in sexual offence cases comes from the victim. See **Selemani Makumba** (supra). For an offence of statutory rape to be proved, the prosecution has a duty to prove existence of two ingredients: **one**, penetration of a male sexual organ into the victim's organ and **two**, that, at the material time, the victim, in this case PW1 was under eighteen. Looking at the charge sheet and the PF3 (Exhibit P1), both appearing at pages i and 20-21 of the record of appeal respectively, it is clear to us that, the said essential ingredients were proved. The evidence from the victim's teacher (PW2) that, PW1 was a class six pupil, at Ilumba Primary school, thus, underage, by necessary implication, was not challenged by the appellant, at least by way of cross examination. Like any other witnesses, therefore, PW1 was, without exception, a witness of truth hence entitled to credence. See- **Goodluck Kyando v. R** [2006] T.L.R. 363 and **John Madata v. R**, Criminal Appeal No. 453 of 2017 (unreported).

We have progressively reiterated this stance on a number of occasions, including in **Charles Hombo v. R**, Criminal Appeal No. 220 of 2006 (unreported). Indeed, the victim was without question underage.

In a nutshell, the prosecution managed to prove its case beyond reasonable doubt. In the up short, the appeal lacks merits and is hereby dismissed.

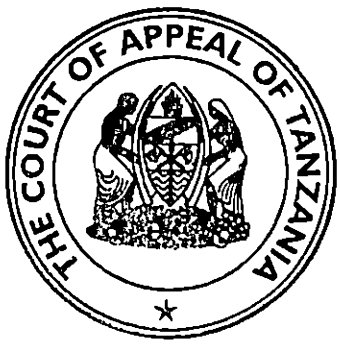
DATED at **MWANZA** this 13th day of December, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered on this 14th day of December, 2023 in the presence of the appellant in person and Mr. Adam Murusuli, State Attorney for the respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL