IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

(DC) CRIMINAL APPEAL NO 81 OF 2019

(C/F Criminal Case No. 39 of 2019 of the District Court of Siha at Siha)

IDDI ABDUL MSUYA @ALIBABA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 26/5/2020

Date of judgment: 6/7/2020

MWENEMPAZI, J:

The appellant, Iddi Abdul Msuya @ Alibaba was charged at the District Court of Siha with two counts, one is rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap 16 [R.E. 2002] and second one is impregnating a school girl contrary to section 60A (3) of Education Act, Cap 353, Miscellaneous Amendment No.2 of 2016. The charge alleged that on 20th April 2018 at Lawate Sanya Juu within Siha District, the appellant had carnal knowledge of one Christina d/o Thadei, a girl of 17 years old and a student of Oshara Secondary School. On the second count it was alleged that on the same date, place and time the appellant is said to have impregnated the said victim as a result of having sex with her. The

appellant denied the allegations however, after a full trial, he was found guilty and convicted as charged. He was then sentenced to thirty (30) years imprisonment in both counts.

The appellant is aggrieved and has preferred this appeal, raising four (4) grounds as reproduced hereunder: -

1. That the trial Magistrate erred in law and in fact by reasoning and deciding that he accused admitted to have committed the offences charged with while no admission was made by the appellant during the hearing of the case.
2. That the trial Magistrate erred in law and in fact for convicting the appellant without proof as the prosecution case was not proved beyond reasonable doubt.
3. That the trial Magistrate erred in law and in fact by relying the whole conviction basing on the misguided testimony of the appellant without considering whether the prosecution has made their case.
4. That the trial Magistrate erred in law and in fact by failure to evaluate evidence adduced in court by prosecution witnesses.

At the commencement of the hearing, the appellant was represented by Ms. Vallentina Bwire learned advocate whereas the respondent Republic was represented by Mr. Omari Kibwana, learned State Attorney. Parties were ordered to dispose the appeal by way of written submission.

Submitting on the first ground appeal the learned counsel for the appellant stated that the trial magistrate wrongly convicted and sentenced the appellant by reasoning that he admitted to have committed the offences while in fact the appellant made no admission to the offences

charged. Counsel referred to the typed proceedings of the trial court on page 19 where the appellant, when giving his defence he was recorded to have stated that, "It is true I met with the victim once". Counsel argued that the phrase in itself does not and should not in any way be construed to mean the appellant admitted to have committed the offence because the word met does not in ordinary meaning imply having sex. Therefore, it was counsel's view that the trial Magistrate erred in both law and fact in reasoning that the appellant admitted to have committed the offences.

Submitting on the second ground of appeal, learned counsel stated that the case was not proved to the required standard because prosecution standard of proof is beyond reasonable doubt and whatever slightest doubt it suffices to acquit the accused. He submitted that the evidence of PW2 who was the victim was unreliable as the credibility of the witness was questionable. To substantiate his point the learned counsel referred to the typed trial court proceedings at page 11 where the victim admitted to have lied by saying she was a house girl. Counsel submitted further that from that statement the victim could also be lying during her testimony in court and that if the victim managed to hide her pregnancy for eight months, she could also have told lies to the court and hide relevant information during her testimony. She was of the view that the trial court erred by fully relying on victim's testimony while knowing that he same ought to be scrutinized.

The learned counsel submitted further that the evidence of PW3 who is a doctor did not link the alleged offence to the appellant and therefore the trial court erred by relying on such evidence to convict the appellant. The counsel submitted that PF3 form which was tendered by PW3 only

revealed that the victim was pregnant but never linked the pregnancy to the appellant. It was for that reason counsel suggested that the evidence of the doctor was to be taken as mere assertions and even though admissible should have not been considered in arriving at the correct decision.

Still on the same ground the learned counsel submitted that the trial court was wrong in convicting the appellant without any determination as to the age of the victim which ultimately occasioned conviction of the appellant on the first count. The counsel was of the view that to prove the first count of rape determination as to the age of the victim was to be conducted. He argued that in the present case no evidence was adduced by the prosecution as to the correct age of the victim.

On the third ground of appeal the learned counsel submitted that the trial magistrate erred by convicting the appellant relying solely on the testimony of the accused without considering whether the prosecution has made their case. He argued that the law requires for the prosecution to prove their case regardless as to whether the accused has made his case or not because the accused person does not assume any burden of proving his innocence. On this point the counsel cited the case of **Selemani Makumba vs. Republic (2006) TLR 379**.

Lastly on the fourth ground the learned counsel submitted that the trial magistrate failed to evaluate evidence adduced in court and proceeded to convict the appellant. He argued that the evidence of PW1 who admitted to have seen changes on victim's body she said that she was told that he

victim was pregnant and to him this was here say evidence and should not have been relied upon by the court in convicting the appellant. Another evidence was that of PW4, the headmaster who testified to the effect that when the victim was tested for pregnancy, she was negative evidence which contradicted that of PW3 who was a doctor. Again, evidence of PW3 only proved that the victim was pregnant but could not link the pregnancy to the accused. The counsel was of the view that the charge of impregnating a school girl cannot stand because the headmaster PW4 stated that the victim tested negative on pregnancy test which meant she was not pregnant during school. With those examples the counsel was of the view that the trial magistrate failed to properly analyze evidence and convicted the appellant he thus prayed for this court to quash the conviction and sentence.

Responding to the submission the learned state attorney submitted that referring to the appellant's statement during trial as recorded in the proceedings the appellant meant he had sexual intercourse with the victim once and that they intended to get married. On top of that she submitted that the appellant admitted to his cautioned statement which was received as exhibit P2. She was of the view that in his cautioned statement the appellant admitted to have committed the offence therefore his rejection at this point is an afterthought.

On the second ground the learned state attorney submitted that the prosecution had a duty to prove that the victim was raped and as a result she became pregnant and during the commission of the offence the victim was a student. She explained that as rightly submitted by the counsel for

the appellant in rape cases the best evidence is that of the victim and in the present case the victim as seen in page 11 of the proceedings she admitted to have had sexual intercourse with one man and she also identified the appellant in court as the one who raped her. It was her view that the identification of the appellant suffices to prove that it was him who raped the victim.

The learned state attorney submitted further that as far as the offence of rape is concerned the important element to be proved is existence of penetration and the evidence of PW3 proved that there was penetration into the victim's vagina. She further argued that the onus of proving the person who raped the victim is the victim herself which she did as seen on page 10 and 11 of the proceedings. Admitting to the issue of DNA not been conducted the learned State Attorney argued however that the issue of paternity is not among the ingredients of the offence of rape.

The learned state attorney finally concluded that the prosecution proved their case beyond reasonable doubt by showing presence of penetration and who committed the offence. She then prayed for this court to uphold the trial court's decision as it was fairly arrived at.

Rejoining the submission, the counsel for the appellant reiterated what was submitted earlier and added that the respondent was misleading this court by submitting that the admission by the appellant was made in cautioned statement. The learned counsel stated that the court disregarded the cautioned statement in the judgment because the same was prepared and

tendered by the investigation officer who was also the arresting officer an act which was contravening the law.

The learned counsel further submitted that the only proof which would have linked the appellant to the offence charged was through DNA test and failure by the prosecution to conduct the same the remaining evidence could not suffice to convict the appellant.

Having carefully considered the arguments of the parties, the issue is whether the offence against the appellant was proved beyond reasonable doubt. In determining this issue what is important is to examine whether the prosecution proved all the ingredients forming the two counts of which the appellant was charged with. On the first count of rape the first important thing to note is that this is a statutory rape where the key element which distinguishes the offence from a common offence of rape is the age of the victim. Therefore, aside from penetration another important element to be established by prosecution in view of the clear provisions of section 130 (1) and 2(e) of the Penal Code, Cap. 16 R.E.2002 was the age of the victim. In order for a girl to qualify for the protection of the law under that provision, sufficient evidence has to be adduced to establish the age of the victim of the alleged rape. Now although age of the victim was not an issue during trial, I still find it was important to be ascertained for the case to be proved beyond reasonable doubt.

Ascertaining the age of the victim is of paramount importance something that the learned trial magistrate overlooked. In the present case the trial magistrate examined only two elements that is penetration and consent on

the contrary and with all due respect I am of a different opinion that consent was not an important element if the age of the victim was properly established. The trial magistrate undertook to believe the victim's testimony who testified that she was seventeen at the time by arguing that it was the best evidence in the circumstance as was so decided in the case of ***Salum Makumba (supra)***. The appellant's counsel was of the view that the victim was not a reliable witness because her credibility was questionable. The learned counsel argued that the fact that the victim herself in her testimony admitted to have lied to the accused that she was not a student but worked as a house girl is an example of how unreliable she was as a witness. Just like the learned counsel for the appellant I think it was wrong for the learned trial magistrate to take the victim's word as gospel, without testing it against the version given by the appellant. The victim PW2 was not such a truthful witness whose evidence on its own would ground conviction. This observation was also made by the court of appeal in the case of ***Mohamed Said vs. Republic,*** **Criminal Appeal No.145 of 2017[2019] TZCA 252; (22 August 2019)**.

I am also convinced that the victim was not at all credible because if she managed to lie to the accused before just to get what she wanted how can she be trusted when she was giving her testimony. Her credibility was indeed questionable. Just as the court of appeal observed in the case of ***Haruna Mtasiwa vs. Republic,*** **Criminal Appeal No.206 of 2018 [2020] TZCA 230 (15th May 2020)** that proof of age may be by parents, medical practitioner or by a birth certificate I therefore think that some more evidence was required to corroborate the testimony of the

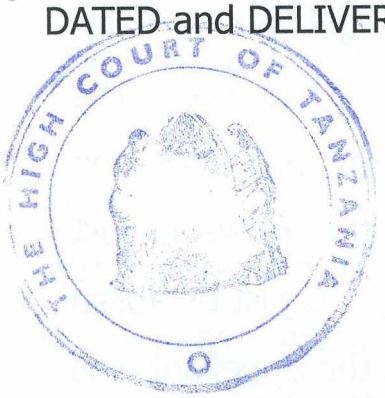
victim but no such evidence was adduced in so far as the age of the victim is concerned. I am tempted to believe the appellant at this point given the alleged age of the victim being 17 years just a year less to adulthood if the victim told him that she was working as a house girl in his position who wouldn't believe her. Considering what I have discussed above I am of the view that the prosecution did not prove the first count beyond reasonable doubt.

Moving on to the second count of impregnating a school girl, proof of this count also depended much on the first count being proved. The prosecution did establish that the victim was pregnant through PW3 who was a doctor who conducted pregnancy test upon the victim. However just as the counsel for the appellant argued it was not enough to just establish the fact that the victim was pregnant but also prove that the appellant was the one responsible. At this juncture since the first count was not proved to the required standard then it is just impossible to even think that the second count was proved. In absence of DNA test no evidence adduced was reliable to prove the second count as there was no evidence that linked the appellant to the pregnancy.

In the circumstances of the case, apart from the fact that it was uncertain as to the correct age of the victim, the appellant was gravely prejudiced throughout the alleged facts, he was called upon to answer the charge of raping a school girl aged 17 years of age, while the prosecution evidence did not establish that fact beyond reasonable doubt. In such situation I would not hesitate to say that the prosecution could not prove their case.

As explained above, the issue of proof of age alone is sufficient to dispose the appeal, and I find no reasons to address the other grievances raised by the appellants' counsel. In the circumstances, I allow the appeal, quash the conviction and set aside the sentence. The appellant is hereby set free, unless he is held on other lawful cause.

DATED and DELIVERED at Moshi this 06th July, 2020



T. MWENEMPAZI

JUDGE