IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA SUB- REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO.54 OF 2023

(Arising from Criminal Case No. 137 of 2020 before Muleba District Court at Muleba)

RWEYEMAMU ZACHARIA.....APPELANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14th March & 22nd March 2024

A.Y. Mwenda, J

In the District Court of Muleba at Muleba, the appellant was arraigned and convicted for allegedly committing rape contrary to section 130(1), (2) (e) and 131(1) of the Penal Code [Cap 16 R.E 2022]; Marrying a school girl contrary to Section 60A(1) (a) & (2) of the Education Act[CAP 353 R.E 2019] and impregnating a schoolgirl Contrary to Section 60A (3) of the Education Act, [Cap 353 R.E 2019]

On the first count, the prosecution alleged that on unknown dates between March and July 2020, at Kakoma Village within Muleba District in Kagera Region, the appellant did unlawfully, have sexual intercourse with the victim whose name is withheld, a girl aged 17 years old.

On the second count, the prosecution alleged that on unknown dates between March and July 2020, at Kakoma Village within Muleba District in Kagera Region, the appellant did unlawfully marry the victim whose name is concealed, while knowing that she was a pupil at Kakoma Primary School.

Regarding the third count, the prosecution alleged that on unknown dates between March and July 2020, at Kakoma Village within Muleba District in Kagera Region, the appellant impregnated the victim whose name is concealed, a girl aged 17 years old, a pupil at Kakoma Primary School while he knew that she was a primary school girl.

In a bid to prove its case, the prosecution called six witnesses who are THE VICTIM(PW1), WILSON KASASA(PW2), NICODEMUS MKATA(PW3), RUSAGA AMON(PW4), MGANGA ANDREW ITOGOZA(PW.5) and G.2536 D/C EMMANUEL MFIPA(PW6). The appellant denied the charges and fended for himself. At the end the trial court convicted him for two counts of rape and impregnating a schoolgirl while acquitting him for marrying a schoolgirl. He was sentenced to serve a term of thirty (30) years jail imprisonment and the said sentences were ordered to run concurrently.

Aggrieved, the appellant filed this appeal with six grounds which can be summarized as follows: **One**, that the charge against him was defective for violating S. 135(8) of CPA, [CAP 20 R. E 2022]. **Two**, that the trial court erred to rely on the victim's evidence while there was no DNA report to connect him

with the victim's pregnancy. **Three**, that there was no proof on the victim's age. **Four**, that the trial court erred to rely on his cautioned statement which was obtained illegally and. **Five**, that the case against him was not proved as the evidence against him was hearsay.

At the hearing of this appeal, the appellant was connected through virtual facility linked from KWITANGA prison, in KIGOMA Region where he is serving sentence. On the respondent's side, MS. MATILDA ASSEY & MS. GLORIA RUGEYE, State Attorneys were in attendance.

In his submission, while beseeching the grounds of appeal to be adopted to be part of his oral submission, the appellant said that he did not commit the alleged offences as the case against him was fabricated against him. He prayed this appeal to be allowed and an order releasing him from prison to be issued.

The republic opposed this appeal and Ms. MATILDA ASSEY responded to each ground as follows. Regarding the appellant's claim that the charge against him was defective, she responded in that the same was valid and was crafted in line with section 135(8) of the CPA R.E 2022 as it was read to him before he entered his plea. According to her, the fact that the appellant cross examined the prosecution's witnesses and fended his case, that by itself entail he knew what he was facing in as far as the charge sheet is concerned.

Regarding the second ground of appeal in which the appellant challenges the trial court's decision on the ground that the victim failed to mention him, MS.

ASSEY submitted that the victim mentioned him in her testimony in chief and during cross examination by his names as RWEYEMAMU ZAKARIA, HER HUSBAND.

On the appellant's allegation that there was no proof regarding the victim's age, the learned State Attorney submitted that the same was proven through the Victim's evidence (PW.1) and her Father's evidence (PW2) who testified that she (the victim) was born on 05/9/2002 and by simple mathematics, she said, the victim was 17 years old when the evil befell unto her.

As for the appellant's claim that there was no DNA report to prove or link him with the purported pregnancy, the learned State Attorney submitted that in law, DNA is not a requirement to prove pregnancy as long as the victim pointed him as the responsible person. To support the point, she cited the case of PETER BUGUMBA CHEREHANI V. R, CRIMINAL APPEAL NO. 251 OF 2019, CAT(Unreported) where it was said that a prove of paternity test through DNA is not a legal requirement.

On the appellant's claim that the cautioned statement was admitted illegally as it was recorded out of time, the learned state attorney, while conceding existence of the said defect, had a reservation that even without the appellant's cautioned statement, the prosecution's case, is still strong based on the victim's evidence. In support to that, she cited the case of SELEMANI MAKUMBA V. R, CRIMINAL APPEAL NO.94 of 1999 (CAT).

Lastly, the learned state attorney submitted that the prosecution's case was built by direct evidence. While acknowledging the appellant's claim that his defence was not considered, she opined that since this is the first appellate court, it can step into the shoes of the trial court and make its own findings. In conclusion she prayed the present appeal to be dismissed for want of merits.

In a brief rejoinder, the appellant said that he did not commit the alleged crime as he was arrested along the road and not at home as it was alleged by the prosecution's witnesses. He also said that even the village chairman did not go at his home. He reiterated to his previous pray beseeching this appeal to be allowed.

Summarily, that is all about the submissions for and against the present appeal and the issue for discussion is whether the prosecution proved its case beyond reasonable doubt.

Before the trial court, the appellant' conviction for rape hinged on the victim's evidence (PW1), and her father's evidence (PW2). Since the appellant was charged for statutory rape, the trial court found her age as proven through her father (PW.2) who mentioned her birthday as being the 5th day of September 2002 entailing she was 17 year of age by the time of the commission of crime. His evidence was supported by the victim's clinic card which was admitted as exhibit P.E1.On the second ingredient of rape(penetration), reliance was on the victim's evidence who testified that in March 2020 during corona pandemic, she

decided to marry the appellant and both lived as husband and wife at Kakoma village where they had several sexual encounters(intercourse) which put her in a family way. This court have considered the trial court's reasoning and found nothing to fault its conclusion. This is so because the appellant was charged for statutory rape where the crucial matters for consideration is the victim's age and fornication(penetration). Regarding proof of age, the law has it that the same can be put forward by parent, medical practitioner or by a birth certificate. See HARUNA MTASIWA V. THE REPUBLIC, CRIMINAL APPEAL NO. 206 OF 2018, CAT (Unreported). In the present matter, the victim's age had the support from the victim's (PW1.) evidence and that of her father who stood as PW2 and tendered the victim's clinic card.

Regarding proof of fornication, the victim testified that during the era of covid pandemic, she decided to live with the appellant as a couple at the appellants abode in KAKOMA village where they had several sexual encounters. Although her testimony was brief, this court found nothing to fault her credibility because apart from her evidence being in alignment to that of other witnesses such as PW2 and PW.3, she was consistence with her testimony during testimony in chief and during cross examination. The back up to this stance is the decision of the Court of Appeal in ALLY NGOZI V. THE REPUBLIC, CRIMINAL APPEAL NO. 216 OF 2018 where the Court held inter alia that:

> "Pertaining credibility of a witness, apart from being a monopoly of the trial court only in as far as the demeanour

is concerned, the credibility of the witness can be determined by the second appellate court when assessing the coherence of that witness in relation to evidence of other witnesses including that of an accused person-See **SHABAN DAUD VS. REPUBLIC**, Criminal Appeal No. 28 of 2001(unreported).

With the said reasons, this court, being mindful of the principle in SELEMAN MAKUMBA V. THE REPUBLIC, CRIMINAL APPEAL NO. 94 OF 1999 that true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman, where consent is irrelevant, that there was penetration, is of the firm view that the with her evidence, victim was raped and the appellant is the one responsible. The appellant argument that he was not mentioned by the victim and that her age was not proven by document is unfounded. That said, this court concludes this part in that the charge of rape was proved beyond reasonable doubt.

Regarding the third count of impregnating a schoolgirl, the prosecution relied on the victim (PW1) who testified that by living with the appellant as husband and wife she was put in a family way as they experienced several sexual intercourses. Another piece of evidence was from PW.5 who testified that he examined the victim and tendered the victim's PF-3 whose reading shows the victim had 22 weeks pregnancy. Also, there was accused's cautioned statement (Exhibit PE-4) in which, the appellant is quoted to admit impregnating the

victim. A close look to the said evidence, made this court conclude that the victim was pregnant and the person responsible is the appellant.

In a bid to dent the prosecution's case, the appellant alleged that the cautioned statement exhibits P.E-4 was inadmissible because it was recorded far beyond the time frame set by the law. He however did not issue any clarification regarding the purported anomaly because he did not challenge its admissibility during trial. Even if he challenged it before the trial court which he did not, still the law has it that the court may admit exhibits which were illegally obtained provided the interest of justice so demands. Also, it is important to issue a kind reminder that admission of a cautioned statement is one thing and the weight to be accorded is another thing. This position was propounded in the case of STEVEN S/O JASEN and 2 OTHERS VERSUS REPUBLIC, CRIMINAL APPEAL NO. 79 OF 1999, CAT where the Court held that.

> "Admission of an exhibit such as cautioned statement in question is one thing and weight to be given to the evidence contained therein is another thing. This depends on the totality evaluation of evidence at issue and other pieces of evidence available on record."

To conclude this part, this court is of the view that there is cogent and abundant evidence that the victim was impregnated by the appellant, thus his denial is an afterthought.

Lastly, the appellant complained that his defence was not considered by the trial court. This court have revisited the record and noted the said complaint to be true. As it was rightly submitted by MS ASSEY, this court being the first appellate court can step into the shoes of the trial court and decide the matter in its totality as I do here under. In his defence, the appellant gave a general denial. A close look on it seems he was struggling to show that there is no evidence that the victim was a student although he concluded that he did not commit the alleged offences. This court have considered his defence only to note that it failed to raise any reasonable doubt. As hinted earlier, the evidence by the victim (PW.1), her father (PW2), the village chairman (PW3), the assistant clinical Officer (PW5) and PW6 is sufficient to support the charge of rape and impregnating the school girl because they were coherent and consistent in their testimonies.

That said, this court is of the view that the prosecution side discharged its duty to prove the said charge thus this appeal fails and is hereby dismissed. The sentences of thirty (30) years jail imprisonment for each count is hereby enhanced which shall run concurrently.

Right of appeal is fully explained.

It is so ordered.

A.Y. MWENDA

JUDGE

22.03.2024

Judgment delivered in chamber under the seal of this court in the presence of Ms. Matilda Assey learned state attorney for the republic (respondent) and in presence of the appellant Mr. Rweyemamu Zakaria through virtual facility linked through Kwitanga prison.

A.Y. MWENDA

JUDGE

22.03.2024