IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 172 OF 2020

(Arising from Judgment of the District Court of Geita in Criminal Case No.94 of 2019)

SHIJA S/O BUNZARI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 20.11.2020

Date of Judgment: 20.11.2020

A.Z.MGEYEKWA, J

The appellant SHIJA S/O BUNZARI was arraigned by the District Court of Geita and charged with an offence of rape contrary to section 130 (1),(2),(e) and 131 (1) of the Penal Code Cap.16 [R.E 2019]. The brief background to this appeal is that the prosecution alleged that the accused on diverse dates in July, 2019 at Kilimahewa Street within Katoro area in the District and Region of Geita did have carnal

knowledge with one Kabula D/O Mihayo a young girl aged 14 years old. The appellant was arraigned before the District Court of Geita, where he pleaded not guilty to the charges. Consequently, the appellant was convicted and sentenced as he stands now. Dissatisfied and aggrieved by both conviction and sentence, he appealed to this court.

In the instant appeal, the appellant feels that his case was not proved to the required standard of law. He has therefore presented three grounds of Appeal, which can be compressed as follows; **One**, the appellant was convicted on evidence from the prosecution witnesses which was doubtful, unreliable, and untruthful. **Two,** the trial court erred in law and in fact to convict the appellant relying on the evidence of PW1 which was cooked and lack strong support which was supposed not to be considered and trusted in court.

Three, the evidence of PW2, PW3, and PW5 was hearsay evidence that cannot assist the court to convict the appellant. **Four**, the learned trial Magistrate erred both in law and in fact to put more weight on the evidence of PW4 whose evidence was not authenticated. **Five**, the prosecution's evidence was weak, the prosecution failed to

prove the offence of impregnating a schoolgirl. **Six**, there was no cogent evidence which indicated that the case against the appellant was proved beyond reasonable doubt.

When the matter was called for hearing, the appellant fending for himself, whereas the Respondent Republic had the service of Ms. Gisela Alex, learned State Attorney.

The appellant, in his brief defense urged this court to adopt his grounds of appeal. He added that the trial court did not do justice.

On her part, Ms. Gisela did not support the appeal and she stated that the prosecution proved the case against the appellant beyond reasonable doubt.

Responding to the first ground of appeal, Ms. Gisela stated that the trial court based its decision on the victims' evidence and PF3. She referred this court to page 6 of the trial court proceedings and stated that PW2 testified that during evening hours in July the accused took her to a bush and inserted his penis into her vagina. Ms. Gisela went on to state that PW5 in November examined the victim and confirmed that PW1 was pregnant. She added that PW4 tendered a PF3 (Exh.P3) the test proved that the victim was four months and one week pregnant.

It was her further submission that in accordance with the victim's evidence she was raped in July, 2019 and when she was examined in November, 2019 PW1 was four months and one week pregnant. Ms. Gisela stated that the best evidence of sexual offence comes from the victim as stated in the case of **Selemani Makumba** (2006) TLR and **Shija Msalaba v R**, Criminal Appeal No. 226 of 2011.

Ms. Gisela went on to state that PW1 testimony proved that there was penetration. She added that section 130 (4) (a) of Penal Code Cap.16 [R.E 2019] state that penetration however slight constitute an offence of rape. She went on to state that penetration proved that the appellant impregnated PW1. Ms. Gisela argued that PW5, Teacher testified in court and tendered a school attendance book which was admitted as exhibit P1. It was her view that all have been said the prosecution proved the case against the appellant.

Submitting on the second ground, the learned State Attorney stated that PW1 evidence was credible and reliable since she was the one who proved the case of rape. She added that PF3 proved that penetration took place. Regarding the issue of delaying reporting the

incident, she stated that the delay does not diminish the fact that PW1 was raped.

Submitting on the third ground, Ms. Gisela argued that PW2 testified that PW1 was raped and PW3, the victim's mother confirmed the age of PW1 and PW4 and PW5 testified that the victim is a student. She admitted that PW2, PW4, and PW5 evidence was hearsay evidence. But insisted that PW1 testimony and the PF3 proved that PW1 was raped.

On the fourth ground, Ms. Gisela stated that this ground is baseless because the charges on the second count; impregnating school girl was not proved.

As to the fifth ground, Ms. Gisela simply stated that the incident of rape confirmed that the appellant was responsible.

Arguing on the sixth ground, Ms. Gisela stated that the prosecution proved the case beyond reasonable doubt. She insisted that PW1

proved that she was raped and the PF3 also proved that PW1 was raped.

On the strength of the above submissions, Ms. Gisela beckoned this court to dismiss the appeal.

The appellant had nothing useful to rejoin. He reiterated his submission in chief.

Before embarking on discussing the grounds of appeal, this court *suo motu* called upon the parties to address the court on an issue of point of law, whether the victim's oath was proper.

Ms. Gisela stated that the records reveal that PW1 testified without taking an oath. She went on to state that the same means PW1 evidence was unsworn evidence which requires to be corroborated by other evidence. It was her submission that PW1 evidence was corroborated by PF3.

Having examined the grounds of appeal and the submissions made by the learned State Attorney and the appellant, I will determine the issue of ***whether or not the present appeal is meritorious***.

I have opted to start with the 6th ground of appeal and the point of law which is raised *suo mottu* by this court that the victim testified in court without taking an oath. I will determine the issue whether PW2 testified without oath and what are the consequences thereto. The trial court records specifically on page 6 of typed proceedings reveal that PW2, was 14 years old, who knew nothing about oath and she testified without taking oath.

PW1 informed the court that in July, 2019 the appellant called her, she responded to his call then the appellant seduced her and pulled her to a bush. PW1 went on to state that the appellant undressed her and inserted his penis in her vagina. The matter was not reported until November, 2019 when the victim was examined by the Doctor and the Doctor confirmed that PW1 was pregnant. The appellant denied the chargers.

Reading the trial court records, it is clear that the trial court was attracted by the evidence of PW2. However, as I have alluded earlier on, the evidence of PW2 was taken without oath. In a situation like this and as rightly pointed out by the State Attorney, the court cannot rely

on unsworn evidence thus, this is a situation where corroboration was required.

It is settled law that unsworn evidence most often requires corroboration, I am referring to the case of **Raphael Mhando v The Republic**, Criminal Appeal No. 54 of 2017 [1st March,2019 TANZLII] and **Hassan Bundala @ Swaga v The Republic**, Criminal Appeal No. 386 of 2015 (unreported). As long as PW2 gave unsworn evidence, her evidence needed to be corroborated. Therefore, I proceed to examine the other prosecution witnesses' testimonies to find out whether PW1 evidence was corroborated.

Examining PW2 evidence, he testified that PW1 is his daughter and was selected to join secondary education but unfortunately it was discovered that PW1 was pregnant. PW2 testified that PW1 informed him that the appellant was responsible for the pregnancy. Thereafter, PW2 reported the matter to the police, and the appellant was arrested. PW2 testified that PW1 was examined and it was revealed that PW1 was three months pregnant.

PW3, testified to the effect that PW1 was her daughter aged 14 years old and she tendered a clinic card to prove PW1 age. PW2 and

PW3 evidence were hearsay evidence. Therefore the same cannot support the evidence of PW1. PW4, a Clinic Officer testified that on 14th November, 2019 she examined PW1 and prepared a PF3. PW5, a Teacher tendered a school attendance book and proved that PW1 graduated in September, 2019.

Nevertheless, PW2 and PW3 evidence are purely hearsay evidence their evidence did not prove if PW1 was raped. PW4 tendered a PF3 (Exh.P2) which indicated that PW1 was about 12 weeks pregnant. PW4 evidence does not show if PW1 was penetrated with a blatant object. In the case of **Kayoka Charles v R** Criminal Appeal No. 325 of 2007, the Court of Appeal held that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. Failure to that penetration is not proved.

With the above observation, there were none of the prosecution witnesses who proved that penetration took place; PW4 (Doctor) examined PW1 to find out if she was pregnant or she was raped. But the records reveal that PW1 did not examine the victim to find out if there were any bruises or blood stains to prove penetration. It is trite law that for the "offence of rape *"...there must be unshakeable*

evidence of penetration." In the case of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal considered whether or not the complainant had been raped by the appellant and observed that: -

> *" True evidence of rape has to come from the victim, of an adult, that there was penetration and no consent, and in the case of any other woman where consent is irrelevant, that there was penetration..."*

Applying the above authority, it is clear that in the instant case penetration was not proved since the remaining prosecution evidence could not form a basis for convicting the appellant. Therefore, the evidence on record was not watertight to convict the appellant for an offence of rape.

With the foregoing observation and the findings which I have made suffices to hold that the trial court's conviction against the appellant was not proved beyond reasonable doubt and occasioned to failure of justice on the part of the appellant.

For the foregoing reasons, I find merit in the sixth ground of appeal and the point of law raised by this court *suo motu*. In the premises, I

refrain from deciding on the remaining grounds of appeal the same will be an academic endeavour.

In the event, I find merit in the appeal and allow it. I quash the conviction and set aside the sentence. I order the immediate release of the appellant namely Shija S/O Bunzari from prison unless he is being held for any other lawful purpose.

Order accordingly.

DATED at Mwanza this 20th November, 2020.

A.Z.MGEYEKWA

JUDGE

20.11.2020

Judgment delivered on this 20th November, 2020 in the presence of Ms. Gisela Alex, learned State Attorney and the appellant.

A.Z.MGEYEKWA

JUDGE

20.11.2020

Right to appeal full explained.