IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: WAMBALI, J.A., FIKIRINI J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 156 OF 2021

ASHUMU MAILOOYA @ LESAGE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Arusha with Extended Jurisdiction at Arusha)

(Massam, RM-Ext. Jur.)

dated the 15th day of January, 2021

in

Criminal Appeal No. 54 of 2020

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JUDGMENT OF THE COURT

12th & 20th February, 2024

ISSA, J.A.:

The appellant, Ashumu Mailooya @ Lesage was tried and convicted by the District Court of Longido at Longido for two counts, namely: rape contrary to sections 130 (1)(2)(e) and 131 of the Penal Code, Cap. 16 and impregnating a school girl contrary to section 60A (3) of the Education Act (Miscellaneous Amendment No. 2) of 2016. Upon convicting the appellant, the trial court imposed a sentence of 30 years imprisonment for the first count and 3 years imprisonment for the second count. The sentences were ordered to run concurrently.

The arraignment of the appellant before the trial court was a result of an accusation that, on 18.11.2018 at about 12.45 hours at Katumbeine village within Longido District in Arusha Region, the appellant had carnal knowledge of a 16 years old girl whom we shall call XY or victim to hide her identity. Further, in the same incident the appellant was alleged to have impregnated XY. The appellant pleaded not guilty to the charge. The prosecution fielded five witnesses to prove the charge. After a full trial the appellant was convicted as charged and sentenced as stated earlier.

The brief facts of the case as found by the trial court and confirmed by the first appellate court were that, at 12.45 hours of 18.11.2018 XY who testified as PW2 was alone at home at Katumbeine in Longido District. The appellant who is familiar to XY, and a neighbour, entered XY's house and called her. He sat on XY's bed and asked her to sleep with him on the bed. XY was wearing a Maasai wrap without undergarment and she pulled it up while the appellant pulled up a Maasai blanket (shuka) and unzipped his short. The appellant then had a carnal knowledge of her until he ejaculated. After satisfying his lust, the appellant left the house.

XY (PW2) did not report the incident to her family on the respective date. Karim Gullan Ally (PW1), the assistant head master of Namanga Secondary School where XY studied testified that on 1.3.2019 he wrote a

letter to Namanga Health Centre requesting the doctor to examine six students who were suspected of being pregnant. XY was one of them and after medical examination by Dr. Elifuraha Ndeleko (PW5), she was found to be 18 weeks and 2 days pregnant. PW1 interrogated XY and she mentioned the appellant as the person responsible for her pregnancy.

PW3, the mother of XY, got the news of XY's pregnancy from PW1 on 2.3.2019. H5015 D/C Ally (PW4) was the investigator of the case. He interrogated the victim as well as other prosecution witnesses. He also interrogated the appellant and charged him for the offence of rape and impregnating a school girl. The last prosecution witness (PW5) is a doctor who examined XY on 1.3.2019 and found her to be 18 weeks and 2 days pregnant.

The appellant, in his defence, denied having committed the offence. He testified that on 18.11.2018 at 12.45 hours he was in Nairobi attending his business for one week. But he admitted that on 13.3.2019 he met PW3 at Ward Executive Officer's (WEO) office to settle the matter facing him, which was rape and impregnating a school girl.

The trial court found the prosecution evidence was sufficient to sustain the charge. Its findings were supported by the evidence of the victim, XY and that it was sufficiently corroborated by the evidence of her

teacher, PW1 and the doctor, PW5. The trial court convicted and sentenced the appellant on the strength of the evidence of those three witnesses, which it found to have proved the case against the appellant beyond reasonable doubt.

The appellant lodged an appeal to the High Court at Arusha in Criminal Appeal No. 72 of 2020 which was transferred to the Court of Resident Magistrate of Arusha and registered as Criminal Appeal No. 54 of 2020. The appeal was heard by the Resident Magistrate (RM) with Extended Jurisdiction who sustained the appellant's conviction, sentence and dismissed the appeal.

Undaunted, the appellant has instituted the instant appeal. Initially, the appellant lodged a memorandum of appeal containing five grounds of appeal. On 6.2.2024, however, the appellant lodged a supplementary memorandum of appeal containing four grounds of appeal. For the reason that will be clear shortly, we will only deal with the first ground of appeal in the supplementary memorandum of appeal which goes thus:

> *"That the trial magistrate erred in law and fact In convicting and sentencing the appellant on the basis of the evidence of PW2 (victim) whose evidence was received in total contravention of section 198(1) of the CPA Cap. 20 R.E. 2022".*

When the appeal was called on for hearing, the appellant appeared in person and was fending for himself. Upon inquiry, the appellant allowed counsel for the respondent Republic to submit first. The respondent Republic was represented by Ms. Janeth Sekule and Ms. Lilian Kowero, learned Senior State Attorneys. Ms. Kowero out-rightly supported the appellant's appeal on the first ground of appeal reproduced above.

She submitted that the victim, PW2 was not sworn before her testimony was recorded at the trial court as required by section 198(1) of the Criminal Procedure Act, Cap. 20 (the CPA). Therefore, her testimony has no value and should be discarded. She buttressed her argument by the decision in **George Amosi v. Republic**, Criminal Appeal No. 401 of 2020 [2023] TZCA 17564 (29th August 2023, TANZLII).

Ms. Kowero added that, if the testimony of PW2 is accorded no value, the remaining evidence is not sufficient to sustain conviction. She argued that the evidence of PW1 and PW5 that PW2 was taken to hospital on 1.3.2019 and after examination it was concluded that she had 18 weeks and 2 days pregnancy is contrary to the allegation in the charge. She submitted further, that particulars in the charge were that PW2 was raped and impregnated on 18.11.2018 and thus on the date of examination the age of the pregnancy was less than 18 weeks and 2 days. Thus, if she was

raped and impregnated on that date the finding of PW5 that her pregnancy was 18 weeks and 2 days on 1.3.2019 could not prove the charge, she emphasised that the remaining evidence of PW1, PW3 and PW4 on the record have no substance in establishing the case for the prosecution. She prayed for the appellant to be acquitted for both charges. The appellant did not have anything of substance to add. He urged the Court to set him free.

In view of the above submission, this Court has two issues to determine. **One**, to consider how the evidence of PW2 was taken and the position of the law. **Two**, to assess the remaining evidence if it is sufficient to sustain the conviction of the appellant. It is clear that before PW2 testified at the trial, she was not sworn as required by the law. The record of appeal on page 7 simply reveals the following:

> *"PW2 ..., 16 yrs Christian, promised to tell the truth and not lies before the court".*

After the said statement, the trial magistrate received the evidence of PW2 without regard to section 198(1) of the CPA which provides:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary, be examined upon oath or affirmation in*

accordance with the provisions of the Oaths and Statutory Declaration Act".

This provision lays down a cardinal rule that in a criminal proceedings a witness must be examined upon oath or affirmation, unless that witness is exempted to do so by any other law. In the case at hand, as PW2 was 16 years old, the trial magistrate was bound to comply with section 198(1) of the CPA. On the contrary, although PW2 was not of the tender age the trial magistrate purported to apply section 127(2) of the Evidence Act, Cap. 6 which provides:

"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies".

Therefore, failure of the trial court to comply with section 198(1) of the CPA rendered the evidence of PW2 valueless and worthy to be discounted. The law is settled that, the evidence of a witness who does not swear or affirm, and who is not exempted from doing so by section 127(2) of the Evidence Act or any other law, amounts to no evidence in law. For this position, see the decisions in **George Amosi v. Republic** (supra), and **Juma Kuyani and Another v. Republic** [2016] 1 T.L.R. 411 among others. Indeed, in **Mwita Sigore @ Ogora v. Republic**, Criminal Appeal

No. 54 of 2008 (unreported), the Court stated as follows with regard to non-compliance with section 198(1) of the CPA:

> *"... failure to administer oath or affirmation on a witness in a criminal trial, excepting cases under section 127(2) of the TEA, would go against public policy, and is a threat to the liberty of the persons facing criminal charges. For that reason, we think the provision of section 198(1) of the CPA is mandatory and its non-compliance entails fatal consequences".*

Therefore, it is our firm view that the evidence of XY, the victim is not worthy of consideration and is accordingly discounted.

The next issue for determination is whether the remaining evidence after discounting PW2's evidence is sufficient to sustain the conviction for the offence of rape and impregnating a school girl. Five witnesses did testify in the trial court, hence, after discounting the evidence of PW2, four witnesses remain. PW3, a mother of PW2 got the information of PW2's pregnancy and about the person responsible for that pregnancy from PW1. She also got the same information from a horse's mouth (PW2), but as we have already discounted PW2's evidence what PW3 said was a hear-say and had no probative value. The same fate goes to PW1's evidence who heard about the commission of the offence by the appellant from PW2. In

the same vein is the evidence of PW4, the investigator of the case, whose narration is what he heard from interrogating different witnesses. Hence, his evidence carries no weight to support the prosecution case.

PW1 was the first person who found out that PW2 was pregnant after he received a report from the doctor, PW5 but in the absence of PW2's evidence to prove rape, what PW1 was told by PW5 cannot stand alone to prove the charge of impregnating a school girl. Therefore, it follows like a day follows a night that it will be impossible to prove that the appellant was responsible for rape and PW2's pregnancy.

Lastly, the evidence of the doctor (PW5) complicated the matter even more. He examined PW2 on 1.3.2019 and found the age of PW2's pregnancy is 18 weeks and 2 days. This contradicts all odds that PW2 was raped on 18.11.2018. If she was raped on that date, when PW5 examined her on 1.3.2019 the age of PW2's pregnancy would be less than 18 weeks and 2 days. Therefore, PW5's evidence does not support the charge that PW2 was raped on 18.11.2019. We, therefore, agree with the learned Senior State Attorney that having discounted PW2's evidence the remaining evidence is not sufficient to sustain both charges.

We accordingly allow the first ground of appeal and hold that, the prosecution case was not proved beyond reasonable doubt. Therefore, we

quash the conviction and set aside the sentence imposed on the appellant. Consequently, we order that the appellant be released from custody unless he is being held for other lawful cause.

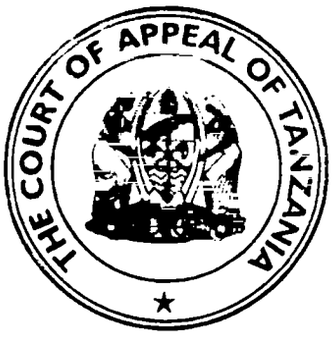
DATED at **ARUSHA** this 19th day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgement delivered this 20th day of February, 2024 in the presence of the appellant in person and Ms. Caroline Kasubi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL