IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 32 OF 2020

(Originating from the District Court of Karatu at Karatu, Criminal Case No. 48 of 2019)

ERICK ASHERY ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

10th December 2020 & 29th January, 2021.

Masara, J.

In the District Court of Karatu (the trial Court), the Appellant stood charged with two counts; namely, Rape, contrary to Section 130(1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 [R.E 2002] and Impregnating a Secondary School Pupil, contrary to section 60A (3) of the Education Act, Cap. 353 as amended by Written Laws (Miscellaneous) Act No. 2 of 2016.

The Prosecution alleged that on 11/3/2019 PW2 & PW3 who are the Headmistress and Matron respectively at Banjika Secondary School were conducting pregnancy test to female students at the school. It was found out that one Form IV student, R.J (PW4 - the Victim) was pregnant. They took the victim to another hospital known as Double D Hospital which verified the results. PW2 and PW3 summoned the victim's father (PW1) to school. PW2 tendered the TSM9 and school attendance register showing that PW4 was her student and the same were admitted as exhibit P1. They also reported the incident to PW5, the Qurus Ward Executive Officer, who advised

them to take the matter to the Police. PW1 attended at the school on 12/3/2019 and was told that his daughter was tested pregnant.

On interrogation, PW4 mentioned the Appellant as the person responsible for the pregnancy. The Appellant was arrested on the same day. PW4 was handed to her father at the Police Station. In court, PW4 testified that she knew the Appellant as he was her neighbour at her grandmother's residence in Bashay. That the Appellant who was working at Neptune Hotel used to seduce her but nothing happened until September 2018 when during her leave, the Appellant took her inside an unfinished house and they had sex. PW4 did not disclose the incident to anyone, fearing her father who she described as angry and aggressive. According to her testimony, PW4 never had sex before, and as soon as she went back to school, she started missing her menstrual periods coupled with frequent vomiting. Upon examination at school, she was discovered pregnant. She was expelled from her studies. She tendered the Clinic Card which was admitted as exhibit P2. PW7 is the Doctor who examined PW1 on 13/3/2019 and found her three months pregnant. She filled in the PF3 form which was admitted as exhibit P3.

In his defence, the Appellant (DW1), who testified alongside his father as DW2 and his Mother as DW3, denied to have raped and impregnated the victim. Their evidence was to the effect that in September 2018 when the victim is said to have been raped, the Appellant was working at Ngorongoro Mountain Lodge and not Neptune Hotel as testified by PW4. The defence

witnesses added that the Appellant was employed at Neptune Hotel in February 2019, and two weeks later he was arrested.

The trial Magistrate convicted the Appellant on both counts and sentenced him to serve thirty years imprisonment for each count, the sentence to run concurrently. The Appellant was aggrieved by that decision, he has therefore preferred this appeal on the following grounds:

a) *That, the trial Magistrate erred in law and fact in arriving at erroneous decision while there was inconsistencies and contradictory evidence;* and
b) *That, the trial Magistrate erred in law and fact in convicting the Appellant while the prosecution failed to prove the case beyond reasonable doubt.*

At the hearing of this appeal, the Appellant was represented by Ms. Anna Andrea Ombay, learned advocate, while Ms Tusaje Samwel, learned State Attorney, appeared for the Respondent. The appeal was argued *viva voce.*

Ms Ombay opted to argue the grounds of appeal together in the form of pointing out irregularities. She contended that the evidence of the victim was to the effect that she had sex with the Appellant once in September 2018, but according to PW7 (the Doctor), the victim was three months pregnant at the time examination which was done on 13/3/2019. She stressed it was impossible for the Appellant to impregnate the victim in September and the pregnancy be found to be 3 months after a lapse of almost 6 months from the day they had sex. On that account, it was Ms Ombay's view that the second count was not proved.

Regarding statutory rape, the learned counsel submitted that the Prosecution was supposed to prove the age of the victim but none of the prosecution witnesses proved the age of PW4 by either tendering medical certificate or by any other evidence. She cited the decision of this Court in ***Ally Amimu Vs. Republic***, Criminal Appeal No. 130 of 2019, which referred to the decision of the Court of Appeal in ***Robert Andondile Komba Vs. Republic***, Criminal Appeal No. 465 of 2017 (both unreported) to the effect that age is a very important ingredient to be proved in statutory rape. Failure by the prosecution to prove age implies that the first count was not proved, she concluded.

The learned counsel further faulted the decision of the trial court in that that all exhibits tendered; namely, school register (exhibit P1), clinic Card (exhibit P2) and PF3 (exhibit P3), were tendered by the prosecutor contrary to section 198 of the CPA. She cited the case of ***Frank Massawe Vs. Republic***, Criminal Appeal No. 302 of 2012 (unreported) where it was held that a Public Prosecutor cannot assume the role of a witness at the same time. The learned advocate added that the exhibits tendered were not read loud in court, citing the case of ***Ally Amimu*** (supra). She therefore prayed that those exhibits be expunged from the Court record.

Ms. Ombay also submitted that even if the victim was truly pregnant, failure to undertake a DNA test makes the evidence against the Appellant weak as the DNA report would have revealed whether the Appellant was responsible for the pregnancy. To support her argument, she cited the decision of this

Court in case of ***Iddi Abdul Msuya@ Alibaba Vs. Republic***, Criminal Appeal No. 81 of 2019 (unreported).

Ms Tusaje did not oppose the Appeal. She conceded on the contradiction relating to the age of the pregnancy, stating that it is true that the evidence of PW7 was that PW4 was found 3 months pregnant but PW4 stated that she had sex with the Appellant in September, 2018, which raises doubts as to the age of the pregnancy. She also conceded that the age of the victim was not proved, therefore difficult to ascertain whether the victim was under 18 years at the time the offence was committed. She cited the case of ***Robert Andondile Komba*** (supra) which stated that age in the is not the actual age of the victim. Ms. Tusaje also admitted that exhibits P1, P2 and P3 were tendered by the prosecutor and they were not read out in court. She cited the decision of the Court of Appeal in ***Julius Josephat Vs. Republic***, Criminal Appeal No. 3 of 2017 at pages 15 & 16 (unreported) and prayed that those exhibits be expunged.

I have taken time to go through the trial court record, and arguments made by the Appellant's counsel as well as the concession by the learned State Attorney. The issue to be determined is whether the Appellant was rightly convicted on the two counts.

Starting with issue relating to the age of the pregnancy, I must admit that there were a lot of contradictions from the prosecution on the age of the pregnancy. PW1, while testifying, stated that he was informed that her

daughter was 6 months pregnant. PW4, who was the victim, in her testimony stated that she had met the Appellant who seduced her but nothing happened, until September, 2018 when she was on her leave, a day she was from the Hotel when she met the Appellant who took her to unfinished building and both had sex which resulted into her pregnancy. On the other hand, PW7, the Doctor who examined PW4 at Karatu Health Centre stated that the examination results showed that PW4 was 3 months pregnant.

Counting from the date PW4 stated that she had sex with the Appellant to the date she was examined by PW7 on 13/3/2019, is six months. Therefore, there is material contradiction on the age of the pregnancy, which makes this Court to doubt the possibility that it was the Appellant who is responsible for the pregnancy. Such doubts make it improbable as to whether the charges against the Appellant were proved in the required standards. The Court of Appeal in various decisions has stated that courts should address the contradictions to ascertain whether they are minor contradictions or whether they go to the root of the matter. In ***Juma Salis @ Jonas Vs. Republic***, Criminal Appeal No. 263 of 2014 (unreported), it was held:

> *"Unfortunately the learned trial judge did not address herself to the above contradictions which in the circumstances of this particular case we find to have gone to the root of the contention."*

In ***Armand Guehi Vs. Republic***, Criminal Appeal No. 242 of 2010 (unreported), the Court had this to say on contradictions;

> *"Minor contradictions, inconsistencies, or discrepancies which do not affect the case of the prosecution, it is said, should not be*

made a ground on which the evidence can be rejected in its entirety. While minor contradictions and discrepancies do not corrode the credibility of a party's case, the material contradictions and discrepancies do."

In the instant appeal, the contradictions on the age of the pregnancy are material and they go to the root of the case as they are the determinant factor tracing when the incident occurred and whether it was the Appellant who committed the offence. Further, since PW4 was the victim her credibility was doubtful on that account. Therefore, the conviction against the Appellant was improper as the contradictions on the age of the pregnancy sufficed to cast doubts on the prosecution evidence relating to the person who was responsible for the pregnancy.

The matter casting doubts on the prosecution evidence relate to the age of the victim. It is true that the Appellant was charged with statutory rape which requires proof of the age of the victim. In the instant appeal, no evidence was led to prove the age of the victim. That omission is fatal. The Court of Appeal in ***Robert Andondile Komba Vs. Republic*** (supra) faced with a similar issue had this to say:

"Not only that, but in cases of statutory rape, age is an important ingredient of the offence which must be proved. We are not prepared to hold that citing of age of the victim is akin to proving it, and this is not the first time we make such observation. In Solomon ***Mazala Vs Republic*** *and in* ***Rwekaza Bernado Vs Republic*** *(supra) we referred to the case of* ***Andrea Francis Vs Republic****, Criminal Appeal No.173 of 2014 (unreported) where the court stated:*

".....it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise the citation

by magistrate regarding the age of a witness before giving evidence is not evidence of that person's age."

Before reproducing the above paragraph from the case of ***Andrea Francis Vs Republic*** *the court stated this in* ***Solomon Mazala;***

> *"Even if we go further and take the liberty to assume that the fact that the trial court conducted a voire dire examination after being satisfied that PW1 was under eighteen years of age, that the law."*

Therefore, it is our conclusion that there was no proof of PW1's age because what was cited in the PF3, even if there was no any other defect, was not proof of her age as required by the law. In the end in her submissions regarding the grounds of appeal, ***our conclusion is that there was no proof of statutory rape because there was no proof of the victim's age.*** *On that around we allow the appeal."* (emphasis added)

See also ***Projestus Zacharia Vs. Republic***, Criminal Appeal No. 162 of 2019 (unreported), where the Court of Appeal stated:

> *"In the case at hand, as earlier indicated in the particulars of the offence, the age of the victim was not stated and* ***neither was it said in the evidence of the victim or her parent as reflected at page 8 to 11 of the record of appeal*** *.....* ***This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim****."* (emphasis added)

Considering that the Appellant was charged with statutory rape, one of the most important ingredients to prove was the victim's age, as per section 130 (1) (e) of the Penal Code Cap 16 [R.E 2019]. Failure to prove the age of the victim in such cases constitutes fatal omission, which cannot sustain conviction. This ground alone suffices to dispose the appeal, but for the purpose of making the record clear, I find it important to also delve on the other matters raised by the parties, albeit briefly.

Ms Ombay raised the issue of failure by the trial court to order DNA test so as to ascertain whether the Appellant is the one responsible for the pregnancy. This argument is flawed. DNA test may be necessary to prove paternity of the child but it cannot always be a requirement to prove commission of a sexual offence. It has always been stated by Courts that the best evidence in sexual offences is that of the victim. In ***Robert Andondile Vs. Republic***, (supra), the Court stated the following regarding DNA test in sexual offences;

> *"We have no hesitation to go along with the learned State Attorney. Proof by DNA test is neither a legal requirement nor the practice in our jurisdiction. Many culprits would walk scot free if that were the case, in our view, and the suggestion by the appellant is impractical"*

I do not therefore agree with the learned counsel that it was a compulsory requirement to undertake a DNA test so as to prove whether it was the Appellant who raped PW4.

The other issue raised relate to the tendering and admission of the exhibits. I have revisited the trial Court record; it is true that exhibit P1 which was the TSM9 and the attendance register were tendered by the Prosecutor instead of PW2. Further it is true that after it was admitted it was not read in court. The same applies to exhibit P2 which is PW4's clinic card. It was as well tendered by the Prosecutor instead of PW4 and after its admission as exhibit it was not read out in court. But as to exhibit P3, which is the PF3, the same was tendered by PW7 and it was read in court as it apparent at page 23 of the proceedings.

The law is well settled that the competent person to tender an exhibit is the witness or the person in the possession of the document. Exhibit P1 and P2 were un-procedurally tendered as they were tendered by the Public Prosecutor who was not a witness. This irregularity was addressed by the Court of Appeal in ***Jacob Mayani Vs. Republic,*** Criminal Appeal No. 558 of 2016 (unreported) when, the Court observed:

> *"Exhibit P3 was un-procedurally tendered for admission because it was tendered by the prosecutor and not the witness ... we are unable to agree with his position because a person who is competent to tender an exhibit is a witness to whom the document was in his possession, custody authored it or had knowledge of its existence."*

As hinted above, the said exhibits P1 and P2 were not read in court after their admission, which is fatal. There is a plethora of authorities to the effect that failure to read exhibits after they are cleared for admission is fatal. See ***Saganda Saganda Kasanzu Vs Republic***, Criminal Appeal No. 53 of 2019 (unreported) where it was held:

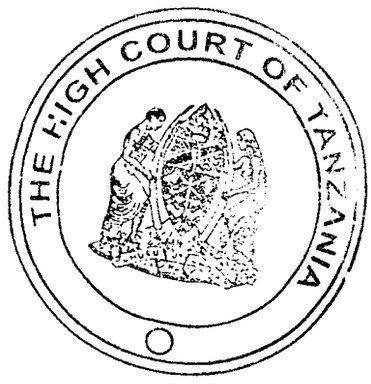
> *"We have gone through the record and we are satisfied that the said exhibits were not read out after being admitted as exhibit P5. It is settled position that failure to read out an exhibit after its admission is fatal as it violates the accused's right to fair trial."*

Since exhibits P1 and P2 were tendered un-procedurally, and since the two exhibits were not read out in court after they were cleared for admission, the two exhibits are accordingly expunged from court record.

Considering the irregularities highlighted above, the reasons stated and the authorities cited, it was unsafe for the trial Court to convict the Appellant.

This appeal has merits. I allow it in its entirety. The conviction met against the Appellant is quashed and the sentence on the two counts set aside. The Appellant is to be released forthwith unless otherwise lawfully held for another lawful cause.

Order accordingly.



Y. B. Masara

JUDGE

29th January, 2021.